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CASES CITED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

Nos. 795 and 796.

JESSE C. ADKINS, ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA,
Appellants,
vs.
THE CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA, A CORPORATION.

JESSE C. ADKINS, ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA,
Appellants,
vs.
WILLIE A. LYONS.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASES.

These cases come to this Court on appeal from final orders of the Court of Appeals of the District of Columbia, affirming decrees of the Supreme Court of the District holding unconstitutional the District of Columbia Minimum Wage Law (Act of September 19, 1918, ch. 174, 40 Stat. L. 960) and enjoining the en-

forcement of an order of the Minimum Wage Board of March 26, 1920 (made under authority of the statute), providing that no person, firm, association or corporation should employ a woman in any hotel, lodging house, apartment house, club, restaurant, cafeteria or hospital, at wages less than those fixed by the Board.

The cases present the question of the constitutional validity of the District of Columbia Minimum Wage Law. That law, passed September 19, 1918, establishes a board, composed of three members appointed by the Commissioners of the District, to be known as "Minimum Wage Board." The Board is given authority to ascertain the wages paid to women and minors in different occupations in the District of Columbia, to examine the books of any employer of women or minors, and to require of such employer a full statement of such wages paid; it is authorized to declare (a) standards of minimum wages for women in any capacity and what wages are adequate to supply the cost of living and (b) standards of minimum wages for minors in any occupation and what wages are unreasonably low. The Board is given power, after certain investigations, conferences with persons appointed by it and hearings by the Board, to fix wages for women employees in any occupation in the District of Columbia where the Board is of the opinion that any substantial number of women workers are

receiving "inadequate" wages, and also to fix "piece rates" where women are being paid by the piece.

After such order of the Board fixing wages or piece rates in any occupation takes effect, it becomes a criminal offense by the provisions of the law, punishable by fine or imprisonment, or both fine and imprisonment, for any employer or any agent, director or officer of any corporation employer to pay any woman employee in such occupation any less wages than those fixed by the Board, or otherwise to violate the Act with reference to wages. And any employer is also made liable in a civil action to any woman employee for the full amount of the wage fixed less the amount actually paid, and any agreement for a less wage is no defense to the action. Prosecutions are to be on information filed in the police court by the Corporation Counsel.

The decision of the Board fixing wages is made final, and there is "no appeal from the decision of the Board on any question of fact", but an error of law embodied in any ruling of the Board may be reviewed by a court. The law further provides punishment of any employer or his agent who either "discharges or in any manner discriminates against any employee because such employee has served or is about to serve on any conference or has testified or is about to testify, or because such employer believes that said employee may serve

on any conference or may testify in any investigation or proceeding under or relative'' to the Act.

The law provides that it shall be known as the ''District of Columbia Minimum Wage Law'' and that its purposes are to protect women and minors of the District from conditions detrimental to their health and morals. (See Appendix A of this Brief.)

(By separate provision the Board is authorized to inquire into the wages of minors and ''determine suitable wages for them'', but with these provisions we are not here concerned because the power to regulate contracts of minors stands on a different footing.)

The bill of complaint filed in the Supreme Court of the District of Columbia by the Children's Hospital recites that the Minimum Wage Board, purporting to act under the statute, issued on March 26, 1920, an order providing in substance that no person or corporation should employ a woman or minor girl in any hotel, lodging house, apartment house, club, restaurant, cafeteria, or other place where food is sold to be consumed on the premises, or at any hospital, at a rate of wages less than 34½ cents per hour, $16.50 per week, or $71.50 per month, and that when meals are furnished by any employer not more than 30 cents per meal may be deducted by such employer from the weekly wage in computing the minimum, and in case lodging is furnished not more than $2.00 per week

shall be so deducted, and tips and gratuities are not to be construed as part of the minimum wage. The order is alleged to be effective 60 days from date, or May 26, 1920. It further recites that the plaintiff is a corporation engaged in conducting a hospital for children in the District of Columbia and that it employs a number of women—scrubwomen, washerwomen, attendants, etc.—at less than the minimum wage fixed by the order; that this employment is under agreements voluntarily made with the employees, and that the employees are satisfied with the wages and desire to continue with the work, but that the Minimum Wage Board is required by the Act and threatens to prosecute the plaintiff for continuing to employ women over 18 years of age at less than the minimum wage; that the plaintiff will be subjected to a multitude of criminal prosecutions and the work conducted at the hospital will be seriously interfered with before it can secure a judicial determination of the validity of the statute and order, and the plaintiff asks for an injunction to restrain the Board from such prosecution, on the ground that the law under which the Board is acting is unconstitutional, in that it deprives plaintiff of liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. (Rec., p. 2.)

The bill of complaint filed by Willie A. Lyons recites the same order of the Minimum Wage Board and that the plaintiff is a woman of the age of 21 years and was on the 25th day of May, and for some months prior thereto, employed by the Congress Hall Hotel Company as an elevator operator and received a salary of $35.00 a month and two meals a day, in compensation for her services; that this employment was under an agreement made by her with the said Hotel Company; that she is willing to resume and continue her services at the same wages, and that the said Hotel Company was entirely satisfied with the services, and is ready and willing to resume and continue her in the said employment at the same wages, but that she was advised that the Hotel Company would be compelled to dispense with her services on May 26, 1920, by reason of the said order of the Minimum Wage Board; that the amount paid for her services was less than the amount required by the said order; that the Minimum Wage Board is required by the Act and threatens to prosecute the said Hotel Company for resuming the employment of the plaintiff for less than the minimum wage; and that the Act and order referred to deny to said Hotel Company its freedom of contract with the plaintiff and denies the right of the plaintiff to work for whom and at such wages as she pleases; and asks for an injunction to

restrain the Board from such prosecution on the ground that the law under which the Board is acting is unconstitutional in that it deprives the plaintiff of liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution. (Rec., p. 18.)

Plaintiff below in each case secured a rule to show cause why the defendants should not be enjoined and restrained as prayed in the bills of complaint. (Rec., pp. 8, 24.) Defendants filed answers to the rules to show cause and motions to dismiss the bills of complaint. The Court entered decrees discharging the rules to show cause, denying the applications for preliminary injunctions, and dismissing the bills. (Rec., pp. 13, 26.)

On appeal to the Court of Appeals, that Court after hearing and rehearing entered orders reversing the decrees of the Supreme Court of the District and remanding the cases for further proceedings in accordance with the opinion of the Court of Appeals in the two cases. (Rec., p. 81.)

Thereafter each cause came on to be heard before the Supreme Court of the District, pursuant to the mandate of the Court of Appeals, and the defendants elected to stand upon the motion to dismiss and not to plead further. The Court, upon consideration of the bill of complaint and other pleadings, decreed that

the Act of Congress known as the District of Columbia Minimum Wage Law was invalid because in conflict with the Constitution of the United States and the amendments thereto, and enjoined the Board from enforcing or attempting to enforce the order of March 26, 1920. (Rec., pp. 15, 28.)

Thereafter at the January Term, 1923, the defendants, constituting the Minimum Wage Board, appealed from these decrees to the Court of Appeals of the District of Columbia, and filed motions to affirm or reverse. By order entered January 11, 1923, the Court of Appeals affirmed the decrees of the Supreme Court. (Rec., p. 83.)

On these appeals to this Court the question on the merits presented for decision is the constitutional validity of the Act of Congress authorizing and directing a board to fix wages for women in various employments in the District of Columbia and to punish by fine and imprisonment the paying of less wages than those fixed.

ARGUMENT.

I.

The Nature and Scope of the Law.

Before discussing the question of the consistency of the legislation in question with the Constitution of the

United States, it is desirable to advert to certain features of the law which will help to make clear its full purport and its scope and effect.

First: The law is a "price-fixing" law, pure and simple. It does not regulate businesses or working conditions, and by such means indirectly affect the cost of labor. It is not concerned with dangerous or unwholesome businesses, places of work, or machinery or appliances, nor is it concerned with fraudulent practices or the overworking of human beings. It is concerned solely with the amount of money involved in contracts of personal employment by which labor is exchanged for money or other forms of property. It requires the Board to fix the price of labor in certain employments in the District of Columbia. This fixing of price is its aim and object. Regardless of the wishes of the parties to the contract of employment, though they be of full age and able to contract, regardless of the skill of the employee or the need of the employer, regardless of the wealth or income of either party, this law requires a fixed minimum, set by a board, to be paid in the exchange of labor for money, and enforces such payment under penalty of fine or imprisonment, or both, imposed upon the employer who disobeys.

Second: The law is not a temporary measure to tide over an emergency. It is not designed to prevent

the stoppage or interruption of public business by requiring the maintenance of wages already agreed upon until the parties can agree, reasonably and in order, upon a new standard. It is a permanent policy of wage fixing in the common occupations of the community, applying to private employment and to private business.

Third: From the standpoint of the woman who desires employment, the law, by the provisions affecting her employer, may forbid her to work in the common occupations of the community in admittedly healthy and moral surroundings, although she is of full age, is able and willing and desires to work, is amply supplied with the necessaries or luxuries of life, and is offered employment suitable to her and at wages satisfactory to her. The law does not say that persons or corporations engaged in particular businesses must pay certain wages as a condition for continuing in that business—it does something more and different—it says that, as to all occupations where the Board sees fit to act, women shall not work in the District of Columbia except for prices fixed by law, while men may work for any prices they see fit. So the woman, willing and able to work in safe, moral and healthful surroundings and under safe, moral and healthful conditions, can not make a bargain with her employer that she may wish to make and he may be willing to make, but this

bargain must be made by the Minimum Wage Board or not at all.

Fourth: The law affects employers who are women as well as employers who are men. The order of the Minimum Wage Board in question in this case applies to every person who employs any woman in any lodging house, restaurant or cafeteria. This, of course, includes women who own or operate such restaurants, lodging houses and cafeterias, and forbids them to agree with their waitresses or female servants as to the daily, weekly or monthly wage that shall be paid for services. The law is thus not limited to the bargain between the male employer and the female employee, but applies to the bargain where both parties to it are women.

Fifth: The law requires the fixing of a vague and uncertain standard as a condition of the orders, which have the force and effect of law, and the violation of which constitutes a criminal offense. The standard is more vague and uncertain than anything probably in any law heretofore enacted, that is, a price for service that shall be "adequate" to supply the cost of living and to preserve health and to protect morals. What will supply the cost of living and protect health and morals can obviously be merely a matter of opinion. Manifestly, opinions on this subject will differ as between a colored girl working in the Con-

gress Hall Hotel and a member of a board who may have an income of many thousands of dollars a year. The Board is required, in fact, to do a vain and meaningless thing, for it can not establish a wage which will "protect health and morals" and afford a "living". It can merely give the average of three opinions against possibly thousands of differing opinions.

An interesting light is thrown on this aspect of the law when it appears that the same woman employed to clean dishes in a restaurant, finding that $16.50 per week is by law the least with which to supply the cost of living and protect her health and morals, discovers without leaving the house where she lives, without eating other or different meals or buying any different kinds of clothes, that from $9.00 to $15.00 a week only is necessary to supply the cost of living and protect her health and morals when she decides to leave the hotel and take up work in a laundry, for the Minimum Wage Board by its orders, which have the force and effect of law, provides a minimum wage of $16.50 per week for hotel workers and a minimum wage of $9.00 to $15.00 a week for laundry workers.

To summarize, the point emphasized in this analysis of the law, is that this legislation has as its direct object solely the fixing of the price in contracts for services by women in purely private employments, without regard to the safety or the health or moral

surroundings of the business or occupation or the time of beginning or leaving work or whether the hours are long or short, and without regard to the resources or income of the employees.

This legislation is aimed directly and solely at the price to be paid in the bargain between employer and employee, and the thing condemned as unhealthy, unsafe or immoral as a justification for legislative interference, is merely the price itself, and not the condition or surroundings where the employment is carried on.

II.

Outline of the Argument.

We come then to discuss the power of Congress to enact this legislation. Our contention is, to put it in brief form, that this wage law is unconstitutional because it is a price fixing law; directly interfering with freedom of contract, which is a part of the liberty of the citizen guaranteed in the Fifth Amendment, and our position is that no exercise of the police power justifies the fixing of prices either of property or of services—that *the amount of the charge* received or paid in the exchange of money for property or labor in private business can not *itself* be called a matter affecting the public health, morals or safety, and thus brought within the scope of the police power. If a

wage fixing law is constitutional, then it must necessarily be because the liberty and property clauses of the Constitution do not inhibit the fixing of prices everywhere for all articles and services that are the subject of bargaining, for there is and can be no distinction in principle between the power to fix a charge for services and the power to fix the prices for houses, chattels or goods of any kind. We believe it is settled by the decisions of this Court, interpreting the Constitution, that the permanent fixing of prices in private business is not within the power of the legislative body. The reason for this, as we believe has also been settled, is that the Constitution itself has laid down certain fundamental principles of economics in establishing private ownership of property and individual liberty; that these fundamental principles can not *themselves* be declared to be inimical to the public health, safety, morals or welfare, and changed under the guise of an exercise of the "police power."

In taking up in detail the authorities on the question, there will be discussed in their order three points:

First: By a long line of decisions it is now settled that the protection of liberty and property guaranteed in the Fifth and Fourteenth Amendments includes freedom of contract.

Second: That a general wage law, permanent in operation, applying to all or to particular industries

not affected with a public interest, is uniformly assumed or conceded in the decisions of this Court to be inhibited by the fundamental guaranties of liberty and property established in the Fifth and Fourteenth Amendments.

Third: That the inhibition against wage laws is not removed by having such laws apply to women alone and excluding men.

III.

The protection of liberty and property guaranteed in the Fifth and Fourteenth Amendments includes freedom of contract, embracing contract for personal services.

In numerous cases decided by this Court it has been determined beyond question that the provisions of the Fifth Amendment and the similar provisions of the Fourteenth Amendment declaring that no person shall be deprived of life, liberty or property without due process of law, guarantee to individuals freedom of contract, subject only to the exercise of the inherent power to protect the public health, morals, safety or welfare. This is so firmly established that it is not necessary to review the authorities at length.

In *Allgeyer* v. *Louisiana* (165 U. S. 578, 590), this Court quoting an earlier decision said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

In *Coppage* v. *Kansas* (236 U. S. 1, 14), this Court said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property."

Of course, the right to make contracts necessarily includes the right to make agreements for personal services, and this Court has many times so stated. In the case of *Coppage* v. *Kansas, supra,* the Court said, following the quotation above given:

> "Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of

> liberty in the long-established constitutional sense."

In *Truax* v. *Raich* (239 U. S. 33, 41), the Court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

In the recent case of *Prudential Insurance Company* v. *Check* (— U. S. —; decided June 5, 1922), it was stated that this Court has affirmed the principle in recent cases:

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property * * *."

This much is settled beyond dispute. These fundamental principles with reference to laws abridging the right of contract are well recognized and are not now open to argument.

These principles apply to legislation by Congress for the District of Columbia.

In *Callan* v. *Wilson* (127 U. S. 540, 550), Mr. Justice Harlan speaking for the Court, said:

> "There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property."

In *Wight* v. *Davidson* (181 U. S. 371, 384), the Court speaking of an act regulating assessments on property in the District of Columbia, said:

> "No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

IV.

That a law fixing wages generally in private employment would be beyond legislative power is uniformly assumed or indicated in the decisions of this Court.

That a general wage law applying to private employment (and not to business of the state or business affected with a public interest) would be uncon-

stitutional as violative of the guaranties with reference to liberty and property, is generally recognized. Judge Cooley, in his Constitutional Limitations (seventh edition, p. 870), says:

> "In the early days of the Common Law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty."

In Labatt, Master and Servant (2nd Ed., Sec. 846, p. 2285), it is said, referring to wage laws:

> "So far as regards work in which neither the state itself nor a political subdivision thereof is concerned, there can be no reasonable doubt that, even where the matter is not covered by any explicit provision in an organic law, a restrictive statute would, under the general principles of American constitutional jurisprudence, be treated by the courts as invalid, whatever might be the nature of the business affected."

Though the constitutionality of a wage law has not been directly passed upon by this Court, the question has been involved in many cases, and the Court has uniformly indicated that such laws would not be valid. In *Frisbie* v. *United States* (157 U. S. 160, 166), in an unanimous decision, the Court referring to the exercise of the police power and the undoubted right to forbid the sale of lottery tickets, to prevent all contracts by minors, to prevent contracts by common carriers releasing themselves from liability for negligence, said:

> "The possession of this power by Government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the *price* of his labor, services, or property." (Italics ours.)

In *Coppage* v. *Kansas* (236 U. S. 1), a case relating to laws prohibiting contracts by which an employee agreed not to become or remain a member of labor organizations, this Court discussed at length the very question here in issue, and pointed out the reasons why restrictions on contracts between employer and employee, which are intended directly to benefit one party to the contract at the expense of the other and only incidentally to effect some purpose under the police power, but do not have directly (but only indirectly)

any relation to public health, morals, safety or welfare, cannot be upheld consistently with the guaranties of the Fourteenth Amendment.

The analogy is clear between the restriction of the terms of a contract of employment as to membership in a labor union and restriction as to the amount of the pay, for each is a direct interference with the agreement of the parties for the benefit of one party and not directly related to the public health, safety, morals or welfare. Indeed, the language used by the Court in *Coppage* v. *Kansas* (236 U. S. 1, 17) applies with even greater force to the price-fixing term in a contract, for while the restriction considered in that decision might result in financial benefit to one party, the fixing of wages directly and plainly makes a distribution of money as between the employer and employee. The language on the subject of such laws is as follows:

> "As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common 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 contracts of purchase thereof.' No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally un-

hampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law', gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either.

"And since a state may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power

> in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

In *Bunting* v. *Oregon* (243 U. S. 426), this Court had under consideration the "hours of service law" of Oregon. It was contended by the plaintiff in error that because of certain provisions relating to overtime the law in effect required the fixing of wages; by the defendant in error it was contended that the law was an "hours law" and not a "wage law". The Court held the law constitutional, pointing out with emphasis that this conclusion rested upon a finding that the law was not to be considered a wage law.

In the latest decision directly on the point, *Wilson* v. *New* (243 U. S. 332, the Adamson Law case), this Court very carefully dealt with the question. In that case the Court had before it a statute fixing an eight-hour working day for railway employees engaged in the operation of trains upon interstate railways and temporarily requiring that the then existing wages should continue until the parties could agree. This law was subjected to the test of the constitutional provision. It is important to note how this Court met the suggestion that the law was invalid be-

cause it required the continuance of wages already agreed upon. First this Court pointed out in clear and unambiguous language and at a number of places in the opinion that the law constituted a regulation of *business affected with a public interest.* At page 353, the Court said:

> "*there is no question here of purely private right* since the law is concerned only with those who are engaged in a business charged with a public interest * * * and which we have seen comes under the control of the right to regulate." (Italics ours.)

To make the matter more emphatic, the Court pointed out that this conclusion was reached by (page 353)

> "conceding that from the point of view of the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages *free from legislative interference.*" (Italics ours.)

And next the Court said that this right to interfere in any way with the wage agreements even in a business affected with a public interest, was limited to (page 353)

> "the law-making power to protect the public right and create a standard of wages resulting from

> a dispute as to wages and a failure therefore to establish by consent a standard."

and this only *temporarily,* as an emergency measure, to prevent an obstruction of public business. The law, as the Court emphasized (page 345), was

> "not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time."

This Court further pointed out and emphasized the distinction—"the very broad difference between the the two powers exerted"—between the permanent fixing of wages and the temporary continuance of wages already agreed upon until a dispute on public carriers could be settled; and finally to sum up and mark the limits of legislative power, the Court said (page 347):

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard *is not subject to be controlled or prevented by public authority.*" (Italics ours.)

And this was emphasized in the later "Adamson Law" decision, *Ft. Smith and Western R. R. Co.* v.

Mills (253 U. S. 206, decided June 1, 1920), where arose the question of the right of the employer and employee to agree upon wages in the exceptional circumstances occurring in the absence of dispute temporarily stopping the business of the railroads of the country and not affecting other roads so as to interfere with their operation and where the parties were willing to agree. The Court held that it would not break up the bargain between the employer and employee, saying (page 208):

> "We can not suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads."

All the Justices concurred in that ruling.

Thus, in these later cases, are the limits clearly defined. The utmost to which the legislative power extends is to provide for the *temporary continuance of wages in a business affected with a public interest,* and to prevent the stoppage of the public business until the parties can agree. Beyond this, the freedom of the employer and employee to agree upon wages "is not subject to be controlled or prevented by public authority."

The principles laid down in *Wilson* v. *New, supra,* were later applied by this Court in the case of *Block* v. *Hirsh* (256 U. S. 135, decided April 18, 1921), to the constitutional test of a law continuing rents in the District of Columbia during an emergency created by the war. While that case dealt with a rent law, and not with a wage law, the opinion of this Court is directly in point on the questions presented in the case at bar, involving as it did an interpretation of the Fifth and Fourteenth Amendments with relation to the power to fix prices by legislative action. While this Court held the Ball Rent Act for the District of Columbia valid, the ground of the decision and the limitations pointed out are so significant on the question now before this Court as to have controlling weight in the argument here presented. In discussing that case it is not necessary to detail the provisions of the Ball Rent Act. The point desired to be emphasized is that the law was declared to affect certain kinds of property in the District and to continue the rents of such property notwithstanding the expiration of terms (subject to regulation by commission, etc.), and this continuance was made necessary by emergencies growing out of the war embarrassing the Federal Government in the prosecution of the public business.

The first question before the Court was whether the law could be considered as regulating a business affected with a public interest so as to come fairly within the reason of the decision in the Adamson Law Case. Whatever may have been the divergent views as to whether the renting of property could be considered a business affected with a public interest, the majority of this Court held that it could be and was, and based the first proposition of its decision on that ground. But even so, the fixing of prices, the Court held, would be within the power of Congress *only as a temporary emergency measure.* The language of the Court on this subject was emphatic. It was said (p. 157):

> "The regulation is put and justified *only* as a temporary measure." (Italics ours.)

It was sustained only as a temporary measure on authority of *Wilson* v. *New, supra,* the Adamson Law Case above referred to. But to put the matter beyond doubt and to leave no misunderstanding as to the furthest limit to which the decision went, this Court said:

> "A limit in time, to tide over a passing trouble, well may justify a law *that could not be upheld as a permanent change.*" (Italics ours.)

There was a difference of view as to whether the law could be upheld even as a temporary measure, but the inference is irresistible that all agreed that it could not be upheld as a permanent change.

The "temporary emergency" feature of the Rent Laws as ground of decision was again amphasized by this Court in the recent case of *Pennsylvania Coal Company* v. *Mahon* (No. 549, October Term, 1922, decided December 11, 1922), where the comment was made not only as to the Ball Rent Act case, but as to the Rent Law cases coming from New York, the Court adding, (after referring to the emergency nature of the laws as justifying the decisions), that "they went to the verge of the law."

There is in the case at bar, of course, no element of the exceptions referred to. The Minimum Wage Law is not a temporary emergency measure, but is a permanent change. It concerns the right to work in the common occupations of the community, and, of course, is not a regulation of public business or business affected with a public interest.

So far as the argument on authority is concerned, we are bound to conclude from decisions of this Court interpreting the Constitution, that a permanent wage law applying to private individuals in any employment would be unconstitutional as beyond the definite limits of legislative power as defined in the Fifth and Fourteenth Amendments.

V.

There is a clear distinction between "hours of service" and similar laws directly promoting health or safety or preventing fraud and only indirectly affecting the cost or remuneration of labor, on the one hand, and on the other hand "wage laws," directly fixing the price in the bargain between employer and employee, whatever may be the indirect or remote effect intended to be secured.

Laws regulating erection of dangerous or unsafe structures or limiting work in underground mines or restricting hours of labor, etc., are measures directly promoting health, securing safety or preventing fraud. They rest upon the inherent power of the state to secure the public welfare by protecting the public health, morals and safety. They may or may not affect indirectly contractual relations between individuals or cause loss to one or gain to another. If they do, that is a secondary result, which is not the "evil" aimed at. The unhealthy condition, the danger to safety, the probability of fraud, are the evils aimed at and directly dealt with. That such laws may indirectly or remotely affect the use of property by some individuals is beside the point. An individual's desire to use his own property according to his own whim cannot stand in the way of such protection of the state itself and

the body politic, for such laws are consistent with the private ownership of property as sanctioned in the Constitution. But to take the property of A and give it to B, C and D is fundamentally different, even though by enriching B, C and D, their health or morals might be promoted indirectly. Laws which would transfer the money of one individual to another or fix the amount of money to be given in exchange for property, cannot have any real or direct relation to health. The possession of ordinary property, much or little, cannot fairly be said to be inimical to health, or if it is, then the fundamental guaranties of individual rights secured in the Constitution, which sanction the private ownership of property, are themselves inimical to health; but, of course, this cannot be under our form of government. The mere restriction of liberty or property—the very thing inhibited by the Constitution—cannot itself be denominated "public welfare."

The distinction we have pointed out has been recognized by this Court in an elaborate opinion on this subject. In *Coppage* v. *Kansas,* 236 U. S. 1, after referring to the numerous and familiar cases in which the police power has been held properly exercised to protect the health, safety, morals, or welfare, such as limiting employment of workers in underground mines, as sustained in *Holden* v. *Hardy* (169 U. S. 366), and forbidding contracts limiting liability for in-

juries by railroads, as sustained in *Chicago, B. & Q. R. Co.* v. *McGuire* (219 U. S. 549), this Court said (page 18):

> "An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his 'financial independence.' In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. *The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare',*

> *and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.''* (Italics ours.)

The court added in that case that it was clear a statutory provision which was not a legitimate police regulation could not be made such by being placed in the same act with the police regulations and by being enacted under a title which declared a purpose which was a proper subject of the police power.

The same distinction was set forth in a single sentence by Mr. Justice Brewer speaking for the Court in *Frisbie* v. *United States,* 157 U. S. 160, 166. After reviewing the numerous instances in which the police power has been validly exercised—such as laws forbidding sale of lottery tickets, laws forbidding contracts by persons not *sui juris,* laws restricting common carriers from releasing themselves from liability for negligence and so forth, he tersely differentiated such exercise of power from ''price fixing'':

> ''The possession of this power by Government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the *price* of his labor, services, or property.'' (Italics ours.)

The case we have just referred to was the unanimous decision of this Court and is one of the

leading cases on the question. The language quoted was a careful summary of the precise subject with which we are concerned, and was used in connection with a law fixing prices—the only kind of price fixing law in private employment as a permanent policy that has ever been sustained by this Court as within the power of Congress or the State legislatures. And that was a law limiting the price that should be charged for services in prosecuting a claim for pensions against the government itself, and this price fixing was sustained solely on the ground that a pension being a bounty granted by the Government, Congress, being at liberty to give or withhold pensions, had the undoubted power to prescribe the conditions under which claims should be prosecuted—not on the ground that this was for the public health, morals, safety or welfare, but because a gift by the Government was not restricted by constitutional guaranties of liberty and property, as clearly it would not be.

If, under our system of government, with its constitutional guaranties, the law-making body may, as to a purely private business, forbid employment at certain times in dangerous occupations, and may limit the hours of labor in underground mines, etc., or in any other employment where deemed necessary (regulations which admittedly may result in restricting to some extent the terms and conditions of contracts

of employment), why may not the law-making body also fix the *price* that shall be paid by the employer to the employee, which would also affect the terms and conditions of the contract of employment? *The answer is found in a consideration of the nature of the respective regulations.* Forbidding employment in dangerous businesses and regulating the hours of labor are valid exercises of the police power because the legislative body has determined that the business is unhealthy or the hours too long for health, and consequently such regulations have a direct relation to the public health or morals. But the holding of property (that is private ownership of property) and the sale of property or the price charged cannot themselves be said to be unhealthy or immoral. Laws fixing prices in the bargains between individuals are intended to change the rules for the distribution of wealth. They are attempts to correct the inequalities of fortune which follow inevitably from the very form of government which we have — a form which recognizes private ownership of property and personal liberty; they are attempts to alter the economic principles embodied in the Constitution itself, on the ground that the operation of those very principles is itself inimical to the public health, morals and safety. This cannot be done without an amendment of the Constitution.

While the right of private ownership of property is recognized in the Constitution itself, manifestly the law-making body cannot make all property common, on the ground that private ownership is dangerous to the public morals, health, safety or welfare, and that the making of all property common is but the exercise of the police power of the State. In our form of government, the State may, for example, forbid the erection of frame houses in thickly populated communities which may cause disastrous fires, or may require all buildings of a certain size to be equipped with fire escapes, but the State cannot determine for the individual owner what such buildings shall sell for, how much profit he must take, or how much loss he must suffer. The State may forbid the use of buildings for certain purposes which are deemed injurious to the public health, safety or morals; but if the private ownership of property is to be permitted, it cannot fix the price that shall be charged for the use, even though the price fixed by law would tend to prevent the use, and thus indirectly affect the public health, safety, or morals. A man must so use his own property as not to injure his neighbor's. But the price he sells it for does not "injure" his neighbor.

The reason why price-fixing and wage-fixing are not within the power of the law-making body is that they are efforts to alter economic laws which are recog-

nized as legitimate in the Constitution itself. Police power is broad, as has been many times said, but it must be exercised under the Constitution. It cannot be exercised to amend the Constitution or to change the form of government. (*Pennsylvania Coal Co.* v *Mahon,* No. 549, October Term, 1922, decided December 11, 1922; *Truax* v. *Corrigan,* 257 U. S. 312.)

VI.

If laws fixing prices or wages generally are inhibited by the constitutional guaranties because they are unwarranted interferences with freedom of contract the inhibitions are not removed by having such laws apply to women only and excluding men.

If a law fixing prices or wages is not a health law at all—because the mere freedom to determine the amount that shall be charged in the exchange of property or services for money cannot itself be dangerous to health, morals or safety—then manifestly it is not a health law for women any more than it would be for men. The distinction between those rights secured by fundamental law which are guaranteed to men and women alike, free in equal measure from any restriction and those whose exercise is subject to varying restrictions because of differences between the sexes is

not impossible to draw. Of course men and women hold their property subject to a proper exercise of the police power. And in the exercise of this power, there are necessarily differing conditions to be met requiring different treatment. One of these differences is that of sex. Requirements as to the equipment of factories, for example, might well be different where women are employed than they would be where men are employed. This is not because the legislative body is without *power* to regulate certain conditions of work (so as to promote the public health, safety or morals) as to men, but has the power as to women; for it has such power for the protection of men and for the protection of women. But it is obvious that cases arise where the need of the protection of the character provided differs because of differences in the sexes or may be needed for women to a greater degree than for men or may be more necessary for the one than for the other. But the fact that this difference exists in the kind, extent or character of the protection afforded by laws passed under the power to protect the health, morals or safety of both men and women does not mean that the constitutional guaranties are withdrawn from either men or women or extend to one and are withheld from the other because of differences between the sexes.

No better example can be given than in the case of "hours of service" laws. Because of her physical nature woman cannot stand the strain of long hours that the man can stand with due regard to health. So, as to work at night or in dangerous occupations there are differences in the need of protection to health, safety, or morals too obvious to need comment. But in such matters we are clearly within the domain of the police power. The differences are differences which the legislature in its discretion in exercising an admitted power may reasonably choose. Hours of service laws obviously constitute exertions of the police power. They have been sustained as to women, *Muller* v. *Oregon* (208 U. S. 412), but they have also been sustained when applying to men, *Bunting* v. *Oregon* (243 U. S. 426).

In determining the legislative discretion and finding whether there is an abuse of an admitted power, of course it is proper to consider the reasonableness of the law and in this connection the physical nature of those to whom the law applies is a factor in the discussion. The hours of service provided in a particular instance and under some circumstances might be reasonable—not an abuse of discretion—when applied to women workers while it might be unreasonable when applied to men. The difference between the sexes may well justify a different rule respecting hours of labor.

And it has been so held, *Muller* v. *Oregon,* 208 U. S. 412, 418. But the Court was careful to point out in this connection the following:

> "It thus appears, that putting to one side the elective franchise, in the matter of personal and contractual rights they (women) stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers."

In their rights to the operation of economic laws affecting the distribution of wealth as fixed by the Constitution itself, there are, of course, no differences between the privileges and immunities of men and those of women. Both are protected by the constitutional guaranties sanctioning the private ownership of property and the liberty of the individual, just as much so as men and women are equally protected by constitutional provisions forbidding conviction and punishment without trial. A law authorizing the seizure of property without just compensation would be obnoxious to the Federal Constitution, whether the owner of the property was a man or a woman. Such an act cannot escape condemnation because it affects only the property of women, even though the law making body might come to the conclusion that it was injurious to the health of the women in some communities to be

burdened with the responsibility of ownership of property. Freedom of contract is secured both to men and women. Both hold that freedom subject to those reasonable restraints which directly affect health, morals, safety or welfare, although indirectly affecting contractual rights. But each possesses contractual rights "free from legislative interference" which would directly strike down the right of contract and only remotely or indirectly secure thereby some purpose concerned with the public health, morals, welfare, safety, etc.

A law forbidding employers to fix as a term in the contract of employment, non-membership by the employee in labor organizations would be invalid as this Court has held; but manifestly it would be just as invalid if it applied to women, as well as to men—as doubtless the law in question did.

A law forbidding employers to contract for the employment of more than a certain percentage of aliens would be invalid as has been held; but it would be invalid applying to women as well as to men.

So a law fixing prices of property would be invalid; but the principles which make it invalid, make it invalid equally as to women and as to men.

So of laws fixing the price of services—wages.

A wage law is not a "health law" (in the sense in which those words are used when speaking of the

exercise of the police power) either for men or for women, because the mere naming of a price in any bargain cannot be said to affect directly the health, morals or safety. This is true of all price fixing laws, but it may be demonstrated in the case of this Minimum Wage Law as well as in that of any other similar restriction upon the right of contract.

It is said that it is necessary to the health and morals of women that they have enough to live on, and this is epitomized by saying that women are entitled to a "living wage". But this expression means and can only mean that women must have, for the protection of their health and morals, a "living income", that is, they must possess sufficient for their food, lodging, clothing, etc.; but this is true also of every human being. It is so obviously not confined to women but extends also to men that it is specious to suggest the contrary. But it does not follow from this, that those who have more than a living income can be compelled by law to hand over a part of that income directly to those who have less. This Government does not operate in that way. It may be conceded that it would be better for the world if there were no poor, and that it would be better for the poor if they were not poor. That does not mean, however, that their neighbors, their friends, their landlords, their employers, their employees, or their fellow servants,

can under our form of government, be compelled to contribute to their support. If they are in need of charity, the state, of course, has the power to help them and levy taxes upon all equally for this purpose, or individuals more fortunately situated may voluntarily, out of their abundance, give to them. But it is voluntary; it can not be made a criminal offense not to make the contribution.

The redistribution of wealth in this country so that all might receive the same or approximately the same income may seem desirable to some, but it requires no reasoning to show that it can not be done under the limitations of our written Constitution—certainly, not by directly requiring A to give a part of his property to B. It can not be done by calling the law which would accomplish it a "health law," a "moral law," a "safety law," or a "welfare law". There is no such magic in the "police power."

And if inequalities of fortune, resulting from the sanction of private property and liberty in the very terms of our Constitution, can not be leveled by distributing the wealth of the country to all in equal proportions, it can not be done partially or indirectly by requiring each to give to another at least the amount that some authority selected for the purpose might opine is "adequate", "sufficient" or "desirable".

The state is not without authority to deal with the

situation of the poor and needy. The ways are well known and are in operation in every community in the country and by the National Government and every State and every subdivision of a State. *But individuals can not have some particular income, enforced by law, from other individuals.* This is because there are individual rights with which such enforcement would conflict. These rights are higher, more important, more fundamental; they are essential to our form of government as distinguished from that form of government in which the right of private ownership of property is abolished. They are rights graven in our bill of rights—the rights of life, liberty and property, which stand at the base of our governmental structure.

But this Minimum Wage Law, as any other wage law of its kind, whether for men or for women, does not assure to anybody a living income. It does not even deal with the minimum amount of money that a woman is to have for her support. It deals solely and only with the *amount which one individual must transfer to another individual,* regardless of the latter's riches or poverty or means of support or lack of them.

That the wage law merely secures the fixing of prices, regardless of the amount of the individual's necessities, is shown by the operation of the law. The Minimum Wage Board, after an investigation, fixes

the wages of hotel, boarding house and hospital employes at $16.50 per week. This is said to be due to the fact, (and this is the only excuse given for the particular amount) that $16.50 a week is the *minimum amount* which will protect the employes' health and morals; and it fixes this amount for hotel workers; and then the same Board decides that from $9.00 to $15.00 a week is the *minimum amount* that a woman can live on with due regard to her health and safety, and fixes these amounts for the *laundry workers.* Any given employee may well be employed in either position. The same woman having the same needs, living in the same house and eating the same food, manifestly can not have a *minimum* need of $16.50 a week and at the same time a *minimum* need of $9.00 to $15.00 a week. There is nothing inherent in the laundry business by which its workers automatically receive outside help in an amount making up the difference between $9.00 a week and $16.50 a week.

The only conclusion to be drawn from the fixing of different wages for women workers is that the Board simply decides how much the hotel or the laundry or the boarding house ought to pay and must pay, whatever the condition of their women workers. The Board, to the extent to which it acts, *simply distributes wealth as between the employer and employee.*

Again, if a woman worker having in mind her own

health, safety, morals or welfare, desires to take less wages and better food and lodging than she could otherwise secure, this law forbids her to do it. If she wishes to secure—as she might if she works in a boarding house—all the comforts necessary to a decent living, her room, her board and her clothing, and in consideration of these, less wages, the orders of the Minimum Wage Board make the bargain a crime. For the Board has anticipated such a possibility and *fixed the price of meals* at thirty cents per meal and fixed *the price of lodging* at $2.00 per week, if these are furnished to an employee and requires that the wages of $16.50 per week less these deductions only, must be paid when meals and lodging are furnished. Such a bargain between a woman and her employer would be but the exercise of the privilege which belongs to the liberty of the individual. There is no general good under our law to be secured by taking away from men or from women the mere *right to bargain.*

Again, if a woman having an income "adequate" to protect her health, or morals, desires to add to that income by engaging as a nurse at the Children's Hospital for what the institution is willing to pay, this law forbids it—makes it a criminal offense punishable by fine or imprisonment or both, for any director of the Children's Hospital to agree to such an arrangement. Is there such a difference between men and women as

that it can be said in one breath that the enjoyment of such a privilege as that, if claimed by a man, would not in any way directly affect his health or morals and in the next breath that, if claimed by a woman, it would be dangerous to her health and morals?

The right to work for a living in the common occupations of the community is the right of all citizens under our government. As stated by this Court "it is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure", (239 U. S. 41.)

It is a right given both to men and to women. It cannot be true that the moment the woman leaves the home to engage in trade or work and exercises such right, she thereby loses the protection of fundamental guaranties in the Constitution.

> "The right of a person to sell his labor upon such terms as he deems proper,"

says Mr. Justice Harlan in *Adair v. United States*, 208 U. S. 161, 174,

> "is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services

> of such employe. * * * In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract *which no government can legally justify in a free land.*" (Italics ours.)

This emphatic statement of the fundamental rights secured by the Constitution was surely not intended to be limited to men and to exclude women.

VII.

Answer to the contentions of appellants.

(1) As to the contention that this Court must consider only the reasonableness of the law so as to determine whether it is arbitrary, wanton or spoliative, and cannot consider the power of Congress to deal at all with the subject.

The first contention of counsel for appellants is that the Court in passing upon the constitutionality of a law, purporting to be the exercise of the "Police Power," must necessarily examine into the question of the reasonableness, desirability, and popular opinion of the law, and if it finds that reasonable men could have come to the conclusion that the law was needed or desirable, the law at once becomes a proper exercise of the "Police Power," and valid, because,

as counsel contends, the determination as to whether a law is desirable or necessary rests exclusively with the law-making body in the absence of such arbitrary action as could not have been taken by reasonable men.

This argument has no application to a case of the kind here before the Court.

Where the Court is dealing with a law clearly *within* the domain of the "Police Power" (such as a law regulating the erection of dangerous or unsafe structures or a law limiting work in underground mines or restricting hours of labor, etc.), the legislative determination of the necessity for such a law and the measures to be adopted and the extent to which the remedy shall go, is final and conclusive, if the law could in any way be considered a reasonable exercise of the admitted power. In such a case, it is necessary to consider the evidence showing the extent of the evil and other information presented to the legislative body so as to see that the legislative determination was reasonable. This is because even the "Police Power" cannot be exercised by legislation that is spoliative and oppressive. In such a case, the question before the Court is whether the law, though within the domain of the "Police Power" is so oppressive and unwarranted as to be an unreasonable exercise of that power and an abuse of it. And in such a case, manifestly it is the

duty of the Court to give every presumption to the legislative determination.*

But where, as here, the question is not whether the legislative body, acting clearly within the domain of the "Police Power," has exceeded its discretion, but *whether the law is within the domain of the "Police Power" at all,* a very different rule as to the function of the Court prevails. In such a case the Court must determine for itself whether the law really constitutes an exertion of the "Police Power." On this question the evidence as to the desirability or expediency of such a law cannot control the decision. Even the legislative declaration that the law *is* an exercise of the "Police Power" does not make it so nor conclude the Court. To take an extreme case, suppose Congress (as it did) provided by law for an income tax upon all individual incomes, before the Sixteenth

*An example of such a case is *Holden* v. *Hardy*, 169 U. S. 366. In that case the Court had before it an act regulating hours of employment in underground mines. That law was clearly an exercise of the "Police Power." The question was, however, whether the legislation was so oppressive and unjust as to be invalid *as an exercise of the power.* The Court, after stating that there were limitations upon the exercise of the power of the Legislature to preserve the public health, safety, morals, or welfare, added that

> "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."

And so the Court reviewed the desirability and necessity for such legislation, giving every presumption to the legislative determination, and found that it could not be considered an unreasonable exercise of the admitted power.

Amendment. Doubtless voluminous statistics were examined by Congress in considering such a law, and doubtless the law was considered by Congress to be for the public good, but the Court was not precluded from examining into the question as to whether such a law was valid because the law-making body had previously determined that it was reasonable. Clearly, also, such a law would not have been made valid and constitutional had Congress declared in express terms that it was enacted in the interest of the public health, morals, safety or welfare. Such a law was invalid because it transcended the power of Congress, being a direct tax not apportioned. It was invalid regardless of the statistics which justified it or the popular opinion which upheld it. Such opinion could be carried into effect only by an amendment to the Constitution. (*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Bailey* v. *Drexel Furniture Co.*, No. 657, October Term, 1921.)

A statute, taking the property of A and giving it to B—which would everywhere be admitted to be beyond the legislative power—would not be aided by a showing that the law-making body had examined a mass of evidence before passing such a law, and that statistics had convinced it that such a law was desirable. Such an enactment is contrary to the fundamental principles

in the Constitution, and could not be valid under our form of Government.

An example of a law thus beyond legislative power, is found in the statute of Kansas passed upon by this Court in *Coppage* v. *Kansas,* 236 U. S. 1, which made is a criminal offense for any employer to put in the term of the contract of employment a clause providing that the employee should not join or remain a member of a labor organization. That law had for its direct and primary object the striking down of the freedom of contract, on the ground that such freedom of contract in that instance was itself inimical to the public health, morals, safety or welfare. It did not regulate conditions of work or limit work in unhealthy conditions. It attacked the contract between employer and employee, so as to give some advantage to one side. It did so on the theory that the public welfare was in danger by permitting freedom of contract between employer and employee. The question before the Court was whether such law was within the domain of the "Police Power," and the Court had the duty of determining that question independently of the desirability and popular opinion of such law, and the Court held the law was not within the domain of the "Police Power."

As to the effect of the declaration of the Legislature itself that the Act was an exercise of the "Police Power," the Court said (p. 15):

> "It seems to us clear that a statutory provision *which is not a legitimate police regulation* cannot be made such by being placed in the same act with a police regulation or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power." (Italics ours.)

In that case there was doubtless shown that the Legislature of Kansas had before it a mass of statistics as to the advantage to health, morals, and public welfare, of the building up of organizations of working men. Doubtless there was urged also the general approval of such interference by the State with the relations between employer and employee. It appeared also that statutes like the one before the Court had been passed in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, and Wisconsin. But this Court answered, in effect, that it was not called upon to approve or question the right of individuals to join labor unions nor the legitimacy or advantages of such organizations; in other words, that the argument was beside the question.

It was urged that the emloyees as a class were at a disadvantage in making contracts because they were not financially able to be as independent as their em-

ployers, and that it was necessary for the State to step in and aid one party to the contract. To this the Court answered that the contention merely meant that the State should step in to level inequalities of fortune where deemed desirable, but under our Constitution the State could not do this, because inequalities of fortune were recognized as legitimate in the very provision of the Constitution that guaranteed the right of private ownership of property. Said the Court (p. 17):

> "It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

To the argument that it was necessary in order to build up and strengthen organizations of employees for the State to throw its weight in the balance between employers and employees (an argument strikingly similar to that made in the case at bar), the Court, in effect, answered that this the State had no power to do under our Constitution, however desirable such help might be independently of the Constitution; and finally the Court, answering the question before it, as to whether or not the Act constituted an exercise

of the "Police Power," in holding that it did not, said (p. 19):

> "The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the Police Power; for such restriction is the very thing that is inhibited by the amendment."

So, in *Truax* v. *Raich* (239 U. S. 33), this Court having before it the question of the validity of a law of the State of Arizona, forbidding any employer having more than five workers to employ less than eighty per cent, native born citizens, held such act to be invalid, regardless of the desirability of such a law under the conditions existing at the time in Arizona, regardless of the statistics which were deemed to justify it in the minds of the Legislature, and regardless of the argument that the measures adopted were appropriate to meet the conditions (inasmuch as all employers were allowed to employ as much as 20% of aliens). As is clearly apparent from the opinion, the question was not as to the desirability of such a law or whether it was an abuse of an admitted power, but whether there was authority under the Constitution thus to strike down the freedom of contract of employment. "We have frequently said," answered the Court (p. 43), "that the Legislature may recognize degrees of evil

and adapt its legislation accordingly, but underlying the classification is *the authority to deal with that at which the legislation is aimed.*''

So the contention made in this case by counsel for appellants, that the Court, in determining whether the act in question was an exercise of the ''Police Power,'' must necessarily sustain the act if statistics before Congress were such as to show that reasonable men could believe such a law to be necessary or desirable for the public welfare, completely ignores the well considered decisions of this Court on this subject. It is unsound in a case of this character. It is simply another way of saying, what doubtless is the logical result of the views set forth, that the Courts have no right to set aside an act of the law-making body in any case. For if, as is contended, the Constitution is so elastic as that every law is within the discretion of Congress and that the Courts cannot find that this discretion has been abused, unless reasonable men could not come to the conclusion that the law was necessary or desirable, then there would be an end to the supremacy of the Constitution over the laws, and the duty of the Court to enforce the mandate of the supreme law. But such is not the character of our Constitution. ''To what purpose'', says Chief Justice Marshall, in *Marbury* v. *Madison* (5 U. S. 137), ''are powers limited, and to what purpose is that limitation

committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed."

The views of this Court on this subject are exactly contrary to those set forth so insistently by counsel for appellants. When the question is, whether the legislative body has exceeded its authority (not whether it has abused its discretion), the courts are at liberty, and "indeed, are under a solemn duty" to determine independently whether the authority has been transcended. "If, therefore", said Mr. Justice Harlan, in *Mugler* v. *Kansas* (123 U. S. 623), "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjudge, and *thereby give effect to the Constitution.*"

The suggestion in general terms that the Constitution is flexible is unsound. Conditions which the principles in the Constitution govern may change, and the Constitution is broad enough to meet the new conditions without altering the fundamental principles. But the principles themselves are immutable—they do not stretch or change; they are not elastic.

As said by this Court in *Truax* v. *Corrigan* (No. 13, October Term, 1921), quoting Mr. Justice Brewer in *Muller* v. *Oregon* (208 U. S. 412):

> "It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action and thus gives a permanence and stability to popular government which otherwise would be lacking."

More fallacious still is the suggestion that the "Police Power" is flexible *in the sense that any legislative action desired may be included within it.*

Laws of the kind here under consideration bring us to the parting of the ways. If every law which expediency may suggest is to be called a "health law" or a "public morality law," or a "public welfare law," and thus becomes an exercise of the "Police Power," the constitutional limitations break down, and no action of the legislative body is in any way restricted by the positive guaranties in the fundamental law This is not our form of government. To hold that it is, is to take the path that leads to the absolute supremacy of the temporary legislative body as against the fixed principles written into the Constitution as the very foundation of our government. The other path is the path that leads to an adherence to the fundamental principles, on the theory that their mainten-

ance is more important than the ease of remedy for a temporary undesirable condition.

The answers to the argument of counsel for appellants are sanctioned by the decisions of this Court in leading cases. Mr. Justice Holmes, in delivering the opinion of this Court, in *Pennsylvania Coal Company* v. *Mahon* (No. 549, October Term, 1922, decided December 11, 1922), referring to the protection of private property in the Fifth Amendment, said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. *But that cannot be accomplished in this way under the Constitution of the United States.*" (Italics ours.)

And again:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In that case the Court held unconstitutional a statute of Pennsylvania forbidding the mining of anthracite coal in such a way as to cause the subsidence of any structure used as a human habitation—a statute which

would destroy previously existing rights of property and contract.

In the recent case of *Bailey* v. *Drexel Furniture Co.* (No. 657, Oct. Term, 1921), the Chief Justice, delivering the opinion of the Court on the question of the constitutional validity of the Child Labor Tax Law, said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

In *Truax* v. *Corrigan, supra,* this Court, speaking of a law of Arizona limiting injunctions in labor disputes between employers and employees, said:

> "Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual."

It may seem desirable on some occasions to interfere with the bargains of individuals in private business, in order to give one party or the other some advantage that he would not otherwise possess. But the maintenance of the principle of liberty and freedom of contract is more important, and therefore more desirable. It might be thought by some to be better to leave the will of the legislative body unrestrained by fixed principles of government, but it was thought best by the framers of the Constitution that this should be a "government of laws and not of men."

(2) As to the contention that the consequences of sustaining the power to enact such a law cannot be considered.

The next proposition of counsel for appellants is that the Court, in passing upon the constitutionality of the Minimum Wage Law, cannot consider the consequences of adopting the rule or principle of law which would sustain this legislation. Stated in another way, the proposition is, that the Court must not lay down any rule or principle at all, and must not apply any rule or principle, and must not contemplate the effect of its decision as a precedent in interpreting rights under the Constitution.

This theory (if we correctly interpret it) is wholly at variance with the decisions of this Court in cases involving the constitutional validity of laws of Congress or the States.

For example, in *Adair* v. *United States* (208 U. S. 161), this Court had before it the question of the constitutionality of an Act making it a criminal offense for any employer on railroads to require of employees as a condition of employment that the employee should agree not to become or remain a member of labor organizations. That law was claimed to be invalid as a deprivation of "liberty and property" guaranteed by the Fifth Amendment. It was urged to the Court, as showing the far-reaching effect of the principle necessary to sustain such a law, that if Congress had the power under the guise of a regulation of commerce to forbid railroad employers to make as a condition of employment non-membership in a labor union, then by the same reasoning Congress would have the power to require that railroads should employ *only* members of labor unions or only non-union men — which would clearly be inconsistent with the Constitution. That argument this Court *fully considered in passing upon the law,* and at page 179 the Court said:

> "If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business only members of labor organizations, or only those who are not members of such organizations—a power which could not be recognized

as existing under the Constitution of the United States."

Again, in *Truax* v. *Raich* (239 U. S. 33), where the Court had under consideration the law of Arizona, previously referred to, restricting the employment of aliens, it was urged to the Court that the provisions of the particular act under consideration allowed the employment of aliens in all employments where there were only five workers or less, and employment of aliens to the extent of twenty per cent of the total in all employments where there were more than five workers, and, therefore, under the conditions existing in the State this did not seriously interfere with employment at all. To this argument Mr. Justice Hughes answered (p 42):

> "It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent of his employes. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of

work, it cannot be denied that the authority exists to make its measures to that end effective. Otis *v.* Parker, 187 U. S. 606; Silz *v.* Hesterberg, 211 U. S. 31; Purity Co. *v.* Lynch, 226 U. S. 192. If the restriction to twenty per cent now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent of the employees to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five."

* * * * *

"The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded."

In *Bailey* v. *Drexel Furniture Co.* (No. 657, Oct. Term, 1921), this Court, speaking of the consequences of sustaining the Child Labor Tax Law, said:

"Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction

> of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

It is also said by counsel for appellants that while this Court may not consider the consequences of laying down a principle which would sustain this law, it must consider the consequences of denying the validity of the law. It is said that laws of a similar nature have been passed in a number of States and that a decision adverse to the law now before the Court would annul such state laws and prevent carrying out the experiment in government sought to be made. As counsel for appellants has insisted in another connection, the laws referred to are not before this Court. But the fact that several state legislatures, whether a large number or small number, have attempted wage fixing, does not control the decision of the question now presented. That question is one of *power,* not of desirability or popular interest. That was made clear in *Coppage* v. *Kansas, supra,* where a similar question of power was presented and where it appeared that

statutes like the one before the Court had been enacted in some fourteen states.

As to the approval of such legislation by some State courts, which counsel for appellants so much relies upon, it must be remembered that all of the State cases which may be fairly cited rest upon the one decision from Oregon which came to this Court on error to the Supreme Court of Oregon. The weight of the Oregon decision as an authority on the interpretation of the Constitution of the United States must be tested by the fact that when that case came to this Court, the Court was equally divided on the question and no opinion was delivered.

As this Court has many times said, a decision by a divided court is no authority for the determination of other cases in this or any other court.* So far as

*Extracts from Decision in *Herts vs. Woodman*, (218 U. S., 205, 211, 213):

"It is also urged that the Circuit Court of Appeals for the Seventh Circuit is precluded from requesting the instruction of this court, because it had in two cases theretofore decided the very question now certified. *United States v. Marion Trust Co.*, 143 Fed., 301; *United States v. Stephenson*, not yet reported. In both cases the decision was adverse to the contention of the United States. The first was affirmed by this court without opinion, by an evenly divided court, 203 U. S., 594, and, in the second, an application by the United States for a writ of *certiorari* was denied, 212 U. S., 572.

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"All of these cases were affirmances by an equally divided court of the judgments of the court below. * * *

* * * * * *

"In such circumstances the court below was not only free to regard the question as one open for determniation, but one which might well be

the Oregon law is concerned, it may be said with just as much reason that it was condemned as inconsistent with the Constitution of the United States as that it was sustained as a valid exercise of power.

Of the state cases cited by counsel for appellants, leaving out the decision in Massachusetts where the law is not compulsory and the case is not in point because it rests upon an entirely different ground and leaving out the decision in Texas where the validity of the law was not involved and where minimum wage laws have been repealed and proposed new ones vetoed as unconstitutional, there remain those from Washington, Arkansas and Minnesota—practically all resting upon the Oregon case.

In the case from Washington the statute of that State was upheld practically without comment on the authority of the Oregon case.

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certified to this court, that the question of law which has never been authoritively decided by this court might be so determined by an instruction as to how it should decide the matter when thus presented for reconsideration.

* * * * * *

"Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting *prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.* The affirmance by a divided court in the second case shows this, for if it was not so, the second equal division could not have happened, for the case would have been controlled by the first equal division."

In the Arkansas case, *State* v. *Crowe,* 130 Ark. 272, the Court was divided. The majority opinion was based on the Oregon case. Chief Justice McCullough dissented in a vigorous opinion and the Justice writing the concurring opinion voted for sustaining the law solely because he felt bound by the course of proceedings in the Oregon case, but gave it as his opinion that "the statute clearly invades the Constitution of the United States and of our own state."

This leaves the decision of the Minnesota court as the only one where the question was independently reasoned, although in that case as well, the Oregon decision was relied on.

Since that decision this Court has passed upon the validity of a number of legislative enactments where the question was really one of power (as in the case at bar) and where the contention was pressed upon the Court that popular opinion or even widespread belief in the desirability of the law should justify the action as within the Constitution. Several of these have been cited in this brief.

As said by the Court of Appeals (*Children's Hospital* v. *Adkins,* 50 Washington Law Reporter, 721, Appendix B of this brief):

> "Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the

distribution of wealth and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government, due to personal liberty and the private ownership of property. These principles are embodied in the Constitution itself, and to interfere with their freedom of operation is to deprive the citizen of his constitutional rights. In other words, regardless of public sentiment or popular demand, such a radical change, if deemed necessary, should not be accomplished by legislative enactment or judicial interpretation, but by way of amendment in the orderly way provided."

"Any intimation that the Constitution is flexible, even in response to the police power, is unsound. Powers expressly delegated by the Constitution—such, for example, as the regulation of interstate commerce—may be extended to meet changing conditions, providing it can be accomplished without altering fundamental principles; but the principles are immutable, not elastic or subject to change. That a state may not impair the obligations of a contract, or that no person can be deprived of his property without due process of law, are principles fundamental, and if the legislature, in response to public clamor for an experimental social reform, may break down these constitutional guaranties by calling an act a 'health law', or a 'public morality law', or a 'public welfare law', all guaranties of the Constitution, under the alleged exercise of the police power, may be changed, modified or totally eliminated."

(3) As to the contention that plaintiffs below were not deprived of property rights because "special licenses" for defectives might have been obtained.

It is contended by counsel for appellants that there is no deprivation of property by the Minimum Wage Law because the plaintiffs below might have applied for a license under the so-called "license clause" and obtained leave of the Board before making contracts. This proposition is insistently and repeatedly set forth and runs through the entire argument of counsel for appellants. So far as it has any bearing on the constitutional question, this contention may be easily and conclusively answered. Counsel for appellants deduces from the language of the Minimum Wage Law the theory that under that law in the District of Columbia, all that the parties to the contract need do if they desire freedom of contract as to price is to apply to the Wage Board for a license—and that this is not a heavy burden upon the parties. Having made this assumption, counsel carries it throughout the argument and makes it the basis of his contention that there is no deprivation of liberty or property or freedom of contract because all can be free by getting a license.

But the argument is entirely beside the point in the case now before the Court for the Minimum Wage Law contains no such provision. The language in the Act

and the only language which refers to "license" or which counsel for appellants could point to in referring to "license" or "leave of the Board" is found in a short provision designated Section 13 of the Act, reading as follows:

> Sec. 13. That for any occupation in which only a minimum time-rate wage has been established, the Board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the Board and stated in the license. (40 Stat. L. 963.)

But under this provision, as is perfectly clear from a study of it, neither the employer, the Children's Hospital, nor the employee, Willie Lyons, could apply for or receive a license and if either or both did, the Minimum Wage Board and not the parties would fix the price in the contract.

To explain this, First: The employer cannot obtain a license because the Act does not anywhere authorize it. The license issues only to an employee. The Board cannot issue a license to an employer because the law authorizes its issuance only to an employee. The employer, employing labor, must pay the wages fixed by the Board or be subject to fine or imprisonment. These are the alternatives—there is no third.

The employer has no right under this law to get any special wages fixed under any circumstances. The possibility of action by some other person is surely not a *right* which affects or lessens the deprivation of rights under the Constitution which the Act brings about. If it is a right or privilege of anybody it is given to the employee only, not to the employer.

Second: The employee, as such, is not given any right to secure a special license. It is only the defective who can secure any change in the wage. It is only the woman "whose earning capacity has been impaired" to whom a special license may be issued. She must *establish* not that she desires to work for less wages or that she is able to support herself without wages or with the wages desired, but that she is impaired as to earning capacity in some way—"by age or otherwise". Assuming that the employee who could thus show she was defective, could obtain the right to make her own contract, is there any the less deprivation of the rights of those employees who are not able and willing to proclaim and prove that they are defectives and impaired in their earning capacity?

Third: But even as to such defective who has applied to the Board there is still given no freedom of contract. The Board and not the employee fixes the wage even then. The law requires even after the

license is obtained, such "wage as shall be fixed by the Board and stated in the license".

The Children's Hospital could not have secured a license from the Minimum Wage Board because the law does not authorize it; Willie Lyons could not have secured a license from the Minimum Wage Board because her earning capacity was not impaired by age or otherwise, and if she could have obtained a license she still would have been subject to the price-fixing of the Board and not to the price-fixing by agreement with her employer. There is, therefore, in Section 13, no provision whatever which affects the argument on the invalidity of the statute.

Counsel for appellants also assumes in this part of the argument that it is a deprivation of property rights only which gives the plaintiffs below a cause of action. In this, also, counsel is in error. In a case of the character of that at bar, it is the right of freedom of contract which has been infringed and that is a right which, (as many times stated by this Court) is part of the "liberty" protected by the Fifth and Fourteenth Amendments, and it is the infringement of this "liberty" which gives the cause of action. *Truax* v. *Raich* (239 U. S. 33).

(4) As to the assignment of error in the action of the Court of Appeals of the District of Columbia in granting a rehearing on the first appeal from the Supreme Court of the District.

The cases before this Court are appeals from final orders of the Court of Appeals of the District of Columbia, affirming decrees of the Supreme Court of the District adverse to the appellants here. These final orders, which appellants here seek to have reversed, were orders made by the Court below upon appellants' appeal from the Supreme Court of the District and upon appellants' assignment of errors and motions to "affirm or reverse."

The orders were made by the Court in regular session, composed of the regular justices authorized by law to sit; there was no temporary vacancy and no occasion or right at that time to call in a substitute justice from the Supreme Court of the District.

On *prior* appeals from the Supreme Court of the District, which ended in orders, not final, but sending the causes back to the lower court for further proceedings, there *were* rehearings granted. It is the granting of these rehearings on the *first appeals,* that appellants now assign as error, in their proceedings in this Court, seeking solely to reverse the orders on the second appeals.

To state the contention in support of this assignment of error seems to answer it, without extended discussion. If there were error in granting or refusing reargument on the first appeals, it is not material in the present proceedings, for these are (as they must be) appeals from the final orders only, made on the second appeals to the Court of Appeals adverse to the present appellants, and in which there was no reargument or rehearing granted or refused nor any question of the constitution of the Court in the cases.

The cases were properly before the Court on the second appeals. The appellants themselves took them there and invoked the action of the Court (*Rooker* v. *Fidelity Trust Co.*, No. 285, Oct. Term, 1922, decided February 19, 1923). To apply the language of this Court: "Both decisions were in the same case, the first was interlocutory; the second was final. Concededly, the case was properly before the Court on the second appeal; the plaintiffs evidently thought so for they took it there."

But, in any event, it is elementary that the granting or refusing of a rehearing in an equity suit is not the subject of review. (*Steines* v. *Franklin County*, 14 Wall. 15; *Roemer* v. *Neumann*, 132 U. S. 103.) The motion or petition is addressed to the discretion of the Court, as shown by all the decisions in the Federal courts. (*Steines* v. *Franklin County, supra.*)

The inherent power of courts (having authority to make rules of procedure and amend them) to correct their own orders during the term is well recognized everywhere.

The contention that the order granting the rehearing on the first appeals was not made by the *Court*, but by an individual member thereof, is without basis in the record. The record shows the order was made by the Court, the Chief Justice dissenting. (On the other hand, the record does show that the first order, that made by letters from Mr. Chief Justice Smyth and Mr. Justice Stafford, who had been the temporary judge, was made without any action, concurrence or dissent of Mr. Justice Van Orsdel, a member of the Court. Nor was that order put on by two members of the Court acting in the absence of a third, for all were absent on vacations and subject to the same method of consultation.)

The argument of counsel for appellants as to the effect of the designation of a special justice to fill a temporary vacancy in the Court, has no support or basis in the law governing the Court of Appeals. That law (Sec. 225, District of Columbia Code) authorizes the members of the Court present, in case of the temporary illness of one or more of the justices, to "designate a justice or justices of the Supreme Court of the District of Columbia to temporarily fill the va-

cancy or vacancies so created", the justice so designated to sit "while such vacancy or vacancies shall exist." In the same section the Court is given authority to make rules and regulations for the transaction of its business.

The record leaves no doubt that Mr. Justice Robb had resumed his place in the Court before the petition for rehearing was filed and passed upon.

If there were some custom in the Court as to the length of time the temporary justice should sit, it cannot affect the question of power. But the practice varied, at the least, as shown by the record in *Hein* v. *Pungs,* 9 App. D. C. 492

As different deductions appear to be made from the facts, it seems desirable to recite briefly the pertinent proceedings in the cases (taking the proceedings in the Children's Hospital case as typical).

On May 19, 1920, bill for injunction was filed by the Children's Hospital. (Rec., p. 2.) On June 25, 1920, order was entered by the Supreme Court of the District denying the injunction and dismissing the bill. (Rec., p. 13.)

From that order appeal was prosecuted to the Court of Appeals, and in the January Term, 1921, was argued by counsel (Rec., p. 31), and the opinion was handed down during the Term (June 6, 1921) by Chief Justice Smyth and concurred in by Wendell P. Stafford, Jus-

tice of the Supreme Court of the District, sitting in the place of Mr. Justice Robb. (Rec., pp. 31, 41.)

Thereafter, on June 14, 1921, and within fifteen days (exclusive of Sundays and holidays) from the decision of the Court, the Children's Hospital filed a petition for rehearing. (Rec., p. 49.) This was within the time required by the rules, which also provide that no mandate shall issue within said time unless upon special order of the Court for cause shown.

That petition recited an important decision of this Court in the Ball Rent case, rendered since the argument and submission of the cause in the Court of Appeals, and asked that a reargument be had and that the mandate be stayed until a rehearing could be had and decision rendered. (Rec., pp. 44-48.)

It sufficiently appears that the petition for rehearing was filed after the judges had separated for their vacations, for the record shows that the copies were mailed by the clerk to the several justices, including Mr. Justice Robb (Rec., p. 49), who had previously resumed his place on the bench.

On June 22, 1921 (still within the fifteen days, exclusive of Sundays and holidays, in which a petition for rehearing might have been filed), the clerk entered on the record an order denying the petition for rehearing. That order was made upon letters to the clerk from Mr. Chief Justice Smyth and Mr. Justice

Stafford (Rec., p. 50). It sufficiently appears that no action of any kind was taken by Mr. Justice Van Orsdel, who had sat in the case, and it also sufficiently appears that the Justices were absent on vacation at the time.

Thereafter, on July 13, 1921, still within the same term, the Court entered the following order:

> "On consideration of the appellant's motion for a rehearing in the above entitled cause, it is by the Court this day ordered that said motion be, and the same is hereby granted, and that this cause be and the same is hereby restored to the calendar for rehearing in due course. Mr. Chief Justice Smyth dissenting." (Rec., p. 52.)

Thereafter, on September 26, 1921, a motion was made in the Children's Hospital case by the appellee to set aside the order granting the motion for rehearing, and on October 6, 1921, a similar motion was filed in the Lyons case, which motions were denied October 7, 1921, Mr. Chief Justice Smyth dissenting. (R., pp. 53, 54, 55.)

On October 10, 1921, counsel for the Minimum Wage Board appeared for the reargument, and on motion leave was granted to counsel for the Board to file additional briefs (Rec., p. 55), and the argument was made by counsel for both sides.

Thereafter, opinion was handed down by Mr. Justice Van Orsdel, concurred in by Mr. Justice Robb, Mr. Chief Justice Smyth filing a dissenting opinion. (Rec., p. 56.)

And on November 6, 1922, the Court, the Chief Justice dissenting, entered an order reversing the decree of the Supreme Court of the District and remanding the cause to that Court for further proceedings. (Rec., p. 81.)

Thereafter the cause came on to be heard before the Supreme Court of the District, and on December 20, 1922, that Court adjudged, ordered and decreed that the Minimum Wage Law was invalid because in conflict with the Constitution of the United States and the amendments thereto, and that the defendants be enjoined, etc., as appears in the order. (Rec., p. 15.)

From that order the defendants, the Minimum Wage Board, appealed to the Court of Appeals, assigning as error (1) the action of the Court in holding the Minimum Wage Law unconstitutional; (2) the action of the Court in permanently enjoining defendants. (Rec., p. 16.)

Thereafter the appellant, the Minimum Wage Board, filed a motion to dispense with printing the Record, which was granted (Rec., p. 82), and also filed a motion to either affirm or reverse the decrees below. (Rec., p. 83.) Upon consideration thereof the Court

of Appeals acting upon the appellants' motion to affirm or reverse, passed upon the assignment of errors and ordered, adjudged and decreed that the decree of the Supreme Court be affirmed, Mr. Chief Justice Smyth dissenting. (Rec., p. 83.) Thereafter, from this final order, the Court of Appeals allowed an appeal to this Court, on motion of counsel for appellant. (Rec., p. 84.) That is the appeal now before this Court.

CONCLUSION.

The argument of counsel for appellants in support of the validity of the wage law, cannot fairly be said to rest upon any decision of this Court, except that, *assuming* this law to be within the scope of the police power he relies upon the rulings many times made and not disputed here, that Congress has a wide discretion in exercising an admitted power.

But, as has been pointed out, the question here is not one of discretion in determining the extent to which Congress may go in legislating for the public health, safety, morals or welfare *within* the police power. It is not a question of the reasonableness of the exercise of an admitted power. At the very base of the discussion is the question of the power to act at all. The question is whether the fixing of the price of labor is

within the police power at all—not whether it is a proper exercise of that power.

It will not do to say that the fixing of prices is done as a "health measure" and therefore it comes within the police power and the constitutional guaranties do not apply. By the same token it might be said that the mere existence of freedom of contract or private ownership of property, guaranteed by the Constitution, are themselves, inimical to health, morals or safety and therefore Congress has a wide discretion to restrict or eliminate them.

On the other hand, every contention of counsel for appellants in support of the validity of the law is answered in the decisions of this Court.

Forbidding that term in the contract between employer and employee by which the price is fixed by the parties has no more relation to health or morals than forbidding the term of the contract between employer and employee by which one agrees not to be a member of an association of workers. And the direct relation to health or morals does not exist when the contract is made by men, and equally it does not exist when the contract is made by women.

The question before the Court being one of *power,* because of the limitations upon legislative power in the constitutional guaranties, the statistics or opinions which induced Congress to believe the law desirable,

have no more controlling weight on the question than they would have on the question of the validity of a law requiring employers to hire none but union men, or a law forbidding them to hire aliens, or an act of Congress such as the Child Labor Tax law.

Respectfully submitted,

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