

The Commonwealth of Massachusetts.

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DEPARTMENT OF THE ATTORNEY-GENERAL, BOSTON, June 18, 1913.

HON. GRAFTON D. CUSHING, *Speaker of the House of Representatives.*

SIR:—By an order of the House of Representatives you have requested my opinion upon the constitutionality of House Bill No. 2518, entitled “An Act Relative to the Hours of Labor of Employees of Street Railway Companies”. I have already expressed officially my views upon this question to His Excellency the Governor, and I repeat herein my opinion in accordance with those views.

The bill in its final amended form provides as follows:—

“SECTION 1. Chapter five hundred and thirty-three of the acts of the year nineteen hundred and twelve is hereby amended by striking out sections two and three and inserting in place thereof the following:—*Section 2.* A day’s work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway company shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours. No officer or agent of any such company shall require from said employees more than nine hours’ work for a day’s labor. Threat of loss of employment or threat to obstruct or prevent the obtaining of employment by the employees, or threat to refrain from employing any employee in the future shall be considered coercion and ‘requiring’ within the meaning of this section. But nothing herein shall prevent an employee of the character mentioned in this act, if he so desires, from working more hours than those prescribed in the act for extra compensation.

SECTION 2. A company which violates any provision of this act shall forfeit for each offence not less than one hundred dollars nor more than five hundred dollars.

SECTION 3. This act shall not affect any written contract existing at the date of its passage.”

It hardly needs to be stated that the Attorney-General, in passing upon a question of this nature, is not in the position of a court considering the constitutionality of the act as applied to a specific case which has arisen, and that the opinion of the Attorney-General submitted in reply to such a question has not the force of an adjudication by the court in a case between parties before it.

Nevertheless, such a question presented to the Attorney-General must be considered within the same limitations within which it would be considered by the court of last resort in a specific case, since the only effect of an opinion of the Attorney-General is to advise as far as possible as to how the Supreme Court might be expected to rule upon the question now presented, in view of the previously decided cases upon the question.

It has been repeatedly stated in decisions of both the State and Federal courts that questions having to do merely with the policy of the legislation and the judgment exercised by the Legislature in its enactment are not matters coming within the purview of a decision of the courts. That principle was thus stated in *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U. S. 549, 569:—

“The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.”

And in *McLean v. Arkansas*, 211 U. S. 547, 548, it is stated as follows:—

“The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.”

The policy of the legislation in question, therefore, I do not discuss.

The Constitution of Massachusetts provides in part second, chapter I, section I, article IV, as follows:—

“And further, full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof.”

It is to be presumed that the Legislature attempted to act under and in accordance with this provision in formulating the bill presented and the judicial question presented is whether, in so doing, it has in fact exceeded its constitutional powers.

The only contention which has been raised before me in this regard is that it unwarrantably deprives those who are subject to it of the liberty guaranteed both by the State and Federal Constitutions, which, it is well established by many decisions, includes the right of contract.

Both property and liberty, however, are held subject to such reasonable conditions as may be imposed by the governing power in the exercise of those powers called “police powers”, which do not permit of exact definition but are generally described in the decisions of the United States Supreme Court as “relating to the safety, health, morals and general welfare of the public.”

The question of regulating the hours of labor for men has been one of great difficulty and has resulted in much difference of opinion in the courts. It must be settled on considerations differing somewhat from those determining the right to regulate the hours of governmental employment and the hours of labor of women and children. In the case of *Holden v. Hardy*, 169 U. S. 366, the court, with two justices dissenting, sustained as a valid exercise of the police power a

statute of the State of Utah entitled "An Act Regulating the Hours of Employment in Underground Mines and in Smelters and Ore Reduction Works", which limited to eight hours per day the period of employment in all underground mines and in smelters and all other institutions for the reduction or refinement of ores or metals, except in case of emergency. The court, in the course of its opinion, said:—

"These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

In the case of *Lochner v. New York*, 198 U. S. 45, the court, with three justices dissenting, reversed a decision of the highest court of New York and held unconstitutional a statute of New York limiting to sixty hours in any one week the period of employment in a biscuit, bread or cake bakery or confectionery establishment, and containing no emergency clause, as not within the limits of the police power, for the reason that it did not appear that the health of either the employees or the public was directly involved.

Some features are presented by the bill now before me which were not present in the legislation before the courts in the cases cited. The employees to which the bill applies are employed in operating cars of a street railway. The matter of public safety may, therefore, have been considered by the Legislature as directly involved in connection with the health of the employee. From the viewpoint of the safety of the public it is a matter of common knowledge that a high degree of efficiency in the persons operating the cars is desirable. In the case of *Baltimore & Ohio R.R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, it is said:—

"The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depend."

Another distinctive feature of the legislation now in question is that it deals with public-service corporations and the

use of public franchises, and for that reason the State may be considered as having wider jurisdiction under the police power than it would have in a matter involving solely private contracts.

Since 1893 there has existed upon the statute books of this Commonwealth a law providing that not more than ten hours of labor a day should be exacted of employees of street railway companies. I am not aware that in this Commonwealth the question as to the constitutionality of that provision has been presented to the Supreme Court. In an opinion to the Governor on June 24, 1902, the Supreme Court of Rhode Island, however, advised that a similar statute was constitutional. 24 R. I. 603. A short time after that opinion was rendered the Rhode Island statute was so amended as to give the employees of a street railway opportunity to work more than ten hours a day if they so desired, and that law, which in its amended form closely corresponds to the present bill, has remained upon the statute books of Rhode Island without challenge since its enactment.

In the case of *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U. S. 549, 569, the court, after citing many cases involving the exercise of the police power, said: —

“The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review.”

In the case of *McLean v. Arkansas*, 211 U. S. 547, 548, the court said: —

“If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.”

Discussing merely the constitutional question which has been presented to me, I cannot say either that the legislation under discussion has no reasonable relation to the object which I am bound to presume the legislation had in view, the protection of the health, safety and welfare of the public, or that the Legislature cannot have found upon evidence presented to it, which, however, is not before me, that a condition of affairs existed which justified it in enacting the legislation in question for the protection of the health, safety and welfare of the people, including its employees.

In view, also, of the provision that the employees may, if they so desire, work more than nine hours in a day, for extra compensation, the bill does not upon its face appear to be so unreasonable and arbitrary as to be adjudged an arbitrary interference with the right of contract. The contention that the Legislature had in view the public health and safety is not necessarily negatived by the permissive feature with reference to the employees, in the latter part of the bill, in my opinion. The Legislature may have presumed that the employees would not desire to work longer than the hours prescribed unless they were physically able and competent to do so, and that the employers would not so employ them except upon those conditions. While it appears by this provision that the Legislature has not gone so far as it might have attempted to in protecting the public health and safety, it does not for that reason make invalid the protection afforded by the enactment.

It is a rule of constitutional construction that in case of a reasonable doubt the court is bound to resolve the doubt in favor of the statute.

In view of these considerations I am led to the conclusion that there is a strong probability that the court of last resort would not declare this act unconstitutional.

Very respectfully yours,

JAMES M. SWIFT,  
*Attorney-General.*