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LIMITATION OF HOURS OF LABOR AND FIXING A MINIMUM WAGE SCALE ON ALL PUBLIC WORK BY STATUTE, ORDINANCE OR BY CONTRACT

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I

CONSTITUTIONALITY

The great weight of authority in this country is to the effect that a statute, ordinance or contract limiting the number of hours of labor in any one day and providing for a minimum wage scale on all public work, violates no provision of the federal or state constitutions.

The question of whether it is violative of any provision of the federal constitution was settled forever by the United States Supreme Court in the case of *Atkin vs. Kansas*, wherein the court decreed that it was purely a question of public policy to be determined by the legislative bodies and of which the court has no concern.

Since the *Atkin's* case, courts throughout the country have, with but a few exceptions, decided that the action of the Supreme Court of the country in that case has forever foreclosed argument on the question, and have followed the decision without discussion.

Through the enactment of chapter 391, Laws of 1909, and chapter 171, Laws of 1911, known as section 1729m of the statute of 1915, the state has determined that except in cases of extraordinary emergency, all public work of the state "which may involve the employment of laborers, workmen or mechanics" shall be done on an 8 hour day basis and provides for a penalty for any officer, contractor or sub-contractor who violates the provisions thereof.

This enactment represents the public policy of the state. Its legality has never been challenged and cannot be questioned, in view of the many decisions upholding similar legislation in other jurisdictions.

The city of Milwaukee has an ordinance which provides for an 8-hour day and a minimum wage for unskilled laborers and the "prevailing rate of wages" for unskilled laborers on public work. The "8-hour" feature was upheld in *Raulf vs. Milwaukee*, 164 Wis. 172.

The following extracts from numerous cases show the attitude of the strongest courts in the country on the question:

(a) Expressions of courts on.

"Its constitutionality is beyond all question." *Byars vs. State* (Okla.), 102 Pac. 804.

"It violates no provision of the federal or state constitution." *Penn. Bridge Co. vs. U. S.*, 29 App. D. C. 452.

"We believe that the contention of counsel for the defendant (that the 8 hour minimum wage law is unconstitutional) is without merit, and is unsupported by reason or authority." *Byars vs. State*, supra.

"The right of the state or municipality to prescribe 8 hours as a day's work and to require that the current rate of wages be paid upon public work is not open to question." *Norris vs. City of Lawton* (Okla.), 148 Pac. 123.

"The city has the absolute control of its own property and can regulate the hours of work to be employed on the same." *State vs. McNally*, 48 La. Ann. 1450, 21 So. 27.

"The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public works." *Id.*

"That the legislature may fix the hours of labor upon public works and for public work even in cities is now well settled, and no allusion to sustaining authority will be made." *Malette vs. Spokane*, 68 Wash. 578, 123 Pac. 1005; Ann. Cas. 1913E, p. 986.

"This proposition (right to prescribe these conditions) is so elementary that a citation of authorities is unnecessary." *Byars vs. State*, supra.

"It is a proper exercise of power." *Re Dalton* (Kans.), 47 L. R. A. 380.

"We regard discussion of the question * * * as foreclosed by the decision of the United States supreme court in *Atkin vs. Kansas*." *Jeople vs. Williams*, 189 N. Y. 131.

"The power to prescribe the conditions upon which public work shall be carried on is undoubtedly primarily in the state." *Milwaukee vs. Raulf*, 164 Wis. 172.

"A provision in a contract to perform public work that the contractor pay laborers not less than 25 cents an hour is not violative of any constitutional or statutory provision." *Norris vs. Lawton* (Okla.), 148 Pac. 123.

"It is a valid exercise of the police powers." *State vs. Livingston Concrete Bldg. & Mfg. Co.* (Mont.), 87 Pac. 980.

(b) Grounds on which upheld.

Following the *Atkin's* case, the courts in this country have generally upheld the proposed provisions on the ground that they are questions of public policy and therefore not reviewable by the courts. A few courts have upheld similar legislation as a proper exercise of police powers but this theory has been rejected in most jurisdictions where they regard it purely as a question of contract between the state or city and the contractor wherein the contractor agrees to do the work with full knowledge of all provisions.

The grounds upon which the various courts upheld the legislation follow:

"* * * It can only be regarded as a direction by a principal to his agent, and therefore as a matter of considera-

tion to the principal and agent only." *Byars vs. State* (Okla.), 102 Pac. 804.

"The position which the state has taken nowise differs from that of an individual who, in the employment of labor refuses to permit his employees to labor more than eight hours." *In re Dalton*, 61 Kans. 257; 59 Pac. 336; 47 L. R. A. 380.

"If the state itself prosecutes the work, it may dictate every detail of the services required in its performance; prescribe the wages of the workmen, their hours of labor, and the particular individuals who may be employed. * * * The state in this respect stands the same as its citizens. Its rights are just as great as those of private citizens and no greater." *People vs. Orange Co. Road Constr. Co.*, 175 N. Y. 84.

In *Ellis vs. U. S.*, 206 U. S. 246, the court held that the right to limit the hours of labor on public work was an incident to the powers of congress to authorize and enforce contracts for public works. The court also held that a law otherwise valid would not be made unconstitutional by the fact that it secured certain advantages to labor, though Congress did not have general control over labor conditions.

"The city has the absolute control of its own property, and can regulate the hours of work to be employed on the same. The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public work." *State vs. McNally* (La.), 36 L. R. A. 533; 21 So. 27.

"We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest."

U. S. vs. Martin, 94 U. S. 400; 24 L. ed 128 (in which an act of congress was upheld declaring 8 hours shall constitute a day's work for laborers, workmen or mechanics employed by or on behalf of the government of the United States).

The Atkin's case was also followed in *State vs. Livingston Concrete Bldg. & Mfg. Co.* (Mont.), 87 Pac. 980, where it was held to be a valid exercise of the police powers.

"The right by virtue of which the state regulates the use of its property is not only one of dominion and sovereignty. It is also the same in quality and character as the right of the person with whom it contracts, and, when the state engages directly or indirectly in the construction of public improvements, it may employ and refuse employment to whom it will, the same way and to the same extent that any citizen may exercise this right in reference to his private and personal affairs. The right is the same in either case. *This proposition is so elementary that a citation of authorities is unnecessary.*" *Byars vs. State* (Okla.), 102 Pac. 804.

"In the conflict of authority on the subject, the supreme court of the United States having decided the precise question in upholding the Kansas law in the Atkin case, supra, we shall conform to our usual custom by following the lead of that august tribunal in determining the case at bar." *Keefe vs. People* (Colo.), 87 Pac. 791.

"We agree with counsel that this statute, if valid, is so upon the ground that the state, in its proprietary capacity, may properly prescribe for itself and its auxiliary arms of government the terms and conditions upon which work of a public character may be done. (Upholding 8-hour provision.)" *Id.*

In speaking of the right of contract involved and the question of personal liberty involved in this class of legislation the federal supreme court said in *Atkins vs. Kansas*.

"It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee of its people, and having control of its affairs to PRESCRIBE the conditions upon which it will permit public work to be done in its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations of this character suggest only considerations of public policy, and with such considerations the courts have no concern."

Speaking of the right of laborers to contract their labor at any price they may deem fit, the court in the same case said:

"If it be contended to be the right of everyone to dispose of his labor upon such terms as he deems best, as undoubtedly it is, and that to make it a criminal offense for a contractor for public work to permit or require his employee to per-

form labor upon that work in excess of eight hours each day is in derogation of the liberty of both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do."

This decision was cited with approval in the somewhat analogous case of *Ellis vs. U. S.*, 206 U. S. 255.

"The position which the state has taken in no wise differs from that of an individual who, in the employment of labor, refuses to permit his employees to labor more than eight hours. It is certainly lawful for one to refuse to employ men to work more than a given number of hours per day." *Re Dalton* (Kans.), 47 L. R. A. 380.

"We think that the city, in the performance of its public duty of paving its streets, had a right to prescribe as one of the terms upon which the contract should be let and the work performed that the current rate of wages then prevailing in the city should be paid to the laborers performing the work upon said streets." *Norris vs. Lawton* (Okla.), 148 Pac. 123.

(c) Due process clause.

It is not in conflict with the 14th amendment of the Federal Constitution as to taking property without due process of law.

Milwaukee vs. Raulf, 164 Wis. 172; *Atkin vs. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Keeffe vs. People*, 37 Colo. 317, 8 L. R. A. (N. S.) 131, 87 Pac. 791; *Re Broad*, 36 Wash. 449, 70 L. R. A. 1011, 78 Pac. 1004, 2 A. & E. Ann. Cas. 212; *State vs. Livingston Concrete Bldg. & Mfg. Co.*, 34 Mont. 570, 87 Pac. 980, 9 A. & E. Ann. Cas. 204; *Jacobson vs. Massachusetts*, 197 U. S. 11-31, 49 L. ed. 643-652, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Lochner vs. New York*, 198 U. S. 45-55, 49 L. ed. 937-941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *California Reduction Co. vs. Sanitary Reduction Works*, 199 U. S. 306, 319, 50 L. ed. 204, 210, 26 Sup. Ct. Rep. 100; *Moeschen vs. Tenement House Dept.*, 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; *Ellis vs. United States*, 206 U. S. 246, 255,

51 L. ed. 1047, 1052, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589; *Muller vs. Oregon*, 208 U. S. 412-421, 52 L. ed. 551-556, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957.

(d) Equal protection of the law.

It does not deny to any person the equal protection of the laws.

Milwaukee vs. Raulf, 164 Wis. 172; *Williams vs. People*, 24 N. Y. 405; *People vs. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Tenement House Dept. vs. Moeschen*, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; *People ex rel. Armstrong vs. Warden*, 183 N. Y. 223, 2 L. R. A. (N. S.) 859, 76 N. E. 11, 5 A. & E. Ann. Cas. 325; *Re Morgan*, 114 App. Div. 45, 99 N. Y. Supp. 775; *Missouri vs. Lewis (Bowman vs. Lewis)*, 101 U. S. 23-30, 25 L. ed. 989-992; *Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Hayes vs. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Mallett vs. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

Classification is not arbitrary or capricious so as to support a claim that it denied equal protection of the laws because all in the same class were not treated alike.

State ex rel. Williams, etc., Co. vs. Metz, supra.

"We regard discussion of the question involving discrimination between persons employed by private individuals and those employed by municipal corporations as foreclosed by the decision of the United States supreme court in *Atkin vs. Kansas*." *People vs. Williams, etc.*, supra.

(e) Freedom of contract.

The freedom of contract guaranteed by the United States Constitution, 14th Amendment, is not infringed by a statute making it a criminal offense for a contractor on public work to permit or require an employee to perform labor upon a public work in excess of eight hours per day.

State vs. Atkins, 64 Kans. 174, 97 A. S. R. 343, 67 Pac. 519. Affirmed in 191 U. S. 207.

This decision was held binding in *Re Broad*, 36 Wash. 449, 70 L. R. A. 1011, where an ordinance fixing a minimum wage and an 8-hour day on public work was declared not to interfere with the constitutional guaranty of liberty and property on the ground that the public has the right to do its work in any manner it sees fit and to compel those with whom it contracts to perform the work in the same manner.

"It does not restrict or interfere with the right or liberty of the employer or employee to contract." *Byars vs. State* (Okla.), 102 Pac. 804.

In *People ex rel. Williams Engineering & C. Co. vs. Metz* (N. Y.), 85 N. E. 1070, the court, in speaking of this question said:

"We close his branch of the discussion by quoting from the latest utterance upon the subject by the court of last resort upon Federal questions to which our attention has been called: 'It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th amendment to the Federal constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that the state may, without conflicting with the provisions of the 14th Amendment, restrict, in many respects the individual's power to contract.'" *Mueller vs. Oregon*, 208 U. S. 412.

(f) Special assessments.

The question of the validity of such legislation as against special assessments has been the stumbling block in a few of the states. The question was solved in the state of Washington when the courts held that the only question involved as against special assessments was one of reasonableness of the wage. This is a question of fact. Surely no court would hold that a \$2 a day wage for a common laborer would be excessive. And it would not be unreasonable even against special assessments to insist that the prevailing or current wage be paid.

"Laws fixing the hours of labor and providing that no less than the GOING rate of wages shall be paid under contracts such as we have before us have been generally upheld; but the question for us to decide is whether, as against a protesting property owner, a wage unreasonably higher than the going wage can be arbitrarily paid for work done

under a special assessment." *Malette vs. Spokane*, 123 Pac. 1005.

In holding that a wage unreasonably higher than the going wage could not be paid for such work, the court said:

"In disbursing funds so collected (by special assessments) a city council is bound to act for the best interests of those contributing to the fund. The city acts in its proprietary capacity. Its council is the agent of the property owner." *Malette vs. Spokane*, 123 Pac. 1005.

"The opening, construction, and maintenance of public highways is purely a governmental function, whether done by the state directly or by one of its municipalities, for which the state is primarily liable, and it is immaterial whether such public work is paid for by the state or by the city or BY THE BENEFITED PROPERTY OWNER. It is a work of a public, not private character. THE MANNER OF PAYMENT DOES NOT CHANGE THE CHARACTER OF THE WORK." *Byars vs. State* (Okla.), 102 Pac. 804.

II

PURPOSE OF LEGISLATION

"The manifest purpose of this provision is to promote the industrial welfare of the people by fixing a high standard for employes on public work." *Byars vs. State* (Okla.), 102 Pac. 804.

"It is a human life, health and welfare statute to be given a beneficial interpretation for the public good." *State ex rel. vs. Ottawa* (Kans.), 113 Pac. 391.

"The purpose of the statute is to conserve the health and promote the happiness of the workingman." *State vs. Livingston Concrete Bldg. & Mfg. Co.*, 87 Pac. 980.

III

POWER TO IMPOSE CONDITIONS

(a) By statute.

"* * * the legislature, acting as the representative of the commonwealth and its governmental subdivisions, may determine as employer the number of hours which shall constitute a day's labor for all those with whom it makes contracts of employment. * * * There have been numerous decisions to the effect that such laws are unconstitutional.

But we are not inclined to follow them so far as they are inconsistent with the conclusion we have reached." *Woods vs. City of Woburn* (Mass.), 107 N. E. 985.

"That the legislature may fix the hours of labor upon public works and for public work even in cities is now well settled, and no allusion to sustaining authority will be made." *Malette vs. Spokane*, 123 Pac. 1005.

"Oklahoma as a sovereign state is no less free as a party to contract than any person in the state and the lawmaking power has the right to provide that contracts made by the state or any agent of the state shall be executed in conformity with the requirements of the constitution and the statute." *Byars vs. State* (Okla.), 102 Pac. 804.

As to right of legislature to fix by statute compensation which city must pay for labor and other service, see *People vs. Coler* (N. Y.), 52 L. R. A. 814.

As to constitutionality of 8-hour law as affecting municipal corporations, see *Re Dalton* (Kans.), 47 L. R. A. 380, and *Cleveland vs. Clements Bros. Constr. Co.*, 59 L. R. A. 775.

As to power of legislature to impose burdens on municipalities, and to control their local administration and property see note to *State ex rel. Bulkeley vs. Williams* (Conn.), 48 L. R. A. 465.

As to statutory limitation of hours of labor see:

People vs. Phyfe (N. Y.), 19 L. R. A. 141 and note; *State vs. Loomis* (Mo.), 21 L. R. A. note on p. 796; *Low vs. Rees Printing Co.* (Nebr.), 24 L. R. A. 702; *Ritche vs. People* (Ill.), 29 L. R. A. 79; *State vs. McNally* (La.), 36 L. R. A. 533; *Holden vs. Hardy* (Utah), 37 L. R. A. 103; Affirmed in 42 L. ed. U. S. 780; *State vs. Holden* (Utah), 37 L. R. A. 108; *Short vs. Bullion B. & C. Min. Co.* (Utah), 45 L. R. A. 603; *Re Morgan* (Colo.), 47 L. R. A. 52.

(b) By ordinance.

"The city has the absolute control of its own property and can regulate the hours of work to be employed on the same." (This was done by ordinance which is set out in full.) *Louisiana vs. John McNally*, 36 L. R. A. 533.

"The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public works." *Id.*

"* * * and the right of the state or municipality to prescribe eight hours as a day's work and to require that

the current rate of wages be paid upon public work is not open to question." *Norris vs. City of Lawton* (Okla.), 148 Pac. 123.

Milwaukee vs. Raulf, 164 Wis. 172.

The city has a right to pass an ordinance regulating the hours of public works.

State vs. McNally, 48 La. Ann. 1450, 36 L. R. A. 534, 21 So. 27; *Re Dalton*, 61 Kans. 257, 47 L. R. A. 380, 59 Pac. 336; *State vs. Atkin*, 64 Kans. 174, 97 Am. St. Rep. 343, 67 Pac. 519; *People ex rel. Warren vs. Beck*, 30 N. Y. Supp. 473; *People vs. Warren*, 28 N. Y. Supp. 303.

(c) By contract.

"If then the state may do this by statute, or the city may do this by ordinance, there cannot be any valid reason why the same may not be done by contract." *Norris vs. City of Lawton* (Okla.), 148 Pac. 123.

IV

APPLICATION OF PROVISIONS

(a) Extent of application.

In *State vs. Ottawa*, 84 Kans. 100, 113 Pac. 391, it was held that the law applies to engineers and to all laborers, workmen or mechanics or other persons employed to operate an electric light and water plant of a city. It was there said:

"The determination of the amount of time during which an employee works is not to be governed by the amount of time consumed in the actual use of the hands but includes also the time used in supervision, manipulation of machinery however slight, and general oversight."

(b) When applicable.

"It has been decided by other courts that such a statute was not intended to apply where the employment was not by the day but by the hour, week, month or year." *Luske vs. Hotchkiss*, 37 Conn. 219; *Schurr vs. Savigny*, 85 Mich. 144, 48 N. W. 547.

It has been held in New York State that if a laborer, workman or mechanic is employed on a *per diem* basis, he must be paid the prevailing rate of wages, but if he is employed by the year at an

annual salary which he receives irrespective of the number of days he actually works, then the provisions of the labor law as to the rate of compensation do not apply and there is nothing which requires that the annual salary shall be fixed at a sum which divided by the number of working days in the year will give an amount per day equal to the prevailing, or any other rate.

In *Bock vs. City of New York*, 31 Misc. 55, it was said:

"The Acts of 1894 and 1897 (Labor Law, sec. 3) apply only to mechanics employed in the usual way to do laboring work, and, not to an appointee, like the plaintiff, holding under a yearly employment at a fixed salary and furnished with board and lodging without charge by the municipality. A person situated as the plaintiff was is not brought into competition with skilled painters, seeking daily or weekly employment, so that he is clearly not within the reason or purpose of the law, which, in consequence, does not apply."

In *People ex rel. Sweeny vs. Sturgis*, 78 App. Div. 460, page 463, it was said:

"The word 'hire' evidently does not relate to public officers or others holding positions under the city, who are included in the classified lists of the Civil Service Law, such as the uniformed members of the fire department who are appointed to a position after a rigid examination and from competitive lists. No contract of hiring is made with them. They receive annual salaries, not wages, either in the common or legal acceptance of the term."

In *Farrell vs. Board of Education*, 113 App. Div. 405, 406, it is said:

"The language of the Labor Law indicates that it refers to those who are paid daily wages for labor upon public works."

(c) Where the larger part of the work is done in the factory, etc.

In the case of *Ewen vs. Thompson-Starrett Co.*, 208 N. Y. 245, the court held that the prevailing rate of wages means the rate in the locality where the work is done. In that case stone for a municipal building in New York was quarried, cut, dressed and trimmed in Maine and the workmen were paid the rate prevailing

in Maine, which was different from the rate prevailing in New York City, but the court held that the wages paid according to the rate prevailing in Maine governed as the workmen were not employed "on, about or upon" the public work of constructing the municipal building in the City of New York within the intent of the law.

In the report of the Attorney General for New York State given in 1909, it was said:

"The phrase 'sub-contractor or other person doing or contracting to do the whole or a part of the work' does not include a manufacturer entering into an agreement with a municipal contractor for the manufacture of doors, windows and other woodwork for a certain building. The contract constitutes a mere purchase of material. *Bohnen vs. Metz*, 126 App. Div. 807, 111 N. Y. Supp. 196 (1908)."

The Attorney General distinguishing the above case holds that the eight-hour law is binding upon a contractor engaged in erecting a school building even though he has some of the work, such as the preparation and manufacture of fire escapes done in a factory owned by him.

V

RIGHTS INVOLVED

(a) Of employer and employee.

See *Atkins vs. Kansas*, 64 Kan. 174.

"A contractor, in bidding for work to be done by the state, county or city or township, understands, in making his estimates, that under the law eight hours per day is the maximum time which his employees may work. He is in no wise prejudiced, for all other bidders for the same work have equal knowledge of the rule which the state has established governing the hours of labor to be performed in its behalf." *Re Dalton* (Kans.), 47 L. R. A., p. 380.

(b) Waiver of rights by contract and conduct.

Similar legislation was upheld in *Short vs. Bullion-Beck & C. M. Co.*, 20 Utah 20, where it was held that the employee could not waive his rights under the statute.

"* * * the oral or written contracts of the plaintiff to work for ten hours each day for a stipulated weekly wage were not contrary to law and were binding upon him. There is nothing inconsistent with this in *Atkins vs. Kansas* which

arose under a statute quite different in terms." (The particular ordinance is not given in the opinion so it is impossible to determine wherein it differs from the Kansas statute.) *Id.*

"It frequently has been held that compensation for work performed outside the time fixed by statute cannot be recovered when, without protest or demand at the time the work is performed, regular wages have been accepted without comment." *Id.* Citing:

U. S. vs. Garlinger, 169 U. S. 316; *Schurr vs. Savigny*, 85 Mich. 144, 48 N. W. 547; *Timmonds vs. U. S.*, 84 Fed. 933; *Fitzgerald vs. International Paper Co.*, 96 Me. 220, 52 Atl. 655; *McCarthy vs. New York*, 96 N. Y. 1, 48 Am. Rep. 601; *Vogt vs. Milwaukee*, 99 Wis. 258; *Luske vs. Hotchkiss*, 37 Conn. 219.

"The terms of employment are, by this statute, publicly proclaimed; and, if a person insists upon working more than eight hours a day, he must seek other employment. His liberty of choice is not interfered with, nor his right to labor, infringed." (Citing *People ex rel. Warren vs. Beck*, 30 N. Y. S. 473, and *People vs. Warren*, 28 N. Y. S. 303.) *Re Dalton* (Kans.), 47 L. R. A. 380.

The statute cannot be evaded by calling compensation "salary" and making it payable at long intervals.

State ex rel. vs. Ottawa (Kans.), 113 Pac. 391.

"We are of the opinion, therefore, that contracts, fixing or giving a different length of time as a day's work are legal and binding upon the parties making them." *U. S. vs. Martin*, 94 U. S. 400.

Byrnes vs. City of New York, 150 App. Div. 338, presented facts from which a waiver could be inferred, and was apparently decided on that ground. Plaintiff, who was employed as a bricklayer in the fire department at a fixed annual salary of \$939, had receipted for it on the monthly payrolls, and had protested to the deputies but not to the commissioner. He sued for the difference between the amount he received and the prevailing rate, but was not allowed to recover. The court said at page 340:

"The salary designated at the time of his employment was an annual one, payable to him regardless of the amount of work performed. Had he been employed at the prevailing rate of wages, he would have been paid upon a *per diem* basis for work actually performed. * * * It would seem quite obvious that he chose the certainty of an annual salary, payable regardless of the nature and amount of the work

performed, in preference to the uncertainty of a higher *per diem* wage, dependent upon the amount of time he was actually engaged at work."

VI

INTERPRETATION

(a) Eight-hour clause.

The courts have held that the provisions of the section limiting hours of labor upon the work of a municipality does not prevent the employee from working overtime upon work of private customers of the contractor.

People ex rel. Hausauer-Jones Printing Co. vs. Zimmerman, 58 Misc. 264.

(b) Prevailing wage.

The term "prevailing rate of wages" is interpreted to mean the current, general or common rate for a legal day's work in the same trade or occupation in the locality within the state where such public work is performed in its final or completed form. The phrase has been held constitutional in *Ryan vs. City of New York*; 177 N. Y. 271, 69 N. E. 579. See also *Byrnes vs. City of New York*, 150 App. Div. 338.

"As to what the prevailing rate of wages is in this case in dollars and cents," said Attorney General Carmody in an opinion dated February 27, 1912, "is a question of fact to be determined by the commissioner upon the evidence before him and is in no way a question of law to be passed upon by the attorney general."

The term "prevailing rate of wages," he says in the same opinion, "has had no authoritative judicial construction so far as I have been able to find," and goes on to say: "'prevailing rate of wages' must be interpreted to mean the prevailing, current, general or common rate paid for a legal day's work in the city of Yonkers in the same trade or occupation. I do not think it necessarily means the highest or lowest wages paid but the average or common rate—such a rate as one would be able to recover in an action for services where no price was specified in the contract."

The intent, according to Mr. Justice Rumsey in *McAvoy vs. City of New York*, 52 App. Div. 485, 490, "is to insure those laborers the same amount of wages which it has been found

necessary to pay to secure the services of other men at the same sort of work, and to insure the payment to public laborers of the same wages which other men in the same locality, at similar work, are accustomed to receive."

In *Ryan vs. City of New York*, 177 N. Y. 271, the language used on page 272 is:

"Work done for it (the state) or its several subdivisions shall be paid for at such a rate as individuals and corporations in the same locality pay."

and page 275:

"It is provided that they shall be paid at a rate not less than that paid by others for similar services in that locality."

The opinion of the Attorney General holds that "prevailing rate" means "the rate paid for a legal day's work," that is, for eight hours. In New York it has been said that this may be doubted.

The labor law says merely "a day's work," and it would seem that the rate taken should be that paid in outside employment for the day's work customary in the locality, whether a seven, eight or nine hour day.

VII

MANNER OF ENFORCEMENT OF THE LAW

In Buffalo, New York, there are one or two cases a year ordinarily arising on complaint of some laborer or labor organization that the provisions of the city contracts for an eight hour day and the prevailing rate are violated. Ordinarily the contractor assumes the burden of defense when any steps are taken to prevent the continuance of the work. When the city withholds pay on a complaint that the contract has been violated, the contractor assumes the burden of establishing compliance with the contract, and the complainant is called upon by the city authorities to prove the violation, and the matter is promptly settled by the court.

An employee who wishes to contest the correctness of a determination as to the prevailing rate of wages must do so when payment of wages is tendered. If he accepts the amount offered and makes no protest he, in effect, accepts the correctness of the determination and waives all claim to a greater amount.

Ryan vs. City of New York, 177 N. Y. 271.

In New York the rate of wages is fixed by Section 3 of the Labor Law, which provides:

"The wages to be paid for a legal day's work, as hereinbefore defined, to all classes of such laborers, workmen or mechanics upon all such public works, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used."

This section does not definitely fix the rates. It merely establishes the rule by which they must be fixed. Obviously, some one must determine what the "prevailing rate of wages" is in any given locality at any particular time.

In the case of *Ryan vs. City of New York*, 177 N. Y. 271, Chief Justice Parker on page 278 pointed out that:

"Section 3 of the labor law does not attempt to fix in dollars and cents the wages to be paid to those on state or municipal work, but provides that such wages 'shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality.' The statute, therefore, made it the duty of the person charged with employing plaintiff to ascertain the prevailing rate of wages for similar service in the city, and then to fix the compensation at that amount or a still greater one."

Since the law declares that wages must be at the prevailing rate and since nobody has been authorized to make a final, conclusive, binding determination as to what is the rate prevailing in the locality, it follows that in case of dispute the matter can be finally settled only in the courts. That is, if the employee is dissatisfied with the rate as provisionally fixed, he may protest, sue for the amount he claims and have the matter determined in court according to the evidence produced. He cannot be bound by the determination of any municipal officer or body.

Walsh vs. City of Albany, 32 App. Div. 128, page 130.

VIII

PENALTIES WHICH MAY BE IMPOSED

It has been held that for a violation of a statute providing that a certain number of hours shall constitute a day's labor on public

work, the legislature may provide that no officer shall be permitted to pay the amount due on any contract, which has been performed in violation of the statute, from funds under his official control.

People vs. Metz, supra.

The state has the right to pass a statute for the forfeiture of the prohibited contract.

Atkins vs. Kansas, 191 U. S. 207; *Ellis vs. U. S.*, 206 U. S. 246.

"As the legislature has power to regulate and fix the hours of labor on public work, it has the incidental power to compel obedience to its commands by mild or severe penalties, as it sees fit. The method of enforcement is for it to determine. It can make violation a crime punishable by fine or imprisonment, or both, or provide for a forfeiture of the contract, or prohibit payment for work done thereunder. All this is within its sound discretion. * * * the legislature * * * now has the power * * * to provide that when that limit is exceeded no officer of the state or municipal government shall be permitted to pay therefor from funds under his official control." *People vs. Williams, etc.*, supra, page 207.

IX

CONTRARY CASES DISTINGUISHED AND EXPLAINED

Ex parte Kuback, 85 Cal. 274, 20 Am. St. Rep. 226, was held unconstitutional because in addition to providing for an 8-hour day, it excluded Chinese from working on public works.

Seattle vs. Smyth, 22 Wash. 327, 60 Pac. 1120, without argument simply holds that an 8-hour provision is unconstitutional on the theory that they interfere with the constitutional right of persons to contract with reference to compensation for their services, where such services are neither unlawful nor against public policy. Later the court absolutely refused to follow the case and held a similar measure to be a valid exercise of power.

In *Street vs. Varney Electrical Supply Co.* (Ind.), 61 L. R. A. 154, the court held invalid a measure fixing the minimum wage for unskilled workers at \$2 a day, saying:

"But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum wage at which it shall be employed by counties, cities, and towns on their public work. Why exclude the skilled mechanic from the benefit of the

act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence. * * * No sufficient reason has been assigned why the wages of the unskilled laborer should be fixed by law and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill and experience may enable them to do."

In speaking of cases which held invalid statutes imposing an 8-hour day on all contracts let by cities, the court in *Keefe vs. People* (Colo.), 87 Pac. 791, said:

"These authorities are based upon the proposition that, with respect to the carrying on of works of improvements by municipal corporations, they are free from legislative restraint by statutes of this character as are private corporations in carrying out the objects of their incorporation; and, since private corporations may not thus be controlled, it follows that municipal corporations cannot be; that a municipal corporation, in exercising that branch of its powers may properly be designated as "private" concerning its purely private rights, are, like private corporations, free from such control of the legislative department of government."

The cases on which it places this interpretation follow:

Cleveland vs. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885; *Ex Parte Kubach*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Seattle vs. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; *People vs. Orange County Road Constr. Co.*, 37 Misc. 341, 75 N. Y. S. 510, 175 N. Y. 84, 65 L. R. A. 33, 67 N. E. 129; *People ex rel. Rodgers vs. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *Fiske vs. People*, 188 Ill. 206; 58 N. E. 985; 52 L. R. A. 291.