

LABOR LAW ADMINISTRATION IN PENNSYLVANIA.

I.

THE DEVELOPMENT OF AGENCIES FOR ADMINISTERING LABOR LEGISLATION IN PENNSYLVANIA.

I. EARLY LEGISLATION.

The earliest laws for the protection of labor in Pennsylvania, as in other states, failed to provide for any enforcing authority. They went on the theory that the aggrieved workman or some benevolent person interested in the worker's welfare would prosecute the employer, and thus justice would be done.

Some of the early child-labor legislation is typical. We are not interested here so much in the provisions of these laws, which in general prohibited the employment of minors under the age of thirteen in certain industries and limited the hours of labor for minors in certain cases, as we are concerned about the means of enforcement.

The Act of 1848¹ provided a penalty of fifty dollars for violation of the act, one-half to the person illegally employed and one-half to the State, "to be recovered in like manner as fines of like amount are now recoverable by law." This meant that someone would have to institute proceedings against the employer for violation of the statute, but the workman was afraid and there were very few philanthropists who were interested enough to start things, so it is evident that the law accomplished little.

The Act of 1849² provided that any owner or employer who knowingly or wilfully employs any minor below the age of thirteen, shall pay a penalty of fifty dollars for each offense, to be sued for and recovered by any person suing for the same, one-half to go to the person suing and one-half to the county in which

¹ Pennsylvania Statutes, 1848, P. L. 278.

² Pa. Statutes, 1849, P. L. 672.

the offense was committed. The Act of 1855⁵ provided for a penalty of from ten to fifty dollars, recoverable before any alderman or justice of the peace, to be applied to the use of the public schools. A commentator says: "No provision was made for the enforcement of this act, the Legislature having been unwilling to permit constables to proceed in the absence of complaints by private citizens, and it remained practically a dead letter for some thirty-five years."⁴

Another example of ineffectual law-making is an Act of 1887⁵ providing generally for the semi-monthly payment of wage workers. This act contained no provision of any kind for its enforcement and remained inoperative until passage of an amendatory act in 1891,⁶ which made it a misdemeanor for any person to refuse to make payment of wages "when demanded" at certain specified periods. This act made it the duty of the factory inspector to bring action under its provisions, upon the request of any citizen, also authorizing any citizen to bring such action on failure of the factory inspector to do so.⁷ In an opinion of the Attorney General of Pennsylvania to the Factory Inspector, he said: "You are not required to institute such actions indiscriminately and literally upon the request of any citizens of this Commonwealth. It is your right and duty to investigate complaints and requests made to you and to ascertain that they are well-founded and made in good faith before you comply with them."⁸

This matter of law enforcement in the United States during the nineteenth century is very effectively analyzed by Dean Roscoe Pound, in the following words:

"The Anglo-American started out to leave to the courts what in other lands was committed to administration and inspection and executive supervision. He was averse to inspection and supervision in advance of action, preferring to show the individual his duty by a

⁴ Pa. Statutes, 1855, P. L. 472.

⁵ Brinton, *Labor Laws of Pennsylvania* (1917), p. 351.

⁶ Pa. Statutes, 1887, P. L. 120.

⁷ Pa. Statutes, 1891, P. L. 96.

⁸ The importance of having an independent enforcing authority, as the factory inspector, is considered later.

⁹ Report of Factory Inspector, 1894, p. 55.

general law, to leave him free to act according to his judgment, and to prosecute him and impose the predetermined penalty in case his free action infringed the law. This attempt to confine administrative action to the inevitable minimum, which originally was fundamental in our polity, resulted in the nineteenth century in a multitude of rules which hindered as against few which helped. Regulation of public utilities, factory inspection, food inspection, tenement-house inspection, and building laws are compelling us to turn more and more from the criminal law to administrative prevention."⁹

The firm hold which this *laissez-faire* individualism had during the nineteenth century is well shown by the fact that the workers, who were most affected by failure of the labor law to serve its stated purposes, presented no organized demands for government enforcement.

2. BUREAU OF LABOR STATISTICS.

Instead of demanding government enforcement, appeals were made for bureaus of investigation. Such a bureau was first created in Massachusetts in 1869. Pennsylvania followed in 1872 by the creation of a Bureau of Statistics on Labor which was established in 1874,¹⁰ as the Bureau of Industrial Statistics under the Secretary of the Interior, with power to investigate industrial conditions, summon and subpoena witnesses, etc., and to file reports, which, incidentally, seems to have been about all that was done. When the Department of Labor and Industry was organized in 1913, a Bureau of Statistics and Information was created in the department.¹¹ The Legislature in 1919 transferred this Bureau of Statistics and Information from the Department of Labor and Industry to the Department of Internal Affairs,¹² where it absorbed the old Bureau of Industrial Statistics. It seems

⁹ Roscoe Pound, *The Administration of Justice in the Modern City*. 26 *Harvard Law Review* 323.

¹⁰ Pa. Statutes, 1874, P. L. 135, sec. 4.

¹¹ Pa. Statutes, 1913, P. L. 396, sec. 11.

¹² Pa. Statutes, 1919, P. L. 80. This repeals sec. 11 of the Act of 1913, P. L. 396.

that this decentralization is advisable because the business of gathering statistics is entirely distinct from enforcing the labor law, and when carried out under a single authority causes an interference of one function with another. Experience has proved that inspectors are often more anxious to secure the information desired by the statisticians of the Labor Department than to see that the labor law is enforced.¹³

The futility of protective statutes without effective provisions for their enforcement became increasingly evident, and the arm of the State was at last called upon as the enforcing authority. For instance, factory inspection started in Massachusetts as a function of the police officers. Later when it was discovered that the phase of factory life dealing with health was being neglected, a small body of inspectors started to work under the State Board of Health. Finally a Board of Factory Inspection was formed to take over the functions of these two sets of inspectors.¹⁴

3. DEPARTMENT OF FACTORY INSPECTION.

In Pennsylvania, the office of factory inspector was first established by the Factory Act of 1889,¹⁵ which made provision for the appointment by the Governor of a Factory Inspector, to serve for three years at a salary of fifteen hundred dollars a year, and who was authorized to appoint not exceeding six deputies at one thousand dollars a year, one-half to be women. In various Factory Acts passed subsequently the number of inspectors and their salaries have been steadily increased, until today there are over one hundred inspectors and a large office force. In 1905,¹⁶ the Department of Factory Inspection was created. The duties of this department, as provided by the Factory Act of 1905, included the licensing and regulation of tenement work, the inspection and regulation of bakeries, and of all factories where women

¹³ Kingsbury, *Labor Laws and their Enforcement*, 259.

¹⁴ 3 *American Labor Legislation Review* 34.

¹⁵ Pa. Statutes, 1889, P. L. 243.

¹⁶ Pa. Statutes, 1905, P. L. 352, known as the Factory Act of 1905.

and minors are employed, and the enforcement of the laws concerning fire escapes, ventilation, wash-rooms, etc., in factories.

All of this earlier legislation is detailed and cumbersome, covering all conceivable conditions of employment by fixed rules. In a study of the Labor Law of Maryland, Mr. Lauchheimer says:

"Before 1910, all safety and sanitary laws, if complete, were lengthy and minute enactments, covering every known condition of employment and laying down absolute laws to apply to every pre-conceived condition. Set screws, unguarded belts and other dangerous devices were outlawed, but there the law stopped. In 1911, Wisconsin applied the commission idea of regulation to industrial conditions. A general law providing for safety in industrial occupations was enacted and a commission with ordinance powers was appointed to issue orders in compliance with this general law."¹⁷

In discussing the Wisconsin idea, Mr. John R. Commons says: "Instead of specifying the many details of factory inspection, the Legislature boiled them down into one paragraph, requiring the employer to protect the life, safety, health and welfare of employees and authorizing the Commission to draw up rules and orders specifying the details as to how it is to be done."¹⁸

This was the beginning of a movement toward the unification of the various agencies of labor law enforcement. The need for unification is evident when we realize the diverse agencies which were trying to enforce the labor law. In Pennsylvania, there were local boards of all kinds, as Fire Commissioners, County Commissioners, School Boards, Health Boards, Public Safety Departments, local police and local boiler inspectors, besides the State inspectors. Some of these boards still function, but their work is co-ordinated in the Department of Labor and Industry, and, instead of being independent administrative agencies of the labor law, they are now only outside helpers of the Department of Labor and Industry.

¹⁷ Malcolm H. Lauchheimer, *Labor Law of Maryland*, p. 77.

¹⁸ John R. Commons, *Labor and Administration*, Chapter 22.

II.

THE PRESENT ORGANIZATION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF PENNSYLVANIA.

Pennsylvania did not follow the Wisconsin plan, but instead concentrated all responsibility for the enforcement of the Labor Law in one executive, the Commissioner of Labor and Industry, and created a separate body with ordinance-making powers, the Industrial Board. The 1921 Session of the New York Legislature has worked out a plan to supplant the Industrial Commission, as now organized in New York, which is modeled after the Wisconsin idea, by a Department of Labor organized in accord with the Pennsylvania idea. This law was approved on March 9, 1921, and establishes an Industrial Commissioner as the executive head of the Department of Labor, instead of the former Industrial Commission, and also creates an Industrial Board with the powers of a Workmen's Compensation Board and additional ordinance-making powers.¹⁹

The Department of Labor and Industry was established in Pennsylvania by the Act of 1913,²⁰ Section 14 of which lays down a general standard, as follows:

"All rooms, buildings and places in this Commonwealth where labor is employed, or shall hereafter be employed, shall be so constructed, equipped, and arranged, operated and conducted, in all respects, as to provide reasonable and adequate protection for the life, health, safety and morals of all persons employed therein."

The enforcement of this general standard is entrusted to the Commissioner of Labor and Industry, who is also made responsible for all the statutes concerning labor, as the Child Labor Act,²¹ the Woman's Act,²² the Workmen's Compensation Act,²³ and all the factory acts which were previously enforced by the

¹⁹ New York, Laws 1921, Chapter 50 (Labor Law), repealing Chapter 31, Consolidated Laws.

²⁰ Pa. Statutes, 1913, P. L. 396.

²¹ Pa. Statutes, 1915, P. L. 286.

²² Pa. Statutes, 1913, P. L. 1024.

²³ Pa. Statutes, 1915, P. L. 736.

Department of Factory Inspection, whose powers and duties are now vested in and imposed upon the Department of Labor and Industry.

As constituted at present, this department is headed by a Commissioner of Labor and Industry at a salary of ten thousand dollars, who is appointed by the Governor with the consent of the Senate.²⁴ The department organization includes: an Industrial Board, a Workmen's Compensation Board, a Bureau of Inspection, a Division of Hygiene and Engineering, a Bureau of Mediation and Arbitration, a Bureau of Employment and a Bureau of Rehabilitation. The Commissioner of Labor and Industry is empowered to appoint the officers named in the Law, except the Industrial and Workmen's Compensation Boards. He may appoint a general office force and such experts and other employees as he may deem necessary. He is further empowered to have these various officers carry out the purpose of the department under his direction and supervision. Some of the departments mentioned, as the Bureau of Mediation and Arbitration and the Bureau of Rehabilitation, are comparatively new, and their work involves important social rather than legal considerations. The administration of Workmen's Compensation is too large a subject to be taken up in this discussion, which will be consequently limited to the consideration of the Bureau of Inspection and of the Industrial Board.

III.

INSPECTION.

Section 8 of the Act of 1913,²⁵ creating the Department of Labor and Industry, provides:

"The Commissioner of Labor and Industry shall visit and inspect, or cause to be visited and inspected, during reasonable hours and as often as practicable, every room, building or place, where and when any labor is being performed which is affected by the provisions of any law of this commonwealth or of this act, and shall cause to be enforced therein the provisions of all such existing laws and of this act, and the rules and regulations of the industrial Board hereinafter provided for."

²⁴ Pa. Statutes, 1913, P. L. 396, sec. 1.

²⁵ Pa. Statutes, 1913, P. L. 396.

Among the existing laws to be thus enforced are the Child Labor Act,²⁶ the Woman's Act,²⁷ and the sections of Factory Act of 1905,²⁸ which are still in force.

Sections 17 and 18 of the said Factory Act provide in a general way that bake-shops shall be kept in a clean and sanitary condition and that all bake-shops must obtain permits or certificates from the department (now the Department of Labor and Industry), certifying that the law has been complied with, before they are permitted to go ahead and manufacture breadstuffs. Upon the giving of a written notice to comply with the law within ten days, the department may revoke a permit already issued, if, after a hearing, the notice is not obeyed, and thus compel the closing of a bake-shop which is not maintained in a clean and sanitary condition. Sections 15 and 16 of this Factory Act provide for the regulation of "sweat-shops" in somewhat similar terms. The Industrial Board formulated a Bake-Shop Code which became operative in 1916 and carries out in considerable detail the provisions given by the Factory Act in outline.²⁹

The provisions of the Woman's Act³⁰ in regard to enforcement alone cover about four pages of the statute, which shows the extent to which enforcement is emphasized at present. It is provided that official abstracts of the act and a schedule of the hours of labor shall be posted in the room where any female is employed under the terms of the act. The employer is bound to have a record giving satisfactory proof that females employed at night work are over the age of twenty-one. Inspection can be made at any hour. The Commissioner of Labor and Industry and his deputies, the inspectors, are authorized to instigate prose-

²⁶ Pa. Statutes, 1915, P. L. 286.

²⁷ Pa. Statutes, 1913, P. L. 1024.

²⁸ Pa. Statutes, 1905, P. L. 352.

²⁹ The Pennsylvania Legislature by Act No. 325 of the 1919 Session (approved July 9, 1919) has practically taken the Bake-Shop Code of the Industrial Board and incorporated it into a Statute along the same general lines as Sections 17-18 of the Factory Act, with the result that many details of administration are now in statutory form. The Department of Labor and Industry still has authority to formulate new rules as they may be needed for enforcing the Statute, to issue and revoke permits, and, in general, to see that the law is enforced and violations punished.

³⁰ Pa. Statutes, 1913, P. L. 1024.

cutions for violations of the act, and summary proceedings before a magistrate or justice of the peace are provided for, with a right of appeal to a court of proper jurisdiction within twenty days after the imposition of the penalty fixed by the act.

Another of the existing laws to be enforced by the Department of Labor and Industry is the Fire and Panic Act of 1909,²¹ which provides that all buildings in which persons are employed above the second story, shall be provided with proper ways of egress or means of escape from fire; further that such buildings shall have one or more fire escapes as may be directed by the Factory Inspector, and that the said inspector may issue a certificate to the owner or lessee of said building if he deems that such fire escapes are unnecessary, in consequence of adequate provision having been made for safety. The penalty for failure to comply with the provisions of the act or to observe the orders of the Factory Inspector (*i. e.*, official orders) is that the owners of such buildings shall be deemed guilty of a misdemeanor, punishable by fine of \$500 or six months' imprisonment or both.

In the case upholding the constitutionality of this act, Elkin, J., said:²²

"It is true the act might be enforced in such an arbitrary manner as to work hardship and do great injustice in some instances, but nothing of this kind appears in the present case. It will be presumed that officers entrusted with its enforcement will only require such reasonable compliance as the exigencies of each particular case demand. The act should be enforced in a spirit not to destroy the usefulness of property or to place undue burdens upon the owner, but only as a protection to such an extent as may be required in view of the situation of the building, having due regards to the use made of it. When so enforced, there can be no valid objection on the ground of its requirements being unreasonable. That it will be so enforced may be presumed."

Such a liberal interpretation of the statute is of immense value to the department entrusted with its enforcement, and the wisdom of the court in refusing to tie the hands of the administrative agency cannot be doubted.

²¹ Pa. Statutes, 1909, P. L. 417.

²² Rounfort Company v. Delaney, 230 Pa. 377 (1911).

The following language of the Attorney General of Pennsylvania, in advising the Factory Inspector under the provisions of an act ³³ providing that means of egress should be "sufficient," is still applicable to the labor laws mentioned herein:

"What is or is not 'sufficient' means of egress in case of fire, what is 'dangerous' to employees, what are 'sufficient' guards and protection, or what is 'proper diligence' under the act, must in the first instance, be determined by you or your deputy, and should differences exist between you and those to whom you give notice, and from whom you make requirements of observance of these statutes, I am of opinion that the questions of sufficiency, etc., would eventually have to be decided by a jury in the prosecution of the parties for a misdemeanor."³⁴

When raised in civil actions, questions of "dangerous" machinery, "sufficient" guards and protection, etc., have been held to be questions of fact to be found independently by the jury. The court thus outlines the position of the Factory Inspector in relation to the employer and owner:³⁵

"The approval or disapproval of the Factory Inspector is not the test of the owner's liability in such cases. . . . Where an employee is injured by reason of the failure of his employer to properly guard exposed machinery, the negligence consists of the disobedience of the employer, and not of the factory inspector, to comply with the statutory requirement. . . . It follows, therefore, that the approval of a guard in any case by a factory inspector is not conclusive as to whether the machinery is properly guarded with the meaning of the statute. The duty rests upon the owner of the establishment, and, when the question is raised, it can only be determined by a jury as any other question of fact."³⁶

³³ Pa. Statutes, 1893, P. L. 276.

³⁴ Opinions Atty. Gen. (Pa.), 1895-96, p. 515. Quoted in Brinton, *Labor Laws of Pa.* (1917), p. 282.

³⁵ *Booth v. Stokes*, 241 Pa. 349 (1913). Accord: *McCoy v. Wolf Company*, 235 Pa. 571 (1912).

³⁶ See *Wright v. American Dyewood Co.*, 25 York County Rep. 188 (Pa.). The Court declined to permit a defendant in a civil suit "to set up the representations of the factory inspector as final as to the propriety of any such guard," where an employee (plaintiff) was injured. The language of the Court (Judge Ross of York County) was as follows: "The law of Pennsylvania does not make the factory inspectors arbiters of the propriety or safety of any machinery used. Their powers and duties are marked out by the act which created their office, and further than that they cannot go, and we believe it would be an imposition not only upon the manufacturers, but a menace to the safety of every employee if factory inspectors were delegated

The Supreme Court of Illinois, in *Arms v. Ayer*,⁸⁷ upheld the constitutionality of the Illinois Fire-Escapes Act of 1897, which was attacked on the ground that it conferred legislative power upon the Inspector of Factories in that it authorized him to determine how many and in what position, etc., fire escapes should be placed. The Court held that this contention was not valid, as the law was complete in itself and the Factory Inspector was given a discretion only in the execution of it. The Court said:

"Under the Fire-Escapes Act, the duty of equipping buildings with fire escapes rests primarily upon the owner of the building, and this duty and the liability consequent upon its non-performance are not dependent upon the serving of a notice by the Inspector of Factories to erect such escapes."

The California Supreme Court has held an act providing for sanitation of factories unconstitutional, because it went to the other extreme and conferred untrammelled discretion upon the administrative body.⁸⁸

with the arbitrary power of saying what kind of machinery or guards were perfect or proper."

In the case of *Stehle v. Jaeger Automatic Machine Co.*, 225 Pa. 348 (1909), a boy under 14, employed in violation of the Act of 1905 (P. L. 352) was injured. The factory inspector had told the defendant's superintendent that as the boy had been employed before the passage of the act, he was not within its terms, and that he, the inspector, approved of the boy's employment. Recovery was allowed, the Court saying, "Neither factory inspector, nor anybody else, could absolve the defendant from his statutory liability."

It should be noted that the Court in these cases is speaking of informal orders made by individual inspectors, and that the language of the Court does not refer to official orders of the Department.

⁸⁷ 192 Ill. 601 (1901).

⁸⁸ *Schaezlein v. Cabaniss*, 135 Cal. 466 (1902). The act in question provided that in any factory where dust and injurious gases were produced and liable to be inhaled, and it appears to the Commissioner of Labor Statistics that such inhalation could be largely prevented by the use of some mechanical contrivance, he shall direct the use of such contrivance, and, within a reasonable time, it shall be so provided and used. Petitioners in this case were convicted of having neglected to use a suction exhauster in a metal polishing shop, within a reasonable time after notice was given. The Court said: "The difficulty with the present law is that it does not provide for the proper sanitation of factories, . . . but is an attempt to confer, upon a single person, the right arbitrarily to determine not only that the sanitation of a factory is not reasonably good, but to say whether, even if reasonably good, in his judgment, its condition may be improved by the use of such appliances as he may delegate, and then to make a penal offense of the failure to install such appliances. In this case it matters not how important a factory . . ."

There is one aspect of the enforcement of Labor Law, which is illustrated in New York and is of sufficient importance to warrant our consideration, although a similar situation cannot be shown in Pennsylvania. It seems that in Pennsylvania, the Department of Labor and Industry tries to get compliance with the labor laws without prosecution, if possible, and only orders prosecution as a last resort. For this reason, it is understood that the courts will respond with fines upon conviction and not suspend sentence to give the employer a second chance to comply.³⁹ The New York situation is discussed at length in the Report of the New York Industrial Commission for 1919.⁴⁰ It is shown that,

be, the proprietor is guilty of no offense until the Commissioner has required him to use certain appliances and he has refused. The Commissioner has been imposed with the duty, not of enforcing a law of the legislature, but the power to make a law for the individual and to enforce such rules of conduct as he may prescribe. It is arbitrary, special legislation and violative of the Constitution."

* The only material available substantiates the above statement.

According to the Report of the Commissioner of Labor and Industry of Pa. for 1913-14 (Part II, p. 459), there were 469 prosecutions instituted for violation of the labor laws during 1914. There were 231 cases of violation of the Child Labor Law; in 190 cases fines were paid, 1 case was withdrawn, 1 held for court, 4 dismissed and 35 settled by payment of costs. There were 215 cases of violation of the Female Labor Laws; in 163 cases fines were paid, 2 cases were appealed, 1 held for court, 3 withdrawn, 4 dismissed and 42 settled by payment of costs. There were only 16 cases of non-compliance with instructions or orders of the Department, and in 7 of these cases, fines were paid, 1 case was withdrawn, 1 appealed, 1 sentence suspended, 3 settled for payment of costs and 3 held for court. For refusing to give information there were 4 cases; in 2 of them fines were paid, 1 was held for court and 1 settled for payment of costs.

In a similar report of the Commissioner of Labor and Industry for 1915 (part II p. 587), it is shown that there were 305 prosecutions in 1915, 15 of which were for non-compliance with orders issued by inspectors of the Department in which safeguards were ordered or sanitary conditions were not obeyed. Of these 305 prosecutions, only 9 were dismissed and 3 appealed. The report states that effort was made to avoid prosecution by obtaining strict compliance for the future wherever possible.

The Report of 1916 (p. 47) shows that cases reported by the inspectors are carefully gone over before prosecution is authorized, but when once started, prosecutions are closely followed. There were 356 prosecutions in 1916.

Prosecutions are conducted by attorneys of the Attorney-General's Department assigned to the Department of Labor and Industry for that purpose, one of whom is a permanent counsel for labor cases.

* Annual Report of the Industrial Commission of New York, 1919, at pages 265 to 284.

See also a survey by Samuel McCune Lindsay and John B. Andrews, "Labor Law Administration in New York," 7 American Labor Legislation Review 235, particularly pages 484 to 504.

in general, the courts, in practice, act more like an adjunct of the Labor Department than as separate tribunals for the administration of justice. In other words, when there is a failure of an owner or tenant of a building to comply with orders of the Department of Labor, requiring some alteration of the building for sanitary or fire-protection purposes, for instance, and the department is unable to induce compliance, the courts try a hand at persuasion. The usual inquiry by the court when such a prosecution comes before it, is how long it will take the defendant to comply with the order, whereupon an adjournment is granted for a part of the whole of the period to enable the defendant to comply. One case is mentioned where there had been eleven adjournments, each time against the objection of counsel for the Industrial Commission. Added to this over-readiness of the courts to adjourn trials, is the courts' reluctance to impose penalties upon conviction. This is seen in the great number of suspended sentences in New York. During the period of three years investigated, the percentage of suspended sentences in Labor law cases was from 47 to 58 per cent. in New York City and from 69 to 75 per cent. up State. This percentage of suspended sentences is all out of proportion and tends to perpetuate the conditions sought to be remedied by the Labor Law.

The judges do not seem to be conversant with the complex problems of administering the Labor Law, and they regard these cases as essentially criminal proceedings, looking to the individual offender only, rather than considering the proceedings as an important part of the machinery for enforcing the whole body of labor law. Most defendants are well-to-do, respectable gentlemen, and courts tend to be too lenient.

Due to this leniency, orders of the inspectors are often disregarded because defendants know that the courts will give them time to comply. It is worth noting that if the courts, for instance, decide upon how much time the owner of a building used for manufacturing purposes shall have to erect certain fire escapes, a decision which involves questions of fire hazard and building construction, that they substitute their opinion for that of the administrative body which the Legislature has created for that

purpose. The findings of fact of the labor law administrative body should be conclusive unless they are unreasonable. What the courts should do in these prosecutions for violation of the Labor Law, if the order violated is not arbitrary, is merely to determine and punish all non-compliance with the Labor Law. They should not substitute their discretion for that of the administrative body in an attempt to persuade compliance with the law.

Of course, the administration of labor law is so closely bound up with conflicting human interests that settled conditions are impossible. The social interest in the security of acquisitions and transactions (the rights of property) is the interest which the law has been in the habit of securing, and the social interest in human life has slow progress when opposed by it. But it is urged that labor law violations should be more strictly punished by the courts. On occasions there may be a distinct gain involved in giving the employer a second chance to comply, but looking at the administration of labor law as a whole, we may say that the work of the Department of Labor, especially by means of inspection, loses its effectiveness, if the courts fail to sustain the reasonable orders of the administrative body entrusted with the enforcement of the labor law of a state.

IV.

THE INDUSTRIAL BOARD.

I. ORGANIZATION AND DUTIES OF THE INDUSTRIAL BOARD.

The Industrial Board was created by the Act of 1913 (P. L. 396) which established the Department of Labor and Industry as at present organized in Pennsylvania. The Industrial Board consists of the Commissioner of Labor and Industry and four additional members, appointed by the Governor with the consent of the Senate; one of whom shall be an employer of labor, one a wage earner and one a woman. No provision is made setting forth the requirements of the fourth member, but custom has designated him as a representative of the public. The Commissioner is chairman of the Industrial Board. The term of office

of the members of the Board is four years, and the four additional members receive the nominal compensation of ten dollars a day and expenses. The Board shall appoint, and may remove, a secretary and also fix his salary, a provision which has enabled the Board to secure the services of capable men. The Commissioner shall detail to the assistance of the Industrial Board such employees of the Department as they may require, and they may also employ experts for special services. The Board holds stated meetings, at least once a month, which shall be open to the public, and such other meetings as may be necessary, and must keep a record of all its proceedings.⁴¹

The functions of the Industrial Board are investigation and regulation.⁴² The power of investigation is very broad and extends to "all matters touching the enforcement and effect of the provisions of all laws of the Commonwealth, the enforcement of which shall now and hereafter be imposed upon the Department of Labor and Industry, and the rules and regulations made by the Industrial Board in connection therewith." The Board may subpoena witnesses and require the production of papers pertinent to the investigation, and any witness who refuses to obey such subpoena or fails to produce papers or who is guilty of any contempt before the Board, may be punished as for contempt of court, and, for this purpose, application may be made to the courts of Common Pleas of the Commonwealth.⁴³ The investigations of the Industrial Board do not involve any important legal consequences, but their principal utility is as a basis for formulating regulations.

The power of regulation is provided by the said Act of 1913, as follows:

Section 14. "All rooms, buildings, and places in this Commonwealth where labor is employed, or shall hereafter be employed, shall be so constructed, equipped, and arranged, operated and conducted, in all respects, as to provide reasonable and adequate protection for

⁴¹ For a complete statement, see Pa. Statutes, 1913, P. L. 396, sec. 12.

⁴² See a Bulletin of the Department of Labor and Industry, containing a report of the activities of the Industrial Board. Vol. VII, Series of 1920, No. 6.

⁴³ Pa. Statutes, 1913, P. L. 396, sec. 13.

the life, health, safety, and morals of all persons employed therein. For the carrying into effect of this provision, and the provisions of all the laws of this Commonwealth, the enforcement of which is now or shall hereafter be entrusted to or imposed upon the Commissioner or Department of Labor and Industry, *the Industrial Board shall have power to make, alter, amend and repeal general rules and regulations* necessary for applying such provisions to specific conditions, and to prescribe means, methods, and practices to carry into effect and enforce such provisions."

Section 15. "The rules and regulations of the Industrial Board, and the amendments and alterations thereof, may embrace all matters and subjects to which power and authority of the Department of Labor and Industry extends."

Section 15 further provides for publication of every rule or regulation adopted by the Board for thirty days before it shall take effect. It also provides that "any employer, employee or other person interested . . . may petition for a hearing on the *reasonableness* of a rule or regulation," which results in a public hearing if the issues raised have not been adequately determined. The violation of any of the rules or regulations of the Industrial Board is made a misdemeanor.⁴⁴

Although this extends the power of the Industrial Board over all the labor laws of Pennsylvania under the jurisdiction of the Department of Labor and Industry, the Legislature has enacted several statutes in which specific powers and duties are conferred on the Industrial Board.⁴⁵

⁴⁴ Pa. Statutes, 1913, P. L. 396, sec. 16.

⁴⁵ For instance, quite a wide power is given in the Child Labor Law, Pa. Statutes, 1915, P. L. 286, sec. 5, paragraph 4, as follows: "In addition to the foregoing, it shall be unlawful for any minor under eighteen years of age to be employed or permitted to work in any other occupation dangerous to life or limb, or injurious to the health or morals of said minor, as such occupations shall, from time to time, after public hearings thereon, be determined and declared by the Industrial Board."

Another example is in the Woman's Act, Pa. Statutes, 1915, P. L. 709, amending the Act of 1913, P. L. 1024, which provides in Section 3, Paragraph 2: "That the one day of holiday in seven may be subdivided into two days of twelve hours each, for women employes in hotels, boarding houses, and in charitable, educational and religious institutions, at the discretion of the Industrial Board."

In this connection, see also the following statutes:

(1) The Act of 1917, P. L. 186, which is a supplement to the Woman's Act of 1913, provides that the Industrial Board may modify the provisions of the Woman's Act of 1913, P. L. 1024, with certain exceptions, one of which

2. ORDERS, RULES AND REGULATIONS OF THE INDUSTRIAL BOARD.

In pursuance of the power conferred by the legislature, the Industrial Board has made many orders, rules and regulations, of which may be mentioned some thirty-odd rulings relating to the Child Labor Law, over twenty rulings relating to women in industry and about twenty-five Safety Standards or Safety Codes, which are codifications of safety rules applying to a single industry or occupation; besides a number of separate or individual rulings applying to specific conditions. We may divide these administrative orders and rulings of the Industrial Board into two groups, calling them, (a) Executive orders and (b) Legislative orders.

(a) *Executive Orders.*

Executive orders may be defined as specific rules or orders directing a particular person to do or refrain from doing some act in order to enforce compliance with existing law, whether made by the legislature or by the administrative body in pursuance of delegated power. An example would be an order to the X Company that they limit the number of employees in a room, so that there be 300 cubic feet of air space for each employee. These executive orders in Pennsylvania may be issued by the Commissioner of Labor and Industry or by the Industrial Board. The source of the order does not qualify its legal effect, if it is an "official" order.

is that the maximum hours of labor may not be increased. Hearings are provided for upon the proper petition being filed for such modification. Of course, the modification is not to be injurious to the health or welfare of the females affected. Appeals from such modifications as the Board orders, may be made to the Industrial Board itself or to the courts.

(2) Pa. Statutes, 1917: P. L. 163, relating to moving pictures; in Section 3, the Industrial Board is given power to modify requirements specified in the Act, if by so doing the purpose of the Act will be best accomplished. The Bulletin of the Industrial Board for August, 1921, p. 4, gives the following example of this provision at work: the Motion Picture Owners of Pennsylvania petitioned the Board for permission to employ females between ages of 16 and 21 after 9 P. M. in Motion Picture Theatres. The Board denied the petition, since there was no emergency to justify a variation from the law.

The validity of these executive orders may be questioned by the courts, first, in prosecutions for violation of the order, secondly, in civil suits for damages where an order has not been complied with, or thirdly, in direct proceedings, as injunction, which question the legality of the order. In the discussion under Inspection, *supra*, it was seen that in criminal prosecutions, particularly in New York, the courts will try to persuade defendants to comply with the executive order by giving them a second chance. This may be a matter of judicial discretion, but it does not give to an executive order the authority to which it is entitled.

When an executive order is attacked directly, the only question is whether the order is "reasonable." In the case of Roumfort Co. v. Delaney,⁴⁶ already referred to, orders were issued by the Chief Factory Inspector to the corporation requiring it to make such alterations and changes in its place of business as would fully meet the requirements of the Fire and Panic Act of 1909. An injunction was asked for, the constitutionality of the Act being attacked, but the Supreme Court upheld the act and applied the standard of "reasonableness" to the executive order in question. In the words of the Court:

"It is true the act might be enforced in such an arbitrary manner as to work hardship and do great injustice in some instances, but nothing of this appears in the present case. It will be presumed that officers entrusted with its enforcement will only require such reasonable compliance as the exigencies of each particular case demand."

In the case of Cockroft v. Mitchell,⁴⁷ the plaintiff was the owner of a sixteen-story building used principally by manufacturing jewelers with an occupancy of over 600 persons, the location being in a busy down-town section of New York. Its sole interior stairway used as a means of exit was not enclosed with fire-resisting materials, nor was there any exit conforming to the requirements of Section 79-b of the Labor Law of New

⁴⁶ 230 Pa. 377 (1911).

⁴⁷ Cockroft v. Mitchell *et al.*, composing the Industrial Commission of New York, 187 App. Div. (N. Y.) 190 (1919), affirming judgment on the opinion of Ganevin, J., at Special Term, reported in 101 N. Y. Misc. 211 (1917).

York. The Industrial Commission issued orders requiring the plaintiff to provide additional means of exit on each floor of the building remote from the existing exit and to enclose all interior stairways with partitions of fire-resisting material. The plaintiff brought an action to review the decision of the Industrial Commission, attacking the constitutionality of the Labor Law, Section 79-b. The Court upheld the section in question and held that the orders of the Industrial Commission were reasonable and necessary to carry out the law, in the following language:

"The law being upheld as constitutional, it becomes necessary to consider whether the orders involved are valid and reasonable.

"The evidence shows that the building . . . is not equipped in accordance with the statutory requirements for factory buildings. The State Industrial Commission is a legally constituted body, clothed with certain delegated legislative powers. Under the plain wording of the statute, which applies to all buildings used for factory purposes, there can be no question but that said Commission had jurisdiction of the subject matter and was acting well within the scope of its authority in issuing the orders complained of. The plaintiff's argument that the orders are invalid, does not call for serious refutation unless, indeed, it be based on the claim that they are *unreasonable*, which must in turn be proved by a fair preponderance of the evidence.

"The reasonableness of the orders depends on the answer to the question, 'Is the building safe from the danger of panic.' The undisputed facts all point to the same conclusion and that conclusion, to my mind, is that the building is unsafe. . . . Further, compliance with the orders of the Commission will make the building reasonably safe under the circumstances. . . . The expenditure necessary to comply with these orders is neither confiscatory or unreasonable."⁴⁸

(b) *Legislative Orders.*

If executive orders are properly judged by their reasonableness, it seems that legislative orders should be given at least the same consideration. Legislative orders may be defined as general rules and regulations made by administrative officers in pursuance of authority delegated by the legislature. This is really law-making, and conforms to Cooley's definition of a legislative act as "a pre-determination of what the law shall be

⁴⁸ See also *Scheier v. Mitchell*, 188 App. Div. (N. Y.) 182 (1919); *Helme v. Great Western Milling Co.*, 185 Pac. (Cal.) 510 (1919).

for the regulation of all future cases falling under its provisions." 49

A consideration of the procedure of the Industrial Board in making these legislative orders will illustrate that it is law-making. A ruling is always based on a petition to the Board by employer, employee or any interested party. The Board, after passing on the petition may promulgate a ruling, applying the law to the specific conditions. These tentative rulings are then submitted at a public hearing to all persons interested, when they are criticized and modified to satisfy conflicting demands, if possible. For example, in the Bulletin of the Industrial Board (Pa.) for January, 1921, there are some six tentative rulings printed. One of them applies to Safety Standards and is an additional rule fitting into one of the Safety Codes. It reads thus:

MOULDING AND MIXING MACHINES IN BAKERIES. "Rule 130 (n) (A-1). The practice of removing dough from, or the cleaning of moulding and mixing machines while in operation, is prohibited."

Another tentative ruling applies to minors, as follows:

MOULDING AND MIXING MACHINES IN BAKERIES. "Rule M-32. That minors under eighteen years of age shall not be permitted to operate moulding and mixing machines in bakeries."

These particular rulings were originally submitted to the Industrial Board early in December, copies of them were then sent to persons interested in the baking industry for criticism, and they were finally adopted on January 25, 1921. Thereafter a violation of the ruling becomes a misdemeanor. Similarly when the Industrial Board formulated pre-existing practise in the manufacture of explosives and ruled that "no person in a powder mill shall carry or have upon his person matches, . . . or contrivances for lighting," it made any employee, violating the rule, not only subject to discharge, but liable to fine or imprisonment.

Even more closely resembling legislative action is the formulation of safety standards or safety codes, a field in which Pennsylvania has been a leader. In making a safety code, the Indus-

* Cooley, Constitutional Limitations, p. 110.

trial Board, after deciding upon the nature of the subject matter of the proposed code, as elevators, bake-shops, head and eye protection, explosives, etc., selects a representative committee of persons interested. The committee to draw up the elevator code contained representatives of the elevator manufacturer, the elevator owner, the installer, the user, the operator and the insurer. This committee selected a subcommittee to submit a first draft, which was then criticized by the whole committee, after which a tentative draft was made. This tentative draft was then published, and public hearings were held to discuss it in five or six places in the state, for a period of months. After a final draft had been made, it was submitted to the Industrial Board for adoption, whereupon it has the force and effect of law, with this advantage over statutory law, that a ruling of the Industrial Board can be changed or withdrawn at any time to conform with changing conditions of industry.

This discussion of the actual workings of the Industrial Board should be sufficient to justify the use of the word "legislative" as applied to the Board's general rulings and safety standards. Mr. John R. Commons says that this work of investigation and research is what entitles an administrative body, like an Industrial Board, to its position as a fourth branch of government; that the true administrative function is "constructive investigation."⁵⁰

The validity of these legislative orders, when attacked in the courts, depends, in the first place, on the constitutionality of the statute involved. For the most part the courts will uphold present labor legislation, except in those cases where the legislature has acted arbitrarily or capriciously. There is now a large body of precedent behind these laws, as can be seen in the cases upholding workmen's compensation acts,⁵¹ and, in general, cases

⁵⁰ Commons, *Labor and Administration*, Chapter 22.

Commons and Andrews, *Principles of Labor Legislation*, Chap. 9.

⁵¹ *Anderson v. Carnegie Steel Co.*, 225 Pa. 33 (1916); *In re Opinions of Justices*, 209 Mass. 607 (1911); *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156 (1911); *Borgnis v. Falk Co.*, 147 Wis. 327 (1911); *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349 (1912); *Jensen v. Southern Pacific Co.*, 215 N. Y. 514 (1915); *Western Indemnity Co. v. Pillsbury*, 151 Pac. (Cal.) 398 (1915).

upholding laws which provide for the safety and health of employees, for the inspection of factories, etc.⁵² The prevailing tendency of the courts is illustrated by the line of cases involving the constitutionality of statutes fixing hours of labor. For a valuable study of this, reference should be made to an article by Mr. Felix Frankfurter,⁵³ which shows that the courts, adhering to the test of reasonableness, have come more and more to look at these labor laws in the "light of a realistic study of the industrial conditions affected."⁵⁴

Of course, the courts will not uphold a law which leaves untrammelled discretion to the administrative body,⁵⁵ but if the legislature provides some standard and delegates to a commission the power of making rules in accordance therewith, the courts will generally sustain the law.⁵⁶ As the Pennsylvania Supreme Court has said:

"What is more common than to appoint commissioners under a law to determine things upon decision of which the act is to operate in one way or another?' The legislature cannot delegate its power to

⁵² *Arms v. Ayer*, 192 Ill. 601 (1901); *Roumfort Co. v. Delaney*, 230 Pa. 377 (1911); *Cockroft v. Mitchell*, 187 App. Div. (N. Y.) 190 (1919); *Rail and River Coal Co. v. Yapple et al.*, constituting the Industrial Commission of Ohio, 236 U. S. 338 (1914).

⁵³ Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 *Harvard Law Review* 353. See cases cited, particularly; *Holden v. Hardy*, 169 U. S. 395 (1892), upholding the constitutionality of an eight-hour law for men who work in mines; *Mueller v. Oregon*, 208 U. S. 420 (1908), upholding the Oregon ten-hour law for women; *Ritchie v. Wayman*, 244 Ill. 509 (1910), upholding a similar ten-hour law for women in Illinois; *People v. Chas. Schweimler Press*, 214 N. Y. 395 (1915), upholding a law prohibiting night work for women in industry; *State v. Bunting*, 71 Ore. 259 (1914), upholding a ten-hour law for adult males in factories.

⁵⁴ 29 *Harvard Law Rev.* 353, 366.

⁵⁵ *Schaezlein v. Cabaniss*, 135 Cal. 466 (1902); *People v. Klinck Packing Co.*, 214 N. Y. 121 (1915).

⁵⁶ *Com. v. Falk*, 59 Pa. Super. 217 (1915), upholding the constitutionality of the State Live-Stock Sanitary Board; *Mutual Film Co. v. Ohio Industrial Commission*, 236 U. S. 230 (1915), upholding moving-picture censorship; *Intermountain Rate Cases*, 234 U. S. 476 (1914), upholding the power of the Interstate Commerce Commission under the long and short haul clause. See also other cases under the Interstate Commerce Act; for cases upholding the power of public utility boards and commissions, see, *inter alia*: *Connecticut Co. v. City of Norwalk*, 89 Conn. 528 (1915); *Alton and Southern Railway Co. v. Vandalia Railway Co.*, 268 Ill. 68 (1915); *Hocking Valley Railway Co. v. Public Utilities Commission of Ohio*, 92 Ohio St. 9 (1915).

make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."⁵⁷

Granted the constitutionality of the statute involved, the validity of a legislative order depends finally on the reasonableness of the order itself. That this is also the proper test to apply to general rulings and safety standards of the Industrial Board, seems to follow by analogy from cases involving the fixing of rates. Relative to rate-making, the courts are nearly unanimous in holding that they cannot interfere unless confiscation is shown, and that unreasonableness, used in a constitutional sense, means confiscatory.⁵⁸ In the case of the Louisville and Nashville Railroad Co. v. Garrett,⁵⁹ Mr. Justice Hughes, speaking for the court, said:

"The rate making power necessarily implies a range of legislative discretion. . . . The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, . . . whether the Commission violated the constitutional rights of property by imposing confiscatory requirements."

Similar considerations should guide the courts in passing on orders, for instance, which fix a minimum wage. In *Stettler v. O'Hara*,⁶⁰ the Oregon statute provided that it shall be unlawful to employ women or minors for unreasonably long hours or in unsanitary surroundings or for inadequate wages, and created the Industrial Welfare Commission to ascertain standards of hours of employment and of minimum wages. The Commission made an order limiting hours of labor of women em-

⁵⁷ *In re Locke's Appeal*, 72 Pa. 498 (1872).

⁵⁸ *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 41 (1909); *Atlantic Coast Line Co. v. N. Car. Corporation Commission*, 206 U. S. 1 (1907); *C. B. & Q. Railroad Co. v. Babcock*, 204 U. S. 585, 598 (1907); *Railroad Co. v. Minnesota*, 186 U. S. 257, 266 (1902); *San Diego Land Co. v. National City*, 174 U. S. 739, 754, 759 (1899); *San Diego Land Co. v. Jasper*, 189 U. S. 439 (1903); *Knoxville v. Knoxville Water Co.*, 212 U. S. 1 (1909); *Minnesota Rate Cases*, 230 U. S. 352, 433 (1913).

⁵⁹ 231 U. S. 298, 313 (1913).

⁶⁰ *Stettler v. O'Hara et al.*, constituting the Industrial Welfare Commission of Oregon, 69 Ore. 519 (1914), affirmed without opinion by evenly divided court in 243 U. S. 629 (1917).

ployed in the city of Portland to nine hours a day and fixing a minimum wage. In a suit to annul this order, the court held that the statute fixing maximum hours of labor and minimum wages for women and children was within the police power of the state, and was constitutional. In holding that the order of the Commission, although the statute provided that it be conclusive as to all questions of fact, was not a violation of due process, the court said:

"Thus in the present case, the plaintiff was given the right and opportunity to be heard before the Commission. Reasonable notice and fair opportunity to be heard before some tribunal before it decides the issues, are the essentials of due process. The party aggrieved is not without remedy as to matter that would be the appropriate subject of judicial inquiry, namely (referring to *L. & N. Railroad Co. v. Garrett*) in the rates fixed are confiscatory."⁶¹

In *State v. Lange Canning Company*,⁶² in the second opinion filed in the case, the court held as follows:

"We are of the opinion that the statute may properly be construed as laying down the general rule that women shall not be permitted to work in any place for such a period of time as shall be prejudicial to their health, and, authorizing the Industrial Commission upon investigation to determine as a fact what classes of employment are dangerous or prejudicial to the life, health, safety and welfare of such females, and to establish by general orders such classification and the time which females may labor therein; and we are of opinion that, so construed and to that extent, the law should be upheld, for the reason that the authority thus conferred invests the Commission with no arbitrary and uncontrolled discretion, but directs them to ascertain the facts and to apply the rules of law thereto under the prescribed terms and conditions."⁶³

In conclusion, fixing reasonable hours for labor and reasonable conditions of employment is analogous to fixing reasonable rates, rules and practices for public service corporations and to

⁶¹ 69 Ore. 519, 540.

⁶² 164 Wis. 228 (1916).

⁶³ In *American Woodenware Manufacturing Co. v. Schorling*, 117 N. E. (Ohio) 366 (1917), the court said: "An order made by the Industrial Commission to employers generally or to a particular employer, with reference to safe employment or place of employment, is a 'lawful requirement,' for failure to comply with which the employer is liable."

deciding other questions as to which the legislature may have determined the general policy and rule, leaving its application and enforcement to an administrative tribunal. In such cases, courts only interfere where an administrative body acts beyond the scope of its authority or has abused its discretion. Neither legislature nor commission can confiscate property under the guise of regulation, and, in such cases, courts have power to declare void a confiscatory law or order made thereunder. Whether the legislature acts directly, naming a freight rate, for instance, or a particular minimum wage for women, or maximum hours of labor, or whether the legislature adopts general rules and delegates the power to determine the specific rate or wage, the result is the same: the ultimate act is legislative. The commissioners' determination stands on the same plane as a direct enactment of the legislature. The rate of wage or conditions of employment fixed by the Commission become a part of the law, and the only inquiry open to the courts is whether the order was regularly made, duly served and whether any constitutional rights have been violated. Has the commission, under the guise of regulation, acted so arbitrarily as to abuse its discretion or otherwise acted beyond the scope of its authority?

Mr. John R. Commons, speaking of the Wisconsin Industrial Commission, puts the situation as follows:⁶⁴

"We have to provide regulations which, according to the courts, shall be reasonable. This word 'reasonable' is the only loophole we have to enable us to slip by the courts. So we get strong manufacturers, representing those who would be likely to test our provisions in the courts, to assist in drawing up the rules. Public hearings are held on preliminary recommendations and the rulings are satisfactory before they are issued by the commission. If the names of these manufacturers are back of the rules and orders of the commission, nobody can say they are unreasonable and no employer can afford to go against them."

This may help explain the fact that up to the present, the courts have not attacked any of the rulings or codes of the Industrial Board of Pennsylvania, and why the present Commis-

⁶⁴3 American Labor Legislation Review 12.

sioner insists that the important thing behind these rulings is the "prerogative" of the Board.⁶⁵

"Reasonableness" is a legal standard with a variable content, depending for its meaning on the civilization of the time and place. We cannot define it accurately. In rate cases, it is referred to confiscation. In labor legislation, "reasonableness is as complicated as human life and modern industry."⁶⁶ Perhaps we may say, following a suggestion made by Mr. Frankfurter, that in labor cases, "reasonableness" presupposes that behind any order or ruling there shall be a substantiality of evidence.

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⁶⁵ Perhaps the Commissioner, Mr. Clifford B. Connelly, used "prerogative" in the sense of "prestige."

⁶⁶ Commons and Andrews, *Principles of Labor Legislation* (Ed. 2), 479.