Supreme Court of the United States

OCTOBER TERM 1907

CURT MULLER, PLAINTIFF IN ERROR,

v.

THE STATE OF OREGON, DEFENDANT IN ERROR

BRIEF FOR DEFENDANT IN ERROR

This case presents the single question whether the Statute of Oregon, approved Feb. 19, 1903, which provides that "no female [shall] be employed in any mechanical establishment or factory or laundry" "more than ten hours during any one day," is unconstitutional and void as violating the Fourteenth Amendment of the Federal Constitution.

The decision in this case will, in effect, determine the constitutionality of nearly all the statutes in force in the United States, limiting the hours of labor of adult women, — namely:

MASSACHUSETTS

First enacted in 1874 (chap. 221), now embodied in Revised Laws, chap. 106, sec. 24, as amended by Stat. 1902, chap. 435, as follows:

> No woman shall be employed in laboring in a manufacturing or mechanical establishment more than ten hours in any one day, except as hereinafter provided in this section, unless a different apportionment in hours of labor is made for the sole purpose of

making a shorter day's work for one day of the week; and in no case shall the hours of labor exceed fifty-eight in a week. . . . (Held constitutional in Comm. v. Hamilton Mfg. Co., 120 Mass. 383.)

Rhode Island

First enacted in 1885 (chap. 519, sec. 1), now embodied in Stat. 1896, chap. 198, sec. 22 (as amended by Stat. 1902, chap. 994), as follows:

. . . No woman shall be employed in laboring in any manufacturing or mechanical establishment more than fifty-eight hours in any one week; and in no case shall the hours of labor exceed ten hours in any one day, excepting when it is necessary to make repairs or to prevent the interruption of the ordinary running of the machinery, or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week.

Louisiana

First enacted in 1886 (Act No. 43), and amended by Acts of 1902 (No. 49); now embodied in Revised Laws (1904, p. 989, sec. 4):

. . . No woman shall be employed in any factory, warehouse, workshop, telephone or telegraph office, clothing, dressmaking, or millinery establishment, or in any place where the manufacture of any kind of goods is carried on, or where any goods are prepared for manufacture, for a longer period than an average of ten hours in any day, or sixty hours in any week, and at least one hour shall be allowed in the labor period of each day for dinner.

Connecticut

First enacted in 1887 (chap. 62, sec. 1), now embodied in General Statutes, Revision 1902, sec. 4691, as follows:

. . . No woman shall be employed in laboring in any manufacturing, mechanical, or mercantile establishment more than ten hours in any day, except when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery,

or where a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week. . . . In no case shall the hours of labor exceed sixty in a week.

Maine

First enacted in 1887 (chap. 139, sec. 1), now re-enacted in Revised Statutes, 1903, chap. 40, sec. 48, as follows:

. . . No woman shall be employed in laboring in any manufacturing or mechanical establishment in the State more than ten hours in any one day, except when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery, or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week; and in no case shall the hours of labor exceed sixty in a week.

There is a further provision that any woman "may lawfully contract for such labor or any number of hours in excess of ten hours a day, not exceeding six hours in any one week or sixty hours in any one year, receiving additional compensation therefor."

New Hampshire

First enacted in 1887 (chap. 23, sec. 1), now re-enacted by Stat. 1907, chap. 94, as follows:

No woman . . . shall be employed in a manufacturing or mechanical establishment for more than nine hours and forty minutes in one day except in the following cases: I. To make a shorter day's work for one day in the week. II. To make up time lost on some day in the same week in consequence of the stopping of machinery upon which such person was dependent for employment. III. When it is necessary to make repairs to prevent interruption of the ordinary running of the machinery. In no case shall the hours of labor exceed fifty-eight in one week.

Maryland

First enacted in 1888 (chap. 455), now embodied in Public General Laws, Code of 1903, art. 100, sec. 1:

No corporation or manufacturing company engaged in manufacturing either cotton or woollen yarns, fabrics or domestics of

any kind, incorporated under the laws of this State, and no officer, agent or servant of such named corporation, . . . and no agent or servant of such firm or person shall require, permit, or suffer its, his, or their employees in its, his, or their service, or under his, its, or their control, to work for more than ten hours during each or any day of twenty-four hours for one full day's work, and shall make no contract or agreement with such employees or any of them providing that they or he shall work for more than ten hours for one day's work during each or any day of twenty-four hours, and said ten hours shall constitute one full day's work.

Section 2 makes it possible for male employees to work longer either to make repairs, or by express agreement.

Virginia

First enacted in 1890 (chap. 193, sec. 1), now embodied in Virginia Code (1904), chap. 178 a, sec. 3657 b, as follows:

No female shall work as an operative in any factory or manufacturing establishment in this State more than ten hours in any one day of twenty-four hours. All contracts made or to be made for the employment of any female . . . as an operative in any factory or manufacturing establishment to work more than ten hours in any one day of twenty-four hours shall be void.

Pennsylvania

First enacted in 1897 (No. 26), and re-enacted in Laws of 1905, No. 226, as follows:

Section 1. That the term "establishment," where used for the purpose of this act, shall mean any place within this Commonwealth other than where domestic, coal-mining, or farm labor is employed; where men, women, or children are engaged, and paid a salary or wages, by any person, firm, or corporation, and where such men, women, or children are employees, in the general acceptance of the term.

Section 3. . . . No female shall be employed in any establishment for a longer period than sixty hours in any one week, nor for a longer period than twelve hours in any one day.

(Certain exceptions covering Saturday and Christmas.)

(Held constitutional in Comm. *v.* Beatty, 15 Pa. Superior Ct. 5.)

New York

First enacted in 1899 (chap. 192, sec. 77), now embodied in Stat. 1907, chap. 507, sec. 77, sub-division 3:

. . . No woman shall be employed or permitted to work in any factory in this State . . . more than six days or sixty hours in any one week; nor for more than ten hours in one day. . . .

A female sixteen years of age or upwards . . . may be employed in a factory more than ten hours a day; (a) regularly in not to exceed five days a week in order to make a short day or a holiday on one of the six working days of the week; (b) irregularly in not to exceed three days a week; provided that no such person shall be required or permitted to work more than twelve hours in any one day or more than sixty hours in any one week etc.

Nebraska

First enacted in 1899 (chap. 107), now embodied in Compiled Statutes (1905, sec. 7955 a):

No female shall be employed in any manufacturing, mechanical, or mercantile establishment, hotel, or restaurant in this State more than sixty hours during any one week, and ten hours shall constitute a day's labor. The hours of each day may be so arranged as to permit the employment of such female at any time from six o'clock A. M. to ten o'clock P. M.; but in no case shall such employment exceed ten hours in any one day.

(Held constitutional in Wenham *v.* State, 65 Neb. 400.)

Washington

Enacted in 1901, Stat. 1901, chap. 68, sec. 1, as follows:

No female shall be employed in any mechanical or mercantile establishment, laundry, hotel, or restaurant in this State more than ten hours during any day.

The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four.

(Held constitutional in State *v.* Buchanan, 29 Wash. 603.)

The acts in the following States raise somewhat similar questions:

Wisconsin

First enacted in 1867 (chap. 83, sec. 1), and amended by Stat. 1883, chap. 135, now embodied in Wisconsin Statutes, Code of 1898, sec. 1728, as follows:

> In all manufactories, workshops, or other places used for mechanical or manufacturing purposes the time of labor . . . of women employed therein shall not exceed eight hours in one day; and any employer, stockholder, director, officer, overseer, clerk, or foreman who shall compel any woman . . . to labor exceeding eight hours in any one day, . . . shall be punished by fine not less than five nor more than fifty dollars for each such offence.

North Dakota

First enacted in 1877 (Penal Code, sec. 739), now embodied in Revised Code, 1905, sec. 9440, as follows:

> Every owner, stockholder, overseer, employer, clerk, or foreman of any manufactory, workshop, or other place used for mechanical or manufacturing purposes, who, having control, shall compel any woman . . . to labor in any day exceeding ten hours, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding one hundred and not less than ten dollars.

South Dakota

First enacted in 1877 (Penal Code, sec. 739), now embodied in Revised Code, 1903 (Penal Code, sec. 764), as follows:

> Every owner, stockholder, overseer, employer, clerk, or foreman of any manufactory, workshop or other place used for mechanical or manufacturing purposes, who, having control, shall compel any woman . . . to labor in any day exceeding ten hours, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine not exceeding one hundred and not less than ten dollars.

Oklahoma

First enacted in 1890 (Stat. 1890, chap. 25, article 58, sec. 10), now embodied in Revised Statutes, 1903, chap. 25, article 58, sec. 729, as follows:

Every owner, stockholder, overseer, employer, clerk, or foreman of any manufactory, workshop, or other place used for mechanical or manufacturing purposes, who, having control, shall compel any woman or any child under eighteen years of age, or permit any child under fourteen years of age, to labor in any day exceeding ten hours, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding one hundred and not less than ten dollars.

New Jersey

First enacted in 1892 (chap. 92), now embodied in General Statutes, page 2350, secs. 66 and 67, as follows:

Section 66. . . . fifty-five hours shall constitute a week's work in any factory, workshop, or establishment where the manufacture of any goods whatever is carried on; and the periods of employment shall be from seven o'clock in the forenoon until twelve o'clock noon, and from one o'clock in the afternoon until six o'clock in the evening of every working day except Saturday, upon which last named day the period of employment shall be from seven o'clock in the forenoon until twelve o'clock noon.

Section 67. . . . no woman shall be employed in any factory, workshop, or manufacturing establishment except during the periods of employment hereinbefore mentioned: Provided, That the provisions in this act in relation to the hours of employment shall not apply to or affect any person engaged in preserving perishable goods in fruit-canning establishments or in any factory engaged in the manufacture of glass.

Colorado

Enacted in 1903, Acts of 1903, chap. 138, sec. 3:

No woman . . . shall be required to work or labor for a greater number than eight hours in the twenty-four hour day, in any mill, factory, manufacturing establishment, shop, or store for any person, agent, firm, company, copartnership, or corporation, where such labor, work, or occupation by its nature, requires the woman to stand or be upon her feet, in order to satisfactorily perform her labors, work, or duty in such occupation and employment.

South Carolina

Approved February 19, 1907 (Acts of 1907, No. 223), as follows:

Section 1. Ten hours a day or sixty hours a week shall constitute the hours for working for all operatives and employees in cotton and woollen manufacturing establishments engaged in the manufacture of yarns, cloth, hosiery, and other products for merchandise, except mechanics, engineers, firemen, watchmen, teamsters, yard employees, and clerical force. All contracts for longer hours of work other than herein provided in said manufacturing establishments shall be and the same are hereby null and void; and any person entering into or enforcing such contracts shall be deemed guilty of a misdemeanor in each and every instance, and on conviction in a court of competent jurisdiction shall be fined a sum of money not less than twenty-five or more than one hundred dollars, or imprisonment not exceeding thirty days, provided that nothing herein contained shall be construed as forbidding or preventing any such manufacturing company from making up lost time to the extent of sixty hours per annum, where such lost time has been caused by accident or other unavoidable cause.

ARGUMENT

The legal rules applicable to this case are few and are well established, namely:

First: The right to purchase or to sell labor is a part of the " liberty " protected by the Fourteenth Amendment of the Federal Constitution.

Lochner v. *New York*, 198 U. S. 45, 53.

Second: This right to " liberty " is, however, subject to such reasonable restraint of action as the State may impose in the exercise of the police power for the protection of health, safety, morals, and the general welfare.

Lochner v. *New York*, 198 U. S. 45, 53, 67.

Third: The mere assertion that a statute restricting " liberty " relates, though in a remote degree, to the public health, safety, or welfare does not render it valid. The act must have a " real or substantial relation to the protection of the public health and the public safety."

Jacobson v. *Mass*, 197 U. S. 11, 31.

It must have " a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate."

Lochner v. *New York*, 198 U. S. 45, 56, 57, 61.

Fourth: Such a law will not be sustained if the Court can see that it has no real or substantial relation to public health, safety, or welfare, or that it is " an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."

But " If the end which the Legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the

Court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those " who assail it.

Lochner v. *New York*, 198 U. S. 45–68.

Fifth: The validity of the Oregon statute must therefore be sustained unless the Court can find that there is no " fair ground, reasonable in and of itself, to say that there is material danger to the public health (or safety), or to the health (or safety) of the employees (or to the general welfare), if the hours of labor are not curtailed."

Lochner v. *New York*, 198 U. S. 45, 61.

The Oregon statute was obviously enacted for the purpose of protecting the public health, safety, and welfare. Indeed it declares:

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

The facts of common knowledge of which the Court may take judicial notice —

See *Holden* v. *Hardy*, 169 U. S. 366.
Jacobson v. *Mass*, 197 U. S. 11.
Lochner v. *New York*, 198 U. S. 481.

establish, we submit, conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a " mechanical establishment, or factory, or laundry " more than ten hours in one day is dangerous to the public health, safety, morals, or welfare.

These facts of common knowledge will be considered under the following heads:

Part I. Legislation (foreign and American), restricting the hours of labor for women.

Part II. The world's experience upon which the legislation limiting the hours of labor for women is based.