CHAPTER V

Our Makers of Law

The dual responsibility which our lawmakers and judges bear, on the one hand to the people, and on the other to the Big Men, produces a chaos of conflicting laws and decisions. For the chartering of business corporations we have the "Delaware theory," which seems to be to give the applicant whatever he asks for; the "New Jersey theory," which is a slight modification of the former; and the "Massachusetts theory," which reserves to the State a certain measure of supervision and control. For the fixing of employers' liability for injuries to workmen we have a wide range of precedents, from States which hold to the common-law doctrine that practically frees the employer from blame, to those which fix a liability in somewhat definite terms. Factory legislation, regulations for the public health, the determination of a legal workday, the restraining of corporate aggressiveness — these and a score of like questions are variously passed upon or deliberately avoided in the several States. Judicial decisions, too, present a spectacle of the widest diversity.

Nevertheless this chaos shows signs of a gradual reduction to order. The insistent challenge, "Under which king, Bezonian, speak or die!" which perpetu-

ally assails all of our legislative and judicial functionaries, sooner or later forces a decision, and naturally it is the stronger rival that wins. How effective is this challenge, how strong is the pressure, Mr. John Jay Chapman has strikingly shown in his "Causes and Consequences," and the instances that crop out from time to time, like that of the recent tampering with the Supreme Court of Missouri, reveal only a needless confirmation of a known truth. Legislation in behalf of the general welfare and of the industrially dependent classes becomes less frequent and more guarded; and judicial decisions in matters that involve class antagonisms are more frequently given to the dominant class.

I

A marked tendency of recent legislation is that toward giving increased powers to municipal officials. Another is that toward the creation of boards charged with administrative, executive, semi-judicial, and even police powers. The institution of these boards means simply a further removal from the people of the conduct of public affairs. Mr. Leonard A. Blue, in the *Annals of the American Academy* for November, 1901, gives an interesting view of the subject. "These boards," he writes, "are practically irresponsible bodies. They are beyond the control of the people, or of any one who is responsible to the people for their actions. Appointed as they are for definite terms of office, they cannot be removed during that term except after an investigation which amounts to

an impeachment. The Governor who appoints them in many cases can only appoint a single member, the terms of the others extending beyond his own, so that he can neither mould the policy of the board nor can he be held responsible for it." And he quotes from one of the messages of the Hon. W. E. Russell, Governor of Massachusetts (1891–93), these words: "The people of the State might have a most decided opinion about the management and work of the departments, and give emphatic expression to that opinion, and yet be unable to control their action. The system gives great power without proper responsibility, and tends to remove the people's government from the people's control." Irresponsible to both the people and the people's officials as they are, these boards are yet not wholly unsusceptible to outside pressure; they are, as is well known, peculiarly liable to the influence of the Big Men.

II

While legislation moves rapidly enough in the direction of detaching political powers from the people, it shows a growing disinclination to meddle with affairs between magnate and minion. Twelve or fifteen years ago, in certain sections, "labor" legislation had a flourishing career. The number of laws so classified, passed in a single three-year period in New York State, made a record for all time. Labor was then rapidly combining, and its lusty organizations made emphatic demands for protective laws. A Democratic Governor, not wholly regardless of

hopes of the Presidential succession, for the time allied himself with the movement and secured the passage of many of these measures. With an alacrity much greater than that with which the Constitution follows the flag, judicial decisions in those days tended to follow the general policy of the party in power, and thus but slight trouble was experienced in securing constitutional sanction.

Other States followed, and for several years the astonishment and indignation of the Big Men were intermittently roused by the spectacle of Jacobinical legislators meddling in affairs outside their province. Mr. F. J. Stimson, in the *Atlantic Monthly* for November, 1897, informs us that in the ten preceding years 1639 laws relating to labor had been passed in the various States and Territories. This is an average of 3.4 a year for each legislature, though the courts had modified the average somewhat by declaring 114 of these measures unconstitutional. Doubtless among those that escaped the "killing decree" of the courts were a number that benefited the worker, though it is doubtful if any of them served to modify his economic status.

However that may be, it is unquestioned that the tendency toward the enactment of this sort of legislation has suffered a decline. It is hard to fix the point of culmination, though probably it lies somewhere about the years 1896–97. In isolated instances, and under peculiar circumstances, it is conceded there is an occasional revival. The Pennsylvania legislature of 1897 showed a remarkable zeal, shortening the workday of women and minors, limiting child

labor, establishing a bureau of mines, and making other regulations. Maryland, in 1898, imposed certain mining regulations and required seats in stores for women workers. Virginia and Massachusetts, in the same year, interfered slightly, the former with an arbitration act. In the spring of 1899, Kansas, Illinois, Colorado, Indiana, Michigan, Nebraska, Washington, and Wisconsin, all addressed themselves more or less earnestly to the redress of certain grievances; and they were followed by Iowa in 1900, by Massachusetts again in the same year, and by Alabama in 1901. In the present year New York, after five years of agitation, reluctantly granted a moderately expressed employers' liability law.

Most of this legislation, however, was enacted in the newer States, and served only to push them along toward the standard set in the older States in earlier years. Advances of any sort are difficult to discover. As for the year 1901, the record of progressive legislation is almost bare. Congress suppressed the Eight-hour, Anti-injunction, and Prison-labor bills, and mutilated the Chinese bill. A convention of the National Association of Railway Commissioners, comprising representatives from twenty-five State boards and from the Interstate Commerce Commission, petitioned Congress, in June, 1901, to enact a number of measures regarding railway traffic; but our lawmakers appear to have been too busy with other matters. Factory legislation has suffered a relapse in all of the States. "The statutes of 1901," euphemistically writes Mr. Horace G. Wadlin, in the New York State Library's "Review of Legislation, 1901," "which

may be classed as protective legislation, intended to safeguard the workman in his employment or to secure to him his wages, are neither very numerous nor very radical." Something better, however, as Mr. Adna F. Weber points out in the same volume, was done in regard to shorter workdays. California passed an Eight-hour law for State work; Minnesota, with certain liberal exceptions, another; while Utah penalized infractions of an existing law. Even Pennsylvania, generally so sensitive in the matter of interfering with the rights of her workers to employ themselves in any manner they are constrained to choose, made the daring innovation of prohibiting a longer workday than twelve hours for women and minors in bakeries. Doubtless the lesson to be learned from this is a growing inclination toward the gospel of relaxation, which Mr. Herbert Spencer so emphatically invoked on his visit here twenty years ago. An industrial Feudalism is not inconsistent with a moderate workday, and it is not unlikely that some further experiments in this line may be made.

III

An average man, not overlearned in political science, and not too well acquainted with the ways and means of politicians, might naturally suppose that the result of something more than 1639 "labor" laws would be an almost revolutionary change in the conditions of industry. He might suppose a general effect comprising these particulars: the securing of safe places and safe conditions for toil; the utmost

safeguarding against accidents; the fixing of liability for injuries or death suffered in the service of a master; the guarantee of the right of workmen to combine, to leave their work for causes sufficient to themselves, and peaceably to persuade others to do so; the guarantee of protection from blacklisting by employers, and the framing of all such laws in a spirit so sincere and in diction so definite that judicial discretion would be reduced to a minimum.

"Labor" legislation, however, takes on too much a form and pressure due to influences from above to confirm even this temperate supposition. It is somewhat presumptuous, and in a later time will be grossly impious, for a layman not of the seigniorial class to speak querulously on so sacred a subject; yet it needs must be said that the mass of the measures so far framed have proceeded but little beyond the confines of the common law. Many of them, indeed, are mere enactments into statute of that elastic, not to say elusive, body of precedent. The common law comes down to us from distant times, when other conditions prevailed, and throughout all of it which bears on the relations of master and servant there runs a principle based on an unsupported theory. "This theory," writes Mr. George W. Alger, a member of the New York Bar, in the *American Journal of Sociology* for November, 1900, "resolutely closed its eyes to common, obvious, social and economic distinctions between men, either considered as individuals or as classes, and with a self-imposed blindness imagined rather than saw the servant and his master acting upon a plane of absolute and ideal equality in all

matters touching their contractual relation; both were free and equal, and the proper function of government was to let them alone. If the servant was dissatisfied with the conditions of his employment; if the dangers created not merely by the necessities of the work, but by the master's indifference to the safety of his men, were in the eyes of the latter too great to be endured with prudence, then, being under this theory a 'free agent' to go or to stay, if he chose to stay he must take the possible consequences of personal injury or death."

Under the common law, it is true, the employer is presumed to have certain duties toward his workmen. As interpreted by Mr. Stephen D. Fessenden, LL.M., in the *Bulletin* of the Department of Labor, for November, 1900, these obligations are as follows: —

"An employer assumes the duty toward his employee of exercising reasonable care and diligence to provide the employee with a reasonably safe place at which to work; with reasonably safe machinery, tools, and implements to work with; with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and, in case of a dangerous or complicated business, to make such reasonable rules for its conduct as may be proper to protect the servants employed therein."

This common-law doctrine is, however, very seriously qualified by the doctrine of the workman's assumption of risk, of his contributory negligence, and of negligence on the part of a fellow-servant. Each of the terms in this doctrinal trinity is of expansive elasticity, and even the constituent words of

each term may be variously interpreted. So that a workman forced to earn his bread where he can, in the face of constant perils, literally takes his life in his hands. If injured, there may be set up and sustained against his claim for damages the plea of free and unconstrained assumption, or of contributory negligence, or of negligence of another workman, even though the latter may be a superior who orders the victim to his dangerous task.

"It is a well-settled principle of common law," writes Mr. Fessenden, "that where . . . duties [of employers] are imposed by legislative enactment or municipal ordinance, it is negligence on the part of the employer to fail to comply with [these] requirements." Now it happens that the United States, twenty States, the District of Columbia (by act of Congress), and one Territory have enacted this common-law principle into statute, affixing it to certain regulations of industry. Yet in such manner are the greater number of these statutes drawn that it is often found possible to evade them on the score of one or more of the terms in the common-law theory. The record of decisions on these statutes is at best conflicting and confusing. But enough can be shown to illustrate the frequent futility of the laws to secure either employers' compliance with imposed duties or employers' liability for injuries due to negligence. The Ohio Supreme Court, in 1895, held that "one cannot maintain an action against his employer for an injury following a violation of the act regulating coal mines, unless at the time he was injured he was in the exercise of due care; that one who voluntarily

assumes a risk thereby waives the provisions of a statute made for his protection." The Wisconsin Supreme Court decided that the law (1889) requiring the guarding or blocking of railway frogs "does not take away the defence of contributory negligence." The New York Court of Appeals in the case of Knisley *vs.* Pratt (148 N. Y. 372) decided that to hold that the workman could not waive his master's statutory duty by continuing at work was "a new and startling doctrine calculated to establish a measure of liability unknown to the common law."

Statute law is presumed to replace common law and to redress the inequities resulting from the application of old principles to changed conditions. But the redress of inequities is conspicuously wanting in much of the so-called "protective" legislation. It is impossible to guess whether on the one hand in legislative indifference or unwisdom, or on the other hand in judicial interestedness and overwisdom, lies the greater cause of these statutory failures. Some added speculations on the subject will be found further along. But whatever the attitude of the judges, that of the lawmakers reveals a chronic and now intensifying fear of disturbing the sacred privileges of "business."

The contractual waiving, by the employee, of the employer's negligence, is a subject about which a number of legislatures have concerned themselves. Two States (Georgia and Massachusetts), according to Mr. Fessenden, have forbidden such waivers generally, one State (Ohio) has declared void such contracts when made by employees, and twelve States

and one Territory have forbidden such waivers where the liability is imposed by statute. The Ohio law, however, was declared unconstitutional by the United States Circuit Court for the Northern District of Ohio in 1896 on the ground that "in denying to the employees of a railroad corporation the right to make their own contracts concerning their own labor, [it] is depriving them of 'liberty' and of the right to exercise the privileges of manhood, 'without due process of law';" and furthermore that it was class legislation. Each of these laws, moreover, can be practically nullified, as the courts have repeatedly held. An employer may organize a relief organization for the payment of benefits. He may tax his employees for a greater or less part of the expenses of the department. He may then make employment conditional upon the workman's joining the association and signing a pledge agreeing, in consideration of the payment of the regular benefits, to release the employer from all claims for injuries. Such contracts are valid, since, according to the ingenious interpretation of the courts, they do not waive damages, but choose between two sources of compensation. Only one State (Iowa) has had the temerity to declare this practice illegal, and in view of the action of the courts the law will probably be held to be unconstitutional.

Statutory provisions against accidents to workmen reveal quite as much timidity as do provisions regarding employers' liability. The yearly number of accidents in our industries is unknown, and can be only roughly guessed at. The investigation of the New

York Commissioner of Labor, in the spring of 1899, would indicate a yearly average of 14,576 accidents for factory workers alone in one State. In the Pennsylvania anthracite mines more than 400 persons are killed every year, and in the bituminous mines of the same State the yearly average for the period 1895–98 was 171 killed and 421 injured. An official report made to the United States Geological Survey in September gives the record of lives lost in mining coal for the year 1901 as 1467, and the number of workmen injured as 3643. In the anthracite mines of Pennsylvania 513 men were killed and 1243 injured, and in the bituminous fields of the same State 301 were killed and 656 injured. The railroads provide a yearly Gettysburg, with some 40,000 casualties to workmen alone; and many an industry annually furnishes its humble Bull Run or Fort Donelson.

Regulations, however, proceed cautiously, not to say haltingly; they are generally tame regulations, they are frequently disobeyed, and their effect on the casualty rate is anything but radical. Though for 1901 the increased use of safety appliances lessened the percentage of coupling accidents on railroads, the percentage actually increased for 1898, 1899, and 1900. Since 1898 there has been an increase in the rate of accidents in coal mining, and doubtless, also, if the figures were known, an increase could be shown for factories and workshops.

Although twenty-one States, according to Mr. William F. Willoughby, in the *Bulletin* for January, 1901, provide for an inspection service in factories, only thirteen impose specific provisions making it

obligatory upon factory and mill owners to take certain precautions against accidents. Only one of these laws, moreover, — that of Ohio, — may fairly be called an adequate and definitely expressed statute. There are but five States that have enacted laws "the purpose of which is to make it obligatory upon directors of building and construction work to take certain precautions against accidents," and only one of these (New York) has given the measure an adequate comprehensiveness. Twenty-three States have more or less elaborate mining regulations; but as compliance with these laws is usually left to the honor and benevolence of the mine owner, and as mining accidents continue at a practically static rate, it is hard to see the beneficial result. Some of the States compel railroads to block or guard frogs, and several have laws independent of the Federal statute of 1893, requiring the use of automatic couplers and power brakes. The former may be evaded, however; and, in the absence of statute imposing liability, the evasion counts for nothing in behalf of an injured workman's claim for damages. The effect on the accident rates has already been mentioned.

Dr. Sarah S. Whittelsey's paper in the *Annals of the American Academy* for July, 1902, summarizes the report of the Industrial Commission on the results of factory legislation in the various States. From this it appears that only about half the States have passed what may be called factory acts, many of which are mere fire-escape provisions, and that there are almost no factory acts in the South, nor in the more distinctly agricultural States of the West.

New Hampshire, Vermont, Nebraska, and California generously permit the employment in factories of children ten years old; seven States put the limit at twelve years, two at thirteen, ten at fourteen, and one makes the limit fourteen years for girls and twelve years for boys. Working hours have been more or less regulated for women and minors in fifteen States, and for minors alone in nine States. Courts in three States, however, have declared acts regulating working hours of women unconstitutional. In sixteen States, three Territories, and the District of Columbia there is absolutely no limitation for persons of any age or sex. Aside from certain occasional acts relating to the payment of wages, to inspection, and to employers' liability, this is a complete summary of protective legislation concerning the industries that employ 5,321,087 of the Nation's wage-earners.

Mr. Fessenden gives a summary of the laws for the protection of workmen in their employment, in the *Bulletin* for January, 1900. The most timid conservative may read it with relief, for any fears of an undue lodgment of power in the working classes will be effectually banished by its perusal. Only nine States have gone so far as to enact into statute the supposed common-law principle that combinations of workmen, formed for the purpose of seeking increase of wages and betterment of conditions, are not of themselves unlawful. Four others specify that the provisions of their "anti-trust" acts do not apply to combinations of labor. On the other hand, the anti-conspiracy laws of eleven States are capable of interpretation which would penalize many of the peaceable methods

of labor societies, and such interpretations have been frequently made.

Moreover, the wording of Sections 3995 and 5440 of the Federal Revised Statutes, chapters 647 of the Anti-trust act, and 104 of the Interstate Commerce act, and the amendment of 1889 to the latter, are capable of interpretation to the effect that collective quitting of work on railways is illegal. Decisions to that effect have several times been made in the United States courts. "A strike, or a preconcerted quitting of work," reads the decision in United States *vs.* Cassidy (1895) before the District Court of the United States for the Northern District of California, "by a combination of railroad employees, is in itself unlawful, if the concerted action is knowingly and wilfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the States." "It will be practically impossible hereafter," reads the United States Circuit Court decision in the case of Waterhouse *et al. vs.* Cromer (1893), "for a body of men to combine to hinder and delay the work of the transportation company without becoming amenable to the provisions of these statutes." The indefinite diction of many of the State laws against "intimidation and coercion" also gives wide scope to judicial discretion, and permits the occasional naming of the most innocuous acts as "coercion."

The necessity of peace in an industrial society is everywhere recognized; and it is, therefore, not surprising that really earnest efforts have been made in behalf of arbitration. It obtained, in a measure, dur-

ing the older Feudalism, through the "courts baron," which considered tenantry and wage-questions; and it is becoming more common day by day. Within sixteen years twenty-one States and the United States have passed more or less effective measures looking to its use in labor disputes. Political coercion is also a matter that has won a large share of legislative attention; twenty-nine States and two Territories have enacted laws regarding it. There is, however, an important distinction to be made. In an ordinary conflict of political issues, when the magnates and their retainers are to be found in both parties, it is obvious confusion and the unsettling of political conditions for the employers to dictate how their workmen shall vote. But when political issues suggest a class conflict, as in 1896, some of the provisions of these laws are by common consent waived. The humble toiler may vote as he likes on the immaterial questions of ordinary campaigns; but on questions having to do with the salvation of society and the preservation of the hallowed code of "business," instruction and even gentle pressure become the solemn duty of his social betters. There are fewer laws, it may be observed, regarding another kind of coercion. Discharges on account of membership in a labor union are forbidden in but fifteen states; and in two of these (Illinois and Missouri) such provisions have been found, after much painstaking study, to be unconstitutional. The discovery is considered a most happy one; and according to the injunction of the Federal Constitution, that "full faith and credit shall be given in each State to the public acts, records, and

judicial proceedings of every other State," the ruling will no doubt be found applicable in a number of the other commonwealths.

IV

Our lawmakers are not to be blamed for decisions of unconstitutionality. Rather, they are to be congratulated. For the recent tendency of the judges to determine for themselves what shall be enacted into law has developed new refuges for the lawmakers. We have now Solon, the legislator, and Rhadamanthus, the judge, in new rôles — the rôles of the good and bad partner of Dickens's novel. To the humble voter, when the pressure from below conflicts with the pressure from above, Solon is now able to stand as the supporter of popular measures, and to throw upon the less responsible Rhadamanthus the onus of declaring them bad law. The fury of the magnate at Solon's demagogy is mitigated, if not extinguished, when he considers the difficulties of the lawmaker's position, and especially by the further consideration that Rhadamanthus has the final word to say. Solon has other refuges, it is true; and sometimes these must be availed of, for it is not always certain that a projected popular measure can be declared unconstitutional. For several years it had been considered possible, for instance, that an employers' liability act, if passed in New York, would stand the test of the courts. It became the custom, therefore, when an adequate measure on this subject was introduced, for the adverse interests to introduce a con-

flicting bill. The ingenious lawmaker thereupon regretfully found a divided public sentiment, and as a consequence no bill was passed. There are no reasons at hand for accounting for the fact that at the last session of the Albany legislature such a measure was actually enacted.

V

How far our legislators are enabled to withstand public sentiment, no matter how strongly based in reason and how definite in objective, may be instanced in the attitude of Congress regarding the Safety-appliance act of 1893. Agitation for this measure had grown to such an extent that action could no longer be delayed. But though action on the bill could not be delayed, the terms of fulfilment of the bill could be postponed to a comparatively remote period. The number of railway employees killed in the year ended June 30, 1893, was 2727, a number exceeding the Union death roll in every battle of the Civil War except Gettysburg, and within 243 of that record. In the same year the number of wounded (31,729) was more than three times as great as the number of Union wounded at either Antietam or Chancellorsville, and more than double that at Gettysburg. Yet despite this tremendous carnage, the legislators, wavering between the public demands and the demands of the magnates, though they passed the bill, generously granted five years for its complete observance, and then gave the Interstate Commerce Commission the power to grant further

delays — in effect giving seven years for its fulfilment. In those seven years 13,906 employees were killed — a loss exceeding the Union death roll at Gettysburg, Spottsylvania, the Wilderness, Antietam, Chancellorsville and Chickamauga combined — and approximately 220,000 were wounded, or more than three times the number of Union wounded in those six battles. That a great part of this casualty record was avoidable is evidenced in the August report of the Interstate Commerce Commission, which shows that the number of employees killed in coupling accidents in the year ended June 30, 1901, declined from 282 to 198, and the number injured from 5229 to 2768. It was in 1893 that this generous latitude was granted the magnates. Were the occasion to arise now, it is probable that the term of grace would number fourteen years instead of seven.