CHAPTER VI

Our Interpreters of Law

The attitude of the judiciary in matters involving class antagonisms is a subject upon which only the most restrained language is tolerable. Even general inferences which suggest such a thing as judicial bias must be avoided. Faith in the rectitude and wisdom of our judges is a virtue sedulously preached, — perhaps most insistently by those who do most toward their corruption, — and though the virtue as we know it is rather vocal than immanent, it is sufficiently deep-seated to be intolerant of spoken heresy. Were it openly questioned by any considerable body of citizens, the foolhardy persons would soon bring down upon themselves the rallying onslaught of those heterogeneous elements which Karl Marx somewhat extravagantly pictured, "landlords and capitalists, stock-exchange wolves and shopkeepers, protectionists and free-traders, government and opposition, priests and freethinkers, young streetwalkers and old nuns — under the common cry for the salvation of property, religion, the family, and society." Such heretics might have all the certainty of Paul, "that the law is good, if a man use it lawfully," and yet it would be a parlous thing to be

openly sceptical of the assumption that it is always lawfully used.

But at least one may, without attainder of anarchy, assemble and classify certain instances, and point out their coincidences and their contrarieties. There is, for example, a notable sameness in kind of the laws which are declared unconstitutional. There is, to utter it mildly, a vast preponderance in the number of injunctions against striking, boycotting, and agitating over the number against locking-out, blacklisting, and the employment of armed mercenaries. There is a practical, though not an entire, unanimity against the awarding of damages to injured employees, whether the decision be based on common or statute law; and, finally, there is a considerable diversity between the decisions usually rendered by judges elected for short terms, and therefore directly responsible to the people, and those rendered by the less responsible judges, elected for long terms or appointed.

I

The legislative aspects of employers' liability have already been considered. Certain judicial aspects of the matter need also to be touched upon. The question is one of grave social import. The worker no longer owns his tools, but must use the machinery provided for him. A certain element of danger inheres in the operation of probably all machinery; but when old, defective, or with its dangerous parts unguarded, injuries to its operatives are well-nigh certain. Yet for such injuries, with their awful con-

sequences to the operative and his dependent ones, there is generally no redress, except in a few States where statutes have fixed the matter of liability in set terms which leave no room for judicial discretion.

Under the common law the workman is held to assume the risk attending his employment. He is a free agent — so the legal fiction runs — and if afraid of injury need not work. Common law also presupposes the providing of a "reasonably safe" place and "reasonably safe" machinery by the employer. It would be difficult to determine, however, from the mass of decisions under the common law, what is meant by "reasonably safe." A Colorado lower court gave damages to the mother of a miner killed by falling rock while removing débris from one of the mines of the Moon-Anchor Consolidated Gold Mines, Limited. The case came finally to the United States Circuit Court of Appeals for the Eighth District, and the judgment was reversed, Judges Sanborn and Adams concurring and Judge Thayer dissenting. The work was admittedly hazardous; in the opinion of Judge Thayer "the place was needlessly made unsafe by the master's negligence." The concurring judges, however, decided that the company's negligence was not responsible, and that "the deceased of his own free will determined to cope with these risks and hazards. . . . In this, his own voluntary conduct, is found the intervening, proximate, and responsible cause of his injury." (111 Federal Reporter, 298.)

Even when the employer assures the workman of the safety of a machine, the risk is still, according to

many decisions, the workman's. The Circuit Court of Shiawassee County, Michigan, refused to award damages to a workman for injuries sustained from a defective machine which he was operating for his employer. The case went to the Supreme Court on a writ of error, and on December 15, 1900, that court affirmed the previous judgment. It had been shown that the plaintiff warned his employer of the danger of the machine, and that the employer gave assurances to the contrary. Nevertheless, in the words of Judge Moon (Moore?), "one cannot continue to operate a machine which he knows is dangerous simply upon the assurance of his employer that it is not, if he has just as much knowledge of the danger arising from the operation of the machine as the principal has [without assuming the risk]." (82 N. W. Reporter, 1797.)

The decision, read by Judge McLennan, in the recent case of Rice *vs.* the Eureka Paper Company (76 App. Div. 336) before the Fourth Appellate Division of New York State, would seem to indicate that the burden of risk is not to be shifted from the workman even when his employer acknowledges a defect in machinery and promises to remedy it. There is some doubt, however, if such a decision, though valid in many States, will stand in the State where it was given; for the Court of Appeals has several times decided that liability follows from an acknowledgment of defective machinery. On the other hand, this highest court of New York State has won the distinction of carrying the doctrine of assumption of risk to an extreme degree. The case

of Gabrielson *vs.* Waydell (135 N. Y. 1) involved the question of the liability of the owners of a maritime vessel for injuries suffered by a sailor in their employ. The captain of the vessel had committed a confessedly unprovoked and particularly brutal assault upon the sailor, who had subsequently sued the owner for damages. The court decided that the sailor had no redress; that "the misconduct of the captain was a risk assumed by the seaman, for the consequences of which the owners are not responsible."

A fact more curious yet to the unlegal mind is the judicial contention, instanced in the previous chapter, that statutory provisions for the safeguarding of machinery may be waived by the workman. Evidently his burden of risk, like the Hindu's caste, is born with him, and cannot be laid aside or escaped. The case of the E. S. Higgins Carpet Company *vs.* O'Keefe (79 Federal Reporter, 900) is an illustration. Damages for an injury received from an unguarded machine had been given a fifteen-year-old boy in the United States Circuit Court for the Southern District of New York. The United States Circuit Court of Appeals for the Second Circuit, however, reversed the judgment. The plaintiff was a minor, but this fact was held to have no bearing. "We think the circumstance that he was a minor of no importance," read the decision of Judge Wallace. "The rules which govern actions for negligence in the case of children of tender years do not apply to minors who have attained years of discretion." The New York factory act required guards for this particular kind of machine. But that, also, was immaterial. "The

provisions of the statute . . . requiring cogs to be properly guarded, have no application to the case, except as regards the question of the negligence of the defendant. As construed by the highest courts of the State, the statute does not impose any liability upon an employer for injuries received by a minor in his service in consequence of the fault of the employee, or arising from the obvious risks of the service he has undertaken to perform." To clinch the matter, Judge Wallace cited the then recent case of Graves *vs.* Brewer before the Fourth Appellate Division of New York State, wherein the court held that "the liability of the employer was not changed by reason of the factory act requiring cog-wheels to be covered, because such protection could be waived and was waived by a person accepting employment upon the machine with the cogs in an unguarded condition, as the danger was apparent, and one of the obvious risks of the employment." The case of Knisley *vs.* Pratt (148 N. Y. 372) before the New York Court of Appeals was decided in the same way, and also the case of White *vs.* Witteman Lithographic Company. In the latter case the plaintiff was a child of fourteen.

Such decisions are common in more States than one. Another case which may prove of some interest to the lay mind is that of Gillen *vs.* the Patten and Sherman Railroad Company (44 Atlantic Reporter, 361). The plaintiff, while uncoupling cars, had his foot crushed in an unfilled frog, and had been awarded damages. A motion for a new trial was argued before the Supreme Judicial Court of Maine, and was granted. The decision, delivered by Judge

Lucilius A. Emery, acknowledged the existence of a statute (chapter 216 of 1889) requiring the filling or blocking of guard rails or frogs on all railways before January 1, 1890. It held, however, that such filling and blocking was not immediately mandatory upon a railroad constructed after that date. "Such company is entitled to a reasonable time for compliance with that statute." It was at a crossing of such a railway that the trainman lost his foot. He had no right to assume that the rails were blocked, merely because a statute said they should be. The brakeman, therefore, assumed the risk, and he also furnished contributory negligence, since "to move about over frogs and switches while coupling and uncoupling cars, even in moving trains, without taking any thought of the frogs and guard rails, or as to where he may be stepping, is negligence on his part contributing to the catching his foot in them."

When the doctrine of assumption of risk is inapplicable, when personal negligence cannot be shown, and when there has been no waiving of statutory provisions by the workman, there is yet, in judicial eyes, one last resort for the defendant company — the common-law plea of negligence on the part of a fellow-workman. There is some diversity of opinion among eminent judges as to who are strictly fellow-servants. "The courts of the majority of the States hold, however," writes Mr. Stephen D. Fessenden, in the *Bulletin* of the Department of Labor for November, 1900, "that the mere difference in grades of employment, or in authority, with respect to each other, does not remove them from the class of fellow-servants as

regards the liability of the employer for injuries to the one caused by the negligence of the other." Thus it has happened that a workman acting in the capacity of agent for his employer, and ordering other workmen to do tasks at which injuries have resulted, has been held to be a fellow-servant — a judgment relieving his employer of liability. To the lay mind it would seem that workmen in different departments could hardly be classed as fellow-servants; and the United States Supreme Court has rendered a decision which makes possible, under certain circumstances, such a discrimination. Since then, however, the Federal courts have suffered a reaction on the question, and current decisions tend the other way.

A case before a State tribunal — the Supreme Court of Georgia (35 Southeastern Reporter, 365) — illustrates the possibilities which lie in this doctrine. A lineman, while repairing a wire for the Brush Electric Light and Power Company, at Savannah, Ga., was killed through the act of the engineer in turning on the current. The city court of Savannah gave damages to his widow. The case was taken to the State Supreme Court, and decision rendered March 3, 1900. The counsel for the plaintiff contended that the fellow-servant doctrine could not apply, on account of the lineman and engineer working in different departments, "so that there was no opportunity for the exertion of a mutual influence upon each other's carefulness." The court, however, reversed the verdict.

The disparity of opinion between inferior judges and superior judges in cases of this kind is remark-

able. The monthly *Bulletins* of the Department of Labor give a fairly excellent summary of court decisions on labor questions. He who reads them will find the expression, "judgment of the lower court reversed," recurring with a rather painful iteration; unless, indeed, the decision of the lower court has rebuked the plaintiff, when the expression, "judgment of the lower court affirmed," is usually found. Mr. George W. Alger, in an article on "The Courts and Factory Legislation," in the *American Journal of Sociology* for November, 1900, gives the following careful and temperately worded summary of recent reversals in employers' liability cases in New York State:—

"The percentage of reversals on appeal in master-and-servant cases of this kind, when the verdict of the juries in the courts below had been in plaintiff's favor, is perhaps larger than in any other branch of litigation. In New York, for example, an examination of twenty volumes of the Court of Appeals reports (126 N. Y.–156 N. Y.) shows written opinions in thirty-seven such cases. Of these: (1) in three cases the juries in the lower court had found for defendant, and plaintiff was the appellant; (2) in four cases the court below had dismissed plaintiff's case as insufficient, without requiring defendant to introduce any testimony; (3) in thirty cases the juries below had found for plaintiff with substantial damages. The Court of Appeals in class (1) affirmed all of the cases where plaintiff was defeated below. In class (2) it reversed the four cases where plaintiff had been summarily non-suited and sent

the cases back to trial courts to hear defendant's testimony: a partial victory at most for plaintiff. In class (3), where plaintiff had actually received a verdict, of the thirty cases twenty-eight were reversed. These statistics are interesting as showing how complete is the lack of harmony between the courts, at least in New York, and the moral sense of the people by whom the courts were created, in regard to these cases. Twice in thirty times do the opinions of the learned judges of New York's highest court coincide with the opinions of juries of citizens as to the requirements of justice."

The tendency, which is most clearly indicated by the mass of decisions in cases demanding damages for injuries or death, is the growing disposition to make property paramount and life subordinate. It is a common practice to set aside verdicts of damages on the score that they are excessive. It is no less a common practice to instruct the jury to decide for the defendant in order to rebuke litigation. The language of the leading work on one phase of this subject — Shearman and Redfield's "A Treatise on the Law of Negligence" — sums up the matter in a few words: —

"It has become quite common for judges to state as the ground of decisions the necessity of restricting litigation. Reduced to plain English, this means the necessity of compelling the great majority of men and women to submit to injustice in order to relieve judges from the labor of awarding justice. . . . The stubborn resistance of business corporations, common carriers, and mill-owners, to the enforcement of the

most moderate laws for the protection of human beings from injury, and their utter failure to provide such protection of their own accord, ought to satisfy any impartial judge that true justice demands a constant expansion of the law in the direction of increased responsibility for negligence."

II

"Law," wrote Sir Edward Coke, "is the perfection of reason." This may be true; but, if so, it tends to throw mankind over to the position of the Catholics, that the reason itself needs considerable perfecting. This is not only the disposition of the lay mind, but, evidently, also of the supreme judicial mind; for a large part of the higher judicial activity during recent years has been expended in declaring null and void laws passed by two houses of the people's representatives and signed by an elected Governor or President. Mr. Stimson, in his summary of labor legislation for the years 1887–97, found that only 114 out of the 1639 laws passed had been declared unconstitutional. But these 114 comprised examples from 19 out of the 35 classes of legislation passed, and must therefore have reacted upon a very considerable number of the remainder. It is a coincidence which has been noted before, and need not be specially insisted upon here, that the overwhelming majority of laws which fail to reach the constitutional standards set by our judges are those intended to safeguard the interests of the industrially subordinate and to set some limitation to the powers of the industrially mighty.

The judicial mind, however, affects to know no difference between high and low, between weak and strong; and thus its decisions, ignoring actual conditions, tend more and more to strengthen the powers of one class and to weaken the powers of another. "Liberty" is the shibboleth; the citizen must be free to act as he wills. Somewhat curiously, though, liberty of speech, press, and assemblage is not so strenuously insisted upon; and, indeed, by injunctions and other judicial determinations is at times rather severely limited: the miners of West Virginia have been recently enjoined from holding meetings on their own grounds. But economic liberty — the liberty of the dependent classes to do acts which, in the nature of things, they cannot possibly do — is held for a sacred principle. The doctrine of the extension of the State's police power, limiting the foregoing doctrine, has gained some headway since the Utah decision confirmed a State's right to limit the hours of work for men in dangerous trades; but the determination of how far it is to be applied rests largely with the forty-eight State and Territorial courts; and it is a safe guess that it will meet with stiff resistance if incarnated in further "advanced" legislation.

"No discrimination," which in effect means much discrimination, follows the judicial shibboleth of "liberty." Especially zealous for the protection of liberty and keenly watchful of proposed discrimination is that eminent tribunal, the Supreme Court of Illinois. Some six years ago it discovered that the statute regulating the hours of women workers in the factories contravened the Federal and State constitu-

tional guarantees of "life, liberty, and property." A woman's labor was her property, and any limitation of it was a deprivation "without due process of law." On December 20, 1900, it fell to the lot of this tribunal to pass upon two labor laws, — to the lay mind entirely different in principle, — and, by a somewhat difficult struggling along parallel lines of argument, triumphantly to reach conclusions adverse to both of them. One was the Chicago ordinance requiring union labor and an eight-hour day on all public work contracted for; the other the State statute prohibiting discharge of an employee for belonging to a labor union. Regarding the ordinance, the union requirement, in the words of Associate Justice Magruder, "amounts to a discrimination between different classes of citizens." It is therefore void, and the eight-hour provision is also void, because it "infringes upon the freedom of contract, to which every citizen is entitled under the law. . . . Any statute providing that the employer and laborer may not agree with each other as to what time shall constitute a day's work is an invalid act." (58 Northeastern Reporter, 985.)

Without venturing to discuss this ruling, one may at least compare it with the ruling on the State statute. The latter was a law intended to prevent discrimination against union men. But, curiously to the unlegal mind, it is discovered to be discrimination in *favor* of the union man. "The act certainly does grant to that class of laborers who belong to union labor organizations a special privilege." (58 Northeastern Reporter, 1007.) The act was also found to "contravene those

provisions of the State and Federal constitutions which guarantee that no person shall be deprived of 'life, liberty, or property without due process of law.'" "That strain again," as Orsino, in "Twelfth Night," exclaims. It has not, however, a "dying fall," for it has been taken up and echoed in other quarters since.

The liberty of the employer to pay his employees in brass checks or store orders was affirmed by the Kansas Supreme Court on December 9, 1896, and the act requiring payment in lawful money was declared invalid. "To say that a free citizen can contract for or agree to receive in return for his labor one kind of property only, and that which represents the smallest part of the aggregate wealth of the country, is a clear restriction of the right to bargain and trade, a suppression of individual effort, a denial of inalienable rights." Anti-truck acts were also declared unconstitutional by the courts of Pennsylvania, Ohio, Illinois, and West Virginia. The Kentucky Supreme Court, however, nine months after the Kansas decision, found that liberty and the compulsory payment of wages in lawful money were compatible, so that the question is at least open. Decisions like that of the Kansas court, and the somewhat similar decisions rendered in Pennsylvania, Illinois, and Tennessee, of course fasten the laborer to the company store; but of this the courts usually take no cognizance. Actual liberty may be restrained, but theoretical liberty must not be tampered with.

Weekly payment laws are found to conflict with liberty in Pennsylvania, Illinois, Missouri, West Virginia, and Indiana. Moreover, the liberty of a legis-

lature to determine that prevailing wages shall be paid to employees of city and State must not be confused by the lay mind with the liberty of the wage-earner to work under what conditions he must. For the former is clearly unconstitutional, as decided in New York by the Court of Appeals in February, 1901. "The effect of this statute [the Prevailing Rate of Wages act]," reads the decision of Judge Denis O'Brien, "was to make the city [of New York] a trustee or instrument for the enforcement of the law in the interests of the persons for whose benefit it was enacted, and thus the powers and functions of the municipality are employed for purposes foreign to those for which they were created and exist under the Constitution." The eight-hour laws passed in several of the States have generally suffered the Illinois fate, although Kansas proved an exception. Regulation of the working hours of women was nullified not only in Illinois, but in Nebraska and California. The police-power doctrine, as voiced in the Utah decision, may justify a limitation of the working day in dangerous trades, but otherwise such a limitation appears to be an infringement of the right of contract, or a deprivation of "property" without "due process of law." Even the National Eight-hour law of 1868, while not strictly unconstitutional, is held to be merely advisory. "We regard the statute," says the Supreme Court (94 U. S. 404), "chiefly as in the nature of a direction from the principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contract shall be based upon that theory."

Anti-trust laws may be quite as lacking in constitutional decorum as are eight-hour and prevailing-wages laws; and the judiciary reserves to itself the right to determine what are the standards. The Texas Anti-trust law of 1889, for instance, overleapt judicial sanction. "It is not every restriction of competition or trade," reads the decision of District Judge Charles Swayne (February 22, 1897), "that is illegal or against public policy, or that will justify police regulation, but only such as are unwarrantable or oppressive; and a State statute which prohibits combinations formed for the purpose of reasonably restricting competition violates the rights of contracts guaranteed by the Federal Constitution." (79 Federal Reporter, 627.) Another legislature, with this lesson before it, will know better where to set bounds to its attempt at interference.

One cannot pass this phase of the general subject without recurring to the pertinent advice of the wise Sir Francis Bacon. "Judges," he wrote in his essay, "Of Judicature," "ought to remember that their office is *jus dicere*, and not *jus dare*, to interpret law, and not to make law. . . . Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. . . . A judge ought to prepare his way to a just sentence, as God useth to prepare his way, by raising valleys and taking down hills; so when there appeareth on either side a high hand, . . . cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen to make inequality equal; that he may paint his judgment as upon an even ground."

Wise counsel! though it seems to have lacked something in observance two hundred and seventy-five years ago, and may be suspected, even yet, of not always and everywhere reaching entire fulfilment.

III

We have the testimony of no less eminent an authority than United States District Judge John J. Jackson, of the Northern District of West Virginia, that in all his experience on the bench he could not recall a single occasion when any court, either Federal or State, ever abused the writ of injunction in strike questions. It is a definite and authoritative pronouncement; and the restrained and careful language accompanying it, wherein the officials of labor unions are described as "a professional set of agitators," and "vampires that fatten on the honest labor of the coal miners," certainly proves that it cannot be an *ex parte* statement. Yet, for all that, there is a widely diffused sentiment that the writ of injunction has occasionally been abused in strike questions. In the same locality, at about the same time, an injunction issued by United States District Judge B. F. Keller, of the Southern District of West Virginia, declared, among a multitude of other prohibitions, that the strikers "are further inhibited, enjoined, and restrained from assembling in camp or otherwise," even on grounds leased by them for their meetings.

A pamphlet, prepared by five members of the New York Bar and issued by the Social Reform Club, of New York City, in the summer of 1900,

gives the substance of a number of injunctions that have been issued against striking workmen. "In the case of the Sun Printing and Publishing Company *vs.* Delaney and others in December (1899)," says the pamphlet: —

"The Supreme Court of New York, among other things, enjoined the defendants from the exercise of their right to give the public their side of the controversy with the *Sun* as an argument against advertising in a paper which they claimed had treated them unjustly; it also forbade them from attempting to persuade newsdealers from selling the paper; and finally wound up with a sweeping restraint 'from in any other manner or by any other means interfering with the property, property rights, or business of the plaintiff.' It should be added that, on appeal, the Appellate Division struck out these commands; but they were so plainly subversive of fundamental rights that it is difficult to see how they could have been granted in the first instance.

"In still another case last year — The Wheeling Railway Company *vs.* John Smith and others (so runs the title of the action without naming the others) — in the United States Circuit Court, West Virginia, two men not parties to the action, nor found to be agents of 'John Smith and others,' whoever they may have been, were punished for contempt of court, for, among other things, 'reviling' and 'cursing' the court? not at all, but for 'reviling' and 'cursing' employees of the railroad company. If these men had not actually served out an imprisonment in jail for thirty days as a punishment for con-

tempt of corporation, it might be thought that your committee had taken this example from opera bouffe. The legality of this punishment was never passed on by the Supreme Court, for the reason, as your committee understand, that the parties were unable to bear the expense of taking it there, and so served their term in jail.

"During the final drafting of our report a temporary injunction has been granted by a Justice of the Supreme Court in New York City. . . . This injunction forbids the defendants [certain members of the Cigar Makers' International Union] even from approaching their former employers for the laudable purpose of reaching an amicable result; it forbids them from making their case known to the public if the tendency of that is to vex the plaintiffs or make them uneasy; it forbids them from trying in a perfectly peaceable way in any place in the city, even in the privacy of a man's own home, to persuade a new employee that justice is on their side, and that he ought to sympathize with them sufficiently not to work for unjust employers; and, finally, it forbids the union from paying money to the strikers to support their families during the strike."

Such instances, as the pamphlet states, can be multiplied. Perhaps they do not wholly controvert Judge Jackson's declaration. But, at least, they illustrate an unbridgeable disparity between the definitions of justice held on the one hand by our interpreters of law, and on the other by the overwhelming majority of the citizenship. That disparity has been great in all recent times; but weekly and daily it

grows greater. The stronger inclination of the judiciary to make property the paramount interest is everywhere observed; and the magnates, with an exultant recognition of the fact, make haste to enjoy the fruits of the new dispensation.

IV

From judgeship to attorneyship of a great corporation has recently become a common promotion. The number of ex-judges who have been thus translated to higher sees is notable: one finds or hears of them in many places. Republics may be ungrateful, as the adage runs, but not so the magnates. The gratitude of the latter may not be wholly platonic; it includes, no doubt, a lively sense of favors to come. But whether prospective or retrospective, it expresses itself in deeds of recompense, and that is the main test. It is a discriminating gratitude, moreover. Keenly enough, it recognizes the comparative value of service. Other servitors of the magnates may toil faithfully, and receive but moderate reward. The moulders of opinion, such, for instance, as the newspaper men, may ask for preferment, and be met by the impatient retort of Richard III to Buckingham, "I am not in the giving vein to-day." But for one who can interpret the law as it should be interpreted, there are glory and riches to be had for the asking.