THE COURTS AND FACTORY LEGISLATION.

BY GEO. W. ALGER.

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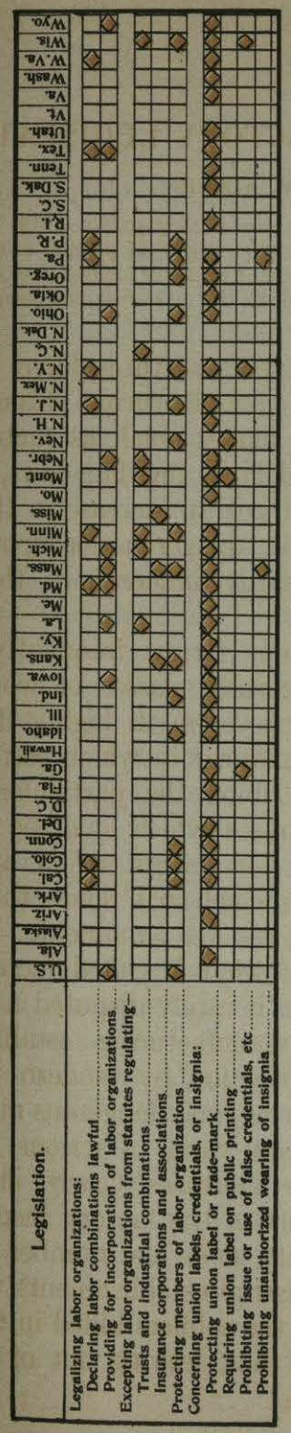
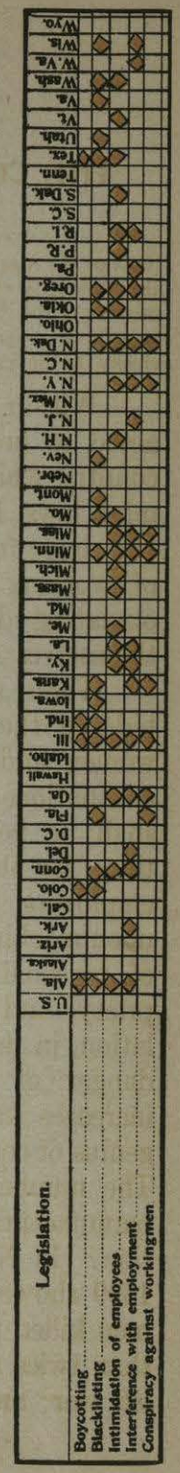
Within the past twenty years statutes have been enacted in nearly all the great manufacturing states of this country which, under various names, such as factory acts, mine laws, labor laws, railroad laws, building laws, and the like, have for their common object an increase in the safety of working people engaged in dangerous occupations by obviating dangers not necessarily inherent in the trades themselves.

These statutes take various forms; frequently in forbidding the employment of certain classes of workers (as women and children of tender years) in highly dangerous occupations; in directing the manner in which certain work shall be performed, by prescribing the particular precautions for the safety of employees which shall be taken by employers, and by providing for certain safety appliances upon machinery or rolling stock which shall render the chances of personal injury to employees less imminent. The propriety, and even necessity, of what is called factory legislation, in its general principles, is rarely disputed now. The danger of employment in manufacturing establishments increases yearly with the perfection by modern inventive genius of complex, rapidly moving, and dangerous machinery. The number of death cases and cases of serious injury in manufacturing establishments increases yearly in proportion. In New York the report of the factory inspector for 1899 showed that in that state alone the number of workmen killed per annum in industrial establishments was more than twice as large as that of the soldiers killed in the Spanish war; and showed further that, leaving out of consider-

LEGISLATION RELATING TO LABOR ORGANIZATIONS



LEGISLATION RELATING TO BOYCOTTING, BLACKLISTING, CONSPIRACY, INTIMIDATION, ETC.



ation the death cases (involving the destruction of some seven hundred lives), the casualties involving crippling, maiming, and wounding would show probably not fewer than forty thousand injuries all told. Under such circumstances, appropriate legislation to reduce the number of casualties by making safer the conditions of employment is amply justified, and statutes having such humanitarian objects in view should be entitled to most favorable consideration and construction by the courts, that the purposes of their enactment should be attained.

This form of legislation is based upon a modern theory of social economy which, long since recognized and followed by the legislatures, is in some states still regarded with concern and suspicion by the courts; a theory which, ordinarily masquerading under the conveniently vague name of police power, justifies class legislation so called, and asserts the right to interfere with the natural laws of the business world, aiming to secure the liberty of one class by curbing the license of another. It is perhaps needless to say that the doctrines of the common law regarding the reciprocal relations of master and servant were formulated and adopted under a totally different conception of economic philosophy—under the old laissez faire theory of extreme individualism. This theory resolutely closed its eyes to common, obvious, social, and economic distinctions between men, either considered as individuals or as classes, and with 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 choose to stay he must take the possible consequences of personal injury or death. The laissez faire doctrine became firmly imbedded in the law, and upon it the doctrine of assumed risk, in the modern

application of the maxim, Volenti non fit injuria, is unquestionably founded.

Under this theory the rules of the common law regarding the rights and duties of masters and servants were established before the commencement of the general legislative movement toward regulative statutes and factory laws. One of the best known of these rules is the so-called doctrine of assumed risk. There is no practical distinction in principle between this doctrine and that involved in the Latin maxim, but in this country the principle involved is more frequently discussed under the former name than the latter. The principle may be stated thus: A servant, by entering upon and continuing in a given employment, by the fact of such continuance is presumed to have voluntarily assumed the risk of personal injuries he may receive, by reason of the ordinary dangers inherent in the employment, by reason of any defect not necessarily inherent in the employment which he knew and understood as a danger before injury received, whether such defect was occasioned by his master's failure to perform his common law duty of furnishing his men with a safe place to work or not. This doctrine is one of the commonest and most successful defenses interposed by employers in this country in actions brought against them by their injured employees. In most of the American states the question whether the servant assumed the risks of personal injury from defective appliances has been treated as a matter of law for the judge to determine, and the continuance in employment with knowledge and comprehension of defects from which personal injuries are afterward received has been ordinarily held sufficient to authorize and require the trial judge to take the case from the jury and dismiss the plaintiff's action. Under the ordinary American rule continuance at his work by the employee with knowledge of a dangerous defect in machinery or in his place of employment can mean but one thing—a conscious, willing assent to the continuance of the danger to his life or safety, and a voluntary assumption of all chances of personal injury from it, absolving the master from all responsibility for such injuries, even if this defect exists by the master's carelessness or indifference to

the employee's safety. Even if the workman protests against the exposure of his life by such defect, if he keeps at work he assumes the risk he protests himself unwilling to assume. A somewhat different rule is adopted in England, where the question whether the workman voluntarily took his chances of being injured is for the jury to say from the circumstances.

Such being the American rule as to the ordinary negligences of the employer to do his legal duty in furnishing his workman a safe place to work, or safe tools and appliances, is there any different rule properly invoked when the master neglects to comply with a specific, definite, statutory duty? In case a statute makes it mandatory upon the employer to take certain precautions, to use certain safety appliances in his business, and he neglects or refuses to comply, does the workman who knows of his employer's neglect to comply with the statute, assume the risk of personal injury which may result from the latter's refusal to obey the law? If he does, then the statute is no protection to the workman, and is utterly worthless as far as its enforcement by ordinary suit at law is concerned. The answer to this question, moreover, will determine whether the courts will recognize and sustain the economic theory upon which such remedial statutes are framed, or will resist and nullify the application of that theory by upholding the laissez faire doctrine upon which the old rule of assumed risk is founded. The modern economic theory which is the justification of factory legislation and laws regulating the hours and conditions of labor for the protection of the working classes, has been recognized and approved by the United States Supreme court, in the great Utah eight hour law case, in which the court, in the opinion by Judge Brown, used the following significant language:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments (mining plants) and their operators do not stand upon an equality, and their interests are in a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced, by fear of discharge, to conform to regulations which their judgment,

fairly exercised, would pronounce detrimental to their health and strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all its parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

Under this theory, it is apparent that the question which we are considering involves an important matter of public policy. In an employment so dangerous (if necessary precautions be not taken) that great numbers of working people are exposed to avoidable dangers to life and limb, and when (recognizing the interest which the state has in the welfare of the citizen) the legislature has interposed its authority in enacting regulative statutes, does not public policy require that such statutes should be mandatory, and not subject to constructive or actual waiver by the persons for whose safety they are framed?

The English courts answer this query in the affirmative. Statutory duties imposed upon the master for the greater protection of the servant may not be waived by the latter. Public policy forbids it. In Baddesley vs. Lord Granville (10 Q. B. 423) an action was brought for the death of a miner caused by a violation of the coal mines regulation act, which requires that a banksman be kept at the mouth of coalpits while miners are going up and down the shaft. The court held that the fact that the deceased knew that no banksman was employed by defendant and yet continued to work at the mine did not constitute a defense. Says Baron Wills:

"There should be no encouragement given to the making of an agreement between A and B that B shall be at liberty to

break the law which has been passed for the protection of A. . . . . If the supposed agreement between the deceased and the defendant in consequence of which the principle of volenti non fit injuria is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed upon him by the statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as himself—such an agreement would be in violation of public policy and ought not to be listened to."

In New York the question whether the statutory duties imposed on employers to guard cogs, gearings, etc., under the factory act could be waived by the employee continuing his work after he knew of his master's violation of this law, has been considered several times. In the case of Simpson vs. the New York Rubber Co. (80 Hun. 415) the general term of the supreme court held that public policy forbade such waiver.

This decision has been in effect reversed by the court of appeals in a later case involving the same question, and in which it was held that the employee may by entering upon the employment with full knowledge of all the facts waive, under the common law doctrine of obvious risks, the performance by the employer of the duty to furnish the special protection prescribed by the factory act. This case (Knisley vs. Pratt, 148 N. Y. 372) passes lightly over the question of public policy, without giving it consideration, except by saying 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, and which is contrary to the decisions of Massachusetts and England under similar statutes. The decision of other states and of England affirming this new and startling doctrine are not considered at all, and the court's attention does not seem to have been called to them by plaintiff's counsel in his brief. The decision is based largely upon supposed analogies between the case at bar and English and Massachusetts

cases on employer's liability acts. These latter cases held that the English act (that of 1880) and the substantially similar Massachusetts law of 1887 (neither of which created or imposed any new statutory duty on the master) were intended to modify the fellow servant doctrine, and not to affect in any way the doctrine of assumed risk. In the Knisley case the defendant refused or neglected to obey the mandatory provision of the Factory act imposing the specific duty upon him of placing guards on cogwheels of his machinery. Owing to the absence of these guards, and apparently not by reason of any personal carelessness, the plaintiff's arm was drawn into the cogs and so crushed and torn that it had to be amputated at the shoulder—a peculiarly distressing case. In this case the plaintiff was a young woman of full age. The New York court recognizes no difference in the rule by reason of infancy, however.

The question of the assumption of statutory risks has been adjudicated upon in Illinois in several cases, but the exact question of public policy involved is apparently still undecided by its highest court. The decisions would make the final adoption of the English rule more probable. It has been held in Indiana, Missouri, and Illinois that where there is a general public ordinance regulating the speed of railway trains passing near or through cities, enacted for the benefit of the public, an employee of a railroad who continues in its employment with knowledge of the violation of the ordinance (without contributing actively to its violation) does not assume the risk of injury, nor is he by reason of his employment deprived of any of the benefits of the ordinance to which other citizens are entitled.

In Greenlee vs. Southern Railway Co. the plaintiff was injured by reason of the failure of the railroad company defendant to comply with the federal law requiring self couplers and air brakes to be placed on all freight and passenger cars by January 1, 1898. The plaintiff's injuries were due to a defective brake. The plaintiff's recovery, at trial, was affirmed on appeal, the court using the following language:

"Six years ago this court said it would soon be negligence per se whenever an action happened for lack of a self coupler.

Congress has enacted that self couplers should be used. For this lack this plaintiff was injured. It is true the defendant replies that the plaintiff remained in its service knowing it did not have self couplers. If that were a defense, no railroad company would ever be liable for failure to put in life saving devices, and the need of bread would force employees to continue the annual sacrifice of thousands of men. But this is not the doctrine of assumption of risk. That is a more reasonable doctrine, and is merely that when a particular machine is defective or injured, and the employee, knowing it, continues to use it, he assumes the risk. That doctrine has no application where the law requires the adoption of new devices to save life or limb (as self couplers), and the employee, either ignorant of that fact or expecting daily compliance with the law, continues in service with the appliances formerly in use."

Two cases illustrative of the diversity of opinion among the courts on this matter of public policy involve statutes requiring railroad companies to fill or block frogs and guard rails on their tracks. In both cases the actions were for recovery of damages for personal injuries from such unblocked frogs received by employees who continued in the railroad service with knowledge that the condition of the rails was contrary to the statute and dangerous. In one decided by the United States Circuit court of appeals, in the opinion of Judge Taft, the learned justice remarks: "In the absence of statute, and upon common law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of blocks in guard rails and switches by defendant." The court held, however, that the plaintiff's rights under the statute could not be waived by continuance:

The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract;

and it would entirely defeat this purpose thus to permit the servant to contract the master out of the statute.

In the other case, the Supreme court of Maine held that the continuing servant assumed the risk of injury from the railway's refusal to obey the law requiring blocked frogs and guard rails.

In Mississippi the state constitution provides (Art. VII., sec. 193):

Knowledge by any employee injured of the defective or unsafe character of any machinery, ways, or appliances shall be no defense to an action for injuries caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them.

A similar statutory provision appears in the Revised Statutes of Ontario, chap. 160, sec. 6:

Provided, however, that such workman shall not reason only of his continuing in the employment of the employer with knowledge of the defect negligence act or omission which caused his injury be deemed to have voluntarily incurred the risk of the injury.

If the writer may venture a personal opinion, it is that the English rule, in cases where no violation of statute is involved, is fairer, leaving it for the jury to say, from the facts in evidence in a given case, whether the workman who continues to use machinery he knows to be defective should be held to have assumed the risk of injury. It has the merit of flexibility, and is more calculated to meet the requirements of substantial justice in the varying facts of different cases.

As to the violation of regulative statutes framed to secure the safety of the employee, the situation would seem to be simpler. If the conditions of an employment are such as to make such legislation necessary to preserve the lives of employees, such resulting legislation should be supported by the courts instead of being nullified and rendered absurd.

The attitude of the courts toward factory legislation is of importance to others besides the injured litigant. While it has been said on good authority that the courts in the great manufacturing states are desirous of diminishing the constantly increasing flood of negligence litigation by discouraging the

injured servant from taking his troubles to court, the public, and particularly the working classes, are interested in obtaining the same result by diminishing the number of accidents from which alone such lawsuits can originate. Any perceptible diminution in the number of accidents can scarcely be expected when the responsibility of the master for his own negligence to his workmen is nominal and not actual. The prospect of verdicts for large damages actually sustained on appeal in actions brought against him by his injured employees would be a most healthful stimulus to vigilance by the master in performing his legal duties to his men and in giving reasonable care to their safety. A reasonable modification of the assumption doctrine would, moreover, make unnecessary the greater part of the regulative statutes applying to particular trades, yearly increasing in bulk and complexity, confusing alike to lawyer and layman—in itself a consummation devoutly to be wished.