

Criminal Law. Eight Hour Law, Prosecutions for Violation of. Prosecutions, for Violating Eight Hour Law.

1. Under facts submitted, doubt is expressed if conviction for violating eight hour law can be sustained.
2. Cases pending should be permitted to take their usual course until district court has passed on sufficiency of evidence under admitted facts.

Helena, Montana, September 16, 1909.

Hon. J. C. Huntoon,
County Attorney,
Lewistown, Montana.

Dear Sir:

I am in receipt of your letter of the 11th instant, submitting the proposition as to whether, under the statement of facts given by you, a conviction can be sustained for a violation of section 1739, revised codes, known as the Eight Hour Law.

It appears from the statement of facts that the town of Roundup, by ordinance, required all side walks laid on a certain street to be twelve feet in width; that a local engineer, not appointed by the council as city engineer, determined the grade of this street and the levels for the side walks; that subsequently an owner of property let a contract for the construction of a walk on this street in front of his property; that the contractor, in prosecuting his work, caused some of his employees to work more than eight hours in a day, paying them for the extra time. The town had also declared by ordinance that if it ordered the walk put down, and the property owner did not lay the walk, the town could do so and tax the cost of the construction to the owner.

In this case, however, the town never had ordered the construction of the walk in question, nor had it ever taken any action with respect thereto, nor had it accepted the walk after the same was laid by the private contractor. The contractor was arrested and convicted in the justice court for violating the eight hour law. Can the conviction be sustained on an appeal, under this statement of facts?

As this case is now in court our discussion of it must be considered rather more personal than official, for the district court alone has authority to set aside the conviction. However, as a matter of discussion, we

are inclined to the belief that the facts are not sufficient to sustain the conviction. This law has been twice considered by the supreme court of this state. First, as to its constitutionality, etc., in *State v. Livingston Concrete Co.*, 34 Mont., 570, 87 Pac., 980, and again in *State v. Hughes*, 100 Pac., 610. In this latter case the city of Billings let a contract to Hughes for the construction of certain walks at stipulated price. Hughes sublet the contract, but retained in himself the authority to see that the work done by the subcontractor was in accordance with the terms of his contract with the city. The city paid Hughes for doing the work, and Hughes paid the subcontractor. The subcontractors worked their men more than eight hours, and Hughes was arrested and convicted. The supreme court set aside the conviction on the ground that the relation between Hughes and the men who did the work was too remote. But it would seem that this relation between Hughes and the employees was more proximate than the relations in the case at bar between the town of Roundup and the contractor who laid the walk in question. In the Hughes case the work had been ordered by the city; the city had actually made a contract for the doing of the work. Hughes was the contractor. As such contractor he received pay from the city, and furnished the money to the subcontractor with which the men were paid. But in the case at bar the town never ordered the walk laid. It made no contract, directly nor indirectly. It did not establish any price for the walk; neither did it accept the walk after it was laid, nor is there any duty resting upon the town to accept the walk; nor is there any evidence that would accept the walk; and if the town were now to order a walk laid on that street, for aught the record shows, it would or could for some reason refuse to accept this walk and order it taken up and another one put down according to the specifications then determined upon by the city council. It seems to us that it would be an exceedingly attenuated construction to say that this walk was a "work or undertaking carried on or aided" by the town of Roundup. The action of the council in determining by ordinance what kind of walk, if any, should be put down, and the action of the engineer in determining the grade or levels, no more constitute this a work carried on or aided by the town than would similar action on the part of the council or the engineer with respect to the construction of private dwellings, especially within the fire limits, make the same a work carried on or aided by the municipality. Such "undertakings" are rather "works" within the town than by the town.

However, this is only a private discussion of a proposition of law, for as the case is now in the district court, or, as I infer, will be there the matter must be passed upon by the district judge, for he alone has the authority either to affirm or to set aside the conviction in the justice court. But as these cases are now pending in court, and as a protection to yourself, I would suggest that they be permitted to take regular course, unless those remaining untried can be continued by stipulation until the district court has passed upon the one appealed.

Very truly yours,

ALBERT J. GALEN,

Attorney General.