Opinion No. 339.

Labor—Eight Hour Day—Women—Statutes, Construction of.

HELD: Section 3073.1 R. C. M. 1935 is merely cumulative with reference to females employed in stores in cities and towns of a population of 2,500, and over; it is not necessarily repugnant to Section 3076 R. C. M. 1935, and the latter section is not repealed either in whole or in part.

August 10, 1936.

Mr. A. P. Bruce
Commissioner, Department of
Agriculture, Labor and Industry
The Capitol

You have requested my opinion on the question whether Chapter 8, Laws of 1933-34, repeals Section 3076 R. C. M. 1935, in so far as the latter applies to retail stores in towns under 2,500 in population. Section 3076 reads: "No female shall be employed in any manufacturing, mechanical, or mercantile establishment, telephone exchange room, or office, or telegraph office, laundry, hotel, or restaurant in this state, for more than eight hours in any one day. The hours of work may be so arranged as to per-

mit the employment of females at any time so that they shall not work more than eight hours during the twenty-four of any one day; provided, that females may be employed in retail stores to work not to exceed ten hours in any one day for one week immediately preceding Christmas day."

Said Chapter 8 (Section 3073.1 R. C. M. 1935) provides: "A period of eight (8) hours shall constitute a day's work and a period of not to exceed forty-eight (48) hours shall constitute a week's work in all cities and towns having a population of twenty-five hundred (2,500), or over, for all persons employed in retail stores, and in all leased businesses where the lessor dictates the price, also kind of merchandise that is sold, and the hours and conditions of operation of the business, all persons employed in delivering goods sold in such stores, all persons employed in wholesale warehouses used for supplying retail establishments with goods, and all persons employed in delivering goods to retail establishments from such wholesale warehouses."

Said Chapter 8 does not expressly repeal said Section 3076. Does it repeal this section by implication because of conflict therewith? It will be noted that Section 3076 applies only to females employed in "any manufacturing, mechanical, or mercantile establishment, telephone exchange room, or office, or telegraph office, laundry, hotel or restaurant", regardless of the size of cities and towns, by limiting the hours of employment to eight hours per day. Section 3073.1 (Chapter 8) brings males employed in retail stores within the eight hour law in all cities and towns 2,500 or over in population. It is a general statute in so far as it applies to both males and females but it does not alter the situation as to females who by Section 3076 were already under the eight hour law unless Section 3076 is in part repealed by implication.

It is my opinion that it was the intention of the legislature to bring males employed in retail stores in cities and towns of 2,500, or over, in population, within the eight hour law and that the legislature had no intention to lay down the bars so far as females are concerned, by permitting unregulated employment of them in retail stores in cities and towns under 2,500 in population. Moreover, if some employers may employ women more than eight hours in retail stores in cities or towns under 2,500 in population but others may not employ them in manufacturing or mechanical establishments or in laundries, hotels or restaurants or other establishments in such cities or towns or in retail stores in cities or towns of 2,500, or over, said Chapter 8 creates a discrimination which might render it unconstitutional, if unreasonable. That the legislature intended by Chapter 8 to introduce an unconstitutional discrimination between employers is absurd but even if that should be the effect of Chapter 8, Section 3076 would nevertheless remain intact. We prefer to take the view that does not place Chapter 8 in jeopardy of being unconstitutional.

It is the generally accepted rule that courts do not favor repeal by implication and that they will not make such adjudication if they can avoid doing so consistently or on any reasonable hypothesis. Nor will they adopt an interpretation leading to adjudication by repeal unless it is inevitable and unless a legislative intent to repeal or supersede the statute plainly or clearly appears. (59 C. J. 905.)

The tendency of the day is to reduce the number of working hours for both men and women rather than increase them. A woman who must work to support herself and family is at an obvious disadvantage. As was said in Muller v. Oregon, 208 U. S. 412, "she becomes an object of public interest and care in order to preserve the strength and vigor of the race," if not for purely humanitarian reasons. The interest of the public has not been lessened in recent years. We have not arrived at the time when women are not the "special subject of exploitation because they are women and are not in a relatively defenseless position." (Quoting from Chief Justice Hughes in his dissenting opinion in the recent case of Morehead v. New York, ex rel. Tipaldo, 80 L. Ed. 921, 936). It seems hardly conceivable that our legislature, in view of the

protection needed by working women against some unscrupulous employers, intended to repeal the eight hour law for women in retail stores in towns under 2,500 in population—a law in operation for nearly twenty-five years, and universally recognized as both humane and beneficial. It is hardly conceivable that the legislature intended to repeal a law of such vital public concern without express mention of the fact. It is my opinion that the legislature had no intention of repealing Section 3076. In placing males in retail stores in cities and towns of 2500, or over, in population, under the eight hour law and at the same time including females therein, the legislature merely inadvertently duplicated the law already in existence for females in retail stores in cities and towns of 2500, or over, in population. To that extent Chapter 8 is merely cumulative as to females. This seems to me to be a reasonable hypothesis upon which to reconcile any apparent repugnancy between the acts. The rule is stated in 59 C. J. 913: "* * * it is not sufficient to establish an implied repeal by inconsistency or repugnancy that the subsequent law covers some, or even all, of the cases provided for by the prior statute, **since it may be merely affirmative, cumulative, or auxiliary.**" (Emphasis ours). (See also 59 C. J. 912, note 72).

I am of the opinion that on this theory the two acts can be harmonized and both can stand, operate and be given effect. The seeming inconsistency or repugnancy is not irreconcilable. It is the duty of the court to harmonize and reconcile seemingly repugnant acts if it is possible by any fair and reasonable construction. (59 C. J. 917.) It is therefore my opinion that Chapter 8 (Section 3073.1) is merely cumulative with reference to females employed in stores in cities and towns of a population of 2500, and over, and that it is not necessarily repugnant to Section 3076, and that the latter section is not repealed either in whole or in part.