itaries, so as to be at all times subject to draft for the purpose of meeting the current expenses of the county, has not been confided in the commissioners, but rather in the county treasurer.

The only statutory limitation in the depositary act upon the amount that may be deposited in any depositary, is that to be found in the last sentence of section 2715 G. C., but since it does not appear in your letter that the amount which the treasurer wishes to transfer to the active depositary is in excess of the prescribed limitation, it will be assumed that the limitation prescribed by section 2715 G. C. is not involved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3392.

WORK HOURS OF FEMALES—SECTION 1008 G. C. DOES NOT APPLY TO EMPLOYMENT OF FEMALES AS TELEGRAPH OPERATORS ON INTERSTATE RAILROAD.

Section 1008 *of the General Code and other similar state laws do not apply to the employment of females as telegraph operators on interstate railroad.*

COLUMBUS, OHIO, July 24, 1922.

HON. PERCY TETLOW, *Director, Department of Industrial Relations, Columbus, Ohio.*

GENTLEMEN:—This department acknowledges receipt of your letter transmitting correspondence between the General Superintendent of the Southwest District of the Baltimore and Ohio Railroad Company and the Chief of the Division of Factory Inspection of the Department of Industrial Relations in which the question is raised as to the application of the law of the State of Ohio relative to the hours of labor of females in industry to female employes of an interstate railroad company engaged in the transmission and receipt of telegraphic messages in connection with the movement of trains.

It will not be necessary to quote any statutes, but is sufficient to state that the Ohio legislation in question limits the hours of labor per day and per week respectively of females employed on work of this character; and that the congress of the United States has passed a law which has been in effect for several years regulating the hours of labor of employes of interstate railroads engaged in this same work. See sections 8677 and 8678 Compiled Statutes of the United States which make it plain that telegraph operators are included within the scope of the Federal Act. The hours mentioned in the Federal Act are more liberal from the standpoint of an employer than those mentioned in the State Act, so that if it is possible for both laws to be in effect at the same time, the employment of a person for a given number of hours might be a violation of the state law without being in violation of the federal law. It should also be stated that while the federal law does not directly regulate the hours of labor per week as does the state law, there is a provision in section 8678 of the Compiled Statutes of the United States regulating the number of days overtime service in any one week.

There is also in another federal law, section 8688 Compiled Statutes of the United States, a provision fixing eight hours as the standard day's work for the purpose of interpretation of contracts of labor and for the purpose of reckoning the compensation for service of employes of common carriers by railroads in interstate commerce.

The Federal Act contains no specific provisions relative to the employment of females as such, its regulations being applicable to employes of both sexes alike.

The general principle is that in the absence of legislation by congress, the laws of the state are competent to govern the relation of employer and employe in interstate commerce and to impose police regulations for the protection of the health, comfort and safety of persons engaged in interstate commerce; but that congress also by reason of the express grant of power in the federal constitution to regulate interstate commerce, has the power to legislate on these subjects. That is to say, the federal power in cases of this kind is not exclusive, so that the states may act in the absence of congressional legislation. The federal power of this character is sometimes classed as "concurrent" with that of the state, but that term is a misnomer, for when congress has so acted as to manifest an intention to cover a particular field of police regulations in the general field of interstate commerce, its action then becomes the sole and exclusive law of the land. That is to say, the state law does not yield to the federal law simply because the federal law is paramount, and simply to the extent of its inconsistency with the federal law, but it becomes null and void during the life of the federal law no matter how compatible with the federal law it may be.

These principles have been applied to the federal hours of service act in several cases, but one of which need be noted. In this connection see Erie R. R. Co. v. N. Y. 233 U. S. 671. The state courts had sustained a judgment against the railroad company, an interstate carrier, for a statutory penalty for violation of a certain section of the New York statutes regulating the hours of labor of telegraph and telephone operators and signal men on surface, subway and elevated railroads. The Supreme Court of the United States reversed this judgment. The following is found in the opinion per Mr. Justice McKenna:

> "The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148, and cases cited. Also Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L. R. A. (N. S.) 203, 33 Sup. Ct. Rep. 174; Chicago I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep 581; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L. R. A. (N. S.) 984, 33 Sup. Ct. Rep. 431; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729; Taylor v. Taylor, 232 U. S. 363, ante, 638, 34 Sup. Ct. Rep. 350.
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> This is the general principle. It was given application to an instance like that in the case at bar in Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160. The case arose upon an asserted conflict between the hours of service law of March 4, 1907, the one involved here, and a law of the state of Washington which also regulated the hours of railway employes. The latter became effective June 12, 1907; that is, before the time the federal hours of service law was in force, but after its enactment. The state act resembled the federal act, and prohibited the consecutive hours of service which had taken place on the Northern Pacific Railroad, and on account of which the action was brought by the Attorney-General of the state against the company for the penalties prescribed for violation of the act. The railroad company admitted the facts, but denied liability under the act, asserting that its train was an interstate train and was not subject to the control of the state, because within the exclusive control of Congress on that subject. The trial court granted a motion for judgment on the pleadings, which

was affirmed by the Supreme Court of the state. That court held that the train was an interstate train, and conceded that Congress might prescribe the number of consecutive hours an employe of a carrier so engaged should be required to remain on duty; and when it so legislated upon the subject, its act superseded any and all state legislation on that particular subject. But the court held that the act of Congress did not apply because of its provision that it should not take effect until one year after its passage, and until such time it should be treated as not existing.

We reversed the judgment on the ground that the view expressed was not 'compatible with the paramount power of Congress over interstate commerce,' and we considered it elementary that the police power of the state could only exist from the silence of the Congress upon the subject, and ceased when Congress acted or manifested its purpose to call into play its exclusive power. It was further said that the mere fact of the enactment of the act of March 4, 1907, was a manifestation of the will of Congress to bring the subject within its control, and to reason that because Congress chose to make its prohibitions take effect only after a year, it was intended to leave the subject to state power, was to cause the act of Congress to destroy itself. There was no conceivable reason, it was said, for postponing the prohibition if it was contemplated that the state law should apply in the meantime. The reason for the postponement, it was pointed out, was to enable the railroads to meet the new conditions.

The reasoning of the opinion and the decision oppose the contention of defendant in error and of the court of appeals, that the state law and the federal law can stand together, because as expressed by the court of appeals, 'the state has simply supplemented the action of the federal authorities,' and on account of special conditions prevailing within its limits, has raised the limit of safety; and the form of the federal statute, although 'not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary.'

We realize the strength of these observations, but they put out the view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when congress manifests a purpose to enter it.

Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'hours of service' law of March 4, 1907, is the judgment of congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

This case in its application to the general principles above laid down would be entirely decisive of the present question if the federal law attempted to regulate the hours of service per week and the state law applied alike to males and to females. The difficulty encountered here is engendered by these two dissimilarities in the two laws. For example, it is suggested by the chief of the Division of Workshops, Factories and Public Buildings that the state law is in the field of legislation for the protection of women as a class; and it appears from the facts that the particular provision of the state law which is alleged to have been violated in the case in question is not that which regulates the hours of service per day, but that which regulates the hours or days of service per week. These points deserve brief consideration. They will be taken up in the inverse order of that previously mentioned herein.

First, as to the fact that the federal law does not regulate hours or days of service per week. This it is believed is immaterial, being answered by the remark of Mr. Justice McKenna that the federal law is intended to be

> "the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

That is to say, if both the state and federal laws applied to hours of service of all employes without discrimination on the footing of sex, the mere fact that the state law contains a provision regulating the hours of service per week while the federal law does not directly regulate this particular subject, would not prevent the operation of the principle above laid down so as to nullify the state provision with respect to hours of service per week as well as that with respect to hours of service per day. In other words, congress having entered the field of legislation respecting hours of service of employes of this character, its legislation becomes exclusive in the sense that its silence on the question of hours of service per week becomes indicative of the intention of congress that there shall be no limitation on such hours of service.

The other point offers greater difficulty. It may be contended that the state law is not a regulation of the hours of service of telegraph operators as such, but a regulation of the hours of labor of women as such; and that congress by entering the field of legislation respecting the hours of service of telegraph operators on interstate railroads as such did not thereby manifest any intention to exclude the operation of the state power with respect to the hours of service of women as such, though engaged as telegraph operators. This point makes it necessary to consider the limitations of the principle thus far developed. As well put in 12 C. J. 18:

> "To have the effect of superseding a state statute, it is not sufficient that a congressional regulation of commerce invades the same field; it must expressly cover the precise subject matter, or show a purpose to take legislative possession of the whole field, * * *. A state statute may be allowed to stand unless the repugnancy and conflict between it and the act of congress are so direct and positive that the two acts cannot be reconciled or stand together." * * *

The statement of the text is justified by the following quotation from Savage v. Jones, 225 U. S. 501:

> "When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen fields else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of congress within the sphere of its delegated power. But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of congress fairly interpreted is in actual conflict with the law of the state."

See also, Missouri, etc. R. Co. v. Harris, 234 U. S. 412.

To be sure, these words were used in a case in which the claim that the federal legislation had superseded that of the state was rather tenuous, but that they state a well established principle cannot be gainsaid.

Notwithstanding this limitation, it is the opinion of this department that the state law, though intended to apply to women only, does so conflict with the intention of congress as manifested through its legislation as to make it impossible for the two to operate together in the same field. This is so because it is clear that congress contemplated all employes both male and female in the scope of its legislation, and because section 8678 of the United States Compiled Statutes not only contains negative language, but also, and by way of exception, certain affirmative and permissive language. The following may be quoted:

> "No operator * * * shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period * * * in all * * * places * * * continuously operated night and day, nor for a longer period than thirteen hours in all * * * places * * * operated only during the day time, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

It is impossible to reconcile this language with section 1008 of the General Code which provides in part that:

> "Females over eighteen years of age shall not be employed * * * in connection with any * * * telegraph office, * * * or in the distributing or transmission of messages * * * more than nine hours in any one day except Saturday * * * or more than six days, or more than fifty hours in any one week. * * *."

There is no emergency clause and no permissive language of the kind found in the Federal Act. The conclusion is therefore reached that section 1008 of the General Code and other similar state laws do not apply to the employment of females as telegraph operators on interstate railroads.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3393.

APPROVAL, BONDS OF CITY OF WELLSTON, $15,000, FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, July 24, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.