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BULLETIN OF THE
U. S. BUREAU OF LABOR STATISTICS.

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REVIEW OF DECISIONS OF COURTS AFFECTING LABOR, 1914.

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INTRODUCTION.

This is the third annual bulletin devoted to the subject of the interpretation of labor laws by the courts, the preceding bulletins in this series being No. 112 and No. 152. During the publication of the bimonthly bulletins of this Bureau, ending with No. 100, practically every bulletin contained some pages of material of this nature. The present series began with the year 1912. The decisions reproduced are mainly those rendered by the Federal courts or by the State courts of last resort, though in a few cases the opinions of subordinate courts of appellate jurisdiction have been used. Not all cases of the classes considered have been noted, the purpose being to show the construction placed upon labor legislation and the application of the common law to the labor contract and its incidents by the selection of representative cases. Questions of constitutionality and those affecting the development of the new forms of legislation, together with cases affecting the status and powers of organized labor, have received the fullest attention. Opinions of the Attorney General of the United States construing Federal labor legislation have appeared in the two preceding bulletins named, but no opinion of this class was handed down by this official during the year 1914.

The method of presentation is that which has been systematically followed in the past—i. e., an abridged statement of facts, followed in most instances by quotations from the opinions of the court, showing the conclusions reached and the grounds therefor. In a number of cases, however, this procedure has been departed from by a very brief statement of the conclusions showing the application of the statute in question to the particular point referred to the court for decision.

The National Reporter System, published by the West Publishing Co., has been depended upon for the court decisions reproduced, except in the matter of reports of cases decided in the courts of the

District of Columbia, for which the Washington Law Reporter was used. The decisions presented are those appearing in the foregoing publications during the calendar year 1914, with the exception of a few decisions by the Supreme Court of the United States on cases argued during the calendar year named, the opinions being rendered early in 1915. The reporters, etc., covered are as follows:

Supreme Court Reporter, volume 34, page 48, to volume 35, page 25.

Federal Reporter, volume 208, page 497, to volume 217, page 688.

Northeastern Reporter, volume 103, page 401, to volume 106, page 1087.

Atlantic Reporter, volume 88, page 977, to volume 92, page 512.

Southeastern Reporter, volume 80, page 225, to volume 83, page 672.

Southern Reporter, volume 63, page 505, to volume 66, page 456.

Southwestern Reporter, volume 161, page 1, to volume 170, page 1199.

Northwestern Reporter, volume 144, page 209, to volume 149, page 720.

Pacific Reporter, volume 136, page 849, to volume 144, page 576.

Opinions of Attorney General, volume 30, pages 241 to 288.

Washington Law Reporter, volume 42.

Perhaps the most interesting class of decisions, as well as one of the most numerous, is the group relating to the subject of workmen's compensation—a type of legislation which was enacted for the purpose of doing away with litigation. However, the type of law is new in the United States, and many expressions are used which seem to require legal definition, while the construction of the laws must necessarily be made authoritative by a process of adjudication. Many points are of minor importance and doubtless represent chiefly a desire to secure early definiteness in the construction of the details of the acts. The Federal employers' liability act continues to be the subject of numerous decisions as to its scope, considerable divergence as to liberality being noticed. Interesting and important decisions relative to labor organizations are also presented in this bulletin, notably the closing up of the long, protracted Danbury Hatters' Case (p. 140), the dissolution of the injunction in the case Mitchell *v.* Hitchman Coal & Coke Co. (p. 315), and the declaration of unconstitutionality of the so-called coercion law of Kansas (Coppage *v.* Kansas, p. 147).

DECISIONS OF COURTS.

Court decisions are divided into two groups, dependent upon whether they are based upon statutes or upon the principles of the common law not enacted into statute form. In this review, however, this distinction is not observed, but the cases are grouped in a general way according to the subject matter considered.

CONTRACT OF EMPLOYMENT.

The question of the labor contract has been the subject of but few laws, so that the decisions under this head are chiefly those that apply the principles of the common law.

The reformation of a written contract obtained by fraud was passed upon in the case Pierson *v.* Kingman Milling Co. (p. 272), in which an injured workman signed a release on the presumption that he was secured in employment for life. The court held that the contract should be made to conform to the oral representations made at the time, and that such a contract was enforceable, not being within the statute of frauds, and not void for indefiniteness. The proper form of procedure in case of the breach of a contract of this nature was considered in Pennsylvania Co. *v.* Good (p. 57), the plaintiff being held in this instance to be barred by the statute of limitations. That an employee may properly be discharged before the end of the term for which he was engaged when he violates the rules of his employer was held in Corley *v.* Rivers (p. 274). The effect of the terms used in a contract for employment was considered in Resener *v.* Watts, Ritter & Co. (p. 275), the court holding that, in the absence of other facts, a hiring on a monthly or yearly salary would be presumed to be a hiring at will. It was held in Nesbit *v.* Giblin (p. 275) that a conditional resignation must be accepted within a reasonable time if the employer desires to terminate the contract, and that damages will lie for a discharge after conduct which would indicate the purpose of the employer to continue the employment. The liability of an employer for the wrongful acts of his employees was declared in the case Birmingham Ledger Co. *v.* Buchanan (p. 277), where the agents of a newspaper company forcibly detained newsboys to prevent their taking employment with a rival. An unratified assault on a third party by an employee was held not to make the employer liable in Matsuda *v.* Hammond (p. 276); while a judgment declaring the nonliability of the employer for a fatal assault by the employee on a trespasser was reversed in Tarnowski *v.* L. S. & M. S. R. Co. (p. 278).

The existence of the relation of employer and employee came up for consideration in some cases in which workmen were being transported to or from their places of employment. In Indianapolis T. & T. Co. *v.* Isgrig (p. 288) it was held that a street railway employee riding home on a pass containing a stipulation exempting the company from liability for death or injury while using the same was a passenger and entitled to protection as such, the pass being presumed to be a part of the employee's wages, and not a gratuity. In Klinck *v.* Chicago Street Ry. Co. (p. 289) the same view was taken; while in Charleston & W. C. R Co. *v.* Thompson (p. 103), this principle was held to apply to the members of an employee's family riding on a pass,

such pass being held to be a part of the employee's compensation, and permissible as such under the Federal law known as the "Hepburn Act." A fireman riding as a passenger on an engine in violation of rules was held to be a trespasser, for whose death by accident the company was not liable (Dixon *v.* Central of Ga. Ry. Co., p. 289).

The right of an employee to recover damages where a third party interferes to procure his discharge was considered in Bausbach *v.* Reiff (p. 294), in which a verdict in favor of a group of workmen who were charged with conspiracy to procure the discharge of an employee was reversed, and a new trial ordered. In Johnson *v.* Aetna Life Ins. Co. (p. 292) it was held that while a letter demanding the discharge of an employee was prima facie evidence of interference, the evidence failed to disclose the causal connection necessary, and the company was held not to be liable in this case. In another case, Heffernan *v.* Whittlsey (p. 296), an employee secured the discharge of his rival, who thereupon sued the company and the interfering employee. Conspiracy was not found, nor was there sufficient evidence to support the charge of malice against the company, so that it was discharged from liability, while the worker who instigated the charges was held liable in damages.

WAGES.

The question of minimum wages received its first notice in the courts of this country last year in connection with the Oregon statute. In Stettler *v.* O'Hara (p. 173) the constitutionality of the statute was upheld, and the power of the commission to which its enforcement was committed to make local and specific applications of the act was affirmed. In Simpson *v.* O'Hara (p. 172) the act was again held to be constitutional, as not being inimical to the provisions of the fourteenth amendment to the Federal Constitution. The rate of wages was considered in another aspect in Wright *v.* Hoctor (p. 186), a statute requiring union labor to be employed and fixing the rate of wages at $2 per day being held unconstitutional.

The question of rates fixed by ordinance was involved in the case Malette *v.* City of Spokane (p. 191). In this case the validity of the ordinance was sustained, as within the power of the State to determine under what conditions it would make contracts, acting through its municipalities.

The question of the time of the payment of wages arose in Erie R. Co. *v.* Williams (p. 195), the New York law requiring semimonthly payment of wages by railroads, etc., being held constitutional by the Supreme Court of the United States. The Supreme Court of Tennessee (State *v.* Prudential Coal Co., p. 196) held unconstitutional a law of that State providing for a semimonthly pay day for corporations running a commissary or supply store, and providing penalties for

failure to comply with the act, the ground being that since an employer who violated the act might be imprisoned for such violation, the spirit of the law which forbids imprisonment for debt was contravened, so that the statute must fall. The requirement of the redemption of scrip is embodied in a Virginia statute which was before the Supreme Court of the United States in the case Keokee Consolidated Coke Co. *v.* Taylor (p. 190), the constitutionality of a law requiring mining and manufacturing companies to redeem in cash store orders issued by them as payable only in merchandise being affirmed. The same view is taken of a very similar point in Regan *v.* Tremont Lumber Co. (p. 189), the Supreme Court of Louisiana upholding the statute of that State.

Statutes providing penalties for failure of the employer to pay wages due workmen on their discharge were considered in two cases. In Kirven *v.* Wilds (p. 190) the Supreme Court of South Carolina affirmed a judgment for a penalty awarded a discharged workman by the court below, while in C. C. C. & St. L. R. Co. *v.* Schuler (p. 190) the Supreme Court of Indiana declared unconstitutional a statute providing a cumulative penalty for the failure of railroad companies to pay their workmen any wages due on the termination of employment.

A statute of Indiana requiring assignments of wages of a married man to have the written consent of his wife was considered in C. C. C. & St. L. R. Co. *v.* Marshall (p. 188), this provision being sustained as constitutional and of general application, and not restricted to wage brokers only.

That an employer should not be held for the mistaken payment of wages to a person fraudulently holding an identification card, the employer himself not being negligent, was held in Roumelitis *v.* M. P. R. Co. (p. 338). Under this head may be noted the case Hughes *v.* Traeger (p. 56), under which a civil-service employee undertook to prevent the retention of any portion of his salary for the establishment of a pension fund. The provision of the law authorizing such retention was held to be constitutional.

The constitutionality of the mechanics' lien law of Illinois was considered in Rittenhouse & Embree Co. *v.* Wm. Wrigley, jr., Co. (p. 167). The statute undertook to permit a subcontractor to secure a lien the same as a contractor, whether or not the contractor could obtain the lien or was by his contract or conduct divested of a right thereto. This provision of the act was held to be unconstitutional. The question of constitutionality with reference to the mechanics' lien law of Wyoming was raised in the case Becker *v.* Hopper (p. 168). The point involved was as to the right of a subcontractor to a mechanic's lien in the absence of a direct contractual relation with the owner of the property. The court held that the statute giving a lien under such circumstances is valid. Another provision of the same statute

allowed attorneys' fees to the plaintiff or complainant in case he was successful, no reciprocal benefit being allowed a successful defendant. This provision was held to be unconstitutional, as not affording the equal protection of the law to the respective parties. The effect on a subcontractor's rights of a stipulation by a contractor that no mechanics' liens should be filed was before the Supreme Court of Oregon in the case Hume *v.* Seattle Dock Co. (p. 169), the court holding that such stipulation could not preclude the subcontractor's rights. Questions of the lienability of certain classes of material were also considered in this case.

HOURS OF LABOR.

Laws limiting the hours of labor on public works were considered in four cases, the Federal statute of August 1, 1892, being before the court in Chattanooga & Tennessee River Power Co. *v.* United States (p. 119), the defendants claiming that the fact that the lock and dam on which they were engaged would furnish them water power took the work out of the statute. This contention was rejected by the court on the ground that the Government had let the contract for the purpose of procuring a benefit to navigation, and that the incidental use of the power developed did not control. The eight-hour law of Oregon was considered in two cases, in one, Ex parte Steiner (p. 116), the superintendent of the State hospital was convicted of violation of the law in requiring a laborer on the asylum farm to work for more than eight hours; in the other case, Albee *v.* Weinberger (p. 117), the mayor of Portland was arrested for a violation of the law in permitting and requiring a fireman and a policeman to work for more than eight hours. The supreme court of the State held that such employment was not a violation of the law. The question of the constitutionality of a Maryland statute applicable to contractors with the city of Baltimore was considered in Sweetser *v.* State (p. 118). The statute was upheld against the contention of depriving contractors of property without due process of law, and of discrimination on account of being applicable only to the city of Baltimore.

Private employment is regulated by a general statute of Oregon limiting to 10 per day the hours of labor of employees in mills, factories, etc. This statute was declared to be constitutional in State *v.* Bunting (p. 120). An ordinance of the city of San Francisco prohibiting work in laundries between the hours of 6 p. m. and 7 a. m. was held by the Supreme Court of California to be constitutional in Ex parte Wong Wing (p. 116). The constitutionality of a statute limited in its application to women and children was contested in Riley *v.* Massachusetts (p. 121), the Supreme Court of the United States sustaining its constitutionality, including the detail requiring the posting of a schedule of work time and penalizing any departure therefrom.

The Federal hours of service act for railway employees gave rise to a considerable number of decisions. The question of emergency was considered in United States *v.* N. P. R. Co. (p. 122), in which a train wreck delayed the return of the crew so that it had a six and one-half hours' rest instead of eight hours as required by the statute, the company being held excusable. In United States *v.* A. T. & S. F. R. Co. (p. 130) it was held that a wreck causing a delay after the employee had left a terminal was a justifiable cause for overtime work, even though a lay off might have been made at an intermediate station other than the starting point of the crew; the attempt to haul a damaged car by means of a chain in violation of the statute was held, however, to be such a cause for delay as could have been avoided, and not an emergency within the meaning of the act. Where trains were delayed by a heavy snowstorm and the crews laid off to avoid violation of the 16-hour law, it was held (N. P. R. Co. *v.* United States p. 125) that keeping a fireman on duty to watch and keep up fires was such a violation of the statute as to incur penalties. The same conclusion was reached in G. N. R. Co. *v.* United States (p. 127), where a fireman was required to watch an engine while tied up at a siding, the court holding that such service was within the law governing the "movement" of trains.

A technical violation of the law was admitted by the defendant in United States *v.* C. M. & St. P. R. Co. (p. 131), where the water that had to be used for the engine was warm and impure and the injectors of the engine, though in good condition, failed to work properly, but the situation was held to be one of unavoidable accident. The death of a member of the household of a telegraph operator and the sickness of such operator were held to excuse the railroad company in United States *v.* N. Y. O. & W. Ry. Co. (p. 131) in a proceeding to recover penalties under the hours of service act; so also of the sickness of an operator in the case United States *v.* S. P. Co. (p. 124).

The Federal statute in its application to telegraph operators makes a distinction between offices operated continuously and those operated only during the daytime. It was held in United States *v.* A. C. L. R. Co. (p. 128) that an office regularly kept open from 6.30 a. m. to 10.15 p. m. was one continuously operated, so that the 9-hour limit must control. So in United States *v.* M. K. & T. R. Co. (p. 128) the employment of an operator from 8 a. m. to 12 noon and from 1 p. m. to 7 p. m., and another from 7 p. m. to 12 midnight and from 1 a. m. to 6 a. m., was held to be continuous service within the meaning of the act. A telegraph operator working overtime, although he had instructions not to do so, was held to have violated the law so that his employer was liable in United States *v.* O.-W. R. & N. Co. (p. 129), since it is an absolute and positive duty of the carrier to

enforce the law, and nonperformance is not excused by the plea of reasonable diligence.

A switch tender was held in M. P. R. Co. *v.* United States (p. 129) not to be classed with "operators, train dispatchers, etc.," whose hours of service are limited to 9 per day.

Employees whose train was delayed by waiting while other trains were passing, and who were relieved for an hour and a half in the meantime by a switching crew, were held to be continuously on duty in United States *v.* N. P. R. Co. (p. 133), the court saying that if the rest period could be thus broken up into small fragments there would be no sufficient opportunity for either sleep or rest. In Osborne's Admr. *v.* C. N. O. & T. P. R. Co. (p. 125) an employee riding free under orders, or "deadheading," was held not to be during such time on duty so as to come within the provisions of the 16-hour law.

A New York statute regulating the hours of service of railroad employees was held in Erie R. Co. *v.* New York (p. 123) to be void after the enactment of the Federal statute on the subject, even though the latter law was not to go into effect until a subsequent date, the Supreme Court of the United States holding that when Congress so acts as to indicate its purpose to take charge of a subject within its powers, the regulating power of the State ceases to exist.

FACTORY REGULATIONS.

The constitutionality of the Illinois law requiring certain employers to furnish wash rooms was before the court in People *v.* Solomon (p. 115), the contention being that it was discriminatory as well as unreasonable and ambiguous. These contentions were rejected by the court, and the constitutionality of the law upheld.

RAILROADS.

With a single exception the cases under this head relate to the Federal safety appliance law, the exception being the case Atlantic C. L. R. Co. *v.* Georgia (p. 182), in which the Supreme Court of the United States upheld as constitutional a statute of Georgia prescribing the headlight equipment for railroad locomotives, with certain exceptions as to tramroads, mill roads, etc.

In Spokane & Inland Empire R. Co. *v.* United States (p. 179) the circuit court of appeals held that the Federal safety appliance law was applicable to an interurban electric line. The statute was held also to apply to a terminal or transfer company handling interstate cars (La Mere *v.* Ry. Transfer Co., p. 181). In Chicago, B. & Q. R. Co. *v.* United States (p. 179) it was held that the prohibition against handling cars with defective coupling apparatus applied to switching operations as well as to long hauls, but that the requirement of the coupling of

the air brakes on 50 per cent of the cars of a train was not applicable in switching movements between yards 2 miles apart. The opposite view was taken with reference to air brakes in United States *v.* Pere Marquette R. Co. (p. 180). In United States *v.* C. & O. R. Co. (p. 183) the repeated handling in switching of a car with a defective apparatus was held to constitute a violation of the statute.

MINES.

A statute of Pennsylvania authorizes and provides for the constitution of a board to decide as to pillars and boundaries between adjacent mining properties. The constitutionality of this act and the status of such a commission were considered in Plymouth Coal Co. *v.* Pennsylvania (p. 170), the Supreme Court of the United States upholding the act as valid. The Ohio Legislature in 1914 provided for the weighing of coal at mines, authorizing the industrial commission of the State to enforce the provisions of the act, and to use its discretion in fixing a standard to be observed. The contention was made that such a law is unconstitutional, interfering with the employers' rights. This contention was rejected in Rail & River Coal Co. *v.* Yaple (p. 171), the presumption being that the commission would proceed in accordance with the terms of the act, while if it should not, an appeal would lie to the courts of the State. The mining law of Alabama, as enacted in 1896–97, prohibited employment of boys under 12 years of age in coal mines in the State. In the code revision the age limit was advanced to 14 years, and the expression "any mine" incorporated in the act. This was held in Cole *v.* Sloss-Sheffield Steel & Iron Co. (p. 113) to make the act applicable to ore mines as well as to coal mines.

RESTRICTIONS OF EMPLOYMENT.

A statute of Texas provided for the establishment of local boards to examine and certify plumbers as a condition precedent to their engaging in their occupation. This statute was held in Davis *v.* Holland (p. 114) to be unconstitutional because permitting all members of a partnership to practice if only one has been certified, while individual plumbers must each secure a license, so that the law was of unequal application. The Supreme Court of the United States in Smith *v.* Texas (p. 178) held unconstitutional a statute of Texas restricting the employment of railroad conductors to persons who had had certain specified experience, the court holding that the requirements were arbitrary and unreasonable, and so in violation of the fourteenth amendment to the Constitution of the United States.

Under this head may be noticed the restriction on the importation under contract, etc., of alien laborers. In United States *v.* Dwight

Mfg. Co. (p. 47) the questions of what constitutes "an offer of employment" within the meaning of the act, and a proper declaration of the violation of the act were discussed at some length, the conclusion being reached that the prosecution had been brought in due form. In Grant Bros. Construction Co. *v.* United States. (p. 48) the liability of the company for the acts of its agents and the propriety of assessing separate penalties for each laborer brought in in violation of the law, even though all came at the same time, were upheld by the Supreme Court of the United States.

Other cases that may be considered here for lack of a better classification relate to the employment of convicts. A Virginia statute, known as the convict lime grinding act, provides for the manufacture and sale of lime, convicts being employed to do the work. In Shenandoah Lime Co. *v.* Mann (p. 58) the constitutionality of this law was upheld as against the contention of the company that the State was thus engaging in internal improvement and using public funds for private purposes in violation of the statute. In Tennessee C. I. & R. Co. *v.* Butler (p. 60) the plaintiff was permitted to recover a balance claimed by him on account of being kept at work under a sentence to work out costs for a longer time than the law permitted.

For the same reason as the above a case involving the constitutionality of a city ordinance prohibiting the keeping open of barber shops on Sunday (City of Marengo *v.* Rowland, p. 186) is noted here, the ordinance in question being declared unconstitutional as discriminating against a single business.

WOMEN AND CHILDREN.

The status of youthful employees and children employed under lawful age is considered under the headings "Liability of employers for injuries to employees" (Sturges & Burn Mfg. Co. *v.* Beauchamp, p. 64; McCarty *v.* R. E. Wood Lumber Co., p. 284; Adams *v.* C. & O. R. Co., p. 286); "Workmen's compensation" (Hillestad *v.* Industrial Commission, p. 269); and a case relating to woman labor appears under "Hours of labor" (Riley *v.* Massachusetts, p. 121).

Laws that relate somewhat indirectly to employment, but that contemplate the care of children until they attain a suitable age to work, are those known as "Mothers' pension laws." The Iowa statute on this subject providing for the care of the children of widows was held not to cover the case of the children of a divorced woman (Debrot *v.* Marion County, p. 177).

LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

The validity of an Indiana statute was decided in Vandalia R. Co. *v.* Stilwell (p. 60), the law distinguishing between the defenses available for employers of five or more persons and those employing a less number. The court in this case held such a provision constitutional.

The abrogation of defenses by the statute was also upheld. A like question arose in Easterling Lumber Co. *v.* Pierce (p. 62), in which the company contended that a statute of Mississippi extending to "other corporations and individuals using engines" the liability fixed by the constitution for railroad corporations was invalid. This contention was rejected by the supreme court of the State, and the abrogation of the defense of fellow service upheld. The Supreme Court of Illinois (Crooks *v.* Tazewell Coal Co., p. 61) had before it the validity of the workmen's compensation act of that State in its effect on the defenses of an employer not accepting its provisions, the court holding that even though the employee had accepted the statute, if the employer rejected it, it did not apply, and damages at common law would be recoverable in a proper case.

The incompetence of a fellow servant was held the cause of liability of the employer in Walters *v.*Durham Lumber Co. (p. 283), the court holding that a workman assumed the risk of negligence of his fellow servant, but not of the negligence of the employer in selecting incompetent employees.

The employing company was held liable for injuries to a boy under 16 years of age employed at a punch press in violation of the statute of Illinois which permits the employment of children over 14, but restricts the employment of those under 16 years of age at designated dangerous employments (Sturges & Burn Mfg. Co. *v.* Beauchamp (p. 64). The Supreme Court of the United States held that classifications of this nature were within the power of the State, and did not violate the rule as to due process of law. The rule as to minority was before the Supreme Court of West Virginia in Adams *v.* C. &. O. R. Co. (p. 286), under the principles of common law. In this case a 17 year old boy was kept on duty as a section hand for about 20 consecutive hours, and the court ruled that on account of his youth he could not be held to be presumed to have fully appreciated the danger of such extraordinary employment. In another case before the same court, McCarty *v.* R. E. Wood Lumber Co. (p. 284), the duty of the employer to instruct an inexperienced youth was emphasized, and the failure to do so was held to charge the employer with liability for a resultant injury.

A number of decisions turned on the failure of the employer to provide or maintain guards for dangerous machinery. Thus in Pulse *v.* Spencer (p. 69) it was held the duty of the employer to see that a guard was in place when it was feasible, even though there might be times when under the statute it might be removed for certain operations, and that the employee in removing the guard at such times was not guilty of negligence as a matter of law. An unguarded wringer or extractor in a laundry was held to be within the provisions of a West Virginia statute requiring machinery to be guarded in manufacturing or mercantile, etc., establishments (McClary *v.* Knight, p. 65). In

Phillips *v.* Hamilton Brown Shoe Co. (p. 66) the question was considered as to whether an injury not due to contact with an unguarded machine, but due to flying objects thrown from the machine, was within the statute requiring guards for dangerous machinery; the court held that the law covered such a condition, and in the absence of contributory negligence recovery might be had for the employer's negligence in failing to provide the necessary protection. A somewhat similar point was involved in Smith *v.* Mt. Clemens Sugar Co. (p. 68), in which it was contended that a gearing did not require a guard because so far removed from the floor as not to be dangerous. It was held that since employees were required to approach this gearing several times daily, that contention could not be maintained. The question of proximate cause arose in C. H. & D. R. Co. *v.* Armuth (p. 67), an employee's hand having been caught in unguarded cogwheels when it slipped from a lever which he was operating. The failure to guard the machinery and the slipping of the hand were considered to be concurring causes, and the former, being in violation of the statute, was the proximate cause, and entailed liability unless the employee was negligent in permitting his hand to slip.

Negligence in the discharge of the common-law duty of warning the employee of new dangers was held to make the employer liable for injuries to a strike guard sent to a point to which deputy marshals had also been summoned, neither party being informed of the other's presence or purpose (McCalman *v.* I. C. R. Co., p. 290).

Several liability cases involved the construction of statutes regulating the operation of mines. Thus the Supreme Court of the United States (Myers *v.* Pittsburgh Coal Co., p. 70) reversed the judgment of the circuit court of appeals and affirmed the judgment of the trial court in a case involving the liability of the employing company for the death of a man from electric shock, the court holding that the employment of a certified foreman did not relieve the company from responsibility where the electrical installation was not in charge of such foreman. In Humphreys *v.* Raleigh Coal & Coke Co. (p. 70) the Supreme Court of West Virginia reached the same conclusion in a very similar case, the court holding that the employment of a mine foreman was not intended to absolve the employer from his duty as to equipment and maintenance. Failure to employ a mining boss to inspect the mine was held to be the proximate cause of an injury in Baisdrenghien *v.* M. K. & T. R. Co. (p. 71); so also in Piazzi *v.* Kerens-Donnewald Coal Co. (p. 72), where, though an inspector was employed, he had not marked a dangerous place. The mine law of Oklahoma was held in Big Jack Mining Co. *v.* Parkinson (p. 72) to apply to lead and zinc mines no less than to coal mines. Violation of the statute as to hoisting was considered by the Supreme Court of Montana, the court finding that under the rule the deceased

workman was, in effect, a station tender and that his death was due to his own negligence, so that no recovery could be had (Maronen *v.* Anaconda Copper Mining Co., p. 73).

The regulation of railroad operations by statute afforded the basis for a number of decisions that have been reproduced, the principal statute taken account of being the Federal liability act of 1908. The hours of service law and the safety appliance laws are also involved in some cases. The liability act referred to abrogates the defense of assumption of risk where the violation of safety statutes contributes to the injuries complained of, but the defense was held to be available in Farley *v.* N. Y. N. H. & H. R. Co. (p. 81), where a locomotive engineer was killed by contact with electric wires, he being held to have assumed the risk. The question of contributory negligence was considered in Pennsylvania Co. *v.* Cole (p. 82), in which the rule for the comparison of the negligence of the employer and the contributory negligence of the employee was discussed.

The Supreme Court of the United States (N. C. R. Co. *v.* Zachary, p. 83) insisted on the exclusive application of the Federal statute to cases coming within its scope; an employee absent for a brief time from his engine on a personal errand was held nevertheless to be on duty at the time and engaged in interstate commerce. The relationship of Federal and State statutes is also considered in Jones *v.* C. & W. C. R. Co. (p. 78), the result in the instant case being that no recovery could be had for the death of a man who left no dependents, though if the State law had prevailed relatives might have recovered damages. So in Taylor *v.* Taylor (p. 79), where the father of a deceased workman sued to procure the paying over to himself in accordance with a statute of New York of one-half the damages recovered by the widow under the Federal statute, the Supreme Court of the United States held that the State law could not be effective, the Federal statute controlling, and reversed a contrary judgment of the New York Court of Appeals. In Wabash R. Co. *v.* Hayes (p. 77) an action brought under the Federal act but shown on trial not to involve an interstate question, was decided in the same suit under the common law in force in the State, such proceeding being approved by the Supreme Court. The relation of State and Federal statutes in their attempts to secure the use of safety appliances was passed upon by the Supreme Court of the United States in a case (S. A. L. R. Co. *v.* Horton, p. 80) in which a judgment of the Supreme Court of North Carolina that sought to make operative a State statute was reversed, the Supreme Court holding that the Federal law must be considered as excluding supplementary legislation in that field. Negligence of the employer in his failure to comply with safety appliance laws was offered as ground for recovery in Pennell *v.* P. & R. R. Co. (p. 102), the Supreme Court of the United States holding that the statute requiring

automatic couplers did not require such a device between the tender and engine, so that the company was not liable for a failure to provide one. In Dodge *v.* C. G. W. R. Co. (p. 102) a defective coupling at the rear of the last car of a train, though perhaps indirectly responsible for a derailment, was held not to be a violation of the safety appliance act. The status of a workman riding home was also considered in this case, the court holding that he was in the present instance a mere licensee, exercising at his own risk the privilege that he was taking.

The provisions of the Federal statute as to accepting benefits from relief associations were considered in Hogarty *v.* P. & R. R. Co. (p. 84), the case having been first tried under the State law, the trial resulting in a verdict in favor of the defendant company. The Supreme Court of Pennsylvania held that though the Federal statute was not brought into the case until the special defense was entered upon, the plaintiff was entitled to a trial under that statute under the rule of the Supreme Court of the United States that it must be considered as enforceable by the State courts the same as State legislation, and under it the acceptance of relief benefits would not exempt from the right to further recovery. Failure of the plaintiff to expressly base his case on the Federal statute was held by the Supreme Court of the United States (G. T. W. R. Co. *v.* Lindsay, p. 99) not to prevent a recovery under the act. Another point considered in this case was as to the doctrine of comparative negligence laid down by the act in question, the court holding that contributory negligence on the part of the employee would in no wise diminish the recovery where the injury is due to the employer's failure to conform to the Federal safety laws. The acceptance of relief benefits from one of two parties charged with liability for an injury was involved in Wagner *v.* C. & A. R. Co. (p. 100). The company sued was not the plaintiff's employer, but was the owner of the tracks over which his employer's train was running at the time of the injury. The Federal statute therefore did not apply as between the present parties, since the relation of employer and employee did not exist. It did apply, however, between the plaintiff and his employer company, which had paid relief benefits and taken a purported release from further liability, which release the present defendant sought to present as a bar to further action. Since under the Federal statute such payments of relief benefits would not bar an action as against an employer, the court held that it was invalid as against the plaintiff in the present case.

The absence of the proof of negligence on the part of the company, as viewed by the Court of Appeals of Kentucky, led to a reversal of a judgment of the trial court in C. N. O. & T. P. R. Co. *v.* Swann's Admx. (p. 98); while in Reeve *v.* N. P. R. Co. (p. 99) the term "negligence" as used in the act was held to mean negligence in the performance of

some duty, so that an injury to a workman caused by horseplay of fellow employees was held not to give rise to an action.

A point in frequent litigation is as to the scope of the Federal statute, or the limits set to its application by the term "interstate commerce." Thus a brakeman setting an intrastate car into an interstate train was held by the Supreme Court of Kansas to be within the act. The car in question had a defective coupler, and the point was raised as to the application of the Federal safety appliance law to it; the court held that the law was intended to embrace all cars used on railroads which are highways of interstate commerce (Thornbro *v.* K. C. M. & O. R. Co., p. 85). Other employees held by the different courts to be within the act were a blacksmith repairing cars used in interstate commerce (Opsahl *v.* N. P. R. Co., p. 94); a boiler maker repairing an engine used in interstate commerce (Law *v.* I. C. R. Co., p. 94); a telegraph lineman engaged in repairing lines used in directing the operation of interstate trains (Deal *v.* Coal & Coke R. Co., p. 95); an engineer going into a roundhouse to look after repairs to his engine used on an interstate run (Padgett *v.* S. A. L. R. Co., p. 90); an engineer testing his engine after repairs prior to going on an interstate run (Lloyd *v.* S. R. Co., p. 96); a workman installing a block-signal system (Saunders *v.* S. R. Co., p. 92); an employee returning from work on a block-signal system riding on a motor tricycle to his boarding place in cars furnished by the company (Grow *v.* O. S. L. R. Co., p. 92); a workman engaged in building an addition to a freight shed (Eng *v.* S. P. Co., p. 86); an employee carrying coal to heat a repair shop (Cousins *v.* I. C. R. C., p. 88); a track worker injured while asleep in his shanty car on a sidetrack (Sanders *v.* C. & W. C. R. Co., p. 89); and employees engaged in weighing empty cars after interstate transportation to determine the net weight of contents (Wheeling Terminal Co. *v.* Russell, p. 97). The following were held to be excluded: A workman engaged on the construction of a new bridge on a cut-off (Bravis *v.* C. M. & St. P. R. Co., p. 87); a tunnel worker on a cut-off not yet in use (Jackson *v.* C. M. & St. P. R. Co., p. 88); a fireman on a switch engine handling interstate and intrastate traffic indiscriminately, at the time of the injury moving several cars loaded with freight wholly intrastate (I. C. R. Co. *v.* Behrens, p. 91); and a hostler in a railroad roundhouse killed by the explosion of the boiler of a locomotive whose last run was intrastate (La Casse *v.* N. O. T. & M. R. Co., p. 96). The Federal statute was also held not to apply to the operations of a private road handling logs to be sent to mills within the State of origin (Bay *v.* Merrill & Ring Lumber Co., p. 97).

The question of beneficiaries under the act was considered in Kenney *v.* S. A. L. R. Co. (p. 81), the Supreme Court of North Carolina holding that a statute of that State defining the rights of inheritance

from illegitimate children determined who might be beneficiaries under the Federal act.

State statutes regulating railway service present a few points that were considered of importance, among these being a case (George *v.* Q. O. & K. C. R. Co., p. 75) in which the Missouri statute requiring frogs, etc., in yards to be blocked as a matter of safety to persons employed in such yards was construed. Against the company's contention that a sidetrack at a station was not a yard within the meaning of the statute, the court held that the portion of the tracks around every station used for the purpose of switching or placing cars is a yard. Another definition required was that of the term "car," as used in a Florida statute which makes the company liable for injuries caused by agents or coemployees in running cars or other machinery; in McGrady *v.* C. H. & N. R. Co. (p. 75) a hand car was held to be a car within the meaning of the act, and the work of placing it on a track was declared a part of the running of such car. In Hughes *v.* I. U. T. Co. (p. 77) the fellow-servant law of Indiana applicable to railroads was held not to cover electric roads. A somewhat different view was taken in a case (Spokane & I. E. R. Co. *v.* Campbell, p. 106) in which the Federal safety appliance law was held to apply to electric trains. (See also Spokane & I. E. R. Co. *v.* United States, p. 179.) The train in question was in interstate use, and a failure to supply the equipment of train brakes, etc., was held to fix the employer's liability for an injury due to insufficient brakes. That a laborer unloading ties on the roadbed for an extension of a railroad line in process of construction was engaged in the operation of the railroad within the terms of the Missouri statute was held in Sartain *v.* J. C. T. Co. (p. 104).

A Pennsylvania statute fixes the liability of the employer where injury results from negligent orders to which the subordinate was bound to conform. This statute was held to apply in Ainsley *v.* P. C. C. & St. L. R. Co. (p. 105), where a brakeman went down the steps of a moving car in an effort to locate the defect in a brake that was not working properly; so also in Chicago & Erie R. Co. *v.* Lain (p. 105), where a similar statute of Indiana was held to support recovery in a case in which the plaintiff was injured while occupying a position of danger in accordance with his foreman's orders. The point was also made that the injured workman, being what is known as a yard and bridge man, was not engaged in the movement of trains and so was not within the act. This contention the court rejected, stating that since his duties exposed him to the dangers of the movement of trains, he was protected by the statute. At common law also the employee may depend on the employer's orders and recover in case injury follows negligence in this respect (Magnuson *v.* MacAdam, p. 285).

The United States Supreme Court upheld a judgment affirmed by the Georgia Court of Appeals rendered under an Alabama statute which fixed the liability of the employer, but provided that actions under it must be brought in the courts of the State of Alabama and not elsewhere. The Georgia courts held that they could take jurisdiction under the act regardless of this limitation, which view was approved by the Supreme Court (Tennessee C. I. & R. Co. *v.* George, p. 107).

The violation of a city ordinance limiting the speed of trains through the municipality was held in Wabash R. Co. *v.* Gretzinger (p. 76) to be the proximate cause of the death of a freight conductor whose train was on a sidetrack, the switch leading to which had been opened by some unknown person after having been closed and locked.

Negligence in failing to properly and safely guard machinery to prevent injury to employees was claimed in Byland *v.* E. I. du Pont de Nemours Powder Co. (p. 73), the negligence consisting in allowing metallic nuts to fall into a powder-mixing machine, resulting in an explosion in which the plaintiff was injured. The connection in this case was held not to be direct enough to bring it within the act. It was also held that a prima facie case of negligence could not be made in a liability suit merely by reliance on the doctrine of res ipsa loquitur.

The necessity of an adequate compliance with the requirements prescribed by statute was emphasized in McClaugherty *v.* Rogue River Electric Co. (p. 108), the statute in question being one regulating electric installations. In Rosholt *v.* Worden-Allen Co. (p. 110) the distinction between the common law and the statute applicable to the case in hand is pointed out, and the liability of the company was then affirmed because of its failure to make an elevated runway safe within the meaning of the statute. A similar law of New York was under consideration in Bornhoff *v.* Fischer (p. 111), the duty of the employer to furnish a proper scaffolding being held to be nondelegable.

If a machine was known to be dangerous, even if of an approved type and make, the employer may still be held to liability for failure to make it safe (Ainsley *v.* John L. Roper Lumber Co., p. 287).

The negligence of a repair man in taking a place of danger without notice to persons moving trains on the tracks in the vicinity was held to bar a recovery for his death in Stone *v.* A. C. L. R. Co. (p. 286).

Somewhat technical features were considered in cases decided by the highest courts of Massachusetts and New York, the question of sufficiency of notice being decided in the plaintiff's favor in the former court in Meniz *v.* Quissett Mills (p. 112), the attorneys retained by the plaintiff to assist him, having written a letter to the defendant, within the proper period, stating that they had been retained to prosecute the case, mentioning the circumstances, time, and place of the injury. In Rodzborski *v.* American Sugar Refining Co. (p. 112) the New York

Court of Appeals held that a letter simply asking that the case of the injured man be investigated, without statement as to the cause of the injury, was not sufficient compliance with the terms of the statute.

The right of an injured employee to elect his remedy after the injury was maintained by the Supreme Court of Arizona in Consolidated Arizona Smelting Co. *v.* Ujack (p. 109), that State having a workmen's compensation act and a liability statute, while a common-law action was held also to be possible. The power of a claimant to make a choice of rights was before the Supreme Court of Washington in Longfellow *v.* City of Seattle (p. 74). In this case the widow of a city fireman had claimed and procured the allowance of a pension for herself and minor daughter under a State law and subsequently sued for damages. This action was held to be barred by the acceptance of the pension benefits, this ruling applying to the mother; as to the daughter, who had no rights under the pension fund, it was held that she might proceed in an action to recover damages.

That the work of keeping clean the streets of a city is a governmental function in the exercise of which a municipality will not be liable for injuries to an employee was held in Mayor and Aldermen of City of Savannah *v.* Jordan (p. 284), even though the superiors of the injured workman knew of the defective condition of the instrumentality causing the injury.

WORKMEN'S COMPENSATION.

As indicated in the introduction, the importance of securing authoritative definitions of the terms used in this new class of laws is doubtless responsible for the fact that a considerable number of cases have been brought to the courts of last resort under these acts. Administration by commissions, and the simplification of legal processes where actions at law are resorted to, have certainly done much to relieve the courts of the burden of litigation in damage suits, and the cases appearing in the Reporter System for the year are practically all presented in this bulletin with greater or less fullness. Questions of constitutionality have been raised in comparatively few cases, the courts in the larger number of the States in which compensation laws have been enacted having already passed upon the general question. This question was raised, however, in a case under the Illinois statute (Deibeikis *v.* Link-Belt Co., p. 216), in which the plaintiff sought to recover in a suit at law even though both he and his employer had accepted the terms of the elective compensation act of the State, and certain payments had been made thereunder. Seven main contentions were made against the act, all being overruled by the court, largely on the ground that the act was elective in form and effect—a fact which even the abrogation of defenses in cases where it was not accepted did not modify. The Minnesota statute was also

called in question, a plaintiff employee claiming that it violated the provisions of the fifth and fourteenth amendments to the Constitution of the United States as to protection of rights and equality before the law (Matheson *v.* Minneapolis Street Railway Co., p. 218). The law was sustained in the present instance largely on the same grounds as in the Deibeikis case, the court ruling that the classifications and exclusions found in the act did not invalidate it. The Kansas statute also (Shade *v.* Ash Grove Lime & Portland Cement Co., p. 224) was upheld against similar contentions, and the remedy under it was declared exclusive, emphasis being laid, as in the preceding cases, on the elective nature of the law as relieving it from the charge of depriving persons by statute of their constitutional rights.

The opposite view was reached by the Kentucky Court of Appeals in Kentucky State Journal Co. *v.* Workmen's Compensation Board (p. 197). This court held that the abrogation of defenses made the act in fact compulsory, even though elective in form, thus in effect establishing a limitation on recovery for injuries resulting in death or for injuries to personal property, in violation of the State constitution. It may be noted that in this position the court formally rejected the views of the courts of last resort of a number of States, distinguishing statutory provisions in some cases, and in others pointing out the absence of constitutional provisions similar to those existing in Kentucky. On a petition for rehearing, which was rejected, specific suggestions were made as to points to be modified in order to make such a law constitutional.

Single points were raised in Jeffrey Mfg. Co. *v.* Blagg (p. 203), in which the constitutionality of the Ohio statute was sustained by the Supreme Court of the United States on the point of the exclusion of small employers from the provisions of the act abrogating defenses; in Young *v.* Duncan (p. 221), in which the form of election under the Massachusetts statute was claimed to deprive the employee of a right to trial by jury and of property rights, the court overruling this contention; and in Huyett *v.* P. R. Co. (p. 225), in which a technical question as to the title was raised, the act being sustained. In this last case also it was decided that the term "wages" as used in the act meant actual earnings at the time of the injury, and not any less or greater amount than might have been customary.

Among the specific terms coming up for definition is the word "accident," this expression being held in Liondale Bleach, Dye & Paint Works *v.* Riker (p. 205) to imply a degree of definiteness as to the specific time or occasion of the occurrence. This was a case in which the compensation was claimed for an eczema possibly due to working in acids. The Massachusetts statute substitutes for the word "accident" the expression "personal injury," and this was held

in Johnson *v.* London Guarantee & Accident Co. (p. 259) to cover the case of a workman who had become affected with lead poisoning through continuous exposure. Compensation was also allowed where a workman suffered from optic neuritis induced by poisonous coal-tar gases to which he was exposed in inspecting processes of manufacture (In re Hurle, p. 260). The Michigan statute, on the other hand, was held in Adams *v.* Acme White Lead & Color Works (p. 258) not to include a case of lead poisoning, even though the word "accident" was not used, the court holding that the term "personal injury" was evidently meant by the legislature to cover only such cases as could be sued for under previous statutes, which related to accidents only. Under the Washington statute it was held (Zappala *v.* Industrial Insurance Commission, p. 240) that a hernia claimed to have been caused by severe strain was the result of a "fortuitous event" for which compensation should be paid, the court overruling in this instance the finding of the commission.

The statutes are not uniform in the form of expression as to whether the injury or accident shall arise out of and in the course of employment. In Henry Steers, Inc., *v.* Dunnewald (p. 206) an accident that might by inference be supposed to have occurred in the course of employment was held not to arise out of it, so that no recovery could be had. The employee in this instance was drowned probably while on his way to work and near the place of his employment. Under the same (New Jersey) statute it was held that circumstantial evidence might support the inference of an injury in the course of employment (Muzik *v.* Erie R. Co., p. 249). Compensation was allowed under the same statute in Terlecki *v.* Strauss (p. 241), a case in which the injury occurred while an employee was combing her hair to remove particles of wool at the conclusion of the day's work, the hair being caught in moving machinery. Anchylosis due to an infection following the improper treatment of a fracture was held in Newcomb *v.* Albertson (p. 247) to be a result of the accident so as to allow compensation under the New Jersey law. Where the injury occurred as the result of using a forbidden agency, the Supreme Court of New Jersey (Reimers *v.* Proctor Pub. Co., p. 250) held that it was not an injury arising out of and in the course of the employment. Compensation was permitted under this act in a case in which a workman had apparently aggravated a preexisting condition of disease by forcible exertion, death ensuing (Voorhees *v.* Smith Schoonmaker Co., p. 248).

The Wisconsin statute provides compensation where injury occurs while one is "performing service growing out of and incidental to his employment." This was held (City of Milwaukee *v.* Althoff, p. 266) to cover an injury to a workman on the way to the place of his employment after he had received instructions from his foreman

where to go. Under the Michigan statute a workman leaving a roof for lunch at the invitation of his employer, and injured while coming down in a way of his own choosing, was held to be within the protection of the act, even though the other workmen came safely by another course (Clem *v.* Chalmers Motor Co., p. 242). The question of willful and intentional misconduct was raised in this case, but the court held that there was no proof of such conduct as to be a bar to the claim. In another case under this statute (Hills *v.* Blair, p. 243) a section hand on his way home from his working place at noon was held not to be within the protection of the act, as he had, in effect, left the premises of his employer, though killed in some unexplained manner along the right of way of the railroad. The Michigan statute was held (Rayner *v.* Sligh Furniture Co., p. 244) to cover the case of an employee injured while running to punch the time clock when the noon whistle blew, the rules requiring employees to punch the clock before going out. Another case under this statute was that of Bayne *v.* Riverside Storage & Cartage Co. (p. 245), where the question of causal connection between an alleged sprain and death from pneumonia was decided favorably to the claimant, the court reaching this conclusion largely on the finding of fact by the State compensation commission.

Under the Massachusetts law the injury must arise out of and in course of employment. In the case In re Sundine (p. 244) a girl injured while going out to lunch by the use of the only means of access to the workshop was held to come within the act; so also of an employee who was injured while riding from his place of work in a wagon furnished by the employer (In re Donovan, p. 245). In the case Milliken *v.* A. Towle & Co. (p. 246) the Massachusetts law was held not to cover the case of a teamster who, due to an injury of some years' standing, showed evidence of lapse of memory and wandered aimlessly about, finally falling into a swamp, where he contracted pneumonia and died. The West Virginia statute was construed in De Constantin *v.* Public Service Commission (p. 249) not to cover the case of a workman employed on construction work of a railway and killed by a train while on his way to work, the evidence showing that the route used by him was not the only or even the proper means of access to his place of employment.

Casual employees are excluded from the benefits in most of the States, this condition under the Massachusetts law having been changed by an amendment of 1914. The case In re Cheevers (p. 213) was decided under the old law, and an independent teamster occasionally employed by a coal dealer was held to be engaged in casual employment when he worked scattered days in February, 1913, his last previous employment being a few days in February, 1912; so also in a case under the same act (In re Gaynor, p. 214), the employee in this case being a waiter whose services were employed for but a

single day, he having never worked for the same employer before. Where, however, a workman was regularly employed to do a certain class of work and was ordered to do the same kind of work under slightly different conditions, he was held to be under the protection of this act (In re Howard, p. 213). A pieceworker in a tannery, injured on the first day of his employment under an arrangement as to continuance that was somewhat indefinite, was held by the Supreme Court of New Jersey not to be a casual employee, since his work was of the same general kind as the business of the establishment (Schaeffer *v.* De Grottola, p. 214); so also of a longshoreman who was killed two hours after beginning work under a new employer, the court holding that the custom of hiring longshoremen, subjecting them to frequent changes of employers, did not render their employment casual, since it was a particular part of a service recurring with some regularity and fair prospect of continuance (Sabella *v.* Brazileiro, p. 214).

Questions of dependency arose in several cases under the Massachusetts law. In the case In re Gallagher (p. 227) a woman, living apart from her husband for justifiable cause and receiving partial support from him, was held not to be presumptively wholly dependent upon him under the earlier form of the law. An amendment of 1914 declares in favor of such presumption, but this amendment did not affect the present case. So also in the case In re Nelson (p. 227), where the wife had lived apart from her husband several times for varying periods, and was so living at the time of the death of her husband, though there had been no talk of permanent separation or divorce. A wife living apart from her husband and receiving no support took nothing in the case In re Bentley (p. 226), while a partially dependent child received an award of a limited amount. A daughter capable of self-support, but living with her father and caring for him from a sense of duty, receiving most of his wages, was held entitled to compensation under the Massachusetts act (In re Herrick, p. 226). Parents and brothers and sisters of a minor whose earnings were contributed to the support of the family were held to be the dependents of such minor (In re Murphy, p. 229). The Supreme Court of Rhode Island affirmed a decree allowing no compensation for the death of a minor (Dazy *v.* Apponaug Co., p. 228), it not appearing that the contributions of the deceased son were required to provide the family with the necessaries of life. It was held in King *v.* Viscoloid Co. (p. 264) that the mother of a minor son might sue at common law for the loss of his services even though he had taken compensation under the Massachusetts statute.

The question of incapacity was passed on by the Supreme Court of Massachusetts in a case (In re Sullivan, p. 241) in which a workman who had lost an arm as the result of an injury reported himself unable

to secure work for some six months after his recovery from the wound, although he tried to do so. The court held that he was entitled to compensation until work was secured, since the inability to obtain work resulted directly from the injury. The same view was taken in Duprey *v.* Maryland Casualty Co. (p. 268), where a workman who was able to work only while sitting had not been able to secure such employment, though competent to render it if obtainable—this in the face of an agreement to accept a lower award. The same court held that a hand was "incapable of use" so as to entitle the workman to compensation as for the loss of a hand, where the injured hand could be used only as a hook on account of injuries to the flexor tendons (In re Meley, p. 241). The New Jersey Supreme Court had before it a question involving an injury to the leg of a plumber which disabled him from following his occupation. The lower court awarded a benefit for total disability, involving the payment of benefits for 400 weeks. This was reversed by the supreme court (Bateman Mfg. Co. *v.* Smith, p. 256), the term being reduced to 175 weeks, which is the period specified for the loss of a leg. The injured man in this case was 73 years of age, and the fracture refused to knit on account of his age. The Wisconsin statute takes note of advanced years and reduces the amount of compensation payable to aged employees in cases of permanent injury. This was held in City of Milwaukee *v.* Ritzow (p. 257) not to call for a reduction of death benefits in a case where a man 80 years of age was killed in the course of his employment. The statute of Washington provides for permanent partial disability, limiting the amount of the benefits payable therefor, and makes a separate provision for permanent total disability, defining the same. In Sinnes *v.* Daggett (p. 257) the supreme court of the State affirmed an award for permanent partial disability in the case of a man who had lost several fingers of each hand as against his claim that he was totally disabled.

Closely related to the foregoing is the determination of the amount of compensation. A case before the Supreme Court of New Jersey involved the right of a workman to compensation for the permanent impairment of function of an arm, without, however, affecting his earning capacity. The award was made (De Zeng Standard Co. *v.* Pressey, p. 207) on the basis of the relation of the degree of disability to the total loss of function, the court rejecting the contention that there could be no statutory disability unless the earnings have been impaired. Another case before this court involved the decision of the question of relative disability, the injury being to the elbow of the right arm and causing loss of motion. An award was made (Barbour Co. *v.* Hagerty, p. 209) as for the loss of the arm. This was reversed by the supreme court, with instructions to take note of any payments that had been made from insurance funds secured by the

employer. O'Connell *v.* Simms Magneto Co. (p. 209) was another case before the New Jersey court where multiple injuries were allowed for, the award being the total of the amounts for each injury. This judgment was reversed by the supreme court on the ground that the disabilities were not such a proportion of a total disability as to justify the award made. The method of procedure was principally involved in another case under the New Jersey statute (Mockett *v.* Ashton, p. 207), where a lump sum had been awarded without an indication as to what continuing payments would have been proper, the supreme court reversing the finding on the ground that there was no sufficient support for it under the statute. A case involving elements similar to the Pressey case above arose under the Wisconsin statute (International Harvester Co. *v.* Industrial Commission, p. 210), in which there was permanent impairment of the sight of an eye but no reduction in earnings. An award had been made by the commission on the ground of permanent partial disability, based on the likelihood of his difficulty in securing employment on account of defective sight. The supreme court of the State reversed this finding, holding that there was no material evidence on which to base the ruling of the commission.

The Michigan statute contains a schedule for certain specific injuries, fixing the term during which disability shall be deemed to exist, that for the loss of a foot being 125 weeks. In Limron *v.* Blair (p. 211) the court reversed an award allowing compensation during the time of actual total disability plus 125 weeks, to commence at the conclusion thereof, but deducting 6 weeks for the time when the foot was amputated, the ground being that the total period could not exceed 125 weeks unless his total disability lasted longer, since the statute "speaks in terms of disability" and does not provide specific indemnities. The Massachusetts statute provides for specific losses certain compensation "in addition to all other compensation." This was held (In re Nichols, p. 213) to sustain a finding for separate allowances for the loss of a finger and for the death of the workman from blood poisoning which subsequently developed; so also where there was permanent total disability for which compensation was recoverable, separate full compensation for the death which ensued being also due (In re Burns, p. 212). In case of permanent injury of a phalange of a finger not resulting in permanent incapacity no compensation was allowed under the Massachusetts act authorizing compensation where injury produces incapacity for use (In re Ethier, p. 212).

The distribution of the amount of an award for death was before the Supreme Court of Massachusetts (In re Janes, p. 230). There were two minor beneficiaries, the deceased father being a widower at the time of his death. One child also died about a week after the father's

death, and the compensation awarded was ordered to be paid one-half to the guardian of the survivor and one-half to the administrator of the deceased child, the supreme court holding that the insurer had no right of appeal in the matter, as its liability was not affected. The computation of weekly payments in the case of a workman who was employed only a part of the year was passed upon by the Supreme Court of Michigan in the case Andrejwski *v.* Wolverine Coal Co. (p. 234), the court holding that the average weekly wages must be arrived at in such a case by dividing the actual average annual earnings by 52, the method of computation by multiplying a day's earnings by 300, prescribed for certain cases as a method of determining annual earnings, not being applicable under the circumstances.

The Massachusetts law requires medical and surgical services to be furnished injured workmen, and this duty was held (In re Panasuk, p. 253) to call for an active effort to render the necessary aid, not being discharged by the mere publishing of lists of doctors. In Jendrus *v.* Detroit Steel Products Co. (p. 253) the Supreme Court of Michigan held that the refusal of an employee to allow an operation when first proposed did not necessarily debar a claim for compensation, the injured man being ignorant and unacquainted with the English language. It was pointed out, too, that there was no evidence that an immediate submission to the operation would have secured recovery.

The question of the serious and willful misconduct of a workman such as would debar recovery was considered by the Supreme Court of Massachusetts (In re Nickerson, p. 265), the court holding that the term meant more than negligence or even gross negligence, and that thoughtless acts, not deliberate, would not constitute such conduct. The Ohio law as originally enacted permitted an action for damages independent of the compensation act where the injury was due to the willful act of the employer. This was held (McWeeny *v.* Standard Boiler & Plate Co., p. 232) to permit recovery where the foreman gave negligent orders and insisted on obedience to them in the face of protest. This subject is now strictly regulated by statute.

The question of election was before the Supreme Court of Rhode Island (Coakley *v.* Mason Mfg. Co., p. 204), the company having accepted the provisions of the act on September 26, 1912, the act coming into effect five days later. Against the plaintiff's contention that an acceptance would not be valid before the act became effective, the court ruled that the rights of the parties were determined by this election. Where acceptance of the compensation law is presumed in the absence of a contrary election, the employee claiming benefits under the act is not required to show that no such election has been made, but the fact must be offered by the employer as an affirmative defense (Gorrell *v.* Battelle, p. 230). This case also presented questions of incapacity, the court ruling that the act contemplates com-

pensation for incapacity due to injury, where the loss manifests itself in inability to perform obtainable work or inability to secure work. That special notice of refusal to accept the terms of a compensation act must be given to the guardian of a minor under the New Jersey statute was held in Troth *v.* Millville Bottle Works (p. 231), general notice not being sufficient. An earlier opinion was cited in this case affirming the applicability of the statute to preexisting contracts. A claimant who had received benefits under the compensation law of Washington was held (The *Fred E. Sander*, p. 232) not to be entitled to recover in an action in admiralty. In an earlier proceeding by the same claimant, seeking to recover in admiralty for injuries (The *Fred E. Sander*, p. 265), the defense was interposed that the State compensation act had abolished actions for personal injuries. The court held that the State could not limit the jurisdiction of courts of admiralty over maritime torts, and overruled the exceptions, the acceptance of benefits not having appeared in this proceeding. That the compensation law of Kansas provides an exclusive remedy where it has been accepted was held in McRoberts *v.* National Zinc Co. (p. 236), the plaintiff having sought to secure both benefits under the compensation statute and damages at common law. The difference between an award of damages and an allowance of compensation was also pointed out. The Washington statute permits damage suits against an employer who is in default in payments to the State accident fund, but this was held (Barrett *v.* Gray's Harbor Commercial Co., p. 206) not to validate an action for injuries by a workman in a case where the accident happened during the 30-day period allowed for the making good of a shortage, the payment having been made within the allowed time.

Cases involving the negligence of a third party were considered in a few instances. In Meese *v.* N. P. R. Co. (p. 250), the death of a brewery employee was occasioned by the negligence of a railroad company, and against the contention that the only recovery open to the wife and children was under the workmen's compensation act of Washington, it was held that this act had no relation to cases involving the liability of persons not in the status of employer and employee, the "Lord Campbell's Act" of the State being unaffected thereby. A different situation was presented in a New Jersey case (Newark Paving Co. *v.* Klotz, p. 251), where a workman was killed in the course of his employment by the negligence of a third party, the payment of damages and the securing of a release by such third party being held not in any way to affect the statutory right of the claimants to compensation. A very similar condition was considered by the Supreme Court of Massachusetts in the case In re Cripp (p. 266), where a teamster was injured by the negligence of a street railway company, which immediately settled with him and secured a release.

The injuries resulted subsequently in death, and it was held that the widow's rights under the compensation act were independent of anything that the workman might have done with respect to his personal injuries. The Wisconsin statute contains a provision for the subrogation to the employer of an injured employee's right of action against a third party occasioning injury. In McGarvey *v.* Independent Oil & Grease Co. (p. 267), the employer, for a consideration, assigned this right of action to the employee, whom it had already compensated. The court held in this case that the employee was entitled to sue alone without the employer as a party plaintiff.

The question of classification was passed upon by the Supreme Court of Washington in State *v.* C. M. & P. S. R. Co. (p. 215), the industrial insurance department of the State having levied a premium rate for tunnel construction work in the instance in question, and the company contending that the lower rate governing steam railroad construction work should apply. The supreme court held that the employments were clearly separable and the "enterprise classification" would not govern. The Washington statute applies to "extrahazardous" occupations, making an enumeration and concluding that if there should be or arise any other extrahazardous occupation or work it should come under the act. In Wendt *v.* Industrial Insurance Commission (p. 238), a carpenter placing shelving in a store and attempting to sharpen his chisel in a workshop belonging to the employer in another line, was held to be engaged in extrahazardous employment and within the provisions of the act, overruling the finding of the commission. That a farmer may accept the provisions of the Massachusetts statute as to certain classes of employees without obligating himself as to all was held in the case In re Keaney (p. 239). A child employed in his father's mill in violation of the statute limiting the age at which children may be so employed is not a workman within the provisions of the Washington compensation act so as to permit recovery from the State accident fund (Hillestad *v.* Industrial Commission, p. 269). In Connole *v.* N. & W. R. Co. (p. 263), the Ohio statute was construed as not applicable to railroad and other employees in the absence of active election in behalf of workmen working only in the State, approved by the State liability board of awards; the provision of the statute abrogating defenses was held not to apply in this instance. The New Jersey compensation law excepts nonresident alien dependents from its benefits. The court of errors and appeals of that State held (Gregutis *v.* Waclark Wire Works, p. 255) that since the remedy of the employee, if he had survived, would have been under the compensation act, the case was governed by that act, and no cause in favor of nonresident alien suitors existed under the death act of the State.

It was held in American Radiator Co. *v.* Rogge (p. 226) that the New Jersey law covered all accidents occurring in that State, regardless of the place of the contract of employment.

The power of a court to issue letters rogatory to obtain the testimony of foreign witnesses for hearings before the State industrial board was denied by the Supreme Court of Massachusetts (In re Martinelli, p. 229), since the relationship of the court to the industrial board did not warrant such exercise of power. The relationship of the industrial board of Illinois to the courts was considered in Courter *v.* Simpson Construction Co. (p. 264), the statute undertaking to provide a review of the decision of the industrial board by the supreme court of the State on a writ of certiorari. This detail of the statute was held to be invalid, since its effect would be to violate a constitutional provision. It was further held that the lower courts could not be deprived of their power to review the proceedings of the board, and that this might be done by writs of certiorari from the circuit courts. Under the provisions of the Massachusetts statute it was held (In re Diaz, p. 264) that the findings of the industrial accident board have the same weight and effect as the verdict of a jury, and will be so accepted by the reviewing courts. What evidence is necessary to support a finding of the industrial accident board of the State was considered by the Supreme Court of Michigan in Reck *v.* Whittlesberger (p. 236), the court holding that in the absence of direct evidence hearsay evidence based on fresh and available sources of information would suffice.

EMPLOYERS' LIABILITY INSURANCE.

A single case appears under this head, the question involved being the scope of the policy of insurance. This was held in May Creek Logging Co. *v.* Pacific Coast Casualty Co. (p. 291) not to protect the employer in a case in which damages were recovered against it by reason of the malpractice of a company surgeon.

RELIEF ASSOCIATIONS.

The only case to be considered under this head in the present bulletin is that of Daughtridge *v.* A. C. L. R. Co. (p. 334), in which the Supreme Court of North Carolina held that a declaration by an applicant for membership in a railroad relief association that he was in good health in so far as he was aware was not fraudulent, he having been examined and passed by the company's physician, every mark or indication of disease relied upon in the present action being then existent and observable.

LABOR ORGANIZATIONS.

Under this head will be considered not only cases involving organized labor directly, but injunction and contempt proceedings growing out of certain acts connected with labor disputes, and the application

of the antitrust laws, etc., to conditions corresponding in some degree to those that operate in labor organizations. Perhaps the most notable case in this field is that involving the liability of the individual members of the hatters' union for injuries resulting from a boycott conducted by the union through its officers (Lawlor *v.* Loewe, p. 137). The Supreme Court of the United States held in this case that the individual members had notice of the acts done and were liable under the Federal antitrust law for resultant damages, affirming the judgment of the appeals court (same case, p. 140). An injunction was granted under the same statute to forbid a conspiracy in restraint of trade, and the maintenance of blacklists and the establishment of a boycott by retail lumber dealers (Eastern States Retail Lumber Dealers' Association *v.* United States, p. 53).

Two closely related cases involving unlawful combinations in restraint of trade were considered in the United States District Court for the Southern District of New York, based on activities of union carpenters and joiners. In Irving *v.* Neal (p. 162) a petition for an injunction under the Federal antitrust law was denied on the ground that such relief under that act could be had only at the instance of the Government, though unlawful combination under the act was found. It was held, however, that the State statutes had been violated and that civil remedies, including injunctive relief, were available to the complainants. In the other case (Paine Lumber Co. *v.* Neal, p. 164) the complainants were held not to have proved injurious acts in pursuance of an unlawful agreement such as would warrant the issue of an injunction.

The Arkansas antitrust law was held (State ex rel. Moose *v.* Frank, p. 50) not to forbid an agreement between proprietors of laundries to fix prices for their work. The constitutionality of the antitrust law of Missouri was attacked (International Harvester Co. of America *v.* State of Missouri, p. 49) on the ground that the exemption of labor organizations from its prohibitions was a violation of the constitutional provision requiring equal protection of the law, this contention being rejected by the Supreme Court of the United States.

The construction of the Newlands Act, successor to the Erdman Act, providing for the mediation and conciliation of disputes between railroad companies and their employees, was before the court on exceptions to certain definitions and statements used by the arbitrators. The court held (In re Ga. & Fla. Ry., p. 50) that the statute contemplated practically a common-law arbitration, and that so long as the board kept within the agreed terms as to its jurisdiction and purposes the courts should not intervene.

The final proceeding growing out of the Buck Stove & Range case against the American Federation of Labor is the decision by the Supreme Court of the United States (Gompers *v.* United States, p. 133), in which that court held that the penalties for contempt assessed by

the courts for the District of Columbia must be set aside on account of the statute of limitations. The jurisdiction of courts in contempt proceedings was considered in Ex parte Heffron (p. 135), the appellate court affirming its right to release on habeas corpus persons imprisoned for contempt for violating an order improperly issued. The injunction issued by the court below was modified as being in part in excess of the powers of a court to issue. A judgment for contempt was affirmed in Sona *v.* Aluminum Castings Co. (p. 305), where it was in evidence that serious assaults had been committed by persons having knowledge of the issue of the injunction.

The power of a court to issue an injunction was considered in Baltic Mining Co. *v.* Houghton Circuit Judge (p. 310). The court below had issued an injunction and then ordered a dissolution on the ground that it had not had the power to take such a step. The supreme court directed the reinstatement of the injunction, showing at some length the grounds for its action.

An injunction was held properly issued in a case (Burnham *v.* Dowd, p. 270) in which a mason's union had procured a boycott against a materialman who had furnished material for use in work on which nonunion masons had been employed, damages being also allowed for unlawful interference with the business of another. Persons inciting others to violence were held to have violated an injunction in United States *v.* Colo et al. (p. 306), and to be guilty of contempt of court, as well as of the actual commission of acts of violence. Incitement to the commission of criminal acts during a strike was held to be proved, and the criminal statutes of New Jersey to have been violated, in State *v.* Quinlan (p. 160). In People *v.* Ford (p. 326) a conviction for manslaughter was sustained in a case in which incitement to violence was proved, one of the defendants being possibly an actual participant in the killing.

Another case involving criminal prosecution was that of Ryan et al. *v.* United States (p. 143), in which the defendants had been convicted of conspiracy to commit crime in the transportation of explosives by interstate trains. The evidence was held sufficient to affirm the judgment in the case of 25 of the defendants, a new trial being granted in the case of 5 others.

The relative status of civil and military authorities was considered in Ex parte McDonald (p. 335) in a habeas corpus proceeding in which persons sentenced by a military court during a strike were held to have been improperly sentenced by this body, but not entitled to release, since they might properly be detained for a trial before the civil courts.

The extent to which an injunction may go in restraining the activities of organized labor was given full consideration in Mitchell *v.* Hitchman Coal & Coke Co. (p. 315), the circuit court of appeals reversing a decree of the district court which practically prevented organized

activities. The same court had before it a case (Bittner *v.* West Virginia-Pittsburgh Coal Co., p. 321) arising out of the same dispute, the evidence in this case, however, showing that violence and intimidation had been resorted to. In this case an injunction forbidding acts of violence and also the use of persuasion and the payment of strike benefits was modified so as to allow the use of peaceful methods, while restraining acts of violence and coercion.

An injunction was allowed by the Supreme Court of Massachusetts, together with damages for loss of employment, in Fairbanks *v.* McDonald (p. 314), in the case of a dispute between labor unions leading to the members of one being discharged by their employers. In Roddy *v.* United Mine Workers (p. 325) no recovery was allowed by the Supreme Court of Oklahoma to a nonunion man who was discharged at the instance of the union, there being no contract for his employment for any definite time. That a labor union might be restrained from establishing a boycott against a workman of the same craft so as to cut him off from employment was held by a Missouri court in Clarkson *v.* Laiblan (p. 313). The Supreme Court of Massachusetts refused to interfere with the carrying out of an agreement between a union and a group of employers which would largely exclude from employment the plaintiffs, who were members of another union (Hoban *v.* Dempsey, p. 303), the court holding that the contract was freely made by the parties to it without a motive to injure the plaintiffs, though it might have the effect of restricting their employment. An injunction was refused a boycotted company in Gill Engraving Co. *v.* Doerr (p. 301), where a union was enforcing its rule not to do any work for customers whose work was not done entirely in union shops. The injury to the plaintiff was not denied, but was held to be only incidental to the main intent, which under controlling decisions was held to be lawful. Interference with business was found to be so direct in New England Cement Gun Co. *v.* McGivern (p. 298) that the Massachusetts Supreme Court held the petitioning company entitled to an injunction against inducing breach of contract and other interference with beneficial business intercourse.

A statute intended to protect members of labor unions in their employment while retaining their membership was held unconstitutional in Coppage *v.* Kansas (p. 147), in which case the Supreme Court of the United States reversed a judgment of the Supreme Court of Kansas. There was an extended dissenting opinion by Justice Day, who pointed out that to hold this act unconstitutional practically decided the invalidity of similar laws in thirteen other States and Porto Rico; while the prevailing opinion stated that, with the single exception of the Supreme Court of Kansas, no court of like rank had ever upheld such a law, an earlier decision of the Supreme Court and six State courts of last resort having held such laws unconstitutional.

The question of picketing was specifically considered by the Supreme Court of Michigan (In re Langell, p. 330) on proceedings to review contempt charges against Langell for the violation of an injunction prohibiting picketing. The power of the court below to issue such an injunction was challenged, but was upheld by the supreme court, as was the conviction for a willful violation of such injunction. While sustaining the legality of peaceful picketing, the Kansas City court of appeals (Berry Foundry Co. *v.* International Molders' Union, p. 332) held that in the present instance intimidation and coercive means had been used, so that an injunction forbidding the same was held to have been properly issued, and an award of damages for injury to business was affirmed.

Matters of internal organization were considered in Monroe *v.* Colored Screwmen's Benevolent Association (p. 323), in which it was held that the levying of a fine by a union upon certain of its members for violations of rules did not give the aggrieved members access to the courts for redress of their alleged grievances. So in an employers' association, an agreement by its members to pay a stipulated sum as liquidated damages for violation of the rules of the association was held enforceable in United Hat Manufacturers *v.* Baird-Unteidt Co. (p. 278).

The effect on individual contracts of a collective agreement made by a labor union was considered in Gulla *v.* Barton (p. 297), the Supreme Court of New York, appellate division, holding that such collective agreement was of such validity as would support a recovery of the difference between the amount stipulated therein and the employee's wages under a contract made in ignorance thereof.

The liability of a union for libel was affirmed in United Mine Workers of America *v.* Cromer (p. 322), the Court of Appeals of Kentucky affirming an award of damages for the publication in the union paper of the name of the plaintiff in a list of persons designated as "detestable scabs and blacklegs."

The liability of union officials for relief funds collected for the benefit of strikers and their families was affirmed in Attorney General ex rel. Prendergast et al. *v.* Bedard et al. (p. 324).

The statute of Massachusetts which requires employers to insert in advertisements for employees notice of strikes or other disputes, if any exist, was held to be constitutional in Commonwealth *v.* Libbey (p. 184) and a conviction for its violation affirmed.

A case not directly affecting organized labor, but growing out of a labor dispute, was Lane *v.* Au Sable Electric Co. (p. 338), in which no punitive damages were allowed for the ejection of an employee from his dwelling, where he had gone on strike and failed to vacate the house furnished him by the employing company, the court holding that the relation of landlord and tenant had never existed and that the relation of employer and employee had terminated when the workman struck, and he had thereby lost all claim to the occupancy of the dwelling.

DECISIONS OF COURTS AFFECTING LABOR, 1914.

DECISIONS UNDER STATUTE LAW.

ALIEN CONTRACT LABOR—IMPORTATION—CONSTRUCTION OF STATUTE—"OFFER OF EMPLOYMENT"—*United States v. Dwight Manufacturing Co., United States District Court, District of Massachusetts (Nov. 19, 1913), 210 Federal Reporter, page 74.*—The Government brought action to enforce penalties against the company named on 122 counts for the importation of aliens in violation of the immigration act of February 20, 1907, chapter 1134, 34 Stat. 900 (U. S. Comp. Stat. Supp. 1911, p. 503). The company contended that the facts alleged did not present an offense under the act, and the question before the court was as to the sufficiency of the charge. The act defines contract laborers, who are excluded by it, to be persons "who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country, of any kind, skilled or unskilled."

The following extracts from the opinion by Judge Dodge discuss some of the points of law involved:

Each count describes the alleged offer as follows:

"That if said alien would migrate from said * * * to [here naming a place in the United States], said defendant would employ and pay said alien to perform for said defendant at said [place within the United States] certain manual labor, that is to say, to operate and assist in operating divers machines used by the defendant in its mill at said [place within the United States] in the manufacture of cotton fabrics."

Having thus described the alleged offer or promise of employment made to the alien named, each count next alleges that the defendant unlawfully assisted him to migrate by prepaying his passage to a place within the United States; follows this by allegations that, induced by the offer and assisted by the prepayment, he did migrate to the United States; and concludes with allegations that he was not at the time an alien entitled to enter the country, that the defendant well knew the fact to be so, and that it owes the prescribed penalty.

The company objected that the aliens named in the counts were not sufficiently alleged to have been contract laborers within the definition given in the act, maintaining that no offer of employment sufficient to make the alien a "contract laborer," even if he was induced or solicited by it to migrate to this country, had been set forth.

The court rejected this view, saying:

If, as this declaration alleges, the aliens named were in fact induced to migrate by offers no more specific as to terms and conditions

amount to be paid, the character of the labor, or the terms of the payment, than the offers described as above, I do not think the court could properly say that they were not "contract laborers" within the act; nor do I see how the court can properly say that offers made in the terms alleged could not have induced any of them to migrate. This will be a question for the jury, as will also the further question whether or not, if they were so induced, and were therefore "contract laborers," the defendant knowingly assisted their migration as charged after they had thus become "contract laborers." I am unable to hold that the declaration has not sufficiently alleged them to have been contract laborers.

The court further held that where the declaration alleged that the corporation made the offers of employment to the aliens and prepaid their transportation, the fact that it did not specify whether the offers were made by an officer of the corporation or by some other person, and did not allege whether they had authority, whether the offers were oral or in writing, or their terms, did not render it demurrable.

ALIEN CONTRACT LABOR—VIOLATION OF STATUTE—NATURE OF ACTION—PENALTIES—*Grant Bros. Construction Co. v. United States, Supreme Court of the United States (Mar. 16, 1914), 34 Supreme Court Reporter, page 452.*—The company named and certain agents had been found guilty of a violation of the immigration law of February 20, 1907 (34 Stat. 898), the Supreme Court of Arizona having assessed penalties of $1,000 each in 45 cases. (114 Pac. 955; see Bul. No. 95, p. 289.) A number of the errors alleged to have been committed by the court below related to procedure and need not be noted here. Mr. Justice Van Devanter, who delivered the opinion of the court, summarized the evidence, which was to the effect that the company was engaged in the construction of a railroad in southern Arizona and had employed an agent to secure workmen. This person employed assistants to follow his suggestions and cooperate with him in the work in which he was engaged. The board of inquiry of the immigration office decided that 45 men in a group of workmen crossing the boundary line from Mexico were aliens, and it was found that their immigration was due to representations made by the company's agents.

Among the complaints made against the trial court was one that the case had been treated as a civil suit rather than a criminal procedure, and that the depositions of absent witnesses had been read and the jury instructed to return a verdict for the Government if the evidence reasonably preponderated in its favor. Objections to this procedure were overruled by the Supreme Court, the court holding that the action was civil and attended with the incidents of a civil action.

As to the amount of penalties recoverable Mr. Justice Van Devanter said:

Still another contention is that, as all the men named in the petition were brought into the United States at one time, there was but a single violation of the statute, and only one penalty could be recovered. The statute declares that "separate suits may be brought for each alien thus promised labor or service," and this plainly means that a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged, or solicited in contravention of the statute.

The judgment of the court below was therefore affirmed.

ANTITRUST LAW—MONOPOLIES—RESTRAINT OF TRADE—EXEMPTION OF LABOR ORGANIZATIONS—CONSTITUTIONALITY OF STATUTE—*International Harvester Co. of America v. State of Missouri, United States Supreme Court (June 8, 1914), 34 Supreme Court Reporter, page 859.*—Judgment was secured by the State of Missouri against the company named in the supreme court of that State, excluding it from doing business in the State, and this was affirmed in the United States Supreme Court. The company was charged with violation of the State antitrust law, and based its defense on certain objections to the constitutionality of the statute, one of which was that it denied equal protection of the laws in excluding combinations of wage earners from the prohibitions against combinations to lessen competition and regulate prices. This is the item of interest from a labor point of view. In dealing with it Mr. Justice McKenna, who delivered the opinion of the court, spoke in part as follows:

Plaintiff in error makes three contentions: (1) The statutes * * * (2) discriminate between the vendors of commodities and the vendors of labor and services; and (3) between vendors and purchasers of commodities.

These contentions may be considered together, both involving a charge of discrimination,—the one because the law does not embrace vendors of labor; the other because it does not cover purchasers of commodities as well as vendors of them. Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the State. And we shall presently see that power has very broad range. A classification is not invalid because of simple inequality. We said in Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 106, 19 Sup. Ct. 609, by Mr. Justice Brewer: "The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it can not be disturbed by the courts

"unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." [Cases cited.]

Whether the Missouri statute should have set its condemnation on restraints generally, prohibiting combined action for any purpose and to everybody, or confined it as the statute does to manufacturers and vendors of articles, and permitting it to purchasers of such articles; prohibiting it to sellers of commodities and permitting it to sellers of services, was a matter of legislative judgment; and we can not say that the distinctions made are palpably arbitrary, which we have seen is the condition of judicial review. It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of the power. To be able to find fault, therefore, with such policy, is not to establish the invalidity of the law based upon it.

ANTITRUST LAW — UNLAWFUL COMBINATIONS — MONOPOLIES — LAUNDRIES—CONSTRUCTION OF STATUTE—*State ex rel. Moose, Atty. Gen. v. Frank et al., Supreme Court of Arkansas (July 13, 1914), 169 Southwestern Reporter, page 333.*—A complaint was brought by the State against Aaron Frank and others to recover a penalty for an unlawful combination in violation of the antitrust law of the State of Arkansas. Judgment was in favor of the defendants in the circuit court of Pulaski County on a demurrer to the complaint, which judgment was on appeal affirmed. The decision turned on the construction of the statute, the State conceding that an agreement to fix the price of laundering, as had been undertaken by the proprietors of the defendant laundries doing business in the city of Little Rock, was not an agreement to fix the price of any article of manufacture, mechanism, or merchandise, forbidden by the statute, but holding that such agreement was an undertaking to fix the price of a commodity, convenience, or repair, within its prohibitions. This contention the court rejected, discussing the terms used at some length, and citing cases sustaining its views as to the nonapplicability of the statute, the opinion of Judge Smith, who spoke for the court, concluding as follows:

If the business of laundering is not a commodity, then an agreement fixing prices for the performance of that service is not within the inhibition of the antitrust act. The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the legislature of this State has not made such an agreement unlawful.

ARBITRATION OF LABOR DISPUTES—AWARD—EXCEPTIONS—PROCEDURE—*In re Georgia & Florida Railway, United States District Court, Southern District of Georgia (July 30, 1914), 215 Federal Re-*

porter, page 195.—A board of arbitrators had been appointed under the provisions of the Newlands Act providing for the mediation and conciliation of disputes between railroad companies and their employees (38 Stat. 103, ch. 6, Acts of 1913), and exceptions were filed to its award. The statute provides for a permanent board of mediation and conciliation, and for the appointment of arbitrators in cases in which this board does not secure the adjustment of the questions involved. Before the appointment of the arbitrators, an agreement in writing must be made by the parties, stipulating that the arbitration is to be made under the provisions of the act, stating specifically the questions to be submitted to the arbitrators for decision, and stipulating that a majority of the board of arbitrators shall be competent to make a valid and binding award. Awards, papers, proceedings, and testimony, certified under the hands of the arbitrators, are to be filed with the clerk of the court of the district wherein the dispute arose, and unless exception is taken thereto within a fixed period, for error of law apparent on the record, such awards are to be binding upon the parties for the term agreed upon.

In the case in hand four exceptions were offered to the award of the arbitrators, one as to the interpretation of the word "arbitration" made by the chairman of the board to the effect that "all matters of arbitration are matters of compromise," the contention being that if this view influenced the award it was error. As to this the court said that there was nothing on the record to show how this remark of one member of the board affected the award. Another exception was as to the correctness of the issue before the board as indicated by a statement by the arbitrator representing the employees. The other exceptions relate to the principles used in arriving at the conclusions reached by the board.

Judge Sheppard, who delivered the opinion of the court dismissing all the exceptions, recited the foregoing facts and quoted portions of the statute under which the arbitration was had, and said:

It is observed by the express terms of the statute that the award shall be final and conclusive upon the parties unless set aside for error apparent upon the record. Thus, we are met at the threshold of the inquiry with the query: Do the exceptions stated above present within the purview of the statute such errors of law as can be reviewed by the court? The only precedent that has rewarded the industry of the court for construction of the act in question is the case which construed the Erdman Act, In re Southern Pacific (C. C.) 155 Fed. 1001, [Bul. No. 74, p. 206], where the provisions of the statute for review by the court for errors apparent on the record were presented. There it was held that an arbitration under the former (Erdman) act, containing essentially the same provisions as section 4 of the present act, was substantially a common-law arbitration, and the power and authority of the board rest solely upon the written submission entered into by the parties, which limits and determines not

only the rights of the parties, but also the extent of the powers of the arbitrators, and that the submission is to be construed according to the rules governing contracts and not those governing pleadings. By reference to paragraph 5 of section 4, it is required that the agreement shall state specifically the matters to be submitted to the board for its decision. Obviously, it was the right of either party under the statute to have prescribed the scope of the inquiry, and to have defined the principles of law or conditions of fact upon which the inquisition was to proceed and the award to be established. Doubtless any departure from accepted rules, or failure on the part of the board to follow the adopted criteria, or the nonobservance of the restrictions imposed by agreement upon the latitude of the board's investigation, would have been cause for error apparent upon the record to which exception would lie as provided in the statute.

There were, however, no limitations by the agreement to arbitrate put upon the scope of the inquiry, or any method prescribed as to how the board was to ascertain a reasonable wage to be paid the employees. It appears that the alleged errors presented by the exceptions raise questions of mixed law and fact put in issue by the submission without limitation, and having been heard and determined by the court constituted by consent of the parties called to arbitrate, that is to say, to hear, compare, adjust, and adjudicate the controversies, is as conclusive of the matters submitted, as well as the process by which they were reached, as the verdict of a jury. It would seem on the facts that their judgments are reviewable for only such errors as would warrant setting aside a common-law arbitration—such error as goes to jurisdiction, right or authority of the court to determine. The award has not been assailed, it will be observed, on any ground that would avoid it for lack of jurisdiction; or any ground that would be cause for setting aside the award of a common-law arbitration; it is not pretended that it was not a legally constituted board, or that the statute under which it was organized was invalid, or that the board traveled beyond the scope of the matters properly submitted by agreement of the parties. By the agreement, the parties accepted the modus operandi of the statute for a speedy and expeditious adjustment of their differences, and thereby voluntarily waived any rights to have the questions involved determined by the strict and cumbersome rules of the courts of law. Arbitration, it is agreed, generally is a substitution by consent of the parties of a simple expeditious tribunal in lieu of courts whose procedure is circumscribed by definite rules of law.

It is plain from the text of the act that Congress, appreciating the necessity of a forum for the arbitration of distracting controversies which often arise between employees and employers, established a tribunal to which the parties at their option might resort for a speedy determination of such controversies on their merits, without the delays incident to trials in courts of law. If the awards of such courts are to be set aside on technical grounds, or because their proceedings were not according to the rules of law, it would tend to set at naught the good offices of Congress as expressed by the act and leave to the courts at last, in spite of legislation to the contrary, the settlement of such controversies. It was undoubtedly the intent of the legislature that such awards should be final except for such error that would avoid the proceedings ab initio.

The exceptions should be dismissed, and the award affirmed, and it will be so ordered.

On appeal to the circuit court of appeals (217 Fed. 755, decided Oct. 30, 1914), that court affirmed the judgment of the district court, holding that an award is subject to exception only on some ground which affects the jurisdiction, right, or authority of the arbitrators to make the same, and that such review can extend only to questions affecting the legality of the proceedings or the conclusiveness of the award, and views expressed by the arbitrators or reasons given for their decision are immaterial.

BOYCOTT—BLACKLISTING—CONSPIRACY—COMBINATION IN RESTRAINT OF TRADE—ANTITRUST LAW—*Eastern States Retail Lumber Dealers' Association v. United States, United States Supreme Court (June 22, 1915), 34 Supreme Court Reporter, page 951.*—The association named brought its appeal to the Supreme Court to review a decree of the District Court of the United States for the Southern District of New York enjoining it as an unlawful combination under the Sherman Antitrust Act. The appeal resulted in the decree of the court below being affirmed. The association was made up of retail lumber dealers in a number of States, including New York and Massachusetts on the north and Maryland on the south, and among its activities was the distribution of a document known as the "official report," in which, on account of "an interest in common with your fellow members in the information contained in this statement," certain information was communicated "in strictest confidence, and with the understanding that you are to receive it and treat it in the same way." Following these statements was a list of wholesale dealers who had been reported as having solicited or quoted or sold directly to consumers. Members were also encouraged to report in detail any instance of such action on the part of wholesalers, the names being obtained and placed on the list as the result of complaints made by individual retailers. Counsel for the association stated that complaints of this nature were investigated and if serious and well founded were acted upon by the board which, if satisfied that the wholesaler made a practice of selling to consumers and customers of the retail trade, directed the name of such wholesaler to be reported for the official list. The name could be removed on satisfactory assurance that the wholesaler was no longer selling in competition with retailers. Having stated these facts Mr. Justice Day, who delivered the opinion, said in part:

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to con-

sumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own.

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.

The Sherman Act has been so frequently and recently before this court as to require no extended discussion now. [Cases cited.] It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce.

In Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. Rep. 492 [Bul. No. 95, p. 323], after citing Loewe *v.* Lawlor [208 U. S. 274, 28 Sup. Ct. 301, Bul. No. 75, p. 622], this court said (p. 438):

"But the principle announced by the court was general. It [the Sherman Act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter."

These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him, but with all others of the class who may be informed of his delinquency. "Section 1 of the act * * * is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein." United States *v.* Patten, 226 U. S. 541, 33 Sup. Ct. Rep. 141. This record abounds in instances where the offending dealer was thus

reported, the hoped-for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired.

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievance against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in Loewe *v.* Lawlor [supra].

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. "But," as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433, 30 Sup. Ct. Rep. 535 [Bul. No. 89, p. 414], "when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

CIVIL-SERVICE EMPLOYEES—PENSION FUNDS—DEDUCTION FROM SALARIES—CONSTITUTIONALITY OF STATUTE—*Hughes v. Traeger et al., Supreme Court of Illinois (Oct. 16, 1914), 106 Northeastern Reporter, page 431.*—This was a suit by Edward J. Hughes against John E. Traeger and others on a bill in chancery to prevent the retention of any portion of the complainant's salary under the provisions of the civil-service pension law of the State (Laws of 1911, p. 158). This act provides for the establishment of such a fund, chiefly by the retention from salaries and wages by the comptroller of the municipalities to which the act applies of the sum of $2 per month for each employee within its scope. The complaint charged that the statute in question was unconstitutional, so that from a decree for the defendant officials the case was taken on a writ of error from the circuit court of Cook County to the supreme court, this court holding that the statute was constitutional.

The status of the complainant and the operation of the law are discussed in the following quotation from the opinion of the court, which was delivered by Judge Dunn:

By section 1 of the pension fund act its provisions do not apply to temporary or probationary employees or to laborers, except, in case of the latter, upon their request. It applies, therefore, only to those holding permanent positions, and those positions, whether called offices or places of employment, have substantially the same characteristics, without regard to the character of the services rendered.

The bill states that the complainant was employed in the civil service of the city, but necessarily, under the provisions of section 10 of the civil-service act, he was appointed by some appointing officer acting under some authority derived from the city council. By virtue of that appointment, and without regard to any agreement or contract, the complainant was entitled to hold his position and receive its emoluments until discharged for cause in the manner prescribed by the civil-service act; but he was not bound to perform the duties of his position for any length of time. He would violate no obligation by leaving the service of the city at any time. There were no terms of service agreed upon. The respective rights and obligations of the city and the complainant were not fixed by contract, but by law and the action of the council authorizing his appointment. He did not hold his position or perform its duties by virtue of any contract. He had no property right in his position or the salary attached thereto, and no right to compensation growing out of any contractual relation. His position was subject to the same legislative control as may be exercised over any public office. Offices created by statute are wholly within the control of the legislature, which may at pleasure create or abolish them, modify their duties, shorten or lengthen their terms, increase or diminish the salary, or change the mode of compensation; and the power of municipal corporations, within the limits prescribed by the constitution or by statute, is of the same absolute character.

The effect of the law was to reduce the salary which the complainant would receive, $2 a month, but he was not thereby deprived of his property, for he had no property in his unearned salary. It is true that the complainant acquires no vested interest in the fund created by the statute, for there is no contract by the State or the city that the disposition of the fund may not be changed in the future, and in such event the complainant's expectancy might be destroyed. The $2 a month deducted from the pay of each employee does not become the property of such employee and can not be controlled or disposed of by him. The fund created by these deductions remains subject to the disposition of the legislature, and the employees can not prevent its appropriation in another way than that designated by the statute. It is not their property, and the statute does not amount to a contract by the State to use it in the manner provided by the statute. A change in the disposition of the fund would not, however, violate any right of the complainant, for until the happening of the event designated by the statute for its distribution he has no vested right in the fund, but only an expectancy created by the law, which the law may revoke or destroy. Pennie *v.* Reis, 132 U. S. 464, 10 Sup. Ct. 149; State *v.* Trustees, 121 Wis. 44, 98 N. W. 954.

It is argued that, if the money retained be regarded as public money, the act is void as an appropriation of public money for private use and allowing extra money to public officers for services already performed. In Firemen's Benevolent Ass'n *v.* Lounsbury, 21 Ill. 511, 74 Am. Dec. 115, it was held that the raising of funds for the relief of the distressed, sick, injured, or disabled members of the Firemen's Benevolent Association of Chicago and their immediate families was a public charity, for which the legislature could make provision. Judge Dillon, writing of pensions for municipal services, in his work on Municipal Corporations, vol. 1, sec. 430 (5th ed.), says that these annuities—"are, in effect, pay withheld to induce long-continued and faithful service, and the public benefit accrues in two ways: First, by encouraging competent and faithful employees to remain in the service and refrain from embarking in other vocations; and, second, by retiring from the public service those who, by devoting their best energies for a long period of years to the performance of duties in a public office or employment, have by reason thereof or of advanced age become incapacitated from performing the duties as well as they might be performed by others more youthful or in greater physical or mental vigor."

In Commonwealth *v.* Walton, 182 Pa. 373, 38 Atl. 790, legislation like that in question was sustained against a similar objection. The purpose of the legislation is within the constitutional power of the general assembly.

CONTRACT OF EMPLOYMENT — BREACH — SUITS — LIMITATIONS— *Pennsylvania Co. v. Good. Appellate Court of Indiana (Dec. 19, 1913), 103 Northeastern Reporter, page 672.*—This was an action by John S. Good against the railroad company named for damages for alleged breach of contract of employment. Judgment was in his favor in the circuit court of Marion County, and the company appealed. The employee set forth that, in 1882, following the receipt of an

injury, his claim for damages was released in consideration of an agreement by the company to employ him as watchman, during his life, at certain wages. He was employed in this capacity for some time and discharged May 22, 1902, on account of which this action was brought.

The company in its appeal argued that Good's right of action expired by the statute of limitations in May, 1908. He had brought suit in 1904, but his counsel had voluntarily dismissed it after a partial trial because of rulings by the court which he believed were erroneous. As to the remedies which Good originally had and his election between them, the court, speaking by Judge Lairy, said:

> Upon such a breach, appellee had a right to pursue either of two remedies. He might treat the contract as still subsisting, hold himself in readiness to perform and sue on the contract for the wages due him thereunder, or he could treat the contract as terminated by the breach, and sue at once for the entire damages resulting to him from such breach. [Cases cited.]
>
> The cause of action for a breach of a contract accrues at the time the breach occurs, and the statute of limitation begins to run from that date.
>
> If appellant had elected to treat the contract as still subsisting, and to sue under it for his wages, his cause of action as to each installment of such wages would have accrued at the time when such installment was due and payable by the terms of the contract, and the statute of limitations as to each installment would run from the time it became due. In this case appellee elected to treat the contract of employment as terminated by his discharge, and to sue for the entire damage resulting to him. This right of action accrued on the date of his discharge, and the statute of limitations expired on the 22d day of May, 1908.

CONVICT LABOR—STATE EMPLOYMENT—CONSTITUTIONALITY OF STATUTE—*Shenandoah Lime Co. et al. v. Mann et al., Supreme Court of Appeals of Virginia (Jan. 15, 1918), 80 Southeastern Reporter, page 753.*—An act of the General Assembly of Virginia, known as the "Convict lime grinding act," which was approved March 14, 1912 (ch. 295, Acts of 1912, p. 586), provides for the employment of convicts at grinding oyster shells and limestone rock, provides for procuring the material upon which they are to work and the instrumentalities with which they are to do the work, and provides for the sale of the product of their labor and for their support from the proceeds. An appropriation of $30,000 is made by the act to carry its provision into effect.

The Shenandoah Lime Co. brought suit against William Mann, governor of the State, and other State officials, in the circuit court of the city of Richmond, for an injunction to prevent the enforcement of the act, on the ground that the law was unconstitutional as it

violates section 185 of the Virginia constitution, which forbids the State from becoming a party to or interested in any work of internal improvement, except public roads, or engaged in carrying on such work. It was also contended that the act is obnoxious to section 188 of the constitution because it appropriates public funds for a private purpose or business, and because it amounts to the taking of the property of the lime company without due process of law, contrary to the fourteenth amendment of the Federal Constitution.

The court held that the law was constitutional and dismissed the bill of the company, whereupon an appeal was taken to the Supreme Court of Appeals of Virginia, where the decision of the lower court was affirmed. Judge Harrison, after reviewing the facts in the case, spoke in part as follows:

It is apparent from the title, preamble, and the body of this act that its dominant purpose is to provide suitable employment for certain long-term or dangerous convicts confined in the penitentiary, and that the other provisions of the act are merely tributary to that end.

We are of opinion that the machinery for grinding oyster shells and limestone rock, and the temporary structures for housing the convicts pending the work contemplated by the act in question do not come within the meaning of the term "internal improvements," as that term is used in section 185 of the constitution. Whatever interpretation that term may have elsewhere, it has no such meaning in Virginia, where for nearly, if not quite, 100 years it has acquired a definite and well-recognized meaning. Its meaning as thus defined and understood throughout the legislation of the State, and the decisions of her courts has included and had reference to the channels of trade and commerce, such as turnpikes, canals, railroads, telegraph lines, including in more recent years telephone lines, and other works of a like quasi public character.

The manifestly dominant purpose of the act being, as already seen, to provide employment for convicts who could not be used in the usual employments under existing statutes, there can be no question that the State is acting within its police power in providing the present means for employing such convicts.

We are warranted, upon abundant authority, in holding that the exercise by the State of its police power, in enacting the "Convict lime grinding act" under consideration, can not be defeated because of any conflict with section 185 of the constitution.

We are further of opinion that the act does not violate section 188 of the Virginia constitution. It does not, as contended, appropriate public funds for a private purpose; nor does it amount to the taking of the property of complainants without due process of law, contrary to the fourteenth amendment of the Federal Constitution. It being the purpose of the act to furnish employment to convicts, as appears from the act itself, and that purpose being, as already seen, a valid exercise by the State of its police power, the appropriation which the act carries is clearly for a public purpose and not for a private purpose.

CONVICT LABOR—WORKING OUT COSTS—ACTION FOR EXCESS WORK—*Tennessee Coal, Iron & Railroad Co. v. Butler, Supreme Court of Alabama (June 4, 1914), 65 Southern Reporter, page 804.*—Alex Butler brought action against the company named in the city court of Birmingham, where his suit prevailed. Butler had been convicted of petty larceny. He was hired from Jefferson County to the defendant company to work during the term of his sentence. After serving his sentence of 110 days at hard labor he proceeded to work out his costs, which amounted to $29.35, at the rate of 40 cents a day as provided in the sentence. Under the law he was entitled to work out the costs at the rate of 75 cents a day. He claimed as damages the value of the labor which he had performed in excess of the legal amount, and the court held that his further imprisonment after the valid part of the contract was illegal, and affirmed the judgment in his favor.

EMPLOYERS' LIABILITY—ABROGATION OF DEFENSES—CLASSIFICATION OF EMPLOYMENTS—CONSTITUTIONALITY OF STATUTE—*Vandalia Railroad Co. v. Stilwell, Supreme Court of Indiana (Mar. 10, 1914), 104 Northeastern Reporter, page 289.*—Charles Stilwell was a freight brakeman in the employ of the company named, and sued the company for damages for personal injury. The first paragraph of the complaint charges negligence of the engineer in backing an engine and cars against a car on which appellee was riding in the course of his duty, whereby he was thrown from the car and injured, and no question is raised as to its sufficiency. The second paragraph alleges the railroad's liability under the employers' liability act of March 2, 1911 (Acts of 1911, p. 145). The railroad company demurred to this paragraph, and assigned the overruling of the demurrer as error in appealing from the judgment of the circuit court of Morgan County in favor of the employee. Judge Myers delivered the opinion of the court, affirming the judgment of the court below. As to the grounds of defense he said:

> The specific grounds of challenge of the constitutionality of this act is [are] that it makes an employer liable for an injury to an employee arising out of dangers and hazards inherent in the nature of the employment, without fault of the employer, and thereby deprives appellant of its liberty and property without due process of law, in violation of article 14, in amendment of the Federal Constitution, and of section 12, art. 1, of the State constitution, and that it makes employers of five or more persons liable, and leaves employers of less than five persons free from the obligations, and liabilities imposed by the act, and thereby denies appellant the equal protection of the laws in violation of the fourteenth amendment to the Federal Constitution, and section 23, art. 1, of the State constitution.

Analyzing the effect of the law, the court concluded that the statute does not change the law as it formerly existed as to when an

employee assumes the risk, or is negligent, or as to the burden of proof as to negligence, but does destroy the fellow-servant rule and changes the rule as to burden of proof as to knowledge or constructive knowledge of the defect in the place, tool, or appliance; that the statute creates no liability on the part of the employers where there is no negligence, and hence does not deprive employers of liberty or property without due process of law.

Judge Myers discussed at length the question of the classification making the act applicable only to employers of five or more workmen, and concluded that it must be considered a reasonable classification on the ground that unless courts are satisfied that there can be no reasonable basis for such a classification, they will not overthrow the statute. The following brief quotations are taken from the discussion on this point:

> The question resolves into the proposition under the broadest views of the case, whether the classification made by the statute here involved rests upon some material or substantial basis, and operates upon all alike within the class.
>
> This statute * * * operates upon conditions which by reason of numbers are not and can not be the same, though the relation should be close, but which will be the same in case the number is reached, in analogy to classification by population, in addition to the fact that there is a natural relation of increase of danger from mere numbers, even though there should seem to be some inequality between so small a difference as between four and five, but that is an inseparable incident of the power of classification.

As to the application of the act to railroads, Judge Myers said:

> It is next urged that the act does not apply to railroads for the reason that they are not engaged in "business, trade or commerce," in the language of the act. "Business" is defined as that which occupies the time, attention, or labor, of men for the purpose of profit or improvement, as their principal concern. [Cases cited.]
>
> "Commerce" is defined as traffic and something more; it is intercourse, transportation; and the latter is commerce itself. It includes not merely traffic, but the means and vehicles by which it is accomplished. As used in the Federal Constitution, it, of course, applies to relations between citizens of different States, foreign nations, and the Indian tribes, and is broad enough to embrace intrastate traffic, and transportation, as well. We have no difficulty in determining that the statute embraces railroads.

EMPLOYERS' LIABILITY—ABROGATION OF DEFENSES—CONSTITUTIONALITY OF WORKMEN'S COMPENSATION ACT—*Crooks v. Tazewell Coal Co., Supreme Court of Illinois (Apr. 23, 1914), 105 Northeastern Reporter, page 132.*—Louis Crooks brought action against the company named for damages for personal injury, alleged to have been caused by its negligence in failing to construct an entry in its mine

of sufficient height and width to permit him safely to drive coal cars through it, and in allowing coal and refuse to accumulate on the tracks. The company had elected not to come under the workmen's compensation act of the State (Acts of 1911, p. 314), and consequently, in accordance with its provisions, was deprived of the defenses of assumed risk, negligence of fellow servants, and contributory negligence. It questioned the constitutionality of the act, but contended that, since the employee had elected to come within the provisions of the act, he was limited in the amount of his recovery by the act, and must bring his proceeding under it. The court affirmed a judgment of the circuit court of Tazewell County for the plaintiff, and followed the decision in Deibeikis *v.* Link-Belt Co., 261 Ill. 454, 104 N. E. 211 (see p. 216), in holding that the act is constitutional, and also that where either party elects not to be bound by the act, and so notifies the proper authorities, there is no contract under the act, and the employee is not limited in his recovery by its terms.

EMPLOYERS' LIABILITY—ABROGATION OF FELLOW-SERVANT DOCTRINE—CONSTITUTIONALITY OF STATUTE—*Easterling Lumber Co. v. Pierce, Supreme Court of Mississippi (Mar. 2, 1914), 64 Southern Reporter, page 461.*—S. W. Pierce, the plaintiff, recovered in the circuit court of Covington County, the sum of $17,500 as damages for personal injuries resulting in the loss of a leg, suffered while an engineer in the employ of the company named. The engine which he was driving on a logging road, hauling a train carrying employees to the company's camp, met in head-on collision another engine pulling cars from the camp. The constitutionality of the statute (ch. 194, Acts of 1908) abolishing the fellow-servant rule among certain employees was brought in question, the company advancing two reasons: (1) It violates section 193 of the Mississippi constitution, which largely took away the defense of fellow service in personal-injury suits against common-carrier railroads; (2) it violates the equality clause of the fourteenth amendment to the Constitution of the United States.

Judge Reed, in delivering the opinion of the court, spoke in part as follows:

We quote the first section of the chapter:

"Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employees, as are allowed by law to other persons not employed. * * *"

It has been held that section 193 applies only to railroad corporations engaged in the business of common carrier, or those denominated "commercial railroad companies," and that it does not apply to railroads owned and operated as an adjunct to the main business of their owners, such as construction company roads, roads used in connection with mines and lumber corporations and logging roads. Construction Co. *v.* Heflin, 88 Miss. 314, 42 So. 174, [Bul. No. 69, p. 446]. The railroad in the case at bar is a logging road.

It will be noticed that the final sentence of section 193 provides for the extension of the remedies therein in the following language: "The legislature may extend the remedies herein provided for to any other class of employees." It is not argued by counsel for appellant that the legislature could not extend the remedies to employees of logging roads. It is conceded that this may be done. It is claimed that the words were at once a grant and a limitation; that by necessary inference the limitation amounted to a denial to the legislature of a power to grant any remedies curtailing the fellow-servant rule other than those provided in the section. It is true that by the statute (ch. 194, Acts 1908) there is a broader and fuller statement of the abrogation of the fellow-servant rule than that contained in the section of the constitution. The makers of the constitution, by section 193, provided for the abrogation of the fellow-servant doctrine to a certain extent.

It was said by Mr. Chief Justice Whitfield in the case of Ballard *v.* Oil Co., 81 Miss. 507, 34 So. 533 [Bul. No. 49, p. 1363], that it was the purpose of the framers of the constitution to authorize legislation to abolish the fellow-servant rule in the case of railroad corporations whose business was known to be inherently dangerous in so far as such litigation [legislation] would be in accord with the principles announced by the decisions of the United States Supreme Court. He further stated in his opinion in that case that "the purpose of the last clause of section 193 was to extend the remedies therein provided for to any other class of employees of corporations or persons whose business was, like that of railroads, inherently dangerous, or whose business was so different from the business of other corporations or persons as to furnish the basis for a classification of the business of such corporations, or persons, under which their employees might be permitted to sue without reference to the fellow-servant rule, while the employees of corporations, or persons not having that sort of business, could not so sue; in other words, to permit a classification based on 'some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed.' * * * It is not therefore to be supposed that the last clause of the section meant any more than that there might be other classifications of the employees of corporations or individual persons based also on some distinguishing difference in the nature of the businesses."

We can not believe from an entire consideration of the section, and in view of its evident purpose, that the final sentence was intended as a restriction. In truth, we do not see that it is necessary to regard it as a grant in order that the legislature should be able to enact a statute to abolish the fellow-servant rule in proper classes of employees. The legislature is intrusted with the general authority to make laws at discretion, unless there is a clear constitutional prohibition.

Now as to the contention that chapter 194 violates the equality clause of the fourteenth amendment of the Constitution of the United States: Counsel for appellant contend that this violation is accomplished by the inclusion of the words "and running on tracks." We can not agree with counsel that this is so. It has been held that section 193 of the constitution excludes all railroads except commercial railroads, or those engaged in the business of common carrier. We see in the act of the legislature the purpose to extend the remedy provided by the abrogation of the fellow-servant doctrine to all employees of all railroad corporations, including the commercial railroads, and including also all other railroads, such as logging railroads and those connected with lumber and other enterprises using such engines, locomotives, and cars "running on tracks." We understand the words "running on tracks" to define such engines, locomotives and cars propelled by the several dangerous agencies named as are used in all of the different kinds of railways. The statute was meant in its broad expression to exclude no kind of railways in Mississippi. The statute provides that the remedies extend to all employees using engines, locomotives, or cars owned and operated by railroad corporations and all other corporations and individuals.

In short, the class made by the statute is all employees using such engines, locomotives, and cars of all kinds and descriptions propelled by the dangerous agencies specified and running on tracks, that is, on a defined way such as used by railroads. We deem this a reasonable classification which applies equally to all in the same situation.

An attempt was made to carry this case to the Supreme Court of the United States on a writ of error, which that court dismissed for want of jurisdiction (35 Sup. Ct. 133). One ground was that the classification in the statute which has been mentioned was so unequal as to cause the statute to be in conflict with the fourteenth amendment; and the other that chapter 215 of the Mississippi Laws of 1912, enacted after the happening of the accident, but before the trial, providing that from the proof of the happening of an accident there should arise a prima facie presumption of negligence, was wanting in due process because retroactively applied to the case.

Mr. Chief Justice White, who delivered the opinion, said in conclusion:

As it results that at the time the writ of error was sued out it had been conclusively settled by the decisions of this court that both grounds relied on were devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction, and we therefore maintain the motion which has been made to dismiss, and our judgment will be, dismissed for want of jurisdiction.

EMPLOYERS' LIABILITY — EMPLOYMENT OF CHILDREN — AGE LIMIT—CONSTITUTIONALITY OF STATUTE—MISREPRESENTATION OF AGE—*Sturges & Burn Manufacturing Co. v. Beauchamp, United States Supreme Court (Dec. 1, 1913), 34 Supreme Court Reporter, page 60.*—Arthur Beauchamp, the defendant in error, was injured

while employed by the company named as a press hand to operate a punch press used in stamping sheet metal, being at the time under 16 years of age. He brought an action through his next friend in the superior court of Cook County, Ill., to recover damages for the injury sustained, relying on a statute of Illinois (Laws of 1903, p. 187, Hurd's Stat. 1909, p. 1082), which, by section 11, prohibited the employment of children under 16 years of age in various hazardous occupations, including that in which the injury occurred. A verdict was rendered for Beauchamp in the trial court, which judgment was affirmed by the supreme court of the State. (250 Ill. 303, 95 N. E. 204.) The case was then taken to the Supreme Court of the United States on error, where the judgment of the State court was affirmed. Mr. Justice Hughes, who delivered the opinion of the court, after stating the facts, said:

The Federal question presented is whether the statute, as construed by the State court, contravenes the fourteenth amendment. It can not be doubted that the State was entitled to prohibit the employment of persons of tender years in dangerous occupations. [Cases cited.] It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith relying upon the representation made by Beauchamp that he was over sixteen. It is said that, being over fourteen, he at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the State, in securing the safety of the young, to prohibit such employment altogether, it could select means appropriate to make its prohibition effective, and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government. [Cases cited.] And where, as here, such legislation has reasonable relation to a purpose which the State was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law. [Cases cited.]

It is also contended that the statute denied to the plaintiff in error the equal protection of the laws; but the classification it established was clearly within the legislative power.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—LAUNDRIES—APPLICATION OF LAW—ASSUMPTION OF RISKS—*McClary v. Knight, Supreme Court of Appeals of West Virginia (Dec. 9, 1913), 80 Southeastern Reporter, page 866.*—T. A. McClary was employed in Knight's laundry to run the engine and washers. He was directed to oil one of the washers, and after having done so, was endeavoring to replace the belts on the pulleys of the line shaft overhead. He was standing on top of the washing machine, when his sleeve was

caught in a belt, throwing him into a running wringer or extractor near by, which had no covering over it, and injuring him to such an extent that amputation of his leg was necessary. He sued Knight and obtained a judgment in the circuit court of Cabell County, W. Va., which judgment was affirmed by the State supreme court of appeals.

In considering whether a laundry was an establishment within the meaning of chapter 19, Acts of 1901, requiring safety guards in "manufacturing, mechanical, and other establishments," Judge Poffenbarger, for the court, said:

> The gravamen of the second count of the amended declaration is failure to guard the wringer or extractor, or provide a cover of some sort for it. A steam laundry may not be a manufacturing establishment, but it is mechanical in the sense that it is filled with running machinery. Whether this is the sense in which the word "mechanical" was used or not, such a laundry is an establishment "where the machinery, belting, shaftings, gearings, drums, and elevators" are so arranged and placed as to be dangerous to persons employed therein.

The judge then considered the question as to whether the machinery was of such a nature as to be dangerous to the employee and impose upon the master the duty to put a cover or guard over it, and gave his opinion that the evidence submitted was sufficient to carry the question to the jury. He then took up the contention that McClary had assumed the danger of injury as a risk of his employment and said:

> If the omitted duty had been one imposed by the common law, the plaintiff's right of action would be precluded by his assumption of the risk of the injury he suffered. He knew as much about the plant and machinery as the master himself, having worked there for nearly four years and in many other similar places. But the duty left unperformed by the master was a statutory one, and the great weight of authority is to the effect that a servant working around unguarded machinery which the statute requires to be guarded does not assume the risk of such injury as may ensue. The statute does not in terms eliminate assumption of risk, nor say the omission of duty shall be negligence on the part of the master. But, to make the statute effective, it is necessary to exclude the assumption of risk and give a right of action for the omission of duty.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—NEGLIGENCE—*Phillips v. Hamilton Brown Shoe Co., Kansas City Court of Appeals (Apr. 6, 1914), 165 Southwestern Reporter, page 1183.*—Champ Phillips brought action against the company named for personal injuries sustained by him by the breaking of the steel driver of a shoe-tacking machine which was not guarded, and the consequent flying of particles which caused the loss of an eye. Sec-

tion 7828, Revised Statutes of Missouri, 1909, requires the machinery in all manufacturing, mechanical, and other establishments in the State, when so placed as to be dangerous to persons employed therein or thereabouts while engaged in their ordinary duties to be safely and securely guarded when possible.

Phillips was 18 years of age at the time of the accident. The machine which he was using breaks off and drives into the shoes as tacks pieces of wire at the rate of 400 per minute. The driver, which was necessarily small and of highly tempered steel, frequently broke and flew with great force, sufficient to pierce the skin of an operator. The plaintiff had been working at the machine for five weeks before the injury. He was obliged while at his work to stand facing the machine and about two feet from it. The result of the trial in the circuit court of Boone County was a judgment in the plaintiff's favor, from which the company appealed.

The following extract from the opinion of the court of appeals, as delivered by Judge Trimble, shows the grounds on which the judgment below was affirmed:

> The main question to be disposed of is: Does the statute apply to a case of this kind, where the injury is not caused by the employee coming into contact with an unguarded machine, but is caused by the lack of a guard to prevent broken pieces from flying from the machine when such breakage is of such frequent and ordinary occurrence as to notify the master that the machine as located and operated is dangerous and likely to injure employees?
>
> We can see no reason why the statute should be given the narrow construction contended for by defendant. The object of the statute is the safety of the employee. It would seem that if that safety would be imperiled either by the employee's inadvertently coming in contact with the machine or by the machine's working in such way as to give notice that it was likely to actively injure the employee the machine would be "dangerous to persons employed therein or thereabouts," within the meaning of the statute.
>
> In the case before us, the negligence charged against the master is that it failed to guard when it could have done so. The evidence tends to show that the failure to guard was the real cause of the injury, and nothing that the plaintiff did or failed to do had any part therein. In all of the cases cited as holding the plaintiff guilty of contributory negligence, such negligence was bottomed on some act, or omission to act, on the part of the employee which he should not or should have performed in the exercise of the prudence of an ordinary man.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—PROXIMATE CAUSE—DAMAGES—*Cincinnati, Hamilton & Dayton Railway Co. v. Armuth, Supreme Court of Indiana (Dec. 19, 1913), 103 Northeastern Reporter, page 738.*—Henry F. Armuth brought action against the railway company named for damages for personal

injury, because of the failure of the company to conform to the statute requiring the guarding of dangerous machinery. (Burns, A. S. 1908, secs. 8021–8052.) The employee's hand slipped from a lever which he was operating, into unguarded cogwheels a few inches away, causing the loss of two fingers. He had secured a verdict in the circuit court of Marion County, and the company appealed. The court held that the failure to guard the machinery and the slipping of the hand were concurring causes of the injury, and that the former, being in violation of statute, was the proximate cause; so that the company was liable unless the slipping of the employee's hand was due to his fault, which question was for the jury. There was therefore no ground for reversal of the judgment on this point, but it was reversed and a new trial granted the defendant because the trial judge had erred in allowing the jury to consider as elements of damages the employee's loss of time and expense for medical and hospital treatment, although the complaint alleged and the evidence implied only that there were such loss and such expense, without showing the amount of same.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—SAFETY FROM LOCATION—*Smith v. Mt. Clemens Sugar Co., Supreme Court of Michigan (Mar. 26, 1914), 146 Northwestern Reporter, page 263.*—George W. Smith brought action for damages for personal injuries received while employed by the company named in looking after the juice pumps at its factory, and from a judgment in his favor the company appealed. Each of the pumps was connected with a tank 8 feet high. Above the tanks was a lime conveyor, an iron trough 2½ feet in diameter, through which ran a spiral attachment, which pushed the refuse lime along until it was finally discharged into the sewer. A stream of water ran into the conveyor, and was controlled by a valve 9 feet from the floor, which plaintiff found it necessary to operate to increase the flow of water. After turning on the water, he started to come down the ladder, which had been broken and mended, and one of its sides gave way. His left hand went into a gearing 3 feet away, and he received an injury such as to necessitate the amputation of his arm between the elbow and wrist. The cog gear was about 9 feet from the floor, and was not guarded in accordance with the statute requiring the guarding of gearing and other dangerous machinery. As to the question whether the statute applied to this gearing the court, speaking by Judge Brooke, said:

It is urged that defendant's motion for a directed verdict should have been granted upon the ground that under the facts in this case

the statute relied upon can not apply, and therefore that no negligence on the part of the defendant was shown. It is said that the gears in question, situated as they were some 9 feet from the floor, were safeguarded by their position. If, as the evidence introduced by plaintiff seems to show, it became necessary for one or other of the employees of defendant many times each day to mount a ladder and attend to a portion of the work within 3 feet of the exposed gearing, we think it can scarcely be said, as a matter of law, that the "position" was an adequate safeguard. Indeed, it may well be doubted whether an exposed gearing can be placed in any position which as a matter of law would be considered as an equivalent to the statutory safeguard. But at all events the charge upon the subject was as favorable to defendant as it was entitled to demand.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—SAWS—*Pulse et al. v. Spencer, Appellate Court of Indiana (May 20, 1914), 105 Northeastern Reporter, page 263.*—Ruben Spencer was injured, as was alleged, by the failure of his employers properly to guard a saw. The principal use of the saw which caused the injury was that of cambering joists. When it was used for that purpose, it could not be guarded in the rear by a spreader, but for the work which the employee was doing at the time of the accident the spreader might have been in place, but was not. The saw was operated exclusively by this employee, and the defendant contended at the trial, and asked an instruction to the effect, that his removal of the guard, if it took place, was negligence per se.

The circuit court of Bartholomew County rendered judgment in favor of the plaintiff, and the appellate court affirmed this judgment, holding, among other things, that the instruction mentioned was properly refused. On this point Judge Lairy expressed the opinion of the court as follows:

Under some circumstances a guard required by statute may be removed without constituting a violation of the statute. The act itself provides that such a guard may be removed for the purpose of making repairs, and the courts have held that machinery is not required to be guarded when the use of guards would materially interfere with its usefulness. The evidence in this case shows that the principal purpose for which the saw in question was used was that of cambering joists, and that, when used for such purpose, the use of a spreader or guard was impracticable. In view of this evidence, the spreader might be properly removed when the saw was used for cambering joists, and such a removal would not constitute a violation of the statute, and would not be negligence per se.

EMPLOYERS' LIABILITY—MINE REGULATIONS—CERTIFIED FOREMAN—TRIAL BY JURY—*Myers v. Pittsburgh Coal Co., United States Supreme Court (Apr. 6, 1914), 34 Supreme Court Reporter, page 559.*—John Myers was killed while employed by the coal company in the movement of coal cars in the mine. His widow brought an action in the United States Circuit Court for the Western District of Pennsylvania to recover for his death, alleged to have been caused by the negligence of the coal company. A judgment rendered in her favor was reversed by the circuit court of appeals, without directing a new trial and without sending the case back to the trial court. The case was then brought to the United States Supreme Court on writ of certiorari, where the judgment of the circuit court of appeals was reversed and the judgment of the trial court against the coal company was affirmed. The action of the circuit court of appeals was based largely upon the want of definite proof as to the manner in which Myers came to his death, but the Supreme Court held that there was ample testimony to submit to the jury, and that the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict.

The coal company objected to the charge given to the jury as to its liability when the mine was in charge of a duly qualified mine foreman. In disposing of this objection, Mr. Justice Day said:

> The record shows that there was testimony tending to show that the electrical system was in charge of the electrician of the coal company employed as superintendent of electrical equipment, who had charge of the purchase, installation, care, operation, and maintenance of the electrical equipment used by the company, and who was not subject to the mine foreman. The court submitted to the jury the question whether the coal company had committed to the mine foreman the electrical system of hauling in the interior of the mine, or whether such system was in charge of an electrical engineer not accountable to the mine foreman, distinctly telling the jury that if the mine foreman was in charge in this respect, the company would not be responsible, but if they found that the coal company had excluded from the control of the mine foreman the electric haulage system, and that the negligence of the coal company was the direct and proximate cause of the death of the plaintiff's husband, there must be a recovery. The charge in this respect was as favorable as the company was entitled to have given.

EMPLOYERS' LIABILITY—MINE REGULATIONS—DUTY OF FOREMAN—ASSUMPTION OF RISKS—*Humphreys v. Raleigh Coal & Coke Co., Supreme Court of Appeals of West Virginia (Jan. 14, 1914), 80 Southeastern Reporter, page 803.*—Humphreys, an employee of the coal company, obtained a judgment against the company in the circuit court of Raleigh County, W. Va., for an injury sustained in

February, 1911, by coming in contact with an uninsulated wire used as a feed wire to an electric pump. In affirming the judgment of the lower court, Judge Poffenbarger, speaking for the supreme court of appeals, said:

Nothing in the statute imposing upon operators duty to employ mine foremen, and exonerating them from liability for the consequences of the negligence of such employees acting within the scope of their statutory powers, absolves the employer from duty to equip the mine or plant with suitable machinery and appliances for the prosecution of the work. To the foreman, the statute commits the control and supervision of the inside workings or actual operation of the mine, including the use of machinery and appliances furnished by his employer.

Both the pump and the wire must necessarily have been furnished by the defendant, for obviously there was no duty upon any other person to supply them. If no feed wire was supplied, and, in consequence of lack thereof, the foreman had to improvise the one used, it was none the less furnished by the defendant in the legal sense, for the mine foreman was his agent, and what a man does through or by another he does himself. Manifestly the wire was an instrumentality or appliance for use, or at least used, in the operation of the pump. Provision of such things, suitable for the purposes for which they are used, and reasonably safe as regards the person of the servant, is a nondelegable duty of the master imposed by the common law, from which he is not absolved by the terms or general purpose of the mine-foreman statute.

EMPLOYERS' LIABILITY—MINE REGULATIONS—FAILURE TO EMPLOY MINING BOSS—*Baisdrenghien v Missouri, Kansas & Texas Railway Co., Supreme Court of Kansas (Mar. 7, 1914), 139 Pacific Reporter, page 428.*—The plaintiff was injured by a falling rock while employed by the company named as a miner. The trial jury rendered a verdict in his favor, and this the supreme court upheld There was evidence that the failure of the company to provide a mining boss to inspect the mine was the proximate cause of the injury. As to the effect of this provision of statute and the failure to observe it the court, speaking by Judge Smith, said:

The statute requires the owner or operator of a mine to "employ a competent and practical inside overseer, to be called 'mining boss,' who shall keep a careful watch over * * * traveling ways, * * * and shall see that as the miners advance their excavations all loose cool [coal], slate and rock overhead are carefully secured from falling in upon the traveling ways." Any omission of this requirement which, by diligent compliance therewith, would have obviated an injury to a miner renders the owner or operator liable in damages. The law to this extent entirely shifts the risks of the employment from the laborer to the employer. Care for his own safety may impel a miner to watch for treacherous mine roofs, but he is not legally required to do so, but may rely upon the presumption that the mining boss or overseer has fully performed his duty.

EMPLOYERS' LIABILITY—MINE REGULATIONS—INSPECTION—*Piazzi v. Kerens-Donnewald Coal Co., Supreme Court of Illinois (Feb. 21, 1914), 104 Northeastern Reporter, page 200.*—Adolph Piazzi recovered a judgment in the circuit court of Madison County for $1,500 against the company named, for personal injuries. This was affirmed in the appellate court, from which the case was taken up on certiorari. Piazzi with another man was cleaning up a crosscut in a mine which had been closed for several months. They attempted to remove a clod in the roof, which had not been marked as dangerous by the mine inspector, but not succeeding, went to work under it, when it fell, injuring the plaintiff.

The company contended that, since the men were engaged in making dangerous places safe, they assumed the risks of their employment; also that they were guilty of contributory negligence in working under the clod. As to these matters the court, speaking by Judge Dunn, said:

All the men in the mine were working under the direction of the mine manager, and according to the testimony of the assistant mine manager all were under general directions to make dangerous places safe. But these instructions did not relieve the owner from the duty of having the mine examined, the mine examiner from the duty of marking dangerous places, or the mine manager from the duty of having danger signals placed.

Whether the failure of the mine examiner to mark the place was the proximate cause of the injury was a question of fact for the jury. The plaintiff had a right to rely upon the performance of the mine examiner's duty, and the absence of a mark indicated the opinion of the mine examiner that the clod was not dangerous. The plaintiff can not be held guilty of contributory negligence in working under the clod. If it had been marked dangerous, he would probably not have given up the effort to get it down, and gone under it to work, and would not have been hurt.

The judgment of the appellate court is affirmed.

EMPLOYERS' LIABILITY—MINE REGULATIONS—LEAD AND ZINC MINES—APPLICATION OF STATUTE—*Big Jack Mining Co. v. Parkinson, Supreme Court of Oklahoma (Dec. 20, 1913), 137 Pacific Reporter, page 678.*—Parkinson was employed as a miner in a lead and zinc mine of the company named. He was killed on July 6, 1910, by a fall of rock from the roof of the drift in which he was working. His widow obtained a judgment in the district court of Ottawa County, Okla., against the company, and the case was then taken to the State supreme court on error, where the judgment was affirmed.

A point of considerable interest was as to the application of the mining law of the State to the case in hand, the company claiming that it was not applicable to mines of the class in which the deceased workman was employed.

This contention was rejected by the court, Judge Galbraith, who delivered the opinion, saying in part:

We do not believe that the legislature intended to provide with such minute care for the protection of workers in coal mines, and to leave similar workers in lead and zinc mines without any protection whatever, particularly when these statutes bear such conclusive evidence that they were intended by the legislature to protect the laborer not only in coal mines but in every other mine that may be operated within the State. We are constrained to hold that the trial court correctly interpreted the meaning, purpose, and intent of the legislature in enacting these statutes, and in holding that the duty imposed on the operator of a mine thereby was a duty that the plaintiff in error owed to the deceased in this instance.

EMPLOYERS' LIABILITY—MINE REGULATIONS—VIOLATION OF STATUTE—ASSUMPTION OF RISKS—FELLOW SERVICE—*Maronen et al. v. Anaconda Copper Mining Co., Supreme Court of Montana (Nov. 24, 1918), 136 Pacific Reporter, page 968.*—August Maronen was employed in the company's mine and was killed in September, 1911, while being hoisted through a shaft, by falling from the cage, the fall being due to the fact that the cage doors were not closed. Section 8536, Revised Codes, Montana, provides that cages must be equipped with steel doors and that such doors "must be closed when lowering or hoisting the men." Maronen's widow and children brought suit against the company in the district court, Silver Bow County, where judgment was for the company. This judgment was affirmed by the Supreme Court of Montana.

The evidence submitted showed that no station tenders were employed to close the cage doors, but a rule adopted required the first man who entered a cage to close the doors before the cage was hoisted. It appeared that Maronen had entered the cage first and had not closed the doors before the signal was given to hoist the cage. After reviewing the law and evidence, Judge Holloway, for the court, concluded:

Our conclusion is that the trial court was justified in finding that Maronen was to all intents and purposes a station tender in the sense that it was his duty to close the door when he entered the cage to be hoisted, and that his death resulted from his failure to discharge a duty which could be and was rightfully imposed upon him; and, because he could not have succeeded upon these facts in an action if he had been injured only, neither his heirs nor personal representatives can succeed in this one.

EMPLOYERS' LIABILITY—NEGLIGENCE—EVIDENCE—GUARDS FOR DANGEROUS MACHINERY—*Byland v. E. I. du Pont de Nemours Powder Co., Supreme Court of Kansas (Nov. 14, 1914), 144 Pacific Reporter,*

page 251.—Tobias Byland was an employee of the company named, and was injured and sued the company. Judgment was for the defendant in the district court of Cherokee County, and this was affirmed on appeal. The questions decided are sufficiently shown in the syllabus prepared by the court, which is as follows:

In an action to recover for injuries caused by the explosion of defendant's powder mill, there was no substantial evidence, direct or circumstantial, fairly tending to prove what actually caused the explosion. Held, following Brown *v.* Railroad Co., 81 Kans. 701, 106 Pac. 1001, "it is not sufficient to show circumstances which would indicate that the other party might have been guilty of negligence, especially when the evidence furnished suggests, with equal force, that the injury might have resulted without fault on the part of the other party"; and that the court rightly sustained a demurrer to the evidence.

Where, in an action founded upon negligence, the plaintiff alleges specifically the negligent acts of the defendant upon which he relies to recover, he must prove the negligence alleged, and will not be allowed to make a prima facie case relying upon the doctrine of res ipsa loquitur.

Plaintiff was injured by the explosion of defendant's powder mill, and alleged, among other acts of negligence, failure of the defendant to provide some appliance to prevent metallic thumb nuts from falling through a defective screen, and alleged that, by reason of the absence of such an appliance, metallic thumb nuts found their way into the inflammable mixture and caused the explosion. At the time the explosion occurred, the plaintiff was not at work near the machine, but stood outside the building, where it was located, and 50 feet therefrom. He was not injured by the thumb nuts falling upon him nor by coming in contact with the machine. Held, that the provisions of the factory act (section 4679, Gen. Stat. 1909), requiring machinery to be properly and safely guarded for the purpose of preventing or avoiding injury to employees in factories, has no application, and that plaintiff could not maintain an action under the statute.

EMPLOYERS' LIABILITY—PENSION FUNDS—ELECTION OF RIGHTS—*Longfellow et al. v. City of Seattle, Supreme Court of Washington (Dec. 4, 1913), 136 Pacific Reporter, page 855.*—A statute of the State of Washington empowers incorporated cities and towns having a paid fire department to compensate the widows and dependents under 16 years of age of firemen killed while on duty, by granting a pension equal to one-half the salary being received by the fireman at the time of his death. The city of Seattle made the statute operative within that city. James Longfellow was thrown from a fire wagon in November, 1910, and killed. The widow filed a claim for a pension for herself and minor children, one of whom was a daughter between 16 and 17 years of age. The claim of the widow was allowed and payments were made to her, beginning in January, 1911. In December, 1910,

the widow also filed a claim for damages for $10,000 for the death of her husband, due to the wrongful and negligent act of the city. The claim was rejected and in September, 1911, she brought suit in the superior court of King County for the sum of $8,500 in her own right and for $1,500 as guardian of her daughter Myrtle, who was over 16 years of age. The city contended that the acceptance of benefits from the pension fund barred a right of action for damages and judgment was entered for the city. An appeal was taken to the supreme court of the State where it was decided that by accepting benefits from the pension fund the widow had barred her right to recover damages.

It was held, however, that as the daughter had no rights under the pension law she had a right of action in the courts.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—BLOCKING FROGS —"YARDS"—*George v. Quincy, Omaha & Kansas City Railroad Co., Kansas City Court of Appeals (May 4, 1914), 167 Southwestern Reporter, page 153.*—Andrew P. George, a brakeman on the road of the company named, was killed on November 7, 1907, and his administrator brought action for his death. After switching out a car to the sidetrack at the station at Kirksville, the brakeman was recoupling the two separated portions of the train, when his foot became caught in an unblocked frog, and as a result he was run down and instantly killed.

Section 3163, Revised Statutes, Missouri, 1909, required the company, on or before September 1, 1907, "to adopt, put in use, and maintain the best known appliances or inventions to fill or block all switches, frogs, and guardrails on their road, in all yards, divisional and terminal stations, and where trains are made up, to prevent, as far as possible, the feet of employees or other persons from being caught therein."

The company made claim that the location of the frog was not in a "yard" under the meaning of the statute. The court held, on the contrary, that the portion of the tracks around every station, used for the purpose of switching or standing cars, is a yard.

On rehearing, the court also decided that the statute was not invalid for uncertainty or impossibility of performance in requiring "the best known appliances or inventions" to be used.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — "CARS" — *McGrady v. Charlotte Harbor & Northern Railway Co., Supreme Court of Florida (Jan. 9, 1914), 63 Southern Reporter, page 921.*—Will McGrady brought suit against the railway company named for per-

sonal injuries suffered by the negligence of another employee while they were placing a hand car upon the track. The action was brought under the provisions of section 3150 of the General Statutes of 1906, which makes the company liable for injuries "caused by negligence of another employee by the running of the locomotives or cars, or other machinery of such company." A demurrer to the declaration was sustained in the circuit court of De Soto County, and judgment rendered for the company; on appeal, however, this judgment was reversed, the supreme court deciding that a hand car is a "car" within the meaning of the act, citing Ryland *v.* Atlantic C. L. R. Co., 57 Fla. 143, 49 So. 745; Thomas *v.* Georgia R. & B. Co., 38 Ga. 222, etc.; and that the placing of the hand car upon the track was a part of the running of such car, so that the accident came within the scope of the statute.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—VIOLATION OF ORDINANCE—DAMAGES—*Wabash Railroad Co. v. Gretzinger, Supreme Court of Indiana (Feb. 19, 1914), 104 Northeastern Reporter, page 69.*—This action was brought by the administratrix of one Beedle, for the benefit of herself as widow and of her infant child, to obtain damages for the death of Beedle in a railroad collision. Beedle was conductor of a freight train, which ran upon a siding in the city of Delphi, so that the rear end was 250 feet from the switch target, upon which the switch leading to the siding was closed and locked. Beedle attended to various duties, secured his orders, and went into the caboose to begin making up a report. In the meantime the switch had evidently been opened by some unknown person. A passenger train then approached at a rate of about 20 miles an hour, and when about 300 feet from the target the engineer saw that it indicated an open switch, and applied the air brakes, but was unable to prevent the collision in which Beedle was killed. A city ordinance required that trains should slow up to 6 miles an hour while passing through the city. If the train had been running at the required rate, it could have been easily stopped in time. Judgment was in the plaintiff's favor in the circuit court of Howard County, and was on appeal affirmed on grounds which appear in the following quotation from the opinion of the court, which was delivered by Judge Morris:

Appellant claims that, because Beedle knew that the passenger train was in the habit of exceeding the ordinance speed limit at this place, he thereby assumed the risk of danger. Such doctrine can not be recognized. Violations of ordinances, however often repeated, do not render them obsolete.

The engineer of the passenger train, in exceeding the lawful speed limit, was thereby guilty of negligence per se. Appellee's decedent assumed no risk of danger from such negligence. [Cases cited.]

While it is true that the accident would not have happened in the absence of the open condition of the switch, it is also true that it would not have happened had the speed of the passenger train not exceeded 6 miles per hour. Where two causes result in an accident, the question of the dominant or proximate one is ordinarily for the jury.

The evidence here warranted the jury in finding that the unlawful speed was the proximate cause of the injury, as alleged in the complaint.

Beedle was 26 years old, healthy, temperate, and industrious, and had already risen to be conductor, his salary being $100 per month, of which amount he turned over $70 to his wife and child. Under these circumstances the court decided that the verdict of $10,000, the statutory limit, rendered by the jury in the circuit court of Howard County was not excessive; also that the fact that the widow had remarried should not be considered in awarding damages. The judgment of the court below was consequently affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—ELECTRIC RAILROADS—*Hughes v. Indiana Union Traction Co., Appellate Court of Indiana (June 3, 1914), 105 Northeastern Reporter, page 537.*—Earl Hughes, a motorman on an interurban electric railroad of the company named, was injured on August 13, 1908, by the alleged negligence of his fellow employees on the car. This was a repair car, and the other employees had entire charge of the loading with materials. A pike pole fell off and struck and injured the motorman while he was operating the car. The coemployees' liability act of Indiana, Burns' A. S. 1908, section 8017, provides that railroads shall be liable for injuries to employees resulting from the negligence of other employees in certain cases. The court affirmed a judgment of the circuit court of Tipton County in favor of the defendant company, Judge Shea, in delivering the opinion, reviewing the history of legislation and decisions creating a distinction between steam and electrically operated railroads, and holding that the act did not apply to the latter.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—*Wabash Railroad Co. v. Hayes, United States Supreme Court (May 25, 1914), 34 Supreme Court Reporter, page 729.*—This case was before the Supreme Court on a writ of error to the appellate court of Illinois to review a judgment in favor of John R. Hayes, who was injured while in the employment of the appellant company. The point of interest is the ruling of the Supreme Court as to the application of the Federal statute of 1908. In the original action the plaintiff Hayes had set forth a good cause of action under the Federal statute,

and alleged that the injuries complained of were received while he was engaged by the company in interstate commerce. On the trial it appeared that the injury was not received in such commerce, and it was ruled that the Federal act had no application to the case. The court then ruled that the case might be heard on the declaration and determined according to the principles of common law prevailing in the State, the company contending that "even though the allegation that the injury occurred in interstate commerce proved unwarranted, the declaration could not be treated, consistently with the Federal act, as containing any basis for a recovery under the law of the State, common or statutory." This contention was rejected by the appellate court of Illinois, and the Supreme Court, in its opinion which was delivered by Mr. Justice Van Devanter, sustained its position, as appears from the following quotations:

Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative.

On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application, and the law of the State was controlling.

The plaintiff asserted only one right to recover for the injury, and in the nature of things he could have but one. Whether it arose under the Federal act or under the State law, it was equally cognizable in the State court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly, nothing in the Federal act would have been in the way.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—DEATH OF EMPLOYEE WITHOUT DEPENDENTS—*Jones v. Charleston & Western Carolina Railway Co., Supreme Court of South Carolina (July 16, 1914), 82 Southeastern Reporter, page 415.*—This action was brought by the administrator to recover damages for the death of E. D. Clary, for the benefit of his brother and sister. The deceased had not married, and his father and mother were dead. The circuit court of Abbeville County directed a verdict for the defendant on the ground that the Federal employers' liability act superseded the State statute on the same subject, under which this action was brought. As the Federal act allows no compensation in case of death except to dependents, and there was no direct evidence that the brother and sister were dependent, it was held that no action would lie. The supreme court affirmed the

judgment in favor of the railway company, Judge Hydrick, who delivered the opinion, discussing the question at issue as to the statute governing the case as follows:

Appellant contends that, as the act of Congress gives a right of action in favor of dependent relatives, while the State statute gives the right in favor of relatives, whether dependent or not, the two statutes do not cover precisely the same field, and therefore the State statute was not superseded, in so far as it gives a right of action in favor of relatives who are not dependent. This is a misconception of the scope of the legislation of Congress. It deals with the liability of interstate carriers by railroad for injuries to their employees while both are engaged in interstate commerce. It creates and determines that liability. It is paramount and exclusive, and necessarily supersedes the State law upon that subject. Therefore the liability of such carriers for such injuries must be tested solely by the act of Congress, which can not be pieced out by the State law on the same subject. [Cases cited.]

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—PERSONS ENTITLED TO BENEFITS—*Taylor v. Taylor, United States Supreme Court (Feb. 24, 1914), 34 Supreme Court Reporter, page 350.*—The plaintiff is the widow and the defendant the father of one Howard Taylor, who was killed through the negligence of an interstate railroad company, by whom he was employed. The widow, as administratrix, brought suit against the railroad company for damages, under the act of Congress of April 22, 1908, known as the employers' liability law, and recovered a judgment in her favor. The father of the decedent then filed a petition in the supreme court of Orange County, N. Y., for an order directing the widow to pay over to him one-half the net proceeds of the judgment in accordance with the statute of distribution of the State. The motion was denied and an order entered that the widow was entitled to receive and retain for her own use all the net proceeds of the judgment. This order was reversed by the appellate division of the supreme court and the judgment of reversal was affirmed by the Court of Appeals of New York. The case was then brought to the United States Supreme Court on error, the widow contending that the Federal statute should govern the distribution of the proceeds of the judgment, instead of the State law. The United States Supreme Court upheld the contention of the widow and reversed the New York State Court of Appeals, which had held that the State law applied.

Mr. Justice McKenna, who delivered the opinion of the court, after reviewing a number of cases, said in part:

It is clear from these decisions that the source of the right of plaintiff in error was the Federal statute. As said in one of the cited

cases, her cause of action was "one beyond that which the decedent had,—one proceeding upon altogether different principles." It came to her, it is true, on account of his death, but because of her pecuniary interest in his life and the damage she suffered by his death. It was her loss, not that which his father may have suffered. The judgment she recovered was for herself alone. He had no interest in it. Any loss he may have suffered was not and could not have been any part of it, as we have seen.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—SAFETY APPLIANCES—*Seaboard Air Line Railway Co. v. Horton, Supreme Court of the United States (Apr. 27, 1914), 34 Supreme Court Reporter, page 635.*—James T. Horton brought action against the railway company named for damages for personal injuries under the Federal employers' liability act, in the superior court of Wake County, N. C. His injuries were caused by the bursting of an engine water glass which was not protected by a guard glass. Judgment was in his favor, and this was affirmed by the Supreme Court of North Carolina, but was reversed by the United States Supreme Court. In the trial court the judge had appeared to consider the State laws on the subject as in force as well as the Federal statute, as far as not inconsistent with the latter; but Mr. Justice Pitney, in delivering the opinion of the Supreme Court of the United States, said:

It is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all State laws upon the subject are superseded. Second Employers' Liability Cases (Mondou *v.* New York, N. H. & H. R. Co.), 223 U. S. 1, 55.

The Federal statute bars the defenses of contributory negligence and assumption of risk in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee.

As to the application of these provisions the court said:

By the phrase "any statute enacted for the safety of employees," Congress evidently intended Federal statutes, such as the safety appliance acts and the hours of service act. For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to State control two of the essential factors that determine the responsibility of the employer.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISKS—SAFE PLACE—*Farley v. New York, New Haven & Hartford Railroad Co., Supreme Court of Errors of Connecticut (July 13, 1914), 91 Atlantic Reporter, page 650.*—Action was brought by the administrator of the estate of John H. Bottomley for the death of the latter while employed as engineer on the road of the company named. He was in charge of a locomotive hauling an interstate freight train, and was killed by contact with or proximity to an electric wire over the center of the track, when going back over the tender to ascertain the height of the water. The wires were used for electrical operation of the passenger trains over a section of the road. They were, where no bridge made it necessary to lower them, 22½ feet above the level of the top of the rails. Under the bridge where the accident occurred they were brought down to a height of 15 feet 4½ inches. The locomotive was of medium size and of a type in long and common use on the road, the tenders varying in height from 10½ to 13 feet. Bridges were numerous on the part of the road where the accident happened, and the wires under them came down to varying heights, from the height of the one in question to about 18 feet. The engineer had been over the electrified section frequently, more often in the daytime; the electrification had taken place more than three years before the occurrence of the accident on September 28, 1911, and he had been employed during all that time. The time-tables furnished him contained a notice that there was danger within 14 inches of the wires, and he had signed a receipt for a special notice to that effect.

Judgment in the superior court of New Haven County was for the defendant company, on the ground that the employee had assumed the risks of his situation, and the plaintiff appealed. The judgment was affirmed, however, the court saying that the Federal employers' liability act abolished the defense of assumption of risk only in cases where the violation of safety statutes contributes to the injury or death.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—BENEFICIARIES—NEXT OF KIN—ILLEGITIMATE CHILDREN—*Kenney v. Seaboard Air Line Railway Co., Supreme Court of North Carolina (Sept. 30, 1914), 82 Southeastern Reporter, page 968.*—This was an administrator's action to recover damages for the death of one born out of wedlock. The mother of the deceased employee was not living, but left two sons and a dependent daughter who were born in wedlock. The only question considered by the court was as to the right of action of the claimants under the Federal statute, which authorizes recovery for the benefit, among others, of the next

of kin dependent upon a deceased employee. The North Carolina Revisal, section 137, authorizes the distribution of the estate of a deceased illegitimate child dying without issue among his mother and "such persons as would be his next of kin if all such children had been born in lawful wedlock." The superior court of Bertie County rendered judgment in the plaintiff's favor, which was on appeal affirmed, two judges dissenting. Chief Justice Clark, who delivered the opinion of the court, cited Cutting *v.* Cutting, 6 Fed. 268, and McCool *v.* Smith, 66 U. S. 459, and said in part:

The object of the act of Congress was to permit a recovery for wrongful death or injuries on interstate railroads, and that the recovery should go to the next of kin in the cases specified; the next of kin being determined by the law of the State in which the action is brought, for the status of the citizen, and the statute regulating descent and distribution is purely a State matter with which Congress has no concern. By the reasoning in the case above cited the words "next of kin" are taken, like the word "heirs," as meaning those to whom the property would go, but who are the heirs and who are the next of kin is a matter purely of State regulation.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—CONTRIBUTORY NEGLIGENCE—*Pennsylvania Co. v. Cole, United States Circuit Court of Appeals, Sixth Circuit (June 15, 1914), 214 Federal Reporter, page 948.*—Cole was rear brakeman and flagman on a freight train of the company named. He was injured by a collision when another train proceeding slowly on account of cautionary signals ran into the rear of his standing train while he was asleep in the caboose. It was urged that he was so negligent in not flagging the other train that all right of recovery was barred. In denying this contention and affirming a judgment of the trial court in the plaintiff's favor, Judge Knappen, who delivered the opinion of the court, said in part:

Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery; for, as said in Norfolk & W. Ry Co. *v.* Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654 [see Bul. No. 152, p. 92], the direction that the diminution shall be "in proportion to the amount of negligence attributable to such employee" means that:

"Where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both."

To say that plaintiff's negligence equals the combined negligence of plaintiff and defendant is impossible.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EXCLUSIVE APPLICATION—INTERSTATE COMMERCE—JURISDICTION OF COURTS—"ON DUTY"—*North Carolina Railroad Co. v. Zachary, United States Supreme Court (Feb. 2, 1914), 34 Supreme Court Reporter, page 305.*—James A. Zachary brought suit in the superior court of Guilford County, N. C., to recover damages for the negligent killing of one Burgess, an employee of the Southern Railway Co., which occurred in April, 1909. Under the State law the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road (Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959), upon the ground that a railroad corporation can not evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employees of the lessee injured through the negligence of the latter.

The Southern Railway Co. was the lessee of the North Carolina Railroad Co., and action was brought against the latter company under the State law. Judgment was rendered against the company in the lower court and affirmed by the Supreme Court of North Carolina. The case was then taken to the United States Supreme Court on error, where the judgment was reversed and the cause remanded for further proceedings, the contention of the railroad company that suit should have been brought under the Federal employers' liability act of April 22, 1908, instead of under the State law, being upheld.

The following language, taken from the opinion delivered by Mr. Justice Pitney, sets forth the grounds on which the conclusion of the court was reached:

> In order to bring the case within the terms of the Federal act defendant must have been, at the time of the occurrence in question engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the statutes of the State. [Cases cited.]

Having found that the employer was an interstate carrier, Justice Pitney took up the point of Burgess's employment, as follows:

> It was, however, further held by the Supreme Court of North Carolina that deceased, at the time he was killed, was not in fact employed by the Southern Railway, the lessee, in interstate commerce.
>
> It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. [Cases cited.]

Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty," and employed in commerce, notwithstanding his temporary absence from the locomotive engine. [Cases cited.]

We conclude that, with respect to the facts necessary to bring the case within the Federal act, there was evidence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EXEMPTION FROM LIABILITY—RELIEF ASSOCIATIONS—*Hogarty v. Philadelphia & Reading Railway Co., Supreme Court of Pennsylvania (May 22, 1914), 91 Atlantic Reporter, page 854.*—William J. Hogarty, an employee of the company named, lost his right arm on February 1, 1910. It was alleged in the declaration that the injury was due to the negligent construction and maintenance of the defendant's road. The court of common pleas of Philadelphia County first gave binding instructions for the defendant, and then entered judgment in its favor, and the plaintiff appealed. The defense set up was that the plaintiff had accepted benefits as a member of its relief association. The plaintiff rejoining that the Federal employers' liability act forbids this defense, the defendant claimed that the Federal act did not apply, as the plaintiff had pleaded at common law, or if it did, that there was a variance between the pleading and the proof. The plaintiff finally contended that, if he should formally have pleaded the Federal statute, he was entitled to amend accordingly.

The court held that the plaintiff was entitled to a trial of the case under the Federal act. Judge Moschzisker delivered the opinion, from which the following is an extract relating to the point mentioned:

The Federal statute was not brought into the case at bar until a special defense was entered upon, and then the plaintiff promptly drew attention to its express prohibition of all defenses of the character of the one offered; just as in the ordinary industrial accident case, although not formally pleaded, a plaintiff may claim the benefit of any particular provision in our fellow-servant act, or our factory act, if the circumstances call for it. True, the law depended upon at bar happened to be a Federal statute; but, since the Supreme Court of the United States has decided that this statute must be treated by State courts, in each instance, as though an act of their

own legislature, for all practical purposes it is a Pennsylvania statute, in the same category as the two acts to which we refer; and its provision that "any contract, rule, regulation, or device whatsoever," the purpose of which is to enable a common carrier to exempt itself from liability for negligence to its employees, "shall to that extent be void," is the announcement of a broad rule of public policy applicable to all cases within the scope of the statute, with like effect as though promulgated by one of our acts.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—BRAKEMAN PLACING CAR IN TRAIN—SAFETY APPLIANCES—*Thornbro v. Kansas City, Mexico & Orient Railway Co., Supreme Court of Kansas (Mar. 7, 1914), 139 Pacific Reporter, page 410.*—Action was brought in the district court of Sumner County for the death of J. N. Thornbro from an injury received while in the employ of the company named. The judgment was in favor of the plaintiff, and this was affirmed on appeal. The action was based upon the Federal employers' liability act of 1908, and alleged also violation of the safety appliance act as taking away the defenses of assumption of risk and contributory negligence in accordance with the terms of the first-mentioned act.

The company was conceded to be engaged in interstate commerce, and the question was whether the employee at the time of the injury was also so engaged. A freight car, from a point in the State of Oklahoma and destined for another point in the same State, was to be taken up by the interstate train of which the decedent was a brakeman at Custer City. It had another car, which was not to be taken, in front of it on the siding. The engine hauled these cars to the main track, and the brakeman received his injuries in uncoupling the cars, by reason of having to go between the cars, because the car which was to be taken had a coupler which was not automatic, and was defective and unsafe.

As to the question of his inclusion under the terms of the employers' liability act the court, speaking by Judge Benson, said:

In order to recover under the act referred to, both the company and the employee must be engaged in interstate commerce at the time of the injury. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169. The precise contention of the defendant is that the car in question, starting from one point, to be transported to another point in the same State, was an instrument of intrastate commerce; and that it had not become a part of an interstate train, and so the brakeman was not engaged in interstate commerce. On the other hand, the plaintiff contends that the duties of the engineer and brakeman in picking up this car and putting it into the train, consisting largely of interstate cars, carrying interstate freight, had such connection with interstate commerce as to bring their work within the purview of the act.

No decision of the Federal Supreme Court has been cited upon the precise point in controversy, and the circuit courts appear to be at variance.

Several cases bearing upon the question were reviewed and discussed quite fully at this point in the opinion, and the court continued:

Referring to the test applied in the Lamphere case [196 Fed. 336; see Bul. No. 112, p. 86]—"Was the relation of the employment of the deceased in interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce"—an affirmative answer is as obvious here as there. It can not be doubted that the work of the deceased had a real and substantial relation to interstate commerce.

Taking up the contention that the coupler was defective and did not meet the requirements of the Federal safety appliance acts, the court briefly reviewed the acts in question, and said in part:

Construing these acts, the Federal Supreme Court, in Southern Ry. Co. *v.* United States, 222 U. S. 20, 32 Sup. Ct. 2, held that they were intended "to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce." It must be regarded as settled that the car in question should have been equipped with a coupler as specified in the statute.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—BUILDING ADDITION TO FREIGHT SHED—*Eng v. Southern Pacific Co., United States District Court, District of Oregon (Dec. 22, 1913), 210 Federal Reporter, page 92.*—The court, speaking by Judge Bean, in holding that the plaintiff's employment at the time of his injury was in interstate commerce, used the following language:

When a carrier is engaged in both intrastate and interstate commerce, using the same instrumentalities, appliances, and employees in both classes of commerce, it is difficult to draw the line of demarcation between the two classes of employment; but the result of the decisions up to this time seems to be that, when the work in which the employee was engaged at the time of his injury is so closely connected with interstate commerce as to be a part thereof, it comes within the statute. Now, freight sheds, depots, and warehouses or other facilities provided and used by a carrier for receiving, handling, and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases, and are so closely connected therewith as to be a part thereof for the purposes of the Federal employers' liability act.

Claim is made that, since plaintiff at the time of his injury was at work framing a new office in the freight shed, he is in the position of one employed to construct buildings, tracks, engines, or cars, which have not yet become instrumentalities of commerce. But the freight

shed in question was being so used by the defendant in its interstate business. The work in which the plaintiff was engaged, as appears from the complaint, was in the nature of the repair of an instrumentality so used, and not in the construction of new work.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CONSTRUCTION OF BRIDGE ON CUT-OFF—*Bravis v. Chicago, Milwaukee & St. Paul Railway Co., United States Circuit Court of Appeals, Eighth Circuit (Oct. 12, 1914), 217 Federal Reporter, page 234.*—Nick Bravis sued the company named in the District Court of the United States for the District of Minnesota. Judgment was for the defendant on a directed verdict, and the plaintiff brought error. In his complaint the plaintiff pleaded negligence of the company, but did not allege that he or the company was engaged in interstate commerce. At the close of his evidence he made an amendment changing the single count of the complaint so as to bring the action under the Federal employers' liability act. The company admitted that it was engaged in interstate commerce, but denied that it employed the plaintiff in such commerce, and the court upheld its contention. The company was engaged in straightening curves in its road, and the plaintiff was employed in building a bridge on a cut-off to avoid a curve about 3 miles in length. The employee went from the nearest point on the railroad to the camp where he boarded, at Chanhassen, on a hand car furnished by the company. The gang in which he was employed consisted of about 15 men, and they used two hand cars to transport themselves from and to Chanhassen. As they were returning to camp one evening the plaintiff, who, with his companions, was engaged in pumping the forward hand car, fell off the rear of it, and the rear hand car ran over him and injured his right hand before the men upon it could stop it after they saw him.

In delivering the opinion of the court, affirming the judgment of the court below, Judge Sanborn said:

The chief contention of counsel for plaintiff in support of their specification of error in this case is that the facts established by the evidence sustain the conclusion that the plaintiff was employed in interstate commerce while constructing the bridge on the cut-off. But there were no rails on the roadbed on this cut-off. It never had been used, it was not then used, and until it should be ironed it could not be used, by the defendant in interstate commerce.

The Federal employers' liability act protects only those employed in interstate commerce. Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in interstate commerce, and are not protected by that act. There was no error in

the ruling of the trial court that an employee engaged in the construction of a bridge, 600 feet distant from a railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, was not employed in interstate commerce, although his employer was engaged, and when the cut-off should be completed intended to use it, in interstate commerce. [Cases cited.]

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CONSTRUCTION OF TUNNEL—*Jackson v. Chicago, Milwaukee & St. Paul Railway Co., United States District Court, Western District of Washington (Feb. 2, 1914), 210 Federal Reporter, page 495.*—This action was brought under the Federal employers' liability act of 1908, and the defendant company demurred to the complaint, which demurrer was sustained by the court, holding that there was no case presented under the act. The question raised is as to whether the employment was in interstate commerce, the fact being that the employee was at work in the construction of a tunnel which would be used in interstate commerce when completed. The court, speaking by Judge Neterer, said in part:

The plaintiff was not himself engaged upon any interstate commerce, nor was he injured by anyone connected with the operation of any of the agencies which actually transported interstate commerce. The building of this cut-off is a facility which is to be used by the defendant, when completed, as an engine or cars, or any other appliance under construction might be considered for use when completed. The act deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—EMPLOYEE CARRYING COAL TO HEAT REPAIR SHOP—*Cousins v. Illinois Central Railroad Co., Supreme Court of Minnesota (June 26, 1914), 148 Northwestern Reporter, page 58.*—Charles W. Cousins brought action against the railroad company named, under the Federal employers' liability act, for damages for injuries received while he was wheeling a barrow full of coal to one of the car repair shops. The only question was whether this employment brought him within the provisions of the act. Judge Bunn, in delivering the court's opinion affirming a judgment of the district court of Ramsey County in the plaintiff's favor, said in part:

The men in the shop were engaged in repairing cars that had been and were to be used in interstate commerce. Plaintiff, when he was injured, was wheeling coal to be used in heating the shop so that these men could do their work.

In Pederson *v.* Delaware, Lackawanna & Western R. Co., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85], the court said:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

It was held that a man carrying bolts to be used in repairing a railroad bridge over which interstate commerce moved was employed in interstate commerce. The court found no merit in the point that plaintiff was not actually repairing the bridge when injured, but was merely carrying to the place where the work was to be done some of the materials to be used therein, saying:

"It was necessary to the repair of the bridge that the materials be at hand, and the act of bringing them there was a part of the work. In other words, it was a minor task which was essentially a part of the larger one, as is the case where an engineer takes his engine from the roadhouse to the track on which are the cars he is to haul in interstate commerce."

That the men engaged in repairing the cars were employed in interstate commerce is well settled. That an employee carrying materials to the shop to be used in repairing the cars would be employed in interstate commerce the Pederson case decides. It seems no extension of the construction thus given to the statute to hold that an employee carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop were heated. We think the Pederson case controls the case at bar.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—EMPLOYEE SLEEPING IN SHANTY CAR—*Sanders v. Charleston & W. C. Ry. Co., Supreme Court of South Carolina (Apr. 2, 1914), 81 Southeastern Reporter, page 283.*—Sanders was employed by the railway company with an iron gang relaying rails. He was injured while asleep in his shanty car, on a train which stood on a sidetrack, which was struck by an incoming train. He brought suit in the common pleas circuit court of Edgefield County, under the Federal employers' liability act and obtained a judgment against the company. The company appealed the case to the State supreme court on the ground that at the time of the injury Sanders was not employed in interstate commerce. This court, however, decided that the employee was engaged in interstate commerce when injured, following the opinion in Pederson *v.* Del. & L. W. Ry. Co., 229 U. S. 146, 33 Sup. Ct. 648. Judge Gage, who gave the opinion of the court, said:

When the plaintiff [Sanders] was in the bunk of his shanty car, in the "sleep that knits up the ravell'd sleeve of care," and getting strength to lay rails next day, the law imputed to him actual service on the track, and extended to him the rights of such a worker; "for the letter (of the law) killeth, but the spirit giveth life."

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ENGINEER IN ROUNDHOUSE TO ATTEND TO REPAIRS—*Padgett v. Seaboard Air Line Railway, Supreme Court of South Carolina (Nov. 18, 1914), 83 Southeastern Reporter, page 633.*—This action was brought by Clara V. Padgett as administrix of the estate of Lewis H. Padgett, for the death of the latter, an engineer in the employ of the company named, which occurred on the morning of January 12, 1913. Padgett had recently been promoted from freight engineer to a passenger run between Columbia, S. C., to Savannah, Ga., so that he was engaged in interstate commerce. Further facts are stated in the opinion delivered by Judge Fraser, as follows:

When the train reached Columbia, the engine was detached and carried to the yard at Cayce, a station near Columbia. The engineer ran his engine into the yard near the roundhouse, and left it upon a siding in the yard. He left his engine about 10.30 on the 11th day of January, 1913. Mr. Padgett's regular run would have required him to leave Columbia at 6.10 a. m. on the morning of the 12th. He was detained in the yard for a while so that he might take out another train, if necessary. It was not necessary, and he was notified that he would make his regular run. The company had built a small boarding house at Cayce for the convenience of its trainmen, but let out the management of the house to a private party. When Mr. Padgett was notified that he would be required to make his regular run, he went to the boarding house and found it full. He then went back on the yard, into the roundhouse, and into an engine, and went to sleep. At about 4.30 o'clock on the morning of the 12th, the engine in which Mr. Padgett was asleep was run out of the roundhouse down to the coal chute, to be supplied with coal, water, etc., for its trip. At the coal chute Mr. Padgett waked and got off the engine. He inquired where his engine was and was told it was in the roundhouse on track No. 3. The last seen of Mr. Padgett alive, he was going in the direction of the roundhouse. When it came time to call him he could not be found, and the engine went off without him. A little later he was found in an open, uncovered pit in the roundhouse dead. His engine had been standing with the step over the pit. The pit was a little over 8 feet deep. There were no lights in the roundhouse.

Suit was brought in behalf of his widow and dependent children for negligence under the Federal employers' liability act. The defendant answered, denying negligence. It denied that the deceased was engaged in interstate commerce at the time of his death. It pleaded that the deceased was a trespasser in the roundhouse, contributory negligence, and assumption of risk. The judgment was for the plaintiff, and the defendant appealed.

The court denied the contention of the company that a verdict should have been directed for it on the ground that there was no evidence that the employee came to his death while engaged in interstate commerce. It held that the evidence, though circumstantial, pointed to the conclusion that Padgett's purpose in going

to the roundhouse was not to further any end of his own, but to make sure that repairs which had been found the night before to be needed were properly and promptly made. It was also held that the question as to negligence of the company and assumption of risk on the part of the engineer had been properly submitted to the jury, and affirmed the judgment of the court below.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FIREMAN ON SWITCH ENGINE—*Illinois Central Railroad Co. v. Behrens, Administrator, Supreme Court of the United States (Apr. 27, 1914), 34 Supreme Court Reporter, page 646.*—Joseph Behrens brought action for the death of his intestate, under the Federal employers' liability act, against the company named, in the Circuit Court for the Eastern District of Louisiana. Judgment being for the plaintiff, the company took the case to the circuit court of appeals on a writ of error, and that court certified a question of law to the Supreme Court. The decedent was a fireman and came to his death through a head-on collision. The nature of his work in general and at the time of the injury and the reasoning of the court in arriving at the conclusion that as he was not engaged in interstate commerce at that time his case was not within the provisions of the statute, are shown in the following extract from the opinion as delivered by Mr. Justice Van Devanter:

The crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon which the circuit court desires instruction is whether, upon these facts, it can be said that the intestate, at the time of his fatal injury, was employed in interstate commerce within the meaning of the employers' liability act.

The court considered briefly the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, and concluded:

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that

task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.

The question is accordingly answered in the negative.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INSTALLING BLOCK-SIGNAL SYSTEM—*Saunders v. Southern Railway Co., Supreme Court of North Carolina (Nov. 25, 1914), 83 Southeastern Reporter, page 573.*—B. B. Saunders, administrator of the estate of his deceased son, Kemp Saunders, brought action against the company named under the Federal employers' liability act for the death of the latter while in the employ of said company. The employee was engaged in installing a block-signal system between two points in the State of North Carolina, in place of one already in use, along a portion of the railway used in interstate commerce. He was killed by a train while crossing the tracks to reach his work train. Referring to the decisions in a number of cases, the court held that the employee was engaged in interstate commerce, saying:

We think it clear that one engaged in installing and equipping the road with the block signals was engaged in doing something which was a part of the interstate commerce in which the defendant was engaged, to the same extent as one engaged in repairing a bridge or a track in such commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE INSTALLING BLOCK-SIGNAL SYSTEM—EMPLOYEE ON WAY FROM WORK—*Grow v. Oregon Short Line Railroad Co., Supreme Court of Utah (Feb. 5, 1914), 138 Pacific Reporter, page 398.*—Action was brought by Cecilia Grow as administratrix of Cyrus L. Grow, for the death of Grow by accident, against the company named. Grow was in the employ of the company, engaged in installing a block-signal system. At the time of the injury he was riding on the track on a motor tricycle to the place where the outfit of the crew was located, and where the men boarded and lodged in cars furnished by the company. A train, late and going with great speed, approached the tricycle without signals or warning and without a headlight, the engineer not keeping a lookout nor seeing the tricycle until within a car length of it. The foreman of the block-signal system installing crew, who was with Grow on the tricycle, saw the train and jumped in time to save himself, but Grow was struck and killed.

At the completion of the evidence in the district court of Weber County, the court directed a verdict for the defendant. The plaintiff

appealed, and the judgment was reversed and the case remanded. The defendant applied for a rehearing, but this was denied. Several questions were argued, but the most important was whether the employee was engaged in interstate commerce under the provisions of the Federal employers' liability act. This question was answered in the affirmative, as is shown by the appended quotation from the opinion by Judge Straup:

Counsel for both parties have largely argued the case upon the proposition or theory of whether the case is within or without the provisions of the act of Congress relating to the liability of interstate common carriers by rail to their employees.

We think the rule announced in the Pederson case [229 U. S. 146, 33 Sup. Ct. 648, Bul. No. 152, p. 85], is decisive of the question here. If, as there announced, an employee engaged in repairing a car, engine, or track, or constructing or repairing a switch or bridge along a track used in interstate commerce, is, within the meaning of the act, employed in such commerce, then, do we think, was the deceased here also employed in such commerce.

The evidence, without dispute, shows, and the defendant, on the record, unqualifiedly admitted, that the signals were installed to carry on, and were in furtherance of, the interstate commerce in which the defendant was engaged. On the record it is clear that they were put in for no other purpose.

The further point is made that the deceased, at the time of the injury, was not engaged in any work, but was on way to his abode; hence the relation of master and servant did not then exist between him and the defendant, and for that reason he was not then "employed in such commerce." We think that also is answered against the respondent by the Pederson case. But the observations of the court in the case of Phila., B. & W. R. Co. *v.* Tucker, 35 App. D. C., 123, affirmed by the Supreme Court, 220 U. S. 608, 31 Sup. Ct. 725, are here pertinent: * * *

"We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as he does the moment he enters upon the actual performance of his task."

We think the relation of master and servant between the deceased and the defendant with respect to the latter's liability for the charged negligence as clearly existed at the time of the injury as though the deceased then had been actually engaged in his work along the track.

From these considerations it follows that the case falls within the provisions of the congressional act in question.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING CARS—DEFECTIVE GRINDSTONE—*Opsahl v. Northern Pacific Railway Co., Supreme Court of Washington (Feb. 16, 1914), 138 Pacific Reporter, page 681.*—The plaintiff, a blacksmith in the employment of the company named, received injuries to the fingers while using a power grindstone which was in a very defective condition, its use in such condition being a violation of the State factory law. As he was repairing cars used in interstate commerce, he brought the action under the Federal employers' liability act of 1908. The defense of assumption of risk was pleaded by the defendant company, but was not allowed, and judgment was rendered in the plaintiff's favor in the superior court of Pierce County. On appeal the supreme court affirmed this judgment, holding that as the action was brought under the Federal statute, which abrogates the defense of assumed risks in any case where the common carrier violates "any statute enacted for the safety of employees," such violation contributing to the injury complained of, that statute governed in this case.[1]

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING ENGINE—*Law v. Illinois Central Railroad Co. et al., United States Circuit Court of Appeals, Sixth Circuit (Nov. 4, 1918), 208 Federal Reporter, page 869.*—John Law was injured while employed in the repair shop of the railroad company named, and while engaged in repairing a part of an engine used in interstate commerce. He was helping a boiler maker, when on account of the latter striking a glancing blow, a nut flew and hit Law in the eye. He brought suit, making claim for damages both at common law and under the employers' liability act. Judgment was for the defendants on a directed verdict in the District Court for the Western District of Tennessee, and the plaintiff appealed. The circuit court of appeals held that no recovery could be had at common law because the injury was caused by the negligence of the boiler maker, who was a fellow servant of the plaintiff. It held, however, that the plaintiff had been engaged in interstate commerce, and that a recovery was possible under the employers' liability act; the judgment was therefore reversed and a new trial ordered. Judge Knappen, speaking for the court, discussed the question of interstate commerce, using in part the following language:

Was the plaintiff engaged in interstate commerce?

In the instant case the engine was in the shop for what is called "roundhouse overhauling." It had been dismantled at least 21 days

[1] Attention may be called in this connection to the case Seaboard A. L. Ry. Co. *v.* Horton (p. 80), in which the Supreme Court of the United States held that such a binding together of State and Federal laws was not possible.

before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It was destined for return thereto upon completion of repairs. It actually was so returned the day following the accident.

We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character? In Northern Pacific Ry. Co. *v.* Maerkl, 198 Fed. 1, 117 C. C. A. 237 [Bul. No. 112, p. 84], the Circuit Court of Appeals of the Ninth Circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used in interstate commerce, and intended to be again so used when repaired, was within the protection of the employers' liability act. The repairs there in question were substantial in their nature, requiring at least a partial dismantling of the car, which had been in the shop two days when the accident occurred. The rule announced by this decision commends itself to our judgment.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING TELEGRAPH LINE—*Deal v. Coal & Coke Railway Co., United States District Court, Northern District of West Virginia (July 2, 1914), 215 Federal Reporter, page 285.*—David F. Deal was injured while employed in repairing a telegraph line belonging to the company named, and used in directing the operation of interstate trains. As the only reason for a Federal court to have jurisdiction was that the employee was under the Federal employers' liability act, the company demurred to the complaint on the ground that the employment was not included within the provisions of this act, but the court decided against this contention. Judge Dayton, in delivering the opinion, said:

The Supreme Court, in Pederson *v.* Delaware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85], has certainly held that an iron worker engaged in carrying bolts to repair a bridge upon an interstate carrier's roadbed is entitled to the benefit of the act. It says:

"That the work of keeping such instrumentalities in a proper state of repair while thus used (in interstate transportation) is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

I am able to see little difference between the necessity for the proper repair of the bridge over which the interstate commerce passes and the necessity of repairing the telegraph line owned by the company and by the operation of which the movement of such commerce over the bridge is controlled and directed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ROUNDHOUSE EMPLOYEE—*La Casse v. New Orleans, Texas & Mexico Railroad Co., Supreme Court of Louisiana (Mar. 30, 1914), 64 Southern Reporter, page 1012.*—Evelina La Casse brought suit for the death of her husband caused by the explosion of a locomotive boiler while in the employ of the defendant railroad company. The question whether the employment came under the provisions of the employers' liability act arose in a somewhat unusual way, since in this case it was the defense which contended that it was so included. If it were, suit would have to be brought by the personal representative, and the action by the widow would fail. The court's decision, however, was that the employment was not within the scope of the act. The statement in the opinion, delivered by Judge Provosty, as to the work which the employee was doing, and the discussion of his status with respect to the liability act, are in part as follows:

His functions consisted in receiving the locomotives that came to the roundhouse, taking care of them, and having them filled with water and steamed up, ready for use, when called for.

We do not agree with defendant that this case does come under the Federal statute.

If the fact that a locomotive or a car might be used the next day, or whenever next needed, in interstate commerce, were equivalent to being actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, but engaged also in interstate commerce, every one of its employees would at all times be engaged in interstate commerce when at their work. Two decisions of the Supreme Court of the United States, Pederson *v.* Delaware, L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648 [see Bul. No. 152, p. 85]; St. L., S. F. & T. R. R. Co. *v.* Seale, 229 U. S. 156, 33 Sup. Ct. 651 [see Bul. No. 152, p. 87], are relied upon by defendant's learned counsel; but these decisions, as we understand them, are very far from having that broad scope. In those cases, although the connection was but slight, there was a direct engagement in interstate commerce, whereas a locomotive or an empty car, which has completed an intrastate run and may on its next run be used in like manner interstate, can not be said to be actually engaged in interstate commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TESTING ENGINE AFTER REPAIRS—*Lloyd v. Southern Railway Co., Supreme Court of North Carolina (May 26, 1914), 81 Southeastern Reporter, page 1003.*—W. L. Lloyd brought action under the Federal employers' liability act against the company named for personal injuries resulting from a defective ash-pan mechanism on an engine which had just come from the repair shop, and which he was to take as engineer on a regular interstate run after a trial trip to ascertain whether it was in proper order. The

court affirmed a judgment of the superior court of Guilford County in favor of the plaintiff, deciding that the employment was in interstate commerce, and in its opinion by Judge Walker, said as to this point:

He was put in charge of this engine, and his duty, as engineer, required him to inspect it for the purpose of ascertaining whether it was in proper condition for its run from Spencer, N. C., to Monroe, Va. It was in commission for the purpose of moving interstate traffic between these two points. It was not necessary to constitute it an instrument of interstate commerce that it should have started on its journey. This engine was to be employed wholly in interstate commerce, and has been so used since the day of the injury. The work of reparation had been finished in the shops, and the engine was run out on the track, preparatory to her next interstate run. She had been thus used before, and her runs were merely suspended temporarily for the purpose of repairing her, after which the interstate runs would be resumed. Plaintiff was overlooking his engine, expecting to take it out that day or the next to Monroe, Va. His work was done only in a preparatory stage of interstate commerce, but was a part of it.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TRANSPORTATION OF LUMBER BY PRIVATE RAILROAD—*Bay v. Merrill & Ring Lumber Co., United States District Court, Western District of Washington (Feb. 20, 1914), 211 Federal Reporter, page 717.*—August Bay was injured while employed by the company named, and brought suit. At the trial a nonsuit was granted, and the plaintiff moved for a new trial, which was denied. The company was engaged in logging operations, and had a logging railroad of standard gauge connecting with the Great Northern Railway. The products were carried to Puget Sound in Washington, in which State the logs were cut, and there sold to various mills, which sawed them into lumber, about 80 per cent of which went into other States and countries. The company's charter gave it the power to act as a common carrier, but it had never carried or offered to carry anything but its own products. Accordingly the court held that it was not engaged in interstate commerce, and that the plaintiff was not within the provisions of the Federal employers' liability act.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WEIGHING EMPTY CARS—*Wheeling Terminal Co. v. Russell, United States Circuit Court of Appeals, Fourth Circuit (Dec. 8, 1913), 209 Federal Reporter, page 795.*—Russell, the original plaintiff in this case, had recovered a judgment in the District Court of the United States for the District of West Virginia, where-

upon the defendant appealed. The employee when injured was at work as one of a crew engaged in weighing empty cars which had been used in interstate transportation and weighed while full, the object being to ascertain the net weight of contents. The judgment was affirmed on appeal, the court determining among other points that Russell was engaged in interstate commerce at the time of the injury. The following is an extract from the opinion, delivered by Judge Rose, with regard to this point:

> The cars were being weighed to determine the net weight of the interstate load carried by them to the West Virginia consignee. Those who were engaged in ascertaining such weights were themselves employed in that commerce. St. Louis & San Francisco Ry. Co. *v.* Seale, 229 U. S. 156, 33 Sup. Ct. 651 [Bul. No. 152, p. 87]. The cars had been employed in interstate commerce. It was not shown that they had been withdrawn from its service. The reasonable presumption, therefore, is that they remained in it. In practice such presumption will not work injustice. The defendant carrier will usually have little difficulty in showing, when it wishes to do so, where the cars were to be taken and for what purpose. For the plaintiff to trace them may be difficult and expensive.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—*Cincinnati, New Orleans & Texas Pacific Railway Co. v. Swann's Administratrix, Court of Appeals of Kentucky (Oct. 22, 1914), 169 Southwestern Reporter, page 886.*—M. B. Swann, an employee of the company named, was killed by a train, and his administratrix brought action for damages. In the first suit, brought under the State law, the court of appeals reversed a judgment of the trial court against the railroad company, with instructions to direct a verdict in its favor, on the ground of contributory negligence. As this defense would only reduce the damages under the Federal employers' liability act, the former suit was dismissed, and the present one brought under the act mentioned. A judgment was again entered in favor of the plaintiff in the trial court, the circuit court of Boyle County.

There was no dispute as to the employee being engaged in interstate commerce. He was acting as foreman of a crew engaged in putting in water columns near the tracks at Williamstown Station. While standing on the end of the ties looking into a pit excavated for a water column, he was struck by the engine of an express train running 30 or 40 miles an hour and killed. He was not seen by the engineer until too late to take any steps to save him, on account of a sharp curve which the train had just rounded.

The court held that the employers' liability act requires a showing of negligence on the part of the railroad company in order that

recovery may be had for injury or death of any employee, and that this negligence must consist of failure to discharge some duty owed to the employee; and that, unless the negligence charged involves defects in cars, equipment, etc., the State law must be looked to in determining whether the acts or omissions complained of amount to negligence.

It appeared that it was the duty of Swann to know, and he did know, the schedule time of the train in question, which on this occasion was only two minutes late; also that it was not necessary for him to occupy the place of danger in which he stood.

It was held that the employees in charge of the train owed no duty to him to slow down or give him warning of its approach, and that the fact that there were rules requiring slower speed and warnings in approaching such places as the one where the injury occurred did not entitle him to rely on the observation of those rules, as they were not enacted for the benefit of the class of employees to which he belonged.

The judgment of the trial court was therefore again reversed and a new trial granted, with directions, if the facts should prove substantially the same as on the previous trial, to direct a verdict for the defendant company.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—COURSE OF EMPLOYMENT—*Reeve v. Northern Pacific Railway Co., Supreme Court of Washington (Nov. 16, 1914), 144 Pacific Reporter, page 63.*—Mike Reeve was a laborer for the company named, whose duty it was to assist in supplying the company's baggage, mail, and other cars with water and fuel, and to aid otherwise in fitting them for service. On the evening of June 23, 1911, while sitting on the floor in the door of a baggage car with his feet outside, he was pushed out by one of two other employees who were wrestling inside the car, and sustained severe injuries. The Federal employers' liability act provides that any common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, resulting in whole or in part from negligence of any of its officers, agents, or employees. The court held that the word "negligence" was limited to negligence of officers, agents, or coemployees while in the performance of the duties of their employment, and hence the company was not liable under the circumstances of this case.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—REFERENCE TO STATUTE—COMPARATIVE NEGLIGENCE—*Grand Trunk Western Ry. Co. v. Lindsay, United States Supreme Court (Apr. 6, 1914), 34 Supreme Court Reporter, page 581.*—George Lindsay

brought suit against the railway company named, in the United States Circuit Court for the Northern District of Illinois, to recover damages for a personal injury sustained while he was employed by the company, alleging that the injury was caused by its negligence in failing to comply with the provisions of the Federal safety appliance act. Judgment was given in his favor, which judgment was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit. The case then went to the United States Supreme Court, where the judgment of the lower court was again affirmed. The points of interest and the conclusion of the court are indicated below in the language of Mr. Chief Justice White, who spoke for the court:

In the trial court it is insisted the operation and effect of the employers' liability act upon the rights of the parties was not involved because that act was not in express terms referred to in the pleadings or pressed at the trial. But the want of foundation for this contention becomes apparent when it is considered that in the complaint it was expressly alleged and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the employers' liability act. Aside from its manifest unsoundness, considered as an original proposition, the contention is not open, as it was expressly foreclosed in Seaboard Air Line R. Co. *v.* Duvall, 225 U. S. 477, 482, 32 Sup. Ct. Rep. 790.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—RELIEF ASSOCIATIONS—RELEASE—*Wagner v. Chicago & Alton Railroad Co., Supreme Court of Illinois (Dec. 2, 1914), 106 Northeastern Reporter, page 809.*—Joseph M. Wagner recovered a judgment amounting to $15,000 against the company named in the superior court of Cook County, for personal injuries. This was affirmed by the appellate court, which, however, required a remittitur of $387.09, the portion contributed by the Chicago, Burlington & Quincy Railroad Co., Wagner's employer, to the benefits he had received from the relief fund. The Alton company then brought a writ of certiorari to the supreme court, and is therefore designated as the plaintiff in error in the opinion.

The employee, conductor in charge of a switching crew, was knocked from a position on a car step by a semaphore post alleged to be too near the track of the Alton company, over which trains of the Burlington company were operated under a license. It was held that if the post was in fact located too near the track, such location constituted negligence on the part of both railroad companies, and that the fact was properly for the determination of the jury, which had found in favor of the employee. The remaining question related to the release of the company by acceptance of benefits from the relief fund, and involved

the application of the Federal and State laws to the case, especially in view of an agreement at the trial that the question of interstate commerce was eliminated, the company sued not being the employing company. Two of the judges presented a dissenting opinion on this point. Judge Cooke, who delivered the opinion of the majority of the court, affirming the judgment below, discussed the question mentioned as follows:

Defendant in error had no cause of action against plaintiff in error under the Federal employers' liability act, as that act applies only where the relation of master and servant exists. To meet the case of defendant in error, the plaintiff in error proved that he was, and had been since 1902, a member of the relief department of the Burlington company; that the employees of that company made monthly contributions to the relief fund; that the company maintained the department and bore the operating expenses; that he had accepted from the relief fund, as benefits, the sum of $1,231; and that $1,349.59 had been paid in his behalf for hospital bills, physicians' services, and the like. In rebuttal defendant in error was permitted to prove that at the time he was injured the engine and cars were engaged in interstate commerce. The admission of this evidence in rebuttal is assigned as error.

There can be but one satisfaction for an injury, and, if defendant in error made a settlement with the Burlington company and released it from further liability, it was a release, also, of plaintiff in error from all liability, as the Burlington company was a joint tort-feasor. The contract of defendant in error with the relief department provided that the voluntary acceptance by him of benefits after receiving an injury should operate as a satisfaction of further claims against the employer on account of such injury, and it is the law of this State that such an acceptance, with the knowledge that the contract contained such a provision, operates as a satisfaction and bar to a subsequent suit for damages. Eckman *v.* Chicago, Burlington & Quincy Railroad Co., 169 Ill. 312, 48 N. E. 496 [Bul. No. 15, p. 245]. The State law in this regard has been modified, however, by the Federal employers' liability act as to cases where injuries are received by certain employees of an employer engaged in interstate commerce. The Federal act provides that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the act, shall to that extent be void, provided that in any action brought against any such common carrier under the act such common carrier may set off any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto, on account of the injury or death for which the action is brought.

When plaintiff in error attempted to prove a satisfaction by the payment of benefits by its joint tort-feasor, the Burlington company, to defendant in error, it was proper for defendant in error, in rebuttal, to show that no valid release had been given the Burlington company by him. As between defendant in error and the Burlington company the Federal employers' liability act clearly applied, and if, as the United States Supreme Court has repeatedly held, that law super-

sedes all State laws on the subject, then the release given by defendant in error to the Burlington company was not valid and would not have precluded recovery by him from that company. If it was not valid so far as the Burlington company was concerned, it was clearly invalid as to plaintiff in error and constituted no defense to this action.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SAFETY APPLIANCES—*Pennell v. Philadelphia & Reading Railway Co., United States Supreme Court (Jan. 5, 1914), 34 Supreme Court Reporter, page 220.*—The plaintiff, as administratrix of the estate of J. A. Pennell, deceased, brought an action for damages for death by wrongful act in the District Court of the United States, for the Eastern District of Pennsylvania. Pennell was employed by the defendant company in the capacity of fireman on one of its locomotives, and, it was alleged, came to his death by the failure of defendant to comply with the requirements of the safety appliance acts of Congress and the rules and directions of the Interstate Commerce Commission in that defendant failed to affix between the locomotive and its tender an automatic coupling device. The action was prosecuted under the act of Congress relating to the liability of common carriers by railroad engaged in interstate commerce to their employees while so engaged. The trial court directed the jury to render a verdict for the defendant, upon which judgment was entered, and it was affirmed by the circuit court of appeals. (122 C. C. A. 77, 203 Fed. 681.) The case was then brought to the United States Supreme Court on error, where the judgment of the lower court was affirmed, the court holding that the safety appliance law is entirely satisfied by providing the automatic coupler between the tender and the cars constituting the train—that is, on the rear end of the tender—and not necessarily between the engine and the tender.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SAFETY APPLIANCES—HAULING BAD-ORDER CAR—STATUS OF WORKMAN RIDING HOME—*Dodge v. Chicago Great Western Railroad Co., Supreme Court of Iowa (Mar. 24, 1914), 146 Northwestern Reporter, page 14.*—This action was brought for the death of a conductor in the employ of the company named, from an accident which occurred November 22, 1911. A verdict was directed for the defendant, and the plaintiff appealed. The interstate train of which he was conductor picked up a car which had a defective coupling and hauled it on the rear of the train, the bad coupling being, however, on the rear end. This car had been fastened to another car by a chain, and as a convenient way of carrying the chain along it was attached to the brake rod with a wire, the decedent Dodge taking part in doing

this. After arriving at Des Moines at the completion of the trip, Dodge got upon an engine of a freight train going out over the track on which he had just come in, in order to ride to his home. This engine was derailed, and the engine in leaving the track turned, crushing him to death between the engine proper and the tender. A piece of chain, which was probably part of the one in question, was found, and it was claimed that this was the cause of the derailment. Counts of the declaration were based upon both the Federal employers' liability act and the safety appliance act. The court in affirming the judgment for the defendant decided that Dodge was not at the time of the accident engaged in interstate commerce; that the condition of the car had nothing to do with the accident or injury; and that Dodge was not at the time either an employee or a passenger, but a licensee, to whom the company owed only the duty of ordinary care. The following quotation is from the opinion by Judge Withrow:

The accident did not result from any causal connection with the defective condition of the car, but from a cause which was unrelated to it, excepting that the chain had previously been used to couple that car to another one, but which at the time of the movement of the car was not so used. Under these facts, which are not in dispute, we think the provisions of the safety appliance act are without application.

As to the status of the decedent at the time of the accident Judge Withrow said in part:

We conclude that the decedent, at the time of the accident which resulted in his death, was neither an employee nor a passenger, as such terms are used in fixing liability. Assuming that he, with others, had by permission enjoyed the privilege of riding upon the engine towards his home, after his own service had ended, he was but a licensee. Being such, and giving to the evidence all the weight and force that can be properly claimed for it, the standard of duty towards him for his protection would be that the defendant, thus permitting the decedent to ride, would be held only to the exercise of ordinary care, and that the licensee exercises the privilege at his own risk of obvious or patent dangers, and under such conditions the defendant owed him no active duty excepting upon the discovery of his danger.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—INJURIES TO EMPLOYEE'S FAMILY RIDING ON PASS—*Charleston & W. C. Ry. Co. v. Thompson, Court of Appeals of Georgia (Aug. 30, 1913), 80 Southeastern Reporter, page 1097.*—A judgment was obtained against the railway company, by Lizzie Thompson, for injuries sustained by her through the negligence of the company, while riding on one of its trains on a pass issued to her as the wife of a railway laborer. This judgment was affirmed by the Court of Appeals of Georgia.

The following language from the syllabus by the court gives the conclusions reached:

As a general rule, a stipulation in a free pass given by a carrier, to the effect that the person who accepts it assumes all risks of injury in transportation is enforceable; and as to a passenger who has accepted transportation under such a pass a carrier is liable only for injuries resulting from wantonness or willful negligence; but an exception to this rule is presented in the provision of the "Hepburn Act" (Act June 29, 1906, ch. 3591, 34 Stat. 584 [U. S. Comp. Stat. Supp. 1911, p. 1286]), which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be regarded as a part of the consideration paid for the services of the employee and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that, if the plaintiff (the wife of an employee) was traveling on a free pass, she would not be entitled to recover.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—OPERATING RAILROAD—*Sartain v. Jefferson City Transit Co., Kansas City Court of Appeals (Nov. 2, 1914), 170 Southwestern Reporter, page 411.*—Henry W. Sartain sued the railroad company named for damages for personal injuries. Judgment was in the plaintiff's favor in the circuit court of Cole County, and the defendant appealed. The decision involved the construction of the Missouri statute, Revised Statutes of 1909, section 5434, under which the action was brought, and which provides that railroad companies shall be liable for damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof. The work which the plaintiff was doing at the time of the injury consisted of unloading ties from a wagon onto the roadbed of an extension of the railroad line, which extension was in process of construction. The company contended that he was not engaged in operating a railroad, but the court, after citing and discussing the cases in point, held that the law of the State is that such employees—those who, though not employed in actually moving a train, are doing work which is directly essential to enable the trains to move—are within the statute. As negligence on the part of a fellow employee in dropping a tie and mashing the plaintiff's foot was alleged, and the jury by its favorable verdict had found this to be the fact, the court affirmed the judgment below.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—ORDERS OF SUPERIOR—INJURY TO BRAKEMAN—*Ainsley v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., Supreme Court of Pennsylvania (Jan. 5, 1914), 90 Atlantic Reporter, page 129.*—The employee Ainsley secured judgment in the court of common pleas of Allegheny County for personal injuries, which judgment was affirmed on appeal.

At the time the plaintiff below was injured he was in the employ of the defendant company as a brakeman on a passenger train. He was on duty on a train which left the city of Pittsburgh between 2 and 3 o'clock on the morning of October 31, 1909, bound for Columbus, Ohio. Shortly after it had started it was discovered that the air brake on one of the cars was not working properly, and the plaintiff got on the lower step of a Pullman car in an effort to locate the brake which needed attention. While leaning out from that step while the train was still in motion, he was brushed from the car by coming in contact with a fence which the defendant company had constructed between its passenger tracks to prevent persons from crossing over them at grade. He was severely injured, and, from the judgment which he recovered in the court below, the defendant company appealed.

It was held that the evidence justified findings by the jury that the brakeman's act was in obedience to peremptory orders by the conductor, and that the latter was a person to whose orders the brakeman was "bound to conform" under the State statute; also that the question of assumed risks had been properly submitted to the jury, and on their finding that the apparent hazard was not so excessive as to make obedience to the orders an act of negligence, the liability of the company was sustained.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—ORDERS OF SUPERIOR—YARD AND BRIDGE MEN—*Chicago & Erie Railroad Co. v. Lain, Supreme Court of Indiana (Jan. 13, 1914), 103 Northeastern Reporter, page 847.*—Henry Leroy Lain sued the company named for damages for personal injury and secured a favorable verdict in the circuit court of Fulton County. This was set aside for defect in the complaint, and this being amended, a verdict for the plaintiff was again rendered on the second trial, from which the company again appealed, the supreme court on this occasion sustaining the judgment of the court below. The suit was brought under Burns' A. S. 1908, section 8017, which provides that every railroad corporation in the State shall be liable for damages for personal injury suffered by any employee while in its service; the employee so injured being in the exercise of due care and diligence, "where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of his injury was bound to conform, and did conform."

Lain was directed by a foreman to move a car which was standing on a switch track, and in order to carry out this order placed himself upon the track behind the car, with his back to other cars standing on the same track. While in this position, under further orders of the foreman, an engine and cars ran at high speed against the cars standing on the track behind Lain, and he was crushed and sustained serious injuries.

Among other contentions of the company, it was claimed that the employee was guilty of contributory negligence, and that on account of the nature of his employment he was not covered by the statute. With regard to these matters, Judge Cox, who delivered the opinion of the court, said in part:

> Under the allegations of the complaint, the position taken by appellee was not of itself dangerous and could only become so by the violation of duty on the part of the foreman, and he was not bound, in the exercise of due care, to anticipate that the foreman who was, under the averments of the complaint, present and acting for the master would violate the duty to exercise ordinary care to prevent his position from becoming a dangerous one. [Cases cited.]
>
> Finally it is claimed by counsel that the complaint affirmatively shows that appellee was a carpenter and not an employee engaged in the operation of trains, and that for that reason he can not come within the provisions of the statute which is invoked to establish his cause of action. It is not averred in the complaint that appellee was employed and working as a carpenter, but, on the contrary, it is averred that he was one of the appellant's "yard and bridge men"; that as such he was ordered to move a car on one of the tracks of appellant's switch yard; and that, while doing this, he was injured by the movement of other cars and an engine in the yard and on that track. This obviously brings appellee within the application of the statute within the rule laid down in Indianapolis, etc., Co. *v.* Kinney (1908) 171 Ind. 612, on page 617, 85 N. E. 954, on page 957, where it was said: "We do not mean that it is essential to the bringing of an employee within the statute that he should be connected in some way with the movement of trains, but it seems sufficient if the performance of his duties brings him into a situation where he is, without fault, exposed to the dangers and perils flowing from such operation and movement, and is by reason thereof injured by the negligence of a fellow servant described in the act."

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—ELECTRIC TRAINS—*Spokane & Inland Empire Railroad Co. v. Campbell, United States Circuit Court of Appeals, Ninth Circuit (Oct. 19, 1914), 217 Federal Reporter, page 518.*—Edgar E. Campbell brought action against the company named for personal injuries suffered while running as motorman an interstate electric train of the company

That the provisions of the safety appliance act as amended now apply to interstate electric trains was held by the court, Judge Wolverton, who delivered the opinion, speaking in part as follows on this point:

There can be no doubt that when the primary act was passed, electrically propelled trains were not within the legislative mind, and where "locomotive engine" occurs reference was had to a steam-propelled engine. And likewise when "engineer" is spoken of, it had relation to a person in charge of a steam-propelled locomotive.

The electric railroad has since come into very general use, with its driving engines called motors, and its employees in charge of the engines are called motormen or enginemen.

In a narrower sense, a locomotive engine is spoken of as an engine propelled by steam; but when the statute, as the amendment does, extends the provisions of the act to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles, it broadens the significance so as, without question, to include motors electrically propelled, used upon railroads engaged in interstate commerce. So, also, the original act, with its amendment, includes the operators of such engines, whether called engineers or motormen. We think the statute is broad enough to require that electrically propelled engines and trains engaged in interstate commerce, as well as steam-propelled engines and trains, shall be equipped with air brakes for their efficient operation and control.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—STATE STATUTE—EXTRATERRITORIAL EFFECT—JURISDICTION OF COURTS—*Tennessee Coal, Iron & R. Co. v. George, United States Supreme Court (Apr. 13, 1914), 34 Supreme Court Reporter, page 587.*—Wiley George was injured while employed by the defendant company in Alabama, the injury being due to a defect in the locomotive on which he was employed. He brought suit for damages in the city court of Atlanta, Ga., basing his right to recover on section 3910 of the Alabama Code which makes the master liable when an injury is caused by the defective condition of machinery, etc. The company defended upon the ground that the courts of Georgia did not have jurisdiction, as section 6115 of the Alabama Code provided that "all actions under section 3910 must be brought in a court of competent jurisdiction within the State of Alabama, and not elsewhere." The company contended that inasmuch as the law provided that action under it should be brought in the Alabama courts only, it would be a denial of full faith and credit to the acts of Alabama, by the State of Georgia, contrary to the provisions of article 4, section 1 of the Constitution of the United States, if the Georgia court took jurisdiction. The contention of the company was overruled and George obtained judgment in his favor, which judgment was affirmed by the Georgia Court

of Appeals. (11 Ga. App. 221, 75 S. E. 567.) In the United States Supreme Court the judgment of the State court was affirmed, Mr. Justice Lamar delivering the opinion of the court, from which the following is taken:

There are many cases where right and remedy are so united that the right can not be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that "where the provision for the liability is coupled with a provision for the special remedy, that remedy, that alone, must be employed." [Cases cited.]

But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common-law restrictions, or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory, and like any other transitory action can be enforced "in any court of competent jurisdiction within the State of Alabama."

The courts of the sister State, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend. But venue is no part of the right, and a State can not create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction.

EMPLOYERS' LIABILITY—REGULATIONS CONCERNING ELECTRIC WIRES—SUBSTITUTE PROVISIONS—*McClaugherty v. Rogue River Electric Co., Supreme Court of Oregon (Apr. 7, 1914), 140 Pacific Reporter, page 64.*—James McClaugherty, a minor a little less than 21 years of age, met his death May 27, 1911, from an electric shock while installing an electric motor, for this purpose running wires on a certain pole, which carried among others some 2,300-volt wires. He was not instructed whether or not to cut off the current from these wires while doing the work, and did not do so. The company had provided means of interrupting the current, instead of conforming to the statutory regulations as to electric wires included in the employers' liability act, Laws of 1911, page 16. As to the necessity of strict compliance by employers with those regulations, the court, in its opinion delivered by Judge Bean, said:

The contention of the defendant assumes that under the employers' liability act the company was at liberty to furnish substitutes for those things required by the terms of the act; that is, instead of "full and complete insulation" being provided at all points where employees are liable to come in contact with the wires carrying electricity of a

dangerous voltage, instead of dead wires not being mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires being "especially designated by a color or other designation which is instantly apparent," and instead of such live wires being strung far enough from the poles or supports to permit the repairmen to engage in their work without danger of shock, all as required by the act, the defendant could furnish cut-off switches so that the current of electricity could be shut off, and then the company would not be negligent, notwithstanding the fact that the provisions of the statute were not complied with. Such, however, is not the law. The requirements of the statute as to the safeguards enumerated are positive and mandatory. There are no alternatives.

The judgment of the court below in the plaintiff's favor was therefore affirmed.

EMPLOYERS' LIABILITY—RIGHT OF ACTION—ELECTION—EFFECT OF WORKMEN'S COMPENSATION ACT—*Consolidated Arizona Smelting Co. v. Ujack, Supreme Court of Arizona (Mar. 17, 1914), 139 Pacific Reporter, page 465.*—The employee Ujack was injured, and brought action against the company employing him. Judgment was for plaintiff in the superior court of Yavapai County, and the supreme court affirmed this judgment. The defense relied upon was that the plaintiff's only remedy was a proceeding under the workmen's compensation act, since he did not previous to the injury elect to reject the provisions of that act. The court decided that an employee has the option to elect any one of three forms of procedure after the injury, and that the adoption of one becomes exclusive only on commencing a suit in accordance with his election. Quotations are made in the opinion from various sections of the constitution and the workmen's compensation act. Among other things, speaking by Judge Ross, the court says:

The appellee [Ujack] contends that he was entitled, under the facts of the case, to maintain his suit for personal injury under the employers' liability law, while the appellant insists that his exclusive remedy was to be found in the compulsory compensation law. The controverted question may be disposed of by a correct answer to this question: Does the compulsory compensation act, when not disaffirmed prior to injury, limit the remedy of the injured employee to the compensation provided in that act, or may he after the injury elect between his remedy under the act and the other remedies of the common-law liability or employers' liability? The appellee was in the employment of appellant at the time the workmen's compensation law took effect, and had been in such employment for more than 10 days thereafter when he was injured. Neither the employer nor the employee had taken any affirmative action in recognition of the law, either to approve or repudiate it.

The constitution says: "The legislature shall enact a workmen's compulsory compensation law * * * by which compulsory compensation shall be required to be paid to any such workman by his

employer. * * * Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this constitution." This mandate to the legislature was carried out in the enacting of the workmen's compulsory compensation law, and, in doing so, there was created a new civil action heretofore unknown to our laws, available to the employee injured in the circumstances provided by law. It is optional with the injured employee as to whether he will accept the compensation. The employee's right to exercise this option being a constitutional right, legislation is impotent to deprive him of it. If the employee is never injured, he can make no claim for "such compensation," nor exercise his option. After the cause of action has accrued to the employee, he may choose to accept the compensation allowed under this act, and the legislature is competent to prescribe the steps he shall take in its enforcement, but it can not require him to elect, in advance of any injury, or the accrual of any right, which remedy he will pursue for redress.

Therefore any expressions in the workmen's compulsory compensation act that seemingly require that the employee shall elect, in advance of injury, his remedy for redress should be read and construed in view of the constitutional provision permitting him to exercise his option, after the injury, either to claim compensation or sue for damages.

The last sentence of section 14 reads: "Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively." This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive.

EMPLOYERS' LIABILITY—SAFE PLACE—*Rosholt v. Worden-Allen Co., Supreme Court of Wisconsin (Dec. 9, 1913), 144 Northwestern Reporter, page 650.*—John Rosholt was injured by falling from a runway on a building the roof of which, as a carpenter, he was engaged in constructing. While carrying planks from a pile to the place where they were to be nailed on the roof, he stepped on the end of a loose plank composing the runway and fell through to the basement of the building, a distance of about 30 feet. The principal contention of the defendant in appealing from a judgment rendered for the plaintiff in the circuit court of Milwaukee County was that there was no negligence on its part. On this point the court, speaking by Judge Barnes, said:

Section 2394–48 requires every employer, among other things, to furnish a place of employment "which shall be safe for employees." Section 2394–49 provides that no employer "shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe." Section 2394–41, subdivision 11, provides that "the terms 'safe' and 'safety' as applied to an employment or a place of employment shall mean such freedom from danger to the life, health or safety of employees * * * as the nature of the employment will reasonably permit."

It is obvious that these provisions make some radical changes in the common law as it existed when the act was passed. * * * It is also apparent that the employer no longer fulfills his duty by furnishing a "reasonably" safe place. Instead, he must furnish one which is as free from danger as "the nature of the employment will reasonably permit."

We think it must be said in the instant case that the jury might well find that the place of employment was not as free from danger as the nature of the employment would reasonably permit. The laying of two or three tiers of planks instead of one would in all probability have prevented the accident. It is almost a certainty that the nailing down of the tier that was laid would have prevented it. So would the erection of a substantial guardrail immediately outside of the joists or purlines on which the planks rested. It may well be that there were other things which might have been done to make the place safe which the nature of the work would reasonably permit, but the enumeration given is sufficient. A jury would be well within its rights in saying that the nature of the work would reasonably permit either of the first two things mentioned to be done, and probably the third. The jury has found that the place was not "safe" within the meaning of the statutory definition of the word, and we think the evidence was ample to warrant such a finding.

As to the questions of assumption of risk and contributory negligence, the court said:

The defense of assumption of hazard was abolished by subdivision 1 of section 2394–1 as to all employees. Were it still a defense, it might and probably would defeat recovery on the part of the plaintiff. But leaving out of consideration assumption of hazard, we think there is little evidence in the record which would warrant the jury in finding that the plaintiff was guilty of contributory negligence. Certainly the jury might find on the evidence, as it did, that there was no contributory negligence on his part.

EMPLOYERS' LIABILITY—SAFE PLACE—SCAFFOLDING—*Bornhoff v. Fischer et al., Court of Appeals of New York (Feb. 3, 1914), 104 Northeastern Reporter, page 130.*—This case was appealed from the decision of the appellate division of the supreme court, which had reversed a judgment in the plaintiff's favor in the trial court. The court of appeals affirmed the judgment of the trial court, reversing the appellate division. The facts and the legal point involved are included in the court's opinion, delivered by Judge Miller:

This plaintiff, an employee of the defendant Fischer, was injured by the fall of a scaffold or runway, and the important question now to be decided is whether section 18 of the labor law (Consol. Laws, ch. 31) makes said defendant responsible for the accident, although the scaffold or runway was actually constructed by the defendant Kennedy. Both defendants were engaged in the construction of a building. Kennedy was the general contractor, and was doing the mason

work. Fischer was a subcontractor, doing the iron work. At the time of the accident employees of both were working on a structure 12 feet high, called a penthouse, on the roof of the building. The plaintiff was sent from the roof of the penthouse by his foreman to fetch a tool, and on his return the planks leading to the penthouse slipped off and fell with him.

It is now settled law that the said statute is to be liberally construed to accomplish its beneficent purpose, that is, the better protection of workmen engaged in certain dangerous employments, and that the duty imposed upon the employer to furnish safe scaffolding, etc., can not be delegated. Scaffolding is thus made by statute a place to work which it is the duty of the employer to furnish. He can no more delegate that duty to some other contractor engaged in the work than to an independent contractor of his own, or one of his own employees, and it can be of no consequence whether he directly employs, or tacitly suffers, another to perform that duty for him.

In this case some means of access to the roof of the penthouse was necessary. The appellant furnished none whatever. His employees were thus left to choose between the runway or the less convenient ladder, both furnished by another. Having furnished none of his own, he must be held to have adopted the means at hand, or the statute loses its efficacy.

EMPLOYERS' LIABILITY—STATUTORY NOTICE—*Meniz v. Quissett Mills, Supreme Judicial Court of Massachusetts (Feb. 25, 1914), 104 Northeastern Reporter, page 286.*—This was an action under the employers' liability act, Stat. 1902, ch. 106, sec. 71 et seq., and the only question raised was as to the sufficiency of a notice given, under the requirements of Stat. 1909, ch. 514, sec. 132. The attorneys retained by the plaintiff to assist him wrote a letter to the defendant, within the time limit, stating that they had been so retained, mentioning the circumstances, time, and place of the injury. This was held by the court to be a sufficient notice, although it did not state in terms that it was intended to be such notice, nor that it was signed on behalf of the injured employee.

EMPLOYERS' LIABILITY—STATUTORY NOTICE—*Rodzborski v. American Sugar Refining Co., Court of Appeals of New York (Feb. 24, 1914), 104 Northeastern Reporter, page 616.*—John Rodzborski was injured February 5, 1907, as his complaint alleged, by the starting of a conveyor, used to convey coal on a large belt, while the employee was removing snow from the belt. The employee was unable to speak or write English. The trial court rendered judgment in his favor, and the appellate division of the supreme court affirmed this judgment. The court of appeals decided that the plaintiff's evidence, though meager and in conflict with that of the defense, was sufficient to sustain the verdict of the jury. The judgment was reversed and a new

trial ordered, however, on other grounds, the principal point of interest being as to the notice required under the employers' liability act (Consol. Laws, ch. 31, sec. 201). This section provides:

No action for recovery of compensation for injury or death under this article [employers' liability] shall be maintained unless notice of the time, place and cause of the injury is given to the employer. * * * The notice required by this section shall be in writing and signed by the person injured or by some one in his behalf, * * *

One Laboda sent to the company a letter, of which no copy was retained, but which he testified read as follows:

To the American Sugar Refining Co., Brooklyn. Gentlemen: Kindly investigate the case of John Rodzborski that has been injured on the 5th day of February, 1907, while cleaning a belt in the boiler room, between South Third and South Fourth Streets; John Rodzborski has been made a cripple and not able to do any work, and won't be for some time to come.

As to the sufficiency of this notice with respect to the cause of injury Judge Werner, in delivering the opinion of the court, said:

It will be seen that the form of the paper which is here claimed to be a notice in compliance with the above-quoted section resembles a letter asking for charitable aid more than it does a notice; but, if we make a due allowance for the ignorance of the plaintiff and assume that the service of this paper was intended to be a compliance with the statute, it is impossible to say that it states any "cause" of the injury. It refers to an injury sustained "while cleaning a belt." No defect in the belt or machinery is claimed, and the defendant might have searched in vain for the cause of the injury. This lack of detail in the notice is not a mere inaccuracy in stating the cause, but an utter absence of the statement of any cause whatever.

The record was not clear as to whether or not there was any signature on the letter which was claimed to be a notice. The court said in part on this point:

We simply say that the language of the statute seems to be plain and unequivocal. It must be "signed by the person injured or by some one in his behalf." That direction is at once so plain and so thoroughly within the understanding of the average layman that it would be doing violence to the intent of the legi lature to say that a notice with no signature has been "signed by the person injured or by some one in his behalf." Such a notice may therefore be signed by a plaintiff himself, or by his mark when he is illiterate, or by some one on his behalf, but it must be signed.

EMPLOYMENT OF CHILDREN IN MINES—AGE LIMIT—CONSTRUCTION OF STATUTE—"ANY MINE"—*Cole v. Sloss-Sheffield Steel & Iron Co., Supreme Court of Alabama (May 14, 1914), 65 Southern Reporter, page*

177.—Willie Cole, a minor under the age of 14 years, employed by the company named, was killed in its ore mine near Bessemer, Ala., June 17, 1911. This action was brought by his administrator, and the complaint alleged that the death was proximately caused by the defendant's violation of Code 1907, section 1034. The original act of 1896–97 prohibited employment of boys under 12 years of age in the mines of the State, and its title showed that it applied to coal mines only. In the revision 12 was changed to 14, and "the mines" to "any mine." The supreme court held that this change manifested a legislative intent to make the provision applicable to mines of all other kinds as well as to coal mines. It therefore reversed the judgment for the defendant company entered in the city court of Bessemer, and remanded the case for a new trial.

EXAMINATION AND LICENSING OF PLUMBERS—CLASS LEGISLATION—CONSTITUTIONALITY OF STATUTE—*Davis v. Holland, Court of Civil Appeals of Texas (May 30, 1914), 168 Southwestern Reporter, page 11.*—The Revised Statutes of Texas, articles 986–998, provide for the establishment of plumbing boards in cities of the State coming within certain descriptions, and for the examination and certification of plumbers, together with other provisions. E. S. Davis and others brought a suit in the district court of Dallas County to require W. M. Holland and others, mayor and commissioners of the city of Dallas, to carry out the provisions of the statute in question. Judgment in this court was for the defendants, whereupon Davis and his associates appealed, the appeal resulting in the judgment of the court below being affirmed.

There were several questions as to the application of the law to the city of Dallas, but they are not of general interest. The court decided, however, that the city was within the description of those municipalities contemplated by the legislature in the enactment of the statute. Another contention was as to the constitutionality of the statute, and on this point the court held that it was unconstitutional, on grounds that appear in the following quotation from the opinion of the court, which was delivered by Judge Rasbury:

> It is further urged, however, by counsel for appellees, that, even though the general laws under discussion are applicable, they are nevertheless without force or validity, because unconstitutional as being in contravention of article 1, section 3, * * * [of the constitution of the State] which provides that:
>
> "All freemen, when they form a social compact, have equal rights, and no men, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service."
>
> With such contention we agree. The rule is that all laws affecting a particular class of business or vocation in order to meet the require-

ments of the section of the constitution cited must affect all of the specified class uniformly and alike. [Cases cited.] The two concluding articles of the act under discussion do not comply with that rule, since their effect is to permit a firm or partnership of plumbers to practice their trade in the event only one member thereof has successfully passed the examination before the board, while every plumber not a member of such a firm or partnership must in any event submit to the examination and be licensed by the board before he may do so.

Thus, by acquiring membership in a firm, one who has failed to pass the examination required by law and which should be the test alike for all would be permitted to practice his trade in competition with one who had passed the examination, and by which method a privilege would accrue to one of the specified class not conferred upon all others in the same class.

FACTORY REGULATIONS—WASH ROOMS—CONSTITUTIONALITY OF STATUTE—*People v. Solomon, Supreme Court of Illinois (Oct. 16, 1914), 106 Northeastern Reporter, page 458.*—George W. Solomon was convicted in the Sangamon County court of failing to provide wash rooms for employees, as required by an act of the Illinois General Assembly, Laws of 1913, page 359, entitled: "An act to provide for wash rooms in certain employments to protect the health of employees and secure public comfort."

The first section of the act is as follows:

SECTION 1. Every owner or operator of a coal mine, steel mill, foundry, machine shop, or other like business in which employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public, shall provide and maintain a suitable and sanitary wash room at a convenient place in or adjacent to such mine, mill, foundry, shop or other place of employment for the use of such employees.

The remaining sections relate to equipment, enforcement, and penalties. In the Sangamon County court a motion was made to quash the information on the ground of unconstitutionality, also unreasonableness and uncertainty. This motion was denied, and on trial the defendant was convicted, whereupon he sued out a writ of error to the supreme court. Judge Craig delivered the opinion of the latter court, sustaining the act against the charges named, using in part the following language:

Any act of this kind, to be valid, must apply to all employers of labor similarly situated or to all employers of labor where conditions obtain that would require wash rooms. The question remains: Has this object been accomplished by naming, specifically, certain employments to which the act applies in the first section of the act, followed by the words, "or other like business in which employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work

without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public"?

By a fair construction of the law it applies not only to the employments named, but to all other like business of an established or permanent character in which the "employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public." Under such construction the law will apply to all employments in which the conditions exist that make such a law necessary, and it would not be special or class legislation.

Nor, as we construe this law, is it ambiguous and uncertain. It applies to the employments specifically mentioned in the act and to all other like business of permanent character where the same conditions prevail and where there would be the same reasons for the law to apply.

For the above reasons we are constrained to hold the law valid and constitutional, and accordingly the judgment of the county court of Sangamon County will be affirmed.

HOURS OF LABOR—EIGHT-HOUR LAW—EMPLOYMENT BY STATE—CONSTITUTIONALITY OF STATUTE—*Ex parte Steiner, Supreme Court of Oregon (Dec. 23, 1913), 137 Pacific Reporter, page 204.*—Steiner, who was the superintendent of the Oregon State Hospital, was arrested on a criminal complaint charging him with the violation of the provisions of chapter 61 of the General Laws of Oregon, 1913. This law provides that eight hours shall constitute a day's labor in all cases where the State is the employer, either directly or indirectly, and makes its violation by a contractor, subcontractor, or agent a misdemeanor punishable by fine or imprisonment. The acts complained of were that Steiner required an employee to perform labor as a farm hand at the asylum farm for more than eight hours in one day; also that at the same time and place an engineer was required to labor in excess of eight hours. Steiner applied for a writ of habeas corpus after he was arrested on the ground that the statute was in violation of the fourteenth amendment of the Federal Constitution and in contravention of section 20, article 1, of the State constitution, which provides "No law shall be passed granting to any citizen or class of citizens, privileges * * * which, upon the same terms, shall not equally belong to all citizens."

The writ of habeas corpus was denied, Judge Burnett dissenting. Judge McNary, in giving the opinion of the court, said in part:

The State has undoubted power to prescribe for itself such rules of conduct as it deems best suited for the particular work in which it is engaged. By the legislative act in question the State simply declares that no person shall be permitted or required to perform labor for it,

or for any of its administrative agencies, more than eight hours in a calendar day, and that none need apply who desire longer hours of employment. To the contractor of State work, it says no one can work for you in excess of eight hours in a day. No barrier is placed about a laborer preventing him from seeking employment elsewhere. His liberty of selection is not interfered with, nor his right to labor frustrated. Any individual may, with propriety, declare a policy not to employ within the line of his undertaking any person for a longer period of time than eight hours in a day, or any other unit of time that might appeal to his altruism, and direct his agent to observe that regulation. And by parity of reason, the State, speaking through the legislature, may, with equal fitness, inaugurate a rule of conduct not to work its employees more than eight hours a day, and legally direct its instrumentalities of government faithfully to observe such mandate. The terms of the employment are by this statute publicly proclaimed, and if a person insists upon working more than the hours limited by the act, he must seek elsewhere the engagement of his labor.

HOURS OF LABOR—EIGHT-HOUR LAW—POLICEMEN AND FIREMEN—*Albee v. Weinberger, Supreme Court of Oregon (Feb. 17, 1914), 138 Pacific Reporter, page 859.*—H. R. Albee, mayor of Portland, Oreg., applied for a writ of habeas corpus to Andy Weinberger, constable. This was granted by the court. Albee had been arrested on complaint that he had violated the provisions of chapter 61, General Laws of Oregon, 1913, in permitting and requiring, as mayor, a designated fireman and a specified policeman to labor at their several duties more than eight hours in one day, when there was no emergency demanding the performance of such extra service. The supreme court held that the statute was not violated, not being applicable to the designated employments.

The statute in question (chapter 61, General Laws of 1913) fixes an eight-hour day in all cases where labor is employed by the State, county, school district, municipality, or municipal corporation or subdivision, either directly or through another, except in cases of necessity, emergency, or where public policy absolutely requires it.

Judge Moore first quoted the section in question, and, holding that policemen and firemen are not laborers within the meaning of this act, used in part the following language:

Giving to the term "laborer," as used in the enactment quoted, the most extensive definition applicable, it is not believed that a fireman or a policeman, employed by the city of Portland, or the services which he is ordinarily required to perform for it, makes either a laborer within the meaning of that word. It will be remembered that by law of that municipality all officers and members of the fire and police departments are required to take and subscribe their names to an oath of office.

The firemen and policemen of the city of Portland, when once selected, are not subject to dismissal upon the whim of the appointing

power, or at the command of some political boss. Governed by the civil-service rules, a member of the fire or police department can hold his public position as long as he pleases, provided his physical ability continues, and he remains faithful to the trust. The appointing power being thus unable permanently to discharge a fireman or a policeman, he is neither a servant nor an employee, but, having taken an oath faithfully to perform the duties devolving upon him, he is an officer, and therefore not a laborer within the meaning of chapter 61, Gen. Laws Oreg. 1913.

It was also held that in any case the statute had not been violated, Judge Moore saying on this point:

The services required to be performed by the firemen, though arduous and dangerous at times, requiring vigor and courage, the work so demanded is not constant; and, while the members of the fire department must at all times be ready to respond to alarms whenever given, they are not subjected to active toil 8 hours in any 24, except in cases of emergency which the statute recognizes as a deviation from the prescribed rule.

Policemen, however, must, during the time limited for a performance of their duties, persistently and constantly patrol their beats, except when entering a building in the interest of the service, or answering an inquiry or protecting, delivering, or committing a person when arrested. While on duty they are not permitted a moment's rest but are actively engaged in the execution of their work as guardians of the peace and safety of the community. In the case at bar, as the members of the police department are divided into three shifts of eight hours each, the changes of the watch relieve those who have been on duty from performing more than the prescribed number of hours of service, except in cases of emergency.

Therefore, on both grounds referred to here, there has been no violation of the provisions of the statute. It follows from these considerations that the petitioner should be discharged; and it is so ordered.

HOURS OF LABOR—EIGHT-HOUR LAW—PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—*Sweetser v. State, Court of Appeals of Maryland (Mar. 18, 1914), 90 Atlantic Reporter, page 180.*—Frank B. Sweetser was convicted in the criminal court of Baltimore City of violating the hours of labor law, Acts of 1910, ch. 94, secs. 2 and 3, which provides that in the case of contractors with the city of Baltimore (as well as the city itself) 8 hours shall constitute a day's labor, that employment shall not be for longer except in cases of emergency, that additional pay shall be given in case of longer hours, and that the pay shall be the current rate of per diem wages in the locality where the labor is performed. On appeal the judgment of conviction was affirmed. The contractor in question had employed men at an hourly wage of 19 cents, the usual wage for similar labor being $1.90 per day of 10 hours. While not required to do so, the men worked 10 hours in order to receive the full daily wage.

The defense was largely on the ground of the unconstitutionality of the law. The first point was that the contractors were deprived of property without due process of law, in violation of the fourteenth amendment of the Federal Constitution. While stating that several similar laws had been declared unconstitutional in other States, the court followed, among other cases, the decision of the United States Supreme Court in Atkin *v.* Kansas, 191 U. S. 207, 24 Sup. Ct. 124 (Bul. No. 50, p. 177), and quoted extensively from the opinion of Mr. Justice Harlan therein, sustaining the law. Other objections, that the law places an unauthorized restraint upon a municipal corporation, and that it denies the equal protection of the laws because of the fact that it is applicable to contractors with Baltimore only, were also determined to be invalid.

HOURS OF LABOR—EIGHT-HOUR LAW—PUBLIC WORKS—LOCK AND DAM FURNISHING POWER—*Chattanooga & Tennessee River Power Co. v. United States, United States Circuit Court of Appeals, Sixth Circuit (Dec. 2, 1913), 209 Federal Reporter, page 28.*—The company named was convicted in the district court of violation of the eight-hour law of August 1, 1892, ch. 352, 27 Stat. 340 (U. S. Comp. Stat. 1901, p. 2521). This statute forbids the employment of laborers and mechanics by a contractor on a public work of the United States more than eight hours within a calendar day, except in cases of emergency. The company contended that the building of the lock and dam on which it was engaged was not a "public work."

The facts, as admitted by the demurrer of the company to the complaint, which the lower court overruled, were that the company contracted to build the dam, furnishing the materials, except a specified portion which was furnished by the United States, and to vest title in the United States; and it does this work in consideration of a grant of right to use the water power produced by the dam.

The court of appeals affirmed the decision and judgment of the lower court, on the ground that the principal object of the building of the dam by the Government was the benefit to navigation, and that it was a public work within the act.

HOURS OF LABOR—PUBLIC LAUNDRIES—CONSTITUTIONALITY OF ORDINANCE—*Ex parte Wong Wing, Supreme Court of California (Jan. 16, 1914), 138 Pacific Reporter, page 695.*—Wong Wing was convicted of violation of the provisions of an ordinance of the city of San Francisco, requiring cessation of work in laundries between the hours of 6 o'clock p. m. and 7 o'clock a. m. He applied for a writ of habeas

corpus, and contested the constitutionality of the law. The court discharged the writ, a part of the opinion of the court being as follows:

This court and the Supreme Court of the United States have declared constitutional an ordinance very similar to the one before us, where the restriction upon the hours of labor required the cessation of work in public laundries between the hours of 10 o'clock p. m. and 6 o'clock a. m.

It is settled law that such ordinances operate alike upon all persons and property s milarly situated, and that the motives impelling the legislators who adopt such regulations are immaterial, unless it appear that the laws operate inequitably. We are therefore to determine whether the limitation of the time of labor in public laundries to 11 hours each day is a restriction so unreasonable that it invades the constitutional rights of persons engaged in the laundry business. We can not say that it does. Very many, perhaps a majority of, occupations, employments, and forms of business in San Francisco are conducted during less than 11 working hours a day. The authority of the municipal legislature to prescribe hours of cessation from labor in laundries must be conceded, under the authorities cited above, and we think the fair measure of the extent of that power s the usual period of business activity in similar sorts of employment. We can not say, therefore, that the restriction of the hours of activity provided in the ordinance here attacked is an unconstitutional exercise of the legislative will of the board of supervisors of the city and county of San Francisco.

HOURS OF LABOR—TEN-HOUR LAW—CONSTITUTIONALITY OF STATUTE—*State v. Bunting, Supreme Court of Oregon (Mar. 17, 1914), 139 Pacific Reporter, page 731.*—F. O. Bunting was convicted in the circuit court of Lake County of employing a man to labor in his manufacturing establishment for more than ten hours in one day, in violation of the act, chapter 102, Acts of 1913. This conviction was affirmed on appeal over the defendant's contention that the act in question is unconstitutional.

In setting aside the arguments made against the act, Judge Bean, who delivered the opinion of the court, used in part the following language:

By the adoption of the fourteenth amendment it was not designed nor intended to curtail or limit the right of the State under its police power to prescribe such reasonable regulations as might be essential to the promotion of the peace, welfare, morals, education, or good order of the people.

In order to warrant declaring the act violative of the fundamental law, it should be shown that in the light of the world's experience and common knowledge the act under consideration is palpably and beyond reasonable doubt one that will not tend to protect or conserve the public peace, health, or welfare in its enforcement. It is by nc means clear beyond a reasonable doubt that the law will not promote the peace, health, and general welfare of citizens of the State, or that longer hours of labor in factories would not be injurious to the health

as declared by the act, or that the act is repugnant to the Constitution. The presumption, therefore, is in favor of the wisdom and the correctness of the legislative finding and determination that the law is a necessity for the protection of the health, well-being, and general welfare of the public; that the regulation prescribed by the enactment will tend to correct the evil at which it is aimed. The courts can not set aside the legislative decree without intrenching upon the prerogatives of a coordinate branch of the State government, and usurping the powers of the legislature.

The law does not prevent the laborer from working as many hours per day as he sees fit, and does not violate his right to labor as long as he may desire, but only prohibits his being employed in any mill, factory, or manufacturing establishment more than a certain number of hours in any one day.

The act applies to all the people in the State who employ labor in mills, factories, or manufacturing establishments. In the very nature of things the occupations affected by the law furnish a reasonable basis for the statutory regulation. In the light of the former decisions of this court the classification is not unreasonable. [Cases cited.]

It is contended by counsel for defendant that the provision for employees to work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage, renders the whole act void. It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours' overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause. Reasonable modes of enforcing a statute should be upheld.

Legislative provisions are frequently made that a portion of a fine for the infraction of a statute shall be paid to the informer. The aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties.

The statute under which the complaint is made in this case is not violative of the Constitution of the United States or of this State. As a consequence, the judgment of the lower court is affirmed.

HOURS OF LABOR OF WOMEN—CONSTITUTIONALITY OF STATUTE—LIBERTY OF CONTRACT—EQUAL PROTECTION OF THE LAWS—*Riley v. Massachusetts, United States Supreme Court (Mar. 23, 1914), 34 Supreme Court Reporter, page 469.*—Richard G. Riley was convicted in the superior court for the county of Bristol upon a criminal complaint brought against him charging him with the violation of a statute of the State which limits the hours of labor of women and children, and requires a schedule of work and meal hours to be posted, with penalties for departure therefrom.

The specific charge upon which the conviction was based was the employment of a woman at a time other than set forth in the schedule posted in her workroom in a cotton mill. The conviction was affirmed by the supreme judicial court of the State, 210 Mass. 387, 97 N. E. 367 (Bul. No. 99, p. 715); and the case then went to the United States Supreme Court on error, where the decision of the State court was affirmed, Mr. Justice McKenna delivering the opinion, which is in part as follows:

Section 48, it is urged, not only prohibits the employment of women more than 10 hours a day, but that (quoting the section) "the employment of such person [woman] at a time other than as stated in said printed notice, shall be deemed a violation of the provisions of this section."

The provision is arbitrary and unreasonable, it is insisted, in that it requires the employer to post a notice in a room in which women and minors are permanently employed in laboring only six hours a day, and makes it a crime if such person is allowed to work for five minutes at a time other than as stated in the notice. But if we might imagine that an employer would so enlarge the restrictions of the statute, or be charged with violating it if he did, we yet must remember that, as it was competent for the State to restrict the hours of employment, it is also competent for the State to provide administrative means against evasion of the restriction. [Cases cited.] Neither the wisdom nor the legality of such means can be judged by extreme instances of their operation. The provision of section 48 can not be pronounced arbitrary. As said by the supreme judicial court, the statute "requires the hours of labor to be stipulated in advance, and then to be followed until a change is made. It does not by its terms establish a schedule of hours. This is left to the free action of the parties. Nor does it in the sections now under consideration restrict the right to labor to any particular hours. It simply makes imperative strict observance of any one table of hours of labor while it remains posted.

In other words, the purpose of the posting of the hours of labor is to secure certainty in the observance of the law, and to prevent the defeat or circumvention of its purpose by artful practices.

HOURS OF SERVICE—RAILROADS—CASUALTY OR UNAVOIDABLE ACCIDENT—*United States v. Northern Pacific Railway Co., United States Circuit Court of Appeals, Ninth Circuit (Aug. 3, 1914), 215 Federal Reporter, page 64.*—The company named was prosecuted for alleged violation of the hours of service act in keeping a conductor and two brakemen on duty more than 16 hours without 8 consecutive hours off duty. The crew which operated train No. 303 usually left Tacoma at 1.40 p. m., arriving at Portland at 6.45 p. m., making, with the 30 minutes they were required to report before starting, 5 hours and 35 minutes. Returning they left Portland at 7.25 a. m. and reached Tacoma at 12.35 p. m., being on duty 5 hours and 40 minutes. Between Tacoma

and Lake View is a single track over which 28 trains of three different railroad companies are operated daily. On the date in question, May 12, 1913, train No. 303 left Tacoma at 1.40 p. m., as usual, but another train was derailed on the track in front of it about 10 minutes later and 6 minutes before the two trains would have met. It was a serious wreck with loss of life and much damage to the train and track. The crew of train No. 303 were delayed until 6 p. m., when they were transferred to train No. 314, which had come from Portland, and took that train back into Portland, arriving at 12.30 p. m. on the next day. After being off duty 6½ hours at Portland they made their regular run the next morning and in so doing were on duty a total of about 17 hours without having had 8 consecutive hours off duty. The court decided that these conditions constituted a case of unavoidable accident, and that the company was not liable, affirming a judgment of the district court to this effect.

HOURS OF SERVICE—RAILROADS—CONSTITUTIONALITY OF STATUTE—INTERSTATE COMMERCE—*Erie Railroad Co. v. People of the State of New York, Supreme Court of the United States (May 25, 1914), 34 Supreme Court Reporter, page 756.*—The State of New York brought action against the railroad company named to recover a penalty for violation of the labor law as amended by chapter 627 of the Laws of 1907. The latter act made it unlawful for any operator of a railroad to require or permit any telephone or telegraph operator who spaces trains under the block system to be on duty for more than 8 hours in a day of 24 hours, except in cases of emergency. The trial term of the New York Supreme Court found the company guilty and liable to a fine of $100. The appellate division reversed this judgment and their judgment was in turn reversed by the court of appeals. The United States Supreme Court finally reversed this last judgment, finding the statute unconstitutional because Congress, by enacting the Federal hours of service act applying to interstate railroads, had removed the subject from the field of State control. The complaint charged the company with requiring and permitting one David Henion, a telegraph operator, to be on duty more than 8 hours on the first day of November, 1907. The Federal act did not go into effect until March 4, 1908, so that the alleged offense occurred between the enactment and the taking effect of that act. Mr. Justice McKenna, in delivering the opinion of the United States Supreme Court, spoke in part as follows:

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. [Cases cited.]

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, 32 Sup. Ct. Rep. 160. [See Bul. No. 99, p. 718.] The [State supreme] 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 Congress upon the subject, and ceased when Congress acted or manifested its purpose to call into play its exclusive power.

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 of 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.

HOURS OF SERVICE—RAILROADS—EMERGENCIES—CONSTRUCTION OF STATUTE—*United States v. Southern Pacific Co., United States Circuit Court of Appeals, Eighth Circuit (Nov. 13, 1913), 209 Federal Reporter, page 562.*—The United States brought action against the railroad company named to recover penalties for alleged violation of the hours of service act of 1907. The company maintains at Ogden, Utah, a train dispatcher's office operated continuously day and night. There was employed there a chief dispatcher, who had charge of the office and supervision of the six operators. These men worked ordinarily in eight-hour "tricks," two working together. Operator Johnson was taken ill on August 27, 1912, and did not report for duty until September 2. The company being unable to find a properly qualified substitute, other operators were kept at work 12

hours per day, as follows: Hoover on August 27, 28, and 29; Sewall on August 29, 30, and 31; Small on August 30 and 31 and September 1; and Miller on September 1, 2, and 3. The complaint demanded a $500 penalty on each of the 12 counts arising from these facts. The chief train dispatcher did not ordinarily have anything to do personally with the operation, but could operate the telegraph. The hours of service act allowed operators to exceed the eight-hour limit in cases of emergency, for not more than three days in one week.

The district court rendered judgment for the defendant. On appeal, the circuit court also held the sickness of the operator and the impossibility of getting another to constitute an emergency within the meaning of the law, overruling the contention that the railroad company was obliged to keep extra operators under pay for use in such cases.

HOURS OF SERVICE—RAILROADS—EMERGENCIES—FIREMAN WATCHING ENGINE—*Northern Pacific Railroad Co. v. United States, United States Circuit Court of Appeals, Ninth Circuit (May 4, 1914), 213 Federal Reporter, page 577.*—The company named was charged with violation of the hours of service act in two instances. In each the train was held up by an unusually heavy storm and snowfall, and the crew, with the exception of the fireman, relieved from duty in connection with the movement of the train. The fireman in each case was required to continue watching his engine. The court held that the law was violated by this action, since, though the firemen were not actually engaged in the movement of the train while thus employed in watching and keeping up the fires, they were not enjoying the period of rest that the law contemplated and was intended to secure for all members of a train crew after the designated term of service.

The case was held not to come within the provisions of the act as to emergencies, "if for no other reason, because the uncontradicted evidence, as well as the answer of the defendant company itself, shows that each of the trains in question was stopped by direction of the railroad company, sidetracked, and their respective crews laid off for rest within 16 hours from the time they left Missoula, for the very purpose of complying with the said statute, excepting only the two named firemen."

HOURS OF SERVICE—RAILROADS—EMPLOYEE ON DUTY—*Osborne's Administrator v. Cincinnati, New Orleans & Texas Pacific Railway Co., Court of Appeals of Kentucky (Mar. 24, 1914), 164 Southwestern Reporter, page 818.*—F. H. Osborne was killed while employed by the company named, as a brakeman, in interstate commerce, on January 17, 1912. His administrator brought suit under the Federal

employers' liability act, alleging violation of the hours of service act, as well as negligence of the engineer and conductor of the train. Judgment was for the defendant company on both points in the circuit court of Pulaski County, and on appeal, the court of appeals found no proof of negligence, either in the matter of overemployment or otherwise, and affirmed the judgment of the court below.

An unusual point was raised in connection with the contention as to the hours of service, Osborne having ridden on January 16 under orders from a point some miles distant from his place of duty, on the day of the fatal injury, as a "deadhead." As to this, Judge Carroll, who delivered the opinion of the court, said in part:

Without going into detail as to the time Osborne was engaged on duty in the 24 hours preceding 6.15 a. m. on the morning of the 17th, it is sufficient for the purposes of this case to say that, if the time during which Osborne was "deadheading" on the 16th between Somerset and Oakdale is to be counted as hours of service, he had been on duty 16 hours in the aggregate in a 24-hour period without having had 8 consecutive hours off duty before he left Oakdale on the morning of the 17th at 6.15 a. m. So that the question arising is: Was Osborne engaged in service, within the meaning of the act, while "deadheading" during the five hours that it took the passenger train on which he was riding to run from Somerset to Oakdale?

He had been ordered by the train dispatcher to "deadhead" from Somerset to Oakdale so that he might be in Oakdale on the morning of the 17th in time to leave with his train at 6.15 a. m., and it is shown that he received compensation for the time it took the train on which he was "deadheading" to run from Somerset to Oakdale. The record further shows that, when a railroad employee is "deadheading," as Osborne was in going from Somerset to Oakdale on the 16th, he does not have any duties whatever to perform in connection with the movement of the train on which he is "deadheading"; that he really occupies the attitude of a passenger free from any care or responsibility relating to the operation or management of the train.

Although we have made a very thorough examination of the cases involving the construction of this act, we have not found one presenting or deciding the question whether an employee who is "deadheading" is engaged in service connected with the movement of any train within the meaning of the act.

The Interstate Commission, however, has promulgated rule No. 74, providing that "employees 'deadheading' on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are 'deadheading,' are not while so 'deadheading' 'on duty' as that phrase is used in the act regulating the hours of labor." This construction, although it does not have the binding force of a court decision, is yet entitled to great weight on account of the important duties this high commission exercises in administering these remedial Federal statutes, and we concur in its soundness when applied to the facts of this case. Opposing this interpretation, the argument is made for the plaintiff that

this act should be so construed as to secure for employees relief from cares or responsibilities or orders or authority of any kind connected with their employment during the hours of rest specified in the act. But the act is not fairly susceptible of this construction. In carefully chosen words it describes an employee as a person who is "actually engaged in or connected with the movement of any train," and the hours of service feature of the act only applies to such a described person. The plain reading of the act forbids its application to an employee who is not actually engaged in or connected with the movement of any train, and the railroad company does not violate the act, nor does the employee come within its protecting provisions, unless it be shown that he was actually engaged in or connected with the movement of the train in the manner we have described for a longer period than the act allows without having the rest allowed by the act. This being our construction of the act, Osborne, at the time of his death, had not been engaged in service for a longer period than 16 consecutive hours, nor had he been on duty 16 hours in the aggregate in 24 without having had at least 8 consecutive hours off duty before he again went on duty, as, when there is added to the 5 hours' rest he had at Oakdale between 12.45 and 5.45, the time he was "deadheading," he was off duty considerably more than 8 hours.

HOURS OF SERVICE—RAILROADS—MOVEMENT OF TRAINS—*Great Northern Railway Co. v. United States, United States Circuit Court of Appeals, Ninth Circuit (Feb. 24, 1914), 211 Federal Reporter, page 309.*—This action was brought by the Government against the railway company named for violation of the hours of service act. One Ed. Bergen, a fireman, after having been employed for 16 hours, was kept at work for 8 additional hours as an engine watchman while the train and locomotive were tied up at a siding. The lower court had rendered judgment for the United States, and on the defendant's appeal this judgment was affirmed. Judge Morrow, speaking for the court, said:

We can not believe that it was the intention of Congress that the word "movement" should be restricted to the actual revolution of the wheels of a train or locomotive engaged in interstate commerce, for, if that interpretation were the correct one, obviously the very object of the act, the promotion of the safety of employees and travelers upon railroads, would be frustrated. The sidings of a railroad are a part of its system and are indispensable to the proper operation and movement of its trains. Tying up on a siding for any purpose, whether to await orders, or for the passing of other trains, or for any other purpose connected with the transportation of freight or passengers, is as much a part of the general movement of a train as the actual running thereof on the main line and at scheduled periods. The fact that during the 24-hour period he was employed for 16 hours as fireman and for 8 hours as engine watchman does not lessen the offense.

HOURS OF SERVICE—RAILROADS—OFFICES OPERATED NIGHT AND DAY—*United States v. Atlantic Coast Line Railroad Co., United States Circuit Court of Appeals, Fourth Circuit (Feb. 3, 1914), 211 Federal Reporter, page 897.*—In this case the trial court had rendered a judgment for the defendant, who was charged with violation of the hours of service act in employing certain telephone and telegraph operators for about 11 hours daily. This decision was reversed on appeal. The question of construction hinged on the interpretation of the clauses "continuously operated day and night" and "operated only during the daytime." If the office, which was regularly kept open from 6.30 a. m. to 10.15 p. m., should be adjudged to belong to the former class, the operators could be legally employed only 9 hours, and the law had been violated; if to the latter, they might be employed up to 13 hours.

The court decided that since this office must be classified under one or the other of the two designations, it must be the former. Judge Knapp, who delivered the opinion of the court, discussed this matter fully, concluding his remarks as follows:

If this conclusion gives greater effect to the words "operated only during the daytime" than to the words "continuously operated night and day," we think the objects of the law require that preference be accorded to a construction which recognizes the legislative intent to permit 13 hours of service in offices kept open only such number of hours in the aggregate as do not materially or substantially exceed the length of an ordinary day, and to prohibit more than 9 hours' service in offices kept open such number of hours in the aggregate as necessarily include a material or substantial portion of the night.

HOURS OF SERVICE—RAILROADS—OFFICES OPERATED NIGHT AND DAY—*United States v. Missouri, Kansas & Texas Railway Co., United States District Court, District of Kansas (Jan. 13, 1913), 208 Federal Reporter, page 957.*—This was an action by the Government to recover a penalty for violation of the hours of service act (U. S. Comp. Stat. Supp. 1911, p. 1321). This provides that operators, train dispatchers, etc., in offices and stations operated continuously night and day shall not be permitted to remain on duty more than 9 hours out of 24, while in those operated only during the daytime a longer period is allowed. A statement of facts was agreed upon, and the case referred directly to the court without trial by jury. The alleged offense consisted in employing one operator daily from 8 a. m. to 12 noon and from 1 p. m. to 7 p. m., and another operator from 7 p. m. to 12 midnight, and from 1 a. m. to 6 a. m., in the office at Coffeyville, Kans. Since neither operator was employed continuously, and the office was closed entirely between 6 a. m. and 8 a. m., the company contended that the 9-hour limit of service did not apply to this situation. The court decided against this contention and found the company guilty of vio-

lation of the law, Judge Pollock, who spoke for the court, saying that from the facts as stipulated he was of the opinion, on both authority and the very reason of the matter, that defendant had violated the act as charged.

HOURS OF SERVICE—RAILROADS—SWITCH TENDERS—*Missouri Pacific Railway Co. v. United States, United States Circuit Court of Appeals, Eighth Circuit (Feb. 16, 1914), 211 Federal Reporter, page 893.*—The district court, on the trial of the railway company for alleged violation of the hours of service act, had rendered a judgment in favor of the United States. On appeal, this was reversed. The question was as to whether R. Connell and J. W. King, switch tenders in Kansas City, were included among the "operators, train dispatchers," etc., who the act provides shall not be employed more than 9 hours during any 24, or whether they might be employed up to 16 hours. Judge Carland, in delivering the opinion of the court, said:

When all is said about the duties of these men, it comes to this: Their primary duty was to throw these switches whenever necessary, and the telephones were used to inform them from time to time what was wanted in regard to the switching and in reporting to those who intended to use the switches, the preparation that had been made for such use. It did not differ except in complexity of operation from the service performed by a brakeman who runs ahead of his train, turns a switch, and swings his hand by day, or lantern by night to signal the engineer. If one is within the proviso of section 2, so is the other, unless it be held that the mere use of the telephone brings one switchman within the 9-hour provision and leaves another who does not use it under the 16-hour clause, although the service performed is the same. But we apprehend that there will be no contention that Congress fixed the period of 9 hours for certain employees because of the use of the telephone. The difference in the hours of labor fixed by section 2 was based upon the character of the service rendered by the employee, not upon the use of the telephone. R. Connell and J. W. King, beyond question, were not operators or dispatchers.

HOURS OF SERVICE — RAILROADS — TELEGRAPH OPERATORS — KNOWLEDGE OF SUPERIORS—*United States v. Oregon-Washington Railroad & Navigation Co., United States District Court, Eastern District of Washington (April 23, 1914), 213 Federal Reporter, page 688.*—The United States brought action against the railroad company named for violation of the hours of service act in permitting one Longabaugh, a telegraph operator at a station operated day and night, to work more than the 9 hours limited by the act, on April 21, 1913, and the 9 succeeding days. The stipulated facts showed

that the employee was agent at Wallula, and after acting as agent from 7 a. m. to 7 p. m. remained on duty as telegraph operator until 12 midnight; also that before the employee performed any excessive hours of service he was instructed by his superior officer not to work in excess of 9 hours in any 24-hour period. The sole question for decision was whether these instructions constituted a defense on the part of the company. This question was decided in the negative, Judge Rudkin, who delivered the opinion, saying:

It is now well settled that the safety appliance act and kindred statutes impose positive and absolute duties on carriers, the nonperformance of which is not excused by the exercise of reasonable diligence or due care on their part, and the hours of service act admits of no other rational construction.

It is urged that the words "require or permit" imply consent or knowledge on the part of the employer, and this is perhaps their common significance; but the word "permit" also means a failure to prohibit by one who has the power and authority to do so, and in my opinion the term is here used in the latter sense.

I am of opinion that the knowledge of the agent, Longabaugh, was the knowledge of the company, and that the instructions given by his superior officer not to work excessive hours, or want of knowledge on the part of his superior officers that he did in fact work excessive hours, is no defense.

HOURS OF SERVICE—RAILROADS—UNAVOIDABLE ACCIDENT—CONSTRUCTION OF STATUTE—*United States v. Atchison, Topeka & Santa Fe Railway Co., United States District Court, District of Arizona (Apr. 10, 1914), 212 Federal Reporter, page 1000.*—The United States brought action against the railway company named for violation of the hours of service act. Two distinct violations were alleged. In the first case the delay which made the overtime employment necessary was brought about by the derailment of a freight train ahead of the passenger train concerned. The statute provides that the act shall not apply "where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and which could not have been foreseen."

After a full discussion of the point the court decided that the word "terminal" in this case would be construed to mean the point where the crew began its run, and not the intermediate station where the train might have been tied up and the crew eventually replaced by another. Judgment was given for the defendant, therefore, on the counts involving this alleged violation.

In the second instance the train hauled, by means of a chain, a freight car with a broken drawhead, which car did not contain live stock or perishable freight. This in itself was unlawful, and it appeared that it contributed to the delay. On this part of the complaint

the company was adjudged guilty. Judge Sawtelle, who delivered the opinion of the court, spoke as follows:

The proviso in the statute allows the carrier credit for all lawful delays caused to a train crew on its run by casualty, unavoidable accident, or act of God, or by any cause not known to, or which could not have been foreseen, by the officers or agents of the carrier at the time the crew started from its terminal on its run, but allows no credit for delays not covered by the proviso; and, consequently, if the train is delayed by casualty, accident, or act of God, or other lawful cause, for one hour at one place and another hour at another place, and then is delayed another hour at another place by a cause which was known to or could have been foreseen by the officers and agents of the carrier at the time the crew left the terminal or started on its run, and the regular schedule time of the train was 16 hours, and in consequence of the delays mentioned, the time taken for the run is 19 hours, the carrier is liable, because it was entitled to have spent 18 hours only on the run, and not 19 hours. It being thus unlawful to haul this car with chains, and the evidence without dispute showing that delays to the train between Cliffs and Winslow were caused by this car, it follows that such delays were not the result of casualty or unavoidable accident, and not within the proviso.

HOURS OF SERVICE—RAILROADS—UNAVOIDABLE ACCIDENT—CONSTRUCTION OF STATUTE—*United States v. Chicago, Milwaukee & St. Paul Railway Co., United States District Court, Western District of Wisconsin (Apr. 16, 1914), 212 Federal Reporter, page 574.*—Suit was brought against the railroad company named for violation of the Federal hours of service act by keeping four employees on duty for 18½ hours on July 18, 1912. A plea to guilty of technical violation of the law was filed. The delay in reaching the destination and relieving the men from duty was caused by the use of warm and impure water from a creek, this being made necessary by heavy switching on a temporary logging road. The injectors of the engine were in good condition, but failed to work properly with the water thus supplied, so that finally the engine had to run alone to the end of the line and secure water and go back and haul the train to the terminus. These circumstances, the court decided, constituted a case of unavoidable accident, so that the company would not be compelled to pay a penalty, but only the costs of the proceedings.

HOURS OF SERVICE—RAILROADS—UNAVOIDABLE CASUALTY—CONSTRUCTION OF STATUTE—*United States v. New York, Ontario & Western Railway Co., United States District Court, Northern District of New York (Sept. 11, 1914), 216 Federal Reporter, page 702.*—The railroad company named, operating a railroad with termini in New Jersey and New York, employs at its division headquarters in Norwich, N. Y., train dispatchers and also so-called "copy operators,"

who act as assistants to the dispatchers in a clerical capacity, two of whom, however, are competent to act as dispatchers in emergencies.

Violations of the Federal hours of service act were charged against this company, occurring on November 14, 1912, and July 22, 1913. On the former date the mother of a dispatcher, who was a member of his household, died suddenly, and a copy operator, who had had 8 hours' rest since performing his regular duties, was called upon to serve as dispatcher after the previous dispatcher had worked his regular "trick" of 8 hours and 1 hour additional; the substitute worked as dispatcher from midnight until 7 a. m. On the latter date the dispatcher was taken severely ill, and the same copy operator served during the same hours.

The judgment was in favor of the defendant, the court holding that the company was exempted from responsibility for the overtime work of the employee by the terms of the act. The grounds upon which this decision are based are shown by the following extracts from the opinion as delivered by Judge Ray:

After providing for the time beyond which in any 24 hours the operator can not be employed without incurring the prescribed penalty, the act provides as follows:

"Provided that the provisions of this act shall not apply in case of casualty, or unavoidable accident, or the act of God."

As to the transaction of July 22, 1913, the sudden and unexpected sickness of Brookins absolutely disabled him. It was not an accident, within the commonly accepted definition of the word. Was it a casualty? Brookins was a part of the railroad itself, in that he was one of its employees engaged in the running and operation of its trains. Without Brookins and others like him the road could not operate, and hence, when he broke down suddenly and unexpectedly, the railroad itself, through its operating forces, was acted upon. If Brookins, on his way to take the trick, had been run over by an automobile and killed or seriously injured, without fault on his part, so as to disable him, there would have occurred, not only an accident (unavoidable so far as he and the defendant railroad were concerned) but a casualty. In my judgment in such a case the provisions of the act would not apply.

After showing that the death of the dispatcher's mother in the evening a short time before the time for him to commence duty was "either a casualty, an unavoidable accident, or the act of God," the opinion continues:

If, then, a casualty, or an unavoidable accident, or an act of God, occur and intervene, making it necessary to work an employee overtime, assuming the railroad company has done its duty in having in its employ a reasonable number of employees to take care of ordinary conditions, including mishaps and occurrences reasonably to be apprehended and liable to occur, and the employee is worked overtime, the act does not apply.

The other contention of the defendant, that the law did not in any case apply to the employee Towner, a "copy operator," since in the previous employment during the 24 hours he had not been an operator or train dispatcher, was held to be untenable, Judge Ray saying in part:

I think Towner was within the reason and the spirit of the act. He could not within a given 24-hour period work 8 or 9 hours as copy operator, and later and within the same 24-hour period work 8 or 9 hours more as train dispatcher. The very object or purpose of the law would forbid this.

For the reasons previously given, however, the railroad was held within the proviso of the act, and not guilty of the offense alleged.

HOURS OF SERVICE—RAILROADS—WAITING TIME—*United States v. Northern Pacific Railroad Co., United States District Court, Eastern District of Washington (Apr. 21, 1914), 213 Federal Reporter, page 539.*—In this case employees were engaged in running a train during a period covering altogether 17½ hours in one day, but during that time, for 1½ hours while the train was waiting for other trains to pass, their train was placed in the hands of a switching crew and the regular crew relieved from duty. The court held that there was nevertheless a violation of the law, saying that if the necessarily brief period which trainmen have for rest and recreation can be broken into small fragments, they will be wholly deprived of any substantial period for either sleep or rest. The decision in M., K. & T. Ry. Co. *v.* U. S., 34 Sup. Ct. 26 (see Bul. No. 152, p. 128), was considered as governing this case.

INJUNCTION—CONTEMPT—LIMITATION OF ACTIONS—*Gompers et al. v. United States, Supreme Court of the United States (May 11, 1914), 34 Supreme Court Reporter, page 693.*—The proceedings against Samuel Gompers, John Mitchell, and Frank Morrison for contempt in violating the injunction issued against them and others for continuing a boycott against the Buck Stove & Range Co. were noted in Bulletin No. 152, page 218, and in previous bulletins there mentioned. The matter was brought from the Court of Appeals of the District of Columbia on a writ of certiorari, the principal defense of the petitioners being that of the statute of limitations, Rev. Stat., sec. 1044, U. S. Comp. Stat. 1901, p. 725. Their contention that this statute was applicable and barred the carrying out of the penalty was sustained by the court in its opinion delivered by Mr. Justice Holmes, from which the following is quoted:

It may be assumed for the purpose of our decision that the evidence not only warranted but required a finding that the defendants were

guilty of some, at least, of the violations of this decree that were charged against them, and so we come at once to consider the statute of limitations, which is their only real defense.

The statute provides that "no person shall be prosecuted, tried, or punished for any offense not capital, except * * * unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

The opinion then recited various speeches and writings of the defendant Gompers, giving the dates of the same, extending up to November, 1908.

Continuing, Mr. Justice Holmes said:

The charges against Mitchell and Morrison are mainly for having taken part in some of the above-mentioned publications, but need not be stated particularly, as all the acts of any substance in Mitchell's case and all in that of Morrison were more than three years old when these proceedings began.

The boycott against the company was not called off until July 19 to 29, 1910, and it is argued that, even if the statute applies, the conspiracy was continuing until that date (United States *v.* Kissel, 218 U. S. 601, 607, 31 Sup. Ct. Rep. 124), and therefore that the statute did not begin to run until then. But this is not an indictment for conspiracy, it is a charge of specific acts in disobedience of an injunction.

It is urged in the first place that contempts can not be crimes, because, although punishable by imprisonment, and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right of trial by jury, etc., to persons charged with such crimes. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that, at least in England, it seems that they still may be and preferably are tried in that way. [English statute and English and American cases cited.]

No reason has been suggested to us for not giving to the statute its natural scope. The English courts seem to think it wise, even when there is seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. Re Macleod, 6 Jur. 461. Maintenance of their authority does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these, and there is no more reason for prolonging the period of liability when they see fit to do so than in the case where the same offense is proceeded against in the common way. Indeed, the punishment of these offenses peculiarly needs to be

speedy if it is to occur. The argument loses little of its force if it should be determined hereafter, a matter on which we express no opinion, that in the present state of the law an indictment would not lie for a contempt of a court of the United States.

Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, if not by Congress, by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the Government. By analogy, if not by enactment, the limit is three years.

INJUNCTION—CONTEMPT—REVIEW ON HABEAS CORPUS PROCEEDINGS—*Ex parte Heffron et al., St. Louis Court of Appeals (Dec. 31, 1913), 162 Southwestern Reporter, page 652.*—William H. Heffron, George Ringler, and Oscar Close had been imprisoned for failure to pay a fine levied against them in contempt proceedings in the circuit court of the city of St. Louis. The present case was an original proceeding instituted in the St. Louis court of appeals through a suing out by the parties named of a writ of habeas corpus, the claim being set up that they were improperly restrained of their liberty. The result of the hearing was that the writ was granted and the men released. The petitioners were members of a waiters' union, and with others had been enjoined, among other things, from either singly or in numbers stationing themselves or congregating upon the sidewalk adjoining and in front of plaintiff's place of business, for the purpose of distributing cards or circulars containing statements concerning plaintiff or its business or of addressing remarks concerning plaintiff or its business to persons passing along the sidewalk; from either singly or in numbers patrolling the sidewalks adjoining such place of business, and from preventing or attempting to prevent by the use of force, violence, threats, menaces, or intimidation any person from patronizing the plaintiff's place of business or any of its employees from performing their duties. The petitioner Close was charged with having committed an assault on one Primm within a short time after he had left the plaintiff's establishment, while the other parties were charged with violations of the picketing provisions without violence or intimidation so far as appeared on the record.

Judge Nortoni, who delivered the opinion of the court, stated first that there could be no doubt that a court of equity would restrain persons confederated through a conspiracy to entail substantial injury upon the business of another, as by persuasion of his patrons against their will or interfering with his business through violence or threats, and stated that in the present instance "The judgment of conviction and the commitment issued thereon are wholly insuffi-

cient to justify the punishment as for contempt o the three petitioners for the reasons: First, that the court was without power to make the broad and sweeping order for a violation of which petitioners Heffron and Ringler are convicted; and, second, because it does not appear from the finding of facts that petitioner Close violated the terms of the order on which he was convicted." Cases were cited to support the proposition that one imprisoned as for contempt for violating an order which the court was without authority to make may be released on habeas corpus, of which proposition the court said, "There can be no doubt."

Of the injunction itself Judge Nortoni said in part:

Obviously so much of this injunction as merely restrains defendants singly or in numbers from stationing themselves or congregating upon the sidewalk adjoining and in front of plaintiff's business for the purpose of distributing cards or circulars concerning plaintiff or its business or of addressing remarks concerning plaintiff or its business to persons along the sidewalk avails nothing.

While it was competent for the court to enjoin the defendants from congregating and stationing themselves upon the sidewalk in front of the premises of the catering company so as to interfere with the free ingress and egress from its place of business, no such inhibition is to be found in the order, but instead, it proceeds in broad and sweeping language as though any congregation or standing upon the sidewalk by them was unlawful. In this the injunction exceeded the power of the court in that behalf, unless such conduct is to be prohibited on other grounds.

So much of the injunction as purports to enjoin the petitioners "either singly or in numbers" from patrolling the sidewalk adjoining plaintiff's business avails nothing, for it does not appear what the court intended thereby. This is vague and indefinite. The word "patrolling" involves the idea of one walking to and fro as a guard, but in and of itself implies nothing unlawful. It was certainly competent for the court to enjoin patrolling against patrons or prospective patrons of plaintiff's business from entering there or for the purpose of interfering with its employees. It was competent, too, for the court to enjoin such patrolling as might interfere with the free use of the sidewalk to afford ingress and egress to plaintiff's premises, or such as would be accompanied with threats, intimidation, violence, or conduct that should annoy and deter plaintiff's patrons or employees, but nothing of this kind is enjoined. So much of the injunction as inhibits the defendants from preventing or attempting by the use of force, violence, threats, menaces, or intimidation to prevent any person from patronizing plaintiff's place of business is certainly valid and within the power of the court. So, too, is that portion of the order which forbids petitioners from compelling or attempting to compel by threats, intimidation, or acts of force or violence any of the employees of plaintiff to fail to perform their duties as such employees.

The court then reviewed the evidence on which Heffron and Ringler were convicted, and concluded:

So it appears that, though these petitioners were found to have been engaged in patrolling and picketing, these words in and of them

selves imply nothing unlawful, and there is no finding that in pursuing the patrolling and picketing they interfered with the free access as by ingress and egress to the premises of the catering company or threatened, intimidated, or coerced either plaintiff, any of its officers, employees, patrons, or in any wise conducted themselves in a manner obnoxious to the law.

As to the assault on Primm by petitioner Close it was said:

The injunction forbids the petitioners from exercising violence or assaulting any person patronizing plaintiff's said place of business or any of plaintiff's employees. If Primm, whom the court finds was assaulted by the petitioner Close, was either a patron of the catering company or one of its employees, the facts should have been so found by the court and stated in the judgment convicting him, for no intendments or implications may be invoked in aid of it. It may be that Close committed an unprovoked assault upon Primm on the sidewalk near plaintiff's place of business, for which Close would be answerable under the criminal laws of the State or under the ordinance of the city, but this alone is not sufficient to render him subject to imprisonment as for contempt for violating the order of the court, which restrains such conduct only when directed against a patron or an employee of the catering company. The mere fact that Primm had recently come out of the catering company's place of business is not sufficient under the strict rule which obtains to sustain the conviction for contempt because of an assault upon him, for we can not infer, and it is not implied, that Primm was either a patron or an employee of the catering company.

It is clear that both the judgment of contempt and the commitment thereon are insufficient to justify the conviction and imprisonment of the petitioners, and they should therefore be discharged.

LABOR ORGANIZATIONS—BOYCOTTS—ANTITRUST LAW—KNOWLEDGE OF MEMBERS OF ORGANIZATION—*Lawlor et al. v. Loewe et al., United States Circuit Court of Appeals, Second Circuit (Dec. 18, 1913), 209 Federal Reporter, page 721.*—This case was before the circuit court of appeals on a writ of error to the District Court of the United States for the District of Connecticut, to review a judgment entered November 15, 1912, in favor of the plaintiffs for the sum of $252,130, being the amount of a trebled verdict for damages, with interest, costs, and counsel fees. The case is known as the Danbury Hatters' Case, and has been before the courts for nearly a decade. Loewe & Co. were makers of hats in Danbury, Conn., and their products were boycotted by the hatters' union because of a refusal of the employers to unionize their shops. Action for damages was brought under the Sherman Antitrust Act, and the Supreme Court held the act applicable to the case (Bul. No. 75, p. 622). The question under consideration in the present instance was as to the liability of the individual members for the damages found to have been suffered by the company, the circuit

court of appeals affirming the finding of the court below to this effect. On further appeal, this was affirmed by the Supreme Court (p. 140, post). The facts are set forth with sufficient fullness in the portion of the opinion of the court quoted below, which was delivered by Judge Coxe.

When this cause came on for the second trial all of the fundamental questions of law had been disposed of. That the antitrust act is applicable to such combinations as are alleged in the complaint is no longer debatable. It makes no distinction between classes, employers and employees, corporations and individuals, rich and poor, are alike included in its terms. The Supreme Court [208 U. S. 274, 28 Sup. Ct. 301, Bul. No. 75, p. 622], particularly points out that although Congress was frequently importuned to exempt farmers' organizations and labor unions from its provisions, these efforts all failed and the act still remains, after nearly a quarter of a century of trial, unmarred by amendment, in the language originally adopted. In short, the court held that if the plaintiffs proved the conspiracy or combination as alleged in the complaint, they were within the antitrust act and entitled to the damages sustained by them.

The plaintiffs proved, either without contradiction or by testimony which the jury was justified in accepting as true, the following propositions:

First. That they were engaged in making hats at Danbury, Conn., and had a large interstate business, employing union and nonunion labor.

Second. That the individual defendants are members of a trade-union known as the United Hatters of North America, which was organized in 1896 and, with a few exceptions unnecessary to consider, paid dues to the local unions at Danbury, Bethel or Norwalk, Conn. These dues, after deducting a certain percentage for the expenses of the local unions, were sent to the treasurer of the United Hatters.

Third. That the United Hatters were affiliated with the American Federation of Labor, one of the objects of the latter organization being to assist its members in any "justifiable boycott" and with financial help in the event of a strike or lockout.

Fourth. That the United Hatters, through their connection with the Federation of Labor and affiliated associations, exercised a vast influence throughout the country and, by the use of the boycott and secondary boycott, had it in their power to cripple, if not destroy, any manufacturer who refused to discharge a competent servant because he was not a member of the union.

Fifth. That in March, 1901, the United Hatters had resolved to unionize the plaintiff's factory and informed Mr. Loewe to that effect, their president stating that they hoped to accomplish this in a peaceful manner, but if not, they would resort to their "usual methods."

Sixth. That on the morning of July 25, 1902, the plaintiffs' employees were directed to strike and the union men left the factory on that day, the nonunion men the day after.

Seventh. That this strike temporarily paralyzed the plaintiffs' business, and they were not able to reorganize until January, 1903, and then with a force many of whom were unskilled.

Eighth. That almost immediately after the strike a boycott was established and agents of the hatters were sent out to induce the plaintiffs' customers not to buy any more hats of them. This boycott was successful, and converted a profit of $27,000 made in 1901 into losses ranging from $17,000 in 1902 to $8,000 in 1904, destroying or curtailing a large part of the plaintiffs' business carried on between Danbury, Conn., and several other States.

It appears, then, that a combination or conspiracy in restraint of interstate trade was entered into to the great damage of the plaintiffs and that all of the defendants who participated therein or aided and abetted the active workers in the conspiracy or contributed to its support are liable if they knew of its existence.

The principal question of fact, therefore, is, did the defendants know of the conspiracy or is the evidence of such a character that the jury were justified in finding that they must have known of its existence? And here it is important to remember that the law does not require the proof of conspiracy by direct and positive proof. This is true even in criminal cases and the reason therefor is plain. Conspirators do not put their agreements in writing; they do not disclose their identity or publish their plans. They work in the dark, they may never be seen together, their acts may have no apparent relation to each other, but if it appears that they are all working to accomplish an unlawful purpose which is for their common benefit and in the gains of which all are to share, a jury is justified in finding the existence of a conspiracy.

It is not necessary that there be a formal agreement between the conspirators. If the evidence satisfies the jury that they acted in concert, understandingly and with the design to consummate an unlawful purpose, it is sufficient. It is not necessary that each conspirator shall know of all of the means employed to carry out the purposes of the conspiracy.

As to the defendants who were in the employ of the plaintiffs at the time of the strike and participated therein, we understand that it is not pretended that they were ignorant of the general purpose of the United Hatters. As to the remainder, estimated by the defendants' counsel to be about 90 per cent, it is contended that they knew nothing of the purpose of the strike except that it was "to establish union conditions in that particular (Loewe's) factory."

The defendants reside in Bethel, Norwalk or Danbury, all in the same general locality and so near that it is highly improbable that an event of vital importance to one union would not be known to the other two. But in order to show that the dispute between Loewe and the union excited general interest in the community, newspaper articles published in these towns were introduced in evidence, not as proof of the circumstances therein narrated but to show the improbability of the defendants being ignorant of matters which were constantly being made public and were of vital significance to them, relating as they did, to a controversy which might impair or destroy their own means of livelihood. As to 115 of these defendants it was stipulated that if called as witnesses they would testify "that they read with more or less regularity some local newspapers in their respective towns, but not completely or invariably." As to the Journal of the United Hatters, it was stipulated that the secretaries

of the local unions in question received copies which were distributed in the various factories without charge, so that the workmen there could read them if they desired to do so. The plaintiffs introduced the minutes of the meetings of the local unions of which the defendants were members; also extracts from the Federationist, a monthly journal of the Federation of Labor and a notice, warning all members of labor unions that they would be held responsible for unlawful acts of such unions, their officers and agents. A copy of this notice was sent to all hatters whose names appeared in the Danbury Directory. It can not be denied that all this evidence was competent as to those who actually received it or had knowledge of it and we think it was for the jury to say whether it was sufficient to put the alleged conspirators upon notice of the illegal measures by which it was proposed to enforce the demands of the defendants.

Without attempting to review the testimony in detail, it suffices to say that the jury were fully justified in finding that the measures adopted by the defendants prevented the free flow of commerce between the States. The great bulk of the plaintiffs' business was in States other than Connecticut, to which States the product of their factory was shipped and the proof shows that they suffered great pecuniary loss, equal at least to the amount found by the jury, because of their inability to sell to their interstate customers.

After discussing the question of the admission of certain testimony, the court decided that while only acts taking place before the commencement of the suit were or could be considered, damages subsequently resulting from such acts had been properly shown in testimony and considered by the jury in arriving at the total damages. The opinion concludes as follows:

No one can examine this voluminous record without being impressed with the fact that the trial was conducted with perfect impartiality and with a determination on the part of the judge that both parties should have an absolutely fair trial. We are convinced that the defendants have had such a trial and that no error was committed which would justify us in imposing upon the parties the expense and delay of a third trial.

The judgment is affirmed with costs.

LABOR ORGANIZATIONS—BOYCOTTS—ANTITRUST LAW—LIABILITY OF MEMBERS FOR DAMAGES—*Lawlor v. Loewe, Supreme Court of the United States (Jan. 5, 1915), 35 Supreme Court Reporter, page 170.*—This case was before the Supreme Court on a writ of error to the United States Circuit Court of Appeals; see Lawlor *v.* Loewe, above. For other proceedings growing out of this controversy see 139 Fed. 71 (Bul. No. 61, p. 1067); 148 Fed. 924 (Bul. No. 70, p. 710); 208 U. S. 274, 28 Sup. Ct. 301 (Bul. No. 75, p. 622); 187 Fed. 522 (Bul. No. 96, p. 780); see also 130 Fed. 633; 142 Fed. 216.

The facts briefly stated in the present opinion, which was delivered by Mr. Justice Holmes and sustained the judgment of the court of

appeals, appear in greater fullness in the opinion of the court of appeals, given above. The opinion in the present instance is brief, and is reproduced practically in full:

This is an action under the act of July 2, 1890, ch. 647, sec. 7, 26 Stat. 209, 210, for a combination and conspiracy in restraint of commerce among the States, specifically directed against the plaintiffs, (defendants in error,) among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in 208 U. S. 274 [Bul. No. 75, p. 622], where it will be found set forth at length. The case now has been tried, the plaintiffs have got a verdict, and the judgment of the district court has been affirmed by the circuit court of appeals. 209 Fed. Rep. 721; 126 C. C. A. 445 [p. 137, ante].

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of Eastern States Retail Lumber Dealers' Association *v.* United States, 234 U. S. 600 [p. 53, ante]. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters made use of such lists, and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employees was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. (Loewe *v.* Lawlor, 208 U. S. 274, 299 [28 Sup. Ct. 301, Bul. No. 75, p. 622].) We agree with the circuit court of appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were

thought to be lawful. See Gompers *v.* United States, 233 U. S. 604 [34 Sup. Ct. 693, p. 133, ante]. By the constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not under our jurisdiction" "into the trade." The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell nonunion hats. The Federation of Labor with which the Hatters were affiliated had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public especially among the members in every possible way. If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States. We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been construed in act.

It is suggested that injustice was done by the judge speaking of "proof" that in carrying out the object of the associations unlawful means had been used with their approval. The judge cautioned the jury with special care not to take their view of what had been proved from him, going even farther than he need have gone. (Graham *v.* United States, 231 U. S. 474, 480.) But the context showed plainly that proof was used here in a popular way for evidence and must have been understood in that sense.

Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct. (New York, Lake Erie & Western R. R. Co. *v.* Estill, 147 U. S. 591, 615, 616.) We shall not discuss the objections to evidence separately and in detail as we find no error requiring it. The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts, not to speak of other grounds. The reason given by customers for ceasing to deal with sellers of the Loewe hats, including letters from dealers to Loewe & Co., were admissible. 3 Wigmore, Evidence, sec. 1729 (2). We need not repeat or add to what was said by the circuit court of appeals with regard to evidence of the payment of dues after this suit was begun. And in short neither the argument nor the perusal of the voluminous brief for the plaintiffs in error shows that they suffered any injustice or that there was any error requiring the judgment to be reversed. Judgment affirmed.

LABOR ORGANIZATIONS—CONSPIRACY—TRANSPORTATION OF EXPLOSIVES IN PASSENGER TRAINS IN INTERSTATE COMMERCE—EVIDENCE—*Ryan et al. v. United States, United States Circuit Court of Appeals, Seventh Circuit (June 3, 1914), 216 Federal Reporter, page 13.*—Frank M. Ryan and 29 others were convicted, in the District Court of the United States for the District of Indiana, of conspiracy to commit a crime against the United States, and of transporting, aiding and abetting the transportation of dynamite and nitroglycerin in passenger trains and cars in commerce between the several States of the United States, and brought a writ of error.

From 1905 until 1911 a strike was in force by the International Association of Bridge & Structural Iron Workers against the American Bridge Co. and all concerns affiliated with it. From 1906 on explosives were used to blow up buildings and bridges under construction by the National Erectors' Association and others where the open-shop plan was followed. The number, distribution, and destructiveness of these explosions, and the connection with them of the labor unions mentioned, of which nearly all the plaintiffs in error were officers or members, will be shown in quotations given from the opinion of the circuit court of appeals, which was delivered by Judge Seaman. After stating the substance of the various counts of the indictment, which charge an unlawful transportation of explosives, prohibited by sections 37, 232, et seq., of the Criminal Code, he said:

The charges are, not only necessary but in truth, limited to offenses against the United States, which are alone within Federal cognizance, and if the primary contentions on behalf of all the plaintiffs in error are tenable, as stated by counsel at the outset of their argument for reversal, it is plain that none of the convictions can be upheld.

Under our system of criminal jurisdiction the requirement is elementary that Federal cognizance is strictly limited to violation of the Federal criminal statutes; and offenses against the State, either statutory or common-law, are within the exclusive jurisdiction of the State courts respectively.

After further discussion of the indictment and the objections to it on the part of the plaintiffs in error, Judge Seaman continued:

The authorities concur, as we understand their import, in these definitions of the conspiracy denounced by section 5440, R. S. (as preserved in section 37 of the Criminal Code), namely: That it is distinguishable from the common-law offense of conspiracy, in that it requires for completion and conviction that "one or more of such parties do any act to effect the object of the conspiracy"; that, when so carried forward by any overt act, it constitutes an offense entirely irrespective, either of its success or of the ultimate objects sought to be accomplished by conspiring "to commit any offense against the United States"; that "liability for conspiracy is not taken away by its success, that is, by the accomplishment of the substantive offense at which the conspiracy aims"; and that the

conspiracy so denounced may either intend and be accomplished by one or several acts which complete the offense, or it may be made by the parties a continuing conspiracy for a course of conduct in violation of law to effect its purposes.

Considerable space is then given to a discussion of the nature of the evidence and to the facts presented therein, involving numerous cases of the destruction of property, life also being destroyed, under circumstances showing a fixed plan and the purpose to achieve an apparent end, the whole extending over a series of years, from 1906 to 1911. Following is a summary:

The premises of fact which are settled by the above recitals—laying out of view the far more serious course of crimes which appear in evidence as committed pursuant to the primary conspiracy—may be recapitulated as follows: Executive officers, members, and agents of the International Association of Bridge and Structural Iron Workers, were engaged in a joint undertaking—rightly charged as a conspiracy—to use dynamite, nitroglycerin, and so-called "infernal machines," in required quantities, at many places in various States, either in succession or simultaneously as planned, through agents not residing in such places. For such use these explosives were provided and stored at various storage places, arranged for the purpose in various States, to be carried by the agents for use as required, in special carrying cases provided for the purpose, to distant places with needful dispatch and secrecy, so that interstate carriage on passenger cars as averred in the counts, was made necessary for use thereof in other places and States as constantly ordered by the conspirators; and all expenses for such explosives and for their storage and carriage as described "were paid out of the funds of the International Association," and "drawn upon checks signed by the secretary-treasurer, John J. McNamara, and by the president, Frank M. Ryan" (plaintiff in error). In 25 instances proven such interstate carriages were performed by an agent, as averred in the counts respectively, for designated use of the explosives. Furthermore, the twofold fact of conspiracy for use of the explosives, and that the defendants McManigal, both McNamaras and Hockin were conspirators therein is, in substance, conceded in the argument to be established by the evidence; and it is undisputed that the evidence proves the defendant Edwin Clark to be another member of such conspiracy.

These basic facts directly bearing upon the issues are followed up with connecting evidence of the following nature: Written correspondence on the part of many of the plaintiffs in error, both between one and another thereof and with other defendants, inclusive of the above-mentioned conspirators, together with letters from one and another of such conceded conspirators to one of the plaintiffs in error and to other defendants, properly identified, constitute one volume of printed record; and these letters furnish manifold evidence, not only of understanding between the correspondents of the purposes of the primary conspiracy, but many thereof convey information or directions for use of the explosives, while others advise of destruction which has occurred, and each points unerringly not only to the understanding that the agency therein was that of the con-

spirators, but as well to the necessary step in its performance of transporting the explosives held for such use. This line of evidence clearly tends to prove and may well be deemed convincing of the fact of conspiracy on the part of many, if not all, of the correspondents; and many, if not all, of the uses of explosives therein referred to are established by other evidence to have occurred, together with direct evidence of carriage of explosives for such use, as charged.

The president of the association was the plaintiff in error Ryan, and John J. McNamara was its secretary and treasurer, up to his conviction and sentence (for crimes committed in California) in 1911, thus covering the entire period embraced in the present charges. Under its organization provision was made for monthly reports to show all expenditures of association funds and publication thereof in the official journal. On December 13, 1905, Ryan wrote to McNamara, that it was best to discontinue such publication "while this trouble is on," and in February ensuing the official magazine published a notice by the "executive board" of the association that publication of such reports would cease "during our strike" and until further instructions. The last letter in evidence, written by John J. McNamara, April 13, 1911—the day after his arrest and the concurrent arrest of McManigal—may well be mentioned in this connection both for its general bearing and for its statements that "some organization matters must be surrounded with the utmost secrecy," and that, "even after something has been accomplished, experience has proven the least said about it the better"; also a circular, entitled "Important Warning," dated June 16, 1911, signed jointly by plaintiff in error Ryan and by Hockin (who was one of the original plaintiffs in error and the undisputed director of the explosions), and sent to the officers and members of the association, in effect cautioning all members to keep silent on all actions of the officers thereof of which they may have information, in the view that "traitors will be more active than ever at this particular time." The executive board of the association constituted the managing directors of its policy and affairs, and one of their duties was examination and audit of all expenditures for payment out of its funds. President Ryan and several other plaintiffs in error constituted this board and held frequent meetings at the headquarters in Indianapolis (aside from their respective visits to "fields of operation"), throughout the period during which explosives were purchased, stored, and transported as proven, in performance of their various duties and purposes. We do not understand that minutes of their meetings are in evidence showing their action upon any expenditures during this period, nor does it appear whether record of the fact or items was preserved in any form other than the checks therefor; but the fact of payments from such funds of the association (with many of the checks in evidence) for all expenditures involved herein, is established, as recited in the bill of exceptions, together with the fact that checks therefor were signed by Ryan and McNamara. While it is true that Ryan testifies for the defense, in substance, that he signed such checks in blank, leaving them with McNamara for use in payments, and was unacquainted with the items or purpose entering therein when completed, his credibility in such version was for determination by the jury. So the question was plainly presented for their determination, whether Ryan and other

members of the executive board performed their duties in respect of such expenditures and were advised of their purpose, as a just deduction from all circumstances in evidence pertinent to that inquiry. Plainly the absence of direct proof of affirmative action by the board can not foreclose an inference of such action, in the light of the above-mentioned order in reference to expenditures made during the "trouble," together with another official statement of proceedings of the board (produced from a publication in its recognized official organ, "Bridgemen's Magazine" of April, 1910), embracing various matters ruled upon, wherein the published minutes, signed by the secretary-treasurer, conclude as follows:

"The items set forth above do not include all the matters considered by the executive board. It goes without saying that many questions were presented and acted upon that are not deemed of sufficient importance to be recorded in these columns. Such items, however, were of vital interest to the persons directly interested and were of necessity presented to and considered by the executive board."

Many witnesses, who appear to be disinterested, testify to facts and circumstances which tend strongly in support of one and the other class of charges under the indictment, but specific mention of their testimony is not deemed needful. One feature of circumstantial evidence is brought out by the testimony and justly pressed for consideration, as tending to prove the conspiracy in all its phases, namely: That the use of explosives for destruction of property as described embraced exclusively "open-shop concerns" and was continuous and systematic from the commencement of such course up to the time of the above-mentioned arrest of the McNamaras and McManigal, and then ceased throughout the country.

The chief direct testimony in the record, however, is that of the defendant Ortie E. McManigal, which is plainly subject to the challenge of its independent force, by way of proving the charges, under his relations of record and confessed course of criminality, and thus requires special mention and reference, as well, to the extraordinary array of corroborating evidence furnished in support thereof, as an indispensable requisite for its consideration as proof against the plaintiffs in error. His testimony is remarkable, both for its story of wicked conduct in a systematic course of crimes committed by himself, from the time of his alleged employment in 1907 by Herbert S. Hockin (one of the plaintiffs in error, who has withdrawn his writ) to carry out the objects of the conspiracy, down to the time of his arrest at Detroit, April 12, 1911, and for its directness and completeness upon both classes of issue, inclusive of identification of several of the plaintiffs in error as actors in the conspiracy. In each of the 25 transactions of unlawful carriage of explosives charged in these counts, he testified that the explosives were taken by himself from the storage places, and were personally carried on passenger cars in trains as described, for use in destroying property, and were so used by him. In each instance the transactions are set forth with abundant details of date, places and incidents (on direct and cross examination), which afford the utmost of reasonable opportunity to test their verity; and the extent and comprehensiveness of the evidence introduced in corroboration of this testimony impress us to be not only extraordinary, but thorough for all requirements to authorize its submission to the jury, under proper instructions for testing its force

and credibility, upon which no error is assigned. The elements of corroborative evidence are numerous, including records of telegraph, telephone, railroad, and express companies, hotel registers in many places, testimony of trainmen and many other witnesses for identification of the various trips and carriages, letters and many exhibits of explosives and "infernal machines," identified as taken from various storage places disclosed by McManigal and other witnesses.

We are of opinion, therefore, that the general challenge for insufficiency of evidence must be overruled; that support for the charge of conspiracy, to say the least, by no means rests on the testimony of McManigal; and that no error appears in submission of his testimony for consideration by the jury.

The sufficiency of the evidence to charge each individual plaintiff in error with participation in the crime was discussed, and in the case of 25, conviction by the lower court was affirmed, while in the case of 5 a new trial was granted.

LABOR ORGANIZATIONS—PROTECTION OF EMPLOYEES AS MEMBERS—CONSTITUTIONALITY OF STATUTE—*Coppage v. Kansas, Supreme Court of the United States (Jan. 25, 1915), 35 Supreme Court Reporter, page 240.*—The Supreme Court had before it for the determination of constitutionality chapter 222 of the acts of the Kansas Legislature of 1903, secs. 4674, 4675, G. S. 1909. As enacted, the statute was entitled "An act to provide a penalty for coercing or influencing or making demands upon or requirements of employees, servants, laborers, and persons seeking employment." It was declared unlawful for any employer or agent of an employer to require an agreement, either written or verbal, from employees or prospective employees not to join or continue to be members of a labor organization. Violations were declared misdemeanors punishable by fine or imprisonment. T. B. Coppage was a superintendent employed by the St. Louis & San Francisco Railway Co. at Fort Scott, Kans., and about July 1, 1911, requested one Hedges, a switchman who was a member of a labor organization, to sign an agreement to withdraw from the union. Hedges refused to sign the agreement and also to withdraw from the organization, whereupon he was discharged. From a conviction in the trial court Coppage appealed, claiming that the statute in question was unconstitutional. The Supreme Court of Kansas, however, upheld the statute and affirmed the penalty (State *v.* Coppage, 87 Kans. 752, 125 Pac. 8; Bul. No. 112, p. 119). Further appeal was taken to the Supreme Court of the United States, where the judgment of the court below was reversed by a divided court, and the statute declared unconstitutional. A brief dissenting opinion was written by Mr. Justice Holmes, and a more extended one by Mr. Justice Day, Mr. Justice Hughes concurring therein. The prevailing opinion, concurred in by five others, was written by Mr.

Justice Pitney. On account of the great interest of this case, both the prevailing opinion and those written in dissent are here reproduced in practical completeness. Mr. Justice Pitney having cited the law and stated the facts on which the action was based, said:

At the outset, a few words should be said respecting the construction of the act. It uses the term "coerce," and some stress is laid upon this in the opinion of the Kansas Supreme Court. But, on this record, we have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employee by means unlawful without the act. In the case before us, the State court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employee. In this sense we must understand the statute to have been construed by the court, for in this sense it was enforced in the present case; there being no finding, nor any evidence to support a finding, that plaintiff in error was guilty in any other sense. There is neither finding nor evidence that the contract of employment was other than a general or indefinite hiring, such as is presumed to be terminable at the will of either party. The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union, and at the same time to remain in the employ of the railway company. In particular, it shows (although no reference is made to this in the opinion of the court) that as a member of the union he was entitled to benefits in the nature of insurance to the amount of fifteen hundred dollars, which he would have been obliged to forego if he had ceased to be a member. But, aside from this matter of pecuniary interest, there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests. Of course, if plaintiff in error, acting as the representative of the railway company, was otherwise within his legal rights in insisting that Hedges should elect whether to remain in the employ of the company or to retain his membership in the union, that insistence is not rendered unlawful by the fact that the choice involved a pecuniary sacrifice to Hedges. [Cases cited.] And if the right that plaintiff in error exercised is founded upon a constitutional basis it can not be impaired by merely applying to its exercise the term "coercion." We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense punishable with fine or imprisonment for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but on the contrary free to exercise a voluntary choice.

In Adair *v.* United States, 208 U. S. 161, [28 Sup. Ct. 277, Bul. No. 75, p. 634], this court had to deal with a question not distinguishable in principle from the one now presented.

Mr. Justice Pitney then stated with some fullness the provisions of the Federal statute that was under consideration in the Adair case (30 Stat. 424, 428; sec. 10, act of June 1, 1898). This case involved the discharge of a man on account of his membership, though the statute also included a prohibition similar to the Kansas statute as to agreements not to join a labor union. Continuing, Mr. Justice Pitney said:

Unless it is to be overruled, this decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the fifth amendment, it is too clear for argument that the States are prevented from the like interference by virtue of the corresponding clause of the fourteenth amendment; and hence if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with loss of employment or discriminating against him because of his membership in a labor organization, it is unconstitutional for a State to similarly punish an employer for requiring his employee, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.

It is true that, while the statute that was dealt with in the Adair case contained a clause substantially identical with the Kansas act now under consideration—a clause making it a misdemeanor for an employer to require an employee or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization—the conviction was based upon another clause, which related to discharging an employee because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. In the present case the Kansas Supreme Court sought to distinguish the Adair decision upon this ground. The distinction, if any there be, has not previously been recognized as substantial, so far as we have been able to find. The opinion in the Adair case, while carefully restricting the decision to the precise matter involved, cited (208 U. S. on p. 175), as the first in order of a number of decisions supporting the conclusion of the court, a case (People *v.* Marcus, 185 N. Y. 257 [77 N. E. 1073, Bul. No. 67, p. 888]), in which the statute denounced as unconstitutional was in substance the counterpart of the one with which we are now dealing.

But, irrespective of whether it has received judicial recognition, is there any real distinction? The constitutional right of the employer to discharge an employee because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employee an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Approaching the matter from a somewhat different

standpoint, is the employee's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a sine qua non of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case can not be distinguished from Adair *v.* United States.

The decision in that case was reached as the result of elaborate argument and full consideration. We are now asked, in effect, to overrule it; and in view of the importance of the issue we have reexamined the question from the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

To avoid possible misunderstanding, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. We do not mean to say, therefore, that a State may not properly exert its police power to prevent coercion on the part of employers towards employees, or vice versa. But, in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error, is a criminal punishable with fine or imprisonment under this statute simply and merely because, while acting as the representative of the railroad company and dealing with Hedges, an employee at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the company or would agree to refrain from associa-

tion with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the State of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation can not be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. Nor can a State, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the fourteenth amendment of its effective force in this regard. We of course do not intend to attribute to the legislature or the courts of Kansas any improper purpose or any want of candor; but only to emphasize the distinction between the form of the statute and its effect as applied to the present case.

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The act, as the construction given to it by the State court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. But the fourteenth amendment, in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the States from any unwarranted interference with either.

And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined,

but it can not be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

In our opinion, the fourteenth amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights can not of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the amendment.

It is said in the opinion of the State court that membership in a labor organization does not necessarily affect a man's duty to his employer; that the employer has no right, by virtue of the relation, "to dominate the life nor to interfere with the liberty of the employee in matters that do not lessen or deteriorate the service"; and that "the statute implies that labor unions are lawful and not inimical to the rights of employers." The same view is presented in the brief of counsel for the State, where it is said that membership in a labor organization is the "personal and private affair" of the employee. To this line of argument it is sufficient to say that it can not be judicially declared that membership in such an organization has no relation to a member's duty to his employer; and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment.

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a labor organization—a voluntary association of workingmen—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with nonunion men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any nonunion man? (In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respecting which we intend to intimate no opinion. See Curran *v.* Galen, 152 N. Y. 33; 46 N. E. 297 [Bul. No. 11, p. 529]; Jacobs *v.* Cohen, 183 N. Y. 207, 213, 214; 76 N. E. 5 [Bul. No. 64, p. 896]; Plant *v.* Woods, 176 Mass. 492; 57 N. E. 1011 [Bul. No. 31, p. 1294]; Berry *v.* Donovan, 188 Mass. 353; 74 N. E. 603 [Bul. No. 60, p. 702]; Brennan *v.* United Hatters, 73 N. J. Law 729, 738; 65 Atl. 165, 169 [Bul. No. 70, p. 746].) And can

there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employee is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.

When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for "It takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct.

So much for the reason of the matter; let us turn again to the adjudicated cases.

The decision in the Adair case is in accord with the almost unbroken current of authorities in the State courts. In many States enactments not distinguishable in principle from the one now in question have been passed, but, except in two instances (one, the decision of an inferior court in Ohio, since repudiated; the other, the decision now under review), we are unable to find that they have been judicially enforced. It is not too much to say that such laws have by common consent been treated as unconstitutional, for while many State courts of last resort have adjudged them void, we have found no decision by such a court sustaining legislation of this character, excepting that which is now under review. The single previous instance in which any court has upheld such a statute is Davis *v.* State of Ohio (1893), 30 Cinc. Law Bull. 342; 11 Ohio Dec. Reprint, 894; where the court of common pleas of Hamilton County sustained an act of April 14, 1892, (89 Ohio Laws 269) which declared that any person who coerced or attempted to coerce employees by discharging or threatening to discharge them because of their connection with any lawful labor organi-

zation should be guilty of a misdemeanor and upon conviction fined or imprisoned. We are unable to find that this decision was ever directly reviewed; but in State of Ohio *v.* Bateman (1900), 10 Ohio Dec. 68; 7 Ohio N. P. 487, its authority was repudiated upon the ground that it had been in effect overruled by subsequent decisions of the State supreme court, and the same statute was held unconstitutional.

The right that plaintiff in error is now seeking to maintain was held by the Supreme Court of Kansas, in an earlier case, to be within the protection of the fourteenth amendment and therefore beyond legislative interference. In Brick Co. *v.* Perry, 69 Kan. 297; 26 Pac. 848 [Bul. No. 56, p. 311]; the court had under consideration chapter 120 of the Laws of 1897 (Gen. Stat. 1901, secs. 2425, 2426), which declared it unlawful for any person, company, or corporation, or agent, officer, etc., to prevent employees from joining and belonging to any labor organization, and enacted that any such person, company, or corporation, etc., that coerced or attempted to coerce employees by discharging or threatening to discharge them because of their connection with such labor organization should be deemed guilty of a misdemeanor, and upon conviction subjected to a fine, and should also be liable to the person injured in punitive damages. It was attacked as violative of the fourteenth amendment, and also of the bill of rights of the State constitution. The court held it unconstitutional, saying: "The right to follow any lawful vocation and to make contracts is as completely within the protection of the constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. * * * Every citizen is protected in his right to work where and for whom he will. He may select not only his employer but also his associates. He is at liberty to refuse to continue to serve one who has in his employ a person, or an association of persons, objectionable to him. In this respect the rights of the employer and employee are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property."

In five other States the courts of last resort have had similar acts under consideration, and in each instance have held them unconstitutional. In State *v.* Julow (1895), 129 Mo. 163; 31 S. W. 781 [Bul. No. 2, p. 206]; the Supreme Court of Missouri dealt with an act (Missouri Laws 1893, p. 187), that forbade employers, on pain of fine or imprisonment, to enter into any agreement with an employee requiring him to withdraw from a labor union or other lawful organization, or to refrain from joining such an organization, or to "by any means attempt to compel or coerce any employee into withdrawal from any lawful organization or society." In Gillespie *v.* The People (1900), 188 Ill. 176; 58 N. E. 1007 [Bul. No. 35, p. 797]; the Supreme Court of Illinois held unconstitutional an act (Hurd's Stat. 1899, p. 844) declaring it criminal for any individual or member of any firm, etc., to prevent or attempt to prevent employees from forming, joining, and belonging to any lawful labor organization, and that any such person "that coerces or attempts to coerce employees by discharging or threatening to discharge them because of their connection with such awful labor organization" should be guilty of a

misdemeanor. In State, ex rel. Zillmer *v.* Kreutzberg (1902), 114 Wis. 530; 90 N. W. 1098 [Bul. No. 47, p. 938]; the court had under consideration a statute (Wisconsin Laws 1899, ch. 332), which, like the Kansas act now in question, prohibited the employer or his agent from coercing the employee to enter into an agreement not to become a member of a labor organization, as a condition of securing employment or continuing in the employment, and also rendered it unlawful to discharge an employee because of his being a member of any labor organization. The decision related to the latter prohibition, but this was denounced upon able and learned reasoning that has a much wider reach. In People *v.* Marcus [supra] the statute dealt with (N. Y. Laws, 1887, ch. 688), as we have already said, was in substance identical with the Kansas act. These decisions antedated Adair *v.* United States. They proceed upon broad and fundamental reasoning, the same in substance that was adopted by this court in the Adair case, and they are cited with approval in the opinion (208 U. S. 175). A like result was reached in State, ex rel. Smith *v.* Daniels (1912), 118 Minn. 155; 136 N. W. 584 [Bul. No. 112, p. 122]; with respect to an act that, like the Kansas statute, forbade an employer to require an employee or person seeking employment, as a condition of such employment, to make an agreement that the employee would not become or remain a member of a labor organization. This was held invalid upon the authority of the Adair case. And see Goldfield Consol. Mines Co. *v.* Goldfield Miners' Union, 159 Fed. 500, 513 [Bul. No. 78, p. 586].

Upon both principle and authority, therefore, we are constrained to hold that the Kansas act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the "due process" clause of the fourteenth amendment, and therefore void.

The dissenting opinion of Mr. Justice Holmes was brief, dependence being had upon earlier expressions of his views rather than upon a present restatement. It is as follows:

I think the judgment should be affirmed. In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. Holden *v.* Hardy, 169 U. S. 366, 397 [18 Sup. Ct. 383, Bul. No. 17, p. 625]. Chicago, Burlington & Quincy R. R. Co. *v.* McGuire, 219 U. S. 549, 570 [31 Sup. Ct. 259, Bul. No. 93, p. 644]. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that Adair *v.* United States [supra], and Lochner *v.* New York, 198 U. S. 45 [25 Sup. Ct. 539, Bul. No. 59, p. 340], should be overruled. I have stated my grounds in those cases and think it unnecessary to add others that I think exist. See further Vegelahan

v. Guntner, 167 Mass. 92, 104, 108 [44 N. E. 1077, Bul. No. 9, p. 197]; Plant *v.* Woods, 176 Mass. 492, 505 [57 N. E. 1011, Bul. No. 31, p. 1294]. I still entertain the opinions expressed by me in Massachusetts.

In the dissenting opinion of Mr. Justice Day, Mr. Justice Hughes concurring, attention was called to the fact that similar legislation in fourteen other jurisdictions would be invalidated by the decision in the present case. Cases were then cited to support the statement that the right of contract as a part of individual freedom was nevertheless subject to regulation in the interest of the public welfare, the local legislature being the judge of the necessity of such legislation, its enactments "only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a Government of laws and not of men, and irreconcilable with the conception of due process of law."

Mr. Justice Day distinguished between the portions of the Federal act under consideration in the Adair case, pointing out that the question at that time was declared to be the making it a criminal offense for an employer to discharge an employee from service because of his membership in a labor organization. He was therefore "unable to agree that that case involved or decided the one now at bar." Continuing, Mr. Justice Day said:

There is nothing in the statute now under consideration which prevents an employer from discharging one in his service at his will. The question now presented is, May an employer, as a condition of present or future employment, require an employee to agree that he will not exercise the privilege of becoming a member of a labor union, should he see fit to do so? In my opinion, the cases are entirely different, and the decision of the questions controlled by different principles. The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many States, by virtue of express statutes passed for that purpose, and, being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary may be the legitimate subject of protection in the exercise of the police authority of the States. This statute, passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken precisely to define, has for its avowed purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employee of it as a condition of obtaining employment. I see no reason why a State may not, if it chooses, protect this right, as well as other legal rights.

The act under consideration is said to have the effect to deprive employers of a part of their liberty of contract, for the benefit of labor organizations. It is urged that the statute has no object or purpose, express or implied, that has reference to health, safety,

morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving him who has property of some part of his "financial independence."

But this argument admits that financial independence is not independence of law or of the authority of the legislature to declare the policy of the State as to matters which have a reasonable relation to the welfare, peace and security of the community.

This court has many times decided that the motives of legislators in the enactment of laws are not the subject of judicial inquiry. Legislators, State and Federal, are entitled to the presumption that their action has been in good faith and because of conditions which they deem proper and sufficient to warrant the action taken.

The act must be taken as an attempt of the legislature to enact a statute which it deemed necessary to the good order and security of society. It imposes a penalty for "coercing or influencing or making demands upon or requirements of employees, servants, laborers, and persons seeking employment." It was in the light of this avowed purpose that the act was interpreted by the Supreme Court of Kansas, the ultimate authority upon the meaning of the terms of the law. Of course, if the act is necessarily arbitrary and therefore unconstitutional, mere declarations of good intent can not save it, but it must be presumed to have been passed by the legislative branch of the State government in good faith, and for the purpose of reaching the desired end. The legislature may have believed, acting upon conditions known to it, that the public welfare would be promoted by the enactment of a statute which should prevent the compulsory exaction of written agreements to forego the acknowledged legal right here involved, as a condition of employment in one's trade or occupation.

It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They can not put in terms that are against public policy either as it is deemed by the courts to exist at common law or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the State. It is no answer to say that the greater includes the less and that because the employer is free to employ, or the employee to refuse employment, they may agree as they please. This matter is easily tested by assuming a contract of employment for a year and the insertion of a condition upon which the right of employment should continue. The choice of such conditions is not to be regarded as wholly unrestricted because the parties may agree or not as they choose. And if the State may prohibit a particular stipulation in an agreement because it is deemed to be opposed in its operation to the security and well-being of the community, it may prohibit it in any agreement whether the employment is for a term or at will. It may prohibit the attempt in any way to bind one to the objectionable undertaking.

Would anyone contend that the State might not prohibit the imposition of conditions which should require an agreement to forego the right on the part of the employee to resort to the courts of the country for redress in the case of disagreement with his employer? While the employee might be discharged in case he brought suit

against an employer if the latter so willed, it by no means follows that he could be required, as a condition of employment, to forego a right so obviously fundamental as the one supposed. It is therefore misleading to say that the right of discharge necessarily embraces the right to impose conditions of employment which shall include the surrender of rights which it is the policy of the State to maintain.

It may be that an employer may be of the opinion that membership of his employees in the National Guard, by enlistment in the militia of the State, may be detrimental to his business. Can it be successfully contended that the State may not, in the public interest, prohibit an agreement to forego such enlistment as against public policy? Would it be beyond a legitimate exercise of the police power to provide that an employee should not be required to agree, as a condition of employment, to forego affiliation with a particular political party, or the support of a particular candidate for office? It seems to me that these questions answer themselves. There is a real and not a fanciful distinction between the exercise of the right to discharge at will and the imposition of a requirement that the employee, as a condition of employment, shall make a particular agreement to forego a legal right. The *agreement* may be, or may be declared to be, against public policy, although the right of discharge remains. When a man is discharged, the employer exercises his right to declare such action necessary because of the exigencies of his business, or as the result of his judgment for other reasons sufficient to himself. When he makes a stipulation of the character here involved essential to future employment, he is not exercising a right to discharge, and may not wish to discharge the employee when, at a subsequent time, the prohibited act is done. What is in fact accomplished, is that the one engaging to work, who may wish to preserve an independent right of action, as a condition of employment, is coerced to the signing of such an agreement against his will, perhaps impelled by the necessities of his situation. The State, within constitutional limitations, is the judge of its own policy and may execute it in the exercise of the legislative authority. This statute reaches not only the employed but as well one seeking employment. The latter may never wish to join a labor union. By signing such agreements as are here involved he is deprived of the right of free choice as to his future conduct, and must choose between employment and the right to act in the future as the exigencies of his situation may demand. It is such contracts, having such effect, that this statute and similar ones seek to prohibit and punish as against the policy of the State.

It is constantly emphasized that the case presented is not one of coercion. But in view of the relative positions of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive. No form of words can strip it of its true character. Whatever our individual opinions may be as to the wisdom of such legislation, we can not put our judgment in place of that of the legislature and refuse to acknowledge the existence of the conditions with which it was dealing. Opinions may differ as to the remedy, but we can not understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power. Wherein is the right of the employer to insert this stipulation in the agreement any more sacred than his right to agree with another

employer in the same trade to keep up prices. He may think it quite as essential to his "financial independence" and so in truth it may be if he alone is to be considered. But it is too late to deny that the legislative power reaches such a case. It would be difficult to select any subject more intimately related to good order and the security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse. It is certainly as much a matter for legislative consideration and action as contracts in restraint of trade.

It is urged that a labor organization—a voluntary association of workingmen—has the constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with nonunion men. And it is asserted that there can not be one rule of liberty for the labor organization and its members and a different and more restrictive rule for employers.

It of course is true, for example, that a church may deny membership to those who unite with other denominations, but it by no means follows that the State may not constitutionally prohibit a railroad company from compelling a workingman to agree that he will, or will not, join a particular church. An analogous case,—viewed from the employer's standpoint, would be: Can the State, in the exercise of its legislative power, reach concerted effort of employees intended to coerce the employer as a condition of hiring labor that he shall engage in writing to give up his privilege of association with other employers in legal organizations, corporate or otherwise, having for their object a united effort to promote by legal means that which employers believe to be for the best interest of their business?

I entirely agree that there should be the same rule for employers and employed, and the same liberty of action for each. In my judgment, the law may prohibit coercive attempts, such as are here involved, to deprive either of the free right of exercising privileges which are theirs within the law. So far as I know, no law has undertaken to abridge the right of employers of labor in the exercise of free choice as to what organizations they will form for the promotion of their common interests, or denying to them free right of action in such matters.

But [it] is said that in this case all that was done in effect was to discharge an employee for a cause deemed sufficient to the employer—a right inherent in the personal liberty of the employer protected by the Constitution. This argument loses sight of the real purpose and effect of this and kindred statutes. The penalty imposed is not for the discharge but for the attempt to coerce an unwilling employee to agree to forego the exercise of the legal right involved as a condition of employment. It is the requirement of such agreements which the State declares to be against public policy.

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employee as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

If one prohibitive condition of the sort here involved may be attached, so may others, until employment can only be had as the result of written stipulations, which shall deprive the employee of the exercise of legal rights which are within the authority of the State to protect. While this court should, within the limitations of the constitutional guaranty, protect the free right of contract, it is not less important that the State be given the right to exert its legislative authority, if it deems best to do so, for the protection of rights which inhere in the privileges of the citizen of every free country.

The Supreme Court of Kansas in sustaining this statute, said that "employees as a rule are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof," and in reply to this it is suggested that the law can not remedy inequalities of fortune, and that so long as the right of property exists, it may happen that parties negotiating may not be equally unhampered by circumstances.

This view of the Kansas court, as to the legitimacy of such considerations, is in entire harmony, as I understand it, with the former decisions of this court in considering the right of State legislatures to enact laws which shall prevent the undue or oppressive exercise of authority in making contracts with employees. Certainly it can be no substantial objection to the exercise of the police power that the legislature has taken into consideration the necessities, the comparative ability, and the relative situation of the contracting parties. While all stand equal before the law, and are alike entitled to its protection, it ought not to be a reasonable objection that one motive which impelled an enactment was to protect those who might otherwise be unable to protect themselves.

I therefore think that the statute of Kansas, sustained by the supreme court of the State, did not go beyond a legitimate exercise of the police power, when it sought, not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one man may exact from another as a condition of employment.

LABOR ORGANIZATIONS—STRIKES—INCITING TO INJURY OF PERSONS—*State v. Quinlan, Supreme Court of New Jersey (June 5, 1914), 91 Atlantic Reporter, page 111.*—Patrick Quinlan was convicted in the court of quarter sessions of Passaic County of advocating, encouraging, or inciting the killing or injuring of a class of persons, it being alleged that, at the time of a strike, he uttered in a public meeting the following words: "I make a motion that we go to the silk mills, parade through the streets, and club them out of the mills; no matter how we get them out, we got to get them out." Quinlan took exceptions to the refusal of the trial judge to quash the indictment, one point being as to the sufficiency of the statute under which conviction was had. The statute in question declares guilty of high misdemeanor any person who, in public or private, by speech, writing, or otherwise, advocates, encourages, incites, etc., * * *

the killing or injuring of any class or body of persons, or of any individual.

In its opinion, delivered by Judge Kalisch, the supreme court held that the statute is not in violation of the constitution as being uncertain in describing the offense, saying, "There is no organic law or rule of sound public policy that requires the legislature to define the meaning of English words in common and daily use."

Another contention was that the indictment, in order to charge the offense, must set out that as the result of the utterance of the words alleged there was a killing or injury of a class or body of persons or of an individual. Authorities are quoted to show that this contention is unsound, and the court said in part:

It is germane to the matter under discussion to observe here that the section of the crimes act on which the indictment in the case sub judice is founded is not an innovation upon, but declaratory of, the common law.

Stephen, in his Digest of Criminal Law (Ed. 1877) p. 33, says:

"Every one who incites any person to commit any crime commits a misdemeanor, whether the crime is or is not committed."

The framers of the act had evidently in mind the prevention of breaches of the public peace and the protection of human life and limb, and deemed that these could be best effected by making it a high misdemeanor for any one who shall, in public or private, by speech, etc., or by any other mode and means, advocate, encourage, or incite to such breaches of the law, irrespective of the fact whether such breaches of the law actually took place or not. The gravamen of the statutory offense lies in the incitement or encouragement to the commission of the offenses denounced, and not in the actual commission of them.

As to the admission of remarks made by a speaker just before Quinlan made the motion alleged, the court said:

A reference to Mrs. Jones's remarks shows them to have been of an inflammatory character, but the argument made is that they were irrelevant, incompetent, and immaterial, because the issue before the court and jury was whether the defendant at that time and place uttered the language charged on the indictment. It is further argued that her remarks were not part of the res gestæ, since it was not shown that they were made in furtherance of a common design, or that the defendant was in any way concerned in their making. But this objection is fully answered by the language used by the defendant when he rounded out the peroration of Mrs. Jones, as described by the State's witness Tracey. Mrs. Jones said:

"I want you people to go to the mills and I want you people to advise the people to join you in this strike. If they refuse, I want you to go into the mills and I want you to drive them out of the mills. I want you to knock them out of the mills, even if it takes your extreme force."

It was following this that the defendant made the motion in which he used the language set out in the indictment. We think the tes-

timony was properly admitted as a part of the res gestæ. It was clearly within the issue, for the defendant was charged with advocating, encouraging, and inciting the injuring of a class of persons, and the testimony tended to show that he was participating with Mrs. Jones in a common design to that end.

The conviction was therefore affirmed.

LABOR ORGANIZATIONS—UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE—INJUNCTION—LIABILITY OF MEMBERS—*Irving et al. v. Neal et al., United States District Court, Southern District of New York (Nov. 6, 1913), 209 Federal Reporter, page 471.*—This case arose from a bill in equity brought by Charles R. Irving and Robert Casson, copartners and citizens of Massachusetts, seeking an injunction against Edward H. Neal, individually and as secretary of the joint district council of New York and vicinity of the United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of Carpenters and Joiners of America, and others. The complainant firm had been put on an "unfair list" maintained by the labor organization, and its name was also omitted from the "fair" list distributed to builders, architects, and owners of property using or likely to use woodwork or trim for interior finish of buildings, the complainant company being manufacturers of such material. Strikes were also threatened if the notices in such circulars and letters as were sent were not complied with.

Judge Ward stated the foregoing facts and continued with the opinion of the court in part as follows:

The particular case of a sympathetic strike threatened by the defendant Blumenberg, a business agent of the joint district council at the Cathedral of St. John the Divine in this city, resulted in the issuance of a restraining order and preliminary injunction prohibiting the individual defendants, both individually and officially, from interfering with the complainant's business. The case now comes up on final hearing.

I find that the allegations of the bill as to particular instances in which the purpose of the combination was carried out or sought to be carried out against the complainants are true as matter of fact. The defendants contend that, even if this be so, the bill should be dismissed as without equity against them because they have not individually published "unfair" lists or called or threatened sympathetic strikes, and further because no "unfair" lists have been published or sympathetic strikes called for the past two years. They are, however, members of the United Brotherhood and of the local unions represented by the joint district council and are officers either of the brotherhood or council. Several of them did actually take part in some of the particular instances stated in the bill. At all events, if the thing principally complained of, viz., an agreement not to work on non-union trim enforceable by fine is unlawful, they are liable for anything done to carry it out, even though they did not individually participate.

The agreement is a part of the organic law of the associations of which they are members and officers, and, of course, they can not say they are ignorant of it or do not participate. The admissions of their answer are to the contrary. I think this proposition consistent with the opinion of the circuit court of appeals for this circuit in Lawlor *v.* Loewe, 187 Fed. 522, 109 C. C. A. 288 [Bul. No. 96, p. 780]. So also, assuming that the acts complained of in the bill or some of them have been discontinued, further commission of them may be properly enjoined if they are unlawful.

There can be no question: First, that a combination does exist between the various local unions which constitute the United Brotherhood; second, that one of the purposes of the combination is to compel the unionization of all manufacturing carpenter shops; third, that the object is to restrain competition between open shops and union shops; and, fourth, that this object is to be accomplished principally by an agreement to refuse to work on any job where nonunion trim is used. It further appears that an agreement exists between the Master Carpenters' Association, composed of the principal employers of carpenters in Greater New York, and the joint district council, whereby the builders agree to use only union trim, which I think the builders were coerced into making by the unions. The effect of it is that nonunion trim, except of negligible sizes, can not be sold throughout almost the whole of that territory.

It is said that workmen have a right to refuse to work for any reason they choose, good or bad, which is satisfactory to themselves. This is true, but it does not follow that they have a right to combine to do so some 200,000 strong over the whole country. Doubtless the purpose of the combination is to advance their own interests without actual malice against manufacturers who do not wish to operate their mills in accordance with the requirements of the unions. This, however, is true of almost every combination in restraint of trade. The combination in this case results all the same in directly restraining competition between manufacturers.

The precise question of law to be determined is whether this feature of the combination, there being no right of action at common law, is made unlawful by, and may be enjoined under, any statute.

I think it is shown to be unlawful under the Sherman law by the decision of the Supreme Court in Loewe *v.* Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622].

But because the Sherman law prescribes the remedies, both criminal and civil, at law and in equity, it is held in this circuit that only the prescribed remedies can be pursued. From this it follows that the injunctive relief can only be had at the instance of the Government, and therefore that the complainants can not recover. National Fireproofing Co. *v.* Mason Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535 [Bul. No. 84, p. 427].

Section 340 of the general business law of this State (Consol. Laws 1909, c. 20) makes any combination, whereby competition in the supply or the price of any article in common use in the State is restrained, a misdemeanor. Interior trim such as the complainants manufacture is such an article; but, as the law confers the remedy by injunction on the State and elaborately prescribes the procedure, I am bound to follow the suggestion made in the National Fireproofing

case, supra, that under this act also injunctive relief can be had only at the suit of the State.

Section 580 of the penal law of this State, subd. 6, makes it a misdemeanor for two or more persons to conspire to commit any act "injurious to trade or commerce." Without discussing the multitude of decisions cited by counsel, the reasoning in the case of Loewe *v.* Lawlor, supra, seems to me enough to show that the combination in this case is such an act. See, also, People *v.* McFarlin, 43 Misc. Rep. 591, 89 N. Y. Supp. 527. As the act says nothing whatever about civil remedies, I think any appropriate remedy is available to one especially injured by violation of it.

While there is no evidence of a special hostility to the complainants in particular, as maintaining an open shop, the proofs show a persistent campaign has been made by the combination to compel them to unionize their shop. They suffer in a way different from the community at large. This entitles them to all available civil remedies, among others to injunctive relief. A decree will be entered granting a permanent injunction in accordance with this opinion.

LABOR ORGANIZATIONS—UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE—INJUNCTION—PREVENTION OF COMPETITION—*Paine Lumber Co. (Ltd.), v. Neal et al., United States District Court, Southern District of New York (Nov., 1913), 212 Federal Reporter, page 259.*—This case is closely connected with that of Irving et al. *v.* Neal et al., 209 Fed. 471 [see p. 162], as it arose out of the same labor conditions. This bill in equity was brought by 8 complainants, residents of States other than New York, and manufacturers of wood trim, sash, and similar wood products. As to differences between the two suits, the opinion, delivered by Judge Mayer, said:

Here both the complaint and the relief sought are more comprehensive. There is no question involving an existing strike. The record is barren of any proof of acts of violence, nor is there satisfactory proof that the agreements and acts complained of were, at the time of the commencement of the suit, directed against these particular complainants. Plainly and briefly stated, the suit is brought on behalf of nonunion manufacturers to settle in a private litigation an economic question of ceaseless importance in respect of which in the particular trade here involved there has been a long and bitterly (though peacefully) fought struggle; each side contending for what it believed to be its rights and welfare.

The defendants named in this bill consist of officers of the United Brotherhood of Carpenters and Joiners of America, who were also officers or agents of the joint district council; union manufacturers of floor, sash, and trim in New York; and master carpenters whose business it is to install trim, doors, sash, and other woodwork in buildings. Agreements between the master carpenters and the joint district council, and between the Manufacturing Woodworkers'

Association and the joint district council are set forth in the bill, an injunction being sought to prevent these agreements from being carried into effect.

After stating the allegations as to acts alleged to have been done in pursuance of the conspiracy the opinion continues:

The testimony is voluminous, but I think the essential facts may be summarized as follows: (1) The journeymen carpenters in the Borough of Manhattan and in parts of the Borough of Brooklyn very generally belong to the Brotherhood of Carpenters. (2) Owing to the fact that members of the brotherhood refuse to work with nonunion members and to the further fact that employers in the building trades deem it wise to employ brotherhood men, it is difficult and under ordinary circumstances impracticable to erect carpenter work in the Borough of Manhattan and in parts of the Borough of Brooklyn except with union labor. (3) That the Brotherhood of Carpenters has a by-law that its members will not erect material made by nonunion mechanics. (4) The Brotherhood of Carpenters has given notice that its men will abide by this by-law. (5) The by-law is enforceable by fine. (6) On several occasions in the past few years the members of the brotherhood have quit work where complainants' products were being used and where the products of other so-called nonunion mills were being used. (7) The enforcement of the by-law in question by the Brotherhood of Carpenters and the provision in the agreement with the master carpenters relative to the use of nonunion trim have lessened the sale of complainants' products in the Borough of Manhattan and in some parts of the Borough of Brooklyn. (8) The workmen have adopted and pursued the policy complained of to better their condition in a continuing economic struggle with no malice to the particular complainants herein, but as part of a plan to accomplish a nation-wide unionization of their trade. (9) The contractors or master carpenters have entered into their trade agreements after elaborate negotiation and for the purpose of establishing and maintaining peaceful relation which shall obviate strikes and other disturbing labor troubles.

For the complainants to succeed they must establish: (1) An agreement offensive to the common law or a State or Federal statute; (2) or any acts done in pursuance thereof; and (3) such injury as will warrant injunctive relief in a litigation between private parties.

Assuming the agreement and its operation to be a combination in restraint of trade, the common law gives no right of action to a third person.

The remedy, if any, must therefore be found in statutes which, as I understand the trend of modern decisions, are said to be declaratory of the common law but afford new or additional remedies. This brings us to a consideration of the Federal so-called Sherman antitrust law and the New York State antitrust law (General Business Law, sec. 340). I agree with Judge Ward in his opinion filed contemporaneously herewith [Irving *v.* Neal, supra] that:

"There can be no question, first, that a combination does exist between the various local unions which constitute the United Brotherhood; second, that one of the purposes of the combination is to compel the unionization of all manufacturing carpenter shops; third, that

the object is to restrain competition between open shops and union shops; and, fourth, that this object is to be accomplished principally by an agreement to refuse to work on any job where nonunion trim is used."

I further agree that the combination in the case before him results in directly restraining competition between manufacturers and operates to restrain interstate commerce in violation of the above-referred-to Federal and State statutes.

As the agreement between the joint district council and the master carpenters and the agreement between the Manufacturing Woodworkers' Association and the United Brotherhood and the joint district council are but steps in the course of the combination and effective extensions of its purpose and results, I am of the opinion that these agreements are also condemned by the two statutes referred to—and this irrespective of the motives which actuated any of the defendants, masters, or workmen.

But injunctive relief may be had under either statute only at the instance of the United States or the State of New York, as the case may be, and therefore complainants can not recover in this suit. Nat. Fireproofing Co. *v.* Mason Builders' Ass'n [169 Fed. 259; Bul. No. 84, p. 427].

As I can not agree with the contention of the counsel for complainants that either subdivision 5 of section 580 or section 530 of the Penal Law is applicable to the case at bar, there thus remains for consideration only subdivision 6 of section 580 of the Penal Law of New York. Subdivision 6 of section 580 of article 54 of the Penal Law (formerly section 168, subd. 6, of Penal Code) has long been on the statute book. It provides:

"If two or more persons conspire to commit any act injurious * * * to trade or commerce * * * each of them is guilty of misdemeanor" (formerly part of section 168 of the Penal Code).

The prevention of competition in business has been held to be an act injurious to trade in contemplation of law. Kellogg *v.* Sowerby, 190 N. Y. 370, 83 N. E. 47; People, etc., *v.* Sheldon, 139 N. Y. 251, 34 N. E. 785.

It is further held by the New York Court of Appeals:

"A civil action is maintainable by one who suffers injury as the result of a conspiracy forbidden by the criminal law to recover the damages which he has sustained at the hands of the parties to the combination."

See, also, In re Debs, 158 U. S. at page 593, 15 Sup. Ct. 900.

Under this statute the motive of the parties is immaterial. The gist of the offense is the agreement to prevent competition.

But before a private litigant may recover he must show either that he has suffered special injury as the proximate result of the wrong or that the conspiracy was directed against him. Cranford *v.* Tyrrell, 128 N. Y. 341, 28 N. E. 514.

So, here, it is true that the complainants may be injured by the general situation; but theirs is not a special injury in the sense of Cranford *v.* Tyrrell, supra, nor of the Irving case. Assuming, for the purpose of illustration, the agreement complained of to be unlawful, it was impersonal and intended to accomplish a general result

as distinguished from selecting these particular complainants as the object of its operation. National Fireproofing Co. *v.* Mason Builders' Ass'n, supra.

In such circumstances the policy of the lawmaking power (here, Congress and the New York Legislature) seems to be to remit these problems to the responsible and duly selected public officials. A decree in a litigation at the instance of the Government or the State is binding universally to all practical intents and purposes. It is presumably in the public interest as distinguished from any individual interest and operates for the benefit of all (as distinguished from meeting a particular instance of wrong or injury) on a method or manner of conducting business whether the complaint be against employer or employee.

Of the many cases cited I find none authoritative where a general business situation in the case of employers or a general trade situation in the case of employees was corrected by injunction at the instance of private suitors. Ample remedy is provided at common law or by statute for recovery of money damage in actions by private litigants. The courts have time and again extended the equity arm to prevent the commission or continuance of injury directed against particular persons and have protected employers against violence and sympathetic strikes; but where the purpose of an injunction is, as in the case at bar, to attempt to control a large body of men generally to work or not to work on a class of goods or in a kind of manufacture (as distinguished from a specific instance or instances as above discussed), the remedy of injunction is not to be granted in a litigation between private parties.

Finally, it may be remarked that, in any event, on this branch of the case, the complaint does not seek an injunction against the master carpenters nor does the proof justify the granting thereof.

MECHANICS' LIENS—CONSTITUTIONALTY OF STATUTE—INTERFERENCE WITH RIGHT TO CONTRACT—*Rittenhouse & Embree Co. v. William Wrigley, jr., Co., Supreme Court of Illinois (June 16, 1914), 105 Northeastern Reporter, page 743.*—This case involved the constitutionality of the Illinois statute, Laws of 1903, page 238, section 21, providing that every mechanic or other person who shall furnish any labor or material for any contractor shall be known as a subcontractor and have a lien the same as a contractor, whether or not the contractor could have obtained a lien or was by contract or conduct divested of the right to a lien. The court held that this statute is unconstitutional as depriving the owner of the right to contract, in a manner not within the police power of the State, in so far as it gives a right to a lien where the original contractor has waived his right to lien before any labor was performed or materials furnished, following its previous opinion in the case of Kelly *v.* Johnson, 251 Ill. 135, 95 N. E. 1068 (Bul. No. 98, p. 484).

MECHANICS' LIENS—LIENS OF SUBCONTRACTORS—ATTORNEYS' FEES—CONSTITUTIONALITY OF STATUTE—*Becker v. Hopper, Supreme Court of Wyoming (Jan. 27, 1914), 138 Pacific Reporter, page 179.*—This was an action to recover the value of materials furnished in the construction of a building, the contract not having been made with the owner of the building but with his contractor. The statute of Wyoming, section 3799, Compiled Statutes of 1910, gives the subcontractor a right to a mechanic's lien, though there is no direct contractual relation with the owner of the property. It was contended that this was unconstitutional, which contention was rejected by the court, Judge Beard, who delivered the opinion, saying:

We are content to follow the decisions of the courts of last resort in a large majority of the States where the question has been decided, holding that such statutes, giving subcontractors a lien for labor and materials actually entering into the structure, do not violate constitutional provisions, and are valid. The question was fully and carefully considered by the circuit court of appeals, sixth circuit, in Jones *v.* Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108, in an elaborate opinion by Judge Lurton, in which many cases are reviewed, and that decision was affirmed by the Supreme Court of the United States. Great Southern Hotel Co. *v.* Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778, in the footnote to which case many additional cases are cited.

Another question of constitutionality was raised with reference to a provision of the statute awarding attorneys' fees to the plaintiff or complainant if he shall obtain a judgment or decree, no reciprocal benefit being allowed a successful defendant. As to this the court said in part:

The decisions are not uniform on this question. In some of the States similar statutes have been held valid, and in other invalid, as violative of the Constitution of the United States, which guarantees to every person "the equal protection of the law"; and the provisions of State constitutions that all laws of a general nature shall have a uniform operation, and that no special law shall be enacted when a general law can be made applicable. The decision most frequently referred to and cited in support of the decisions holding such statutes unconstitutional is Gulf, etc., Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. 255 [Bul. No. 11, p. 504], holding invalid a statute of Texas allowing attorney's fees to any person having a bona fide claim against a railroad company for services, or for damages for stock killed.

The opinion then cited Davidson *v.* Jennings, 27 Colo. 187, 60 Pac. 354, and Mills *v.* Olsen, 43 Mont. 129, 115 Pac. 33, in which similar provisions were held unconstitutional, and said:

The reasoning in those cases, supported as it is by the authorities therein cited, appears to us to be sound, and not shaken by the decisions holding the contrary. We are impelled to the conclusion that the statute awarding attorney's fees in this class of cases is unconstitutional and void.

The judgment in the plaintiff's favor was therefore modified and affirmed.

MECHANICS' LIENS—MATERIALMEN—EFFECT OF STIPULATION BY CONTRACTOR—*Hume v. Seattle Dock Co. et al., Supreme Court of Oregon (Jan. 6, 1914), 137 Pacific Reporter, page 752.*—R. A. Hume filed a lien on the Chamber of Commerce Building owned by the dock company, for the amount due him on material he had furnished a contractor for making cement blocks and tile for use in fireproofing the building. The company contended that Hume had no right of lien, as its contract with the principal contractor contained a stipulation that no mechanics' liens should be filed. Hume obtained a judgment in the circuit court of Multnomah County, Oreg., and this judgment was affirmed by the supreme court of the State, on appeal. Judge Eakin, in referring to the contention of the dock company, said:

There is a great conflict in the cases, accounted for in most instances by the difference in the relative statutes. Where there is a covenant in the contract against liens or an express stipulation that liens shall not be filed, the courts of a great many of the States hold that such stipulation will not bind the laborer, materialman, or subcontractor unless he has assented to it. [Cases cited.]

But, on the other hand, a few States follow the holding in Pennsylvania, as stated in Schroeder *v.* Galland et al., 134 Pa. 277, 19 Atl. 632 [since modified by statute], it being held that a mechanic's lien can not be filed by a subcontractor for work or material furnished by him toward the erection of the building, and that the only connection between the owner and the subcontractor is through and by means of the contract between the owner and the contractor, so that the subcontractor is chargeable with notice of all its terms and stipulations and is bound thereby. By this rule the laborer is not consulted, and he must accept the work under the conditions of the original contract, in the making of which he had no voice. It was to protect the workman against such conditions that our lien law was enacted. A lien is not given through the contractor by subrogation but is a direct and independent lien to each claimant against the property. Therefore we conclude that the materialman or laborer, to be bound by the stipulation in the original contract against liens, must have assented thereto, or at least notice of that condition must be brought home to him, which was not done in this case.

The dock company also took the position that the sand and cement furnished by Hume, from which the cement blocks and tile were constructed, were not lienable. In disposing of this contention, Judge Eakin said:

The question is whether material furnished to the MacIte Fire-Proofing Company at its factory for the purpose of manufacturing blocks and tile for use in the construction of the Chamber of Commerce Building was lienable. The appealing defendant contends that raw material used to manufacture a commercial article is not lienable, and also that the identity of the material is lost. We understand the rule to be that the lienability of the material does not

depend on its suitableness in its crude condition for use in construction of the building or on its identity being maintained, but whether it was furnished especially for the manufacture of something to be used in such structure. Of course crude material for the manufacture of an article for the market generally without reference to any particular structure would not be lienable against the building in which it was used. We think that the material furnished by the plaintiff in this case was lienable.

MINE REGULATIONS—CONSTITUTIONALITY OF STATUTE—STATUS OF STATUTORY COMMISSION—*Plymouth Coal Co. v. Pennsylvania, Supreme Court of the United States (Feb. 24, 1914), 34 Supreme Court Reporter, page 359.*—An act of the State of Pennsylvania, section 10 of article 3, act of June 2, 1891, requires owners of adjoining coal properties to leave a pillar or boundary of coal between their properties of a sufficient thickness to secure the safety of the employees of one party in case the other abandons his workings. The necessity for such a barrier and its dimensions are to be determined by a commission or board consisting of the engineers of the adjoining property owners and the mine inspector of the district. The inspector of mines in Luzerne County requested by letter that the Plymouth Coal Co. have its engineer meet the engineer of a company owning adjacent property in his office at a time set, to decide as to the thickness of the barrier pillar to be left between the properties of the two companies. This the Plymouth company declined to do, whereupon proceedings were had and an injunction issued requiring a barrier pillar at least 70 feet wide to be left, subject, however, to subsequent proceedings as to the necessity for such a pillar on findings by the engineers of the respective companies and the inspector of the district. The company's contentions were that the law violated the "due process" clause of the fourteenth amendment to the Federal Constitution, the provision of the statute being "so crude, uncertain, and unjust as to constitute a taking of property without due process of law."

Mr. Justice Pitney, who delivered the opinion of the court, first declared that the police power of the State reached to the dangerous business of mining coal, citing a number of cases. The opinion of the court below was quoted from at some length, showing the construction put upon the law in question by the State courts, the conclusion being that such a pillar must be left unless the persons authorized to decide the question as a tribunal of experts should determine that none is needed. The case of Kern *v.* Delano, 235 Pa. 478, 84 Atl. 452, was also cited as presenting the view of the supreme court of the State as to the exclusive nature of the jurisdiction of this board, the court saying that even the action of one property

owner in removing the coal from its mine up to the boundary line could not deprive the statutory tribunal of its authority, or confer jurisdiction upon a court of equity to determine the width of the boundary barrier. Proceeding, Mr. Justice Pitney said:

The legislature has not defined with precision the width of the pillar, and it is very properly admitted that, in the nature of things, this would have been impossible, because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule. Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for the regulation of public service corporations are a familiar instance.

It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review.

It is further objected that the statute provides for no appeal from the determination of the tribunal. But in such cases the right of appeal on other than constitutional grounds may be conferred or withheld, at the discretion of the legislature. As already pointed out, an appeal on fundamental grounds in this instance seems to inhere in the very practice prescribed by the statute for the enforcement of the determination of the statutory tribunal. Were this not expressed in the act, it would none the less be implied, at least so far as pertains to any violation of rights guaranteed by the fourteenth amendment.

MINE REGULATIONS—WEIGHING COAL—CONSTITUTIONALITY OF STATUTE—*Rail & River Coal Co. v. Yaple et al., United States District Court, Northern District of Ohio (May 20, 1914), 214 Federal Reporter, page 273.*—The coal company named brought action against the defendants, constituting the Industrial Commission of Ohio, for an injunction to restrain them from enforcing the provisions of the Ohio law of February 5, 1914 (104 Ohio Laws, p. 181), entitled "An act to regulate the weighing of coal at the mines." The act provides that the miners shall be paid for the total weight contained in the cars sent out by them, but that the amount of impurities shall not exceed a percentage to be determined by the industrial commission. The court denied the injunction and sustained the constitutionality of the law in an opinion from which the following is quoted:

The State constitution was amended by adding to article 2 the following sections:

"SEC. 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage, and providing for the comfort,

health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

"SEC. 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Without determining the soundness of the argument that the act, indirectly at least, establishes a minimum wage, in that it insures the miner full pay for all coal mined in accordance with the prescribed regulation, it may not be said that, in supplying an incentive for more effectually securing the removal of fine coal and coal dust to the surface, and thereby minimizing or dissipating the danger arising from their continued presence in the mines, the act does not provide for the health, safety, and general welfare of employees.

The Ohio act does not restrict the right of contracting for the labor of miners by the day, week, month, or year, or in any other manner (except as to quantity) that the operator may deem proper. If the miner or loader by the terms of his employment is to be paid by the ton or other weight, the right of contract is then curtailed to the extent that he shall be paid according to the total weight of the coal contained in the mine car, such contents to include, however, no greater percentage of slate, sulphur, rock, dirt, or other impurities than is unavoidable, as determined by the industrial commission. It must be presumed that the industrial commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt, or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the commission's order, which by statute is made prima facie reasonable and lawful, he may petition for and obtain a hearing before the commission as to those features, and may thereafter have a speedy review of its action by the supreme court of the State.

MINIMUM WAGES—CONSTITUTIONALITY OF STATUTE—*Simpson v. O'Hara et al., Supreme Court of Oregon (April 28, 1914), 141 Pacific Reporter, page 158.*—This action was brought to test the constitutionality of the Oregon minimum wage law. As to the one question presented in addition to those in the case of Stettler *v.* O'Hara et al. [see p. 173], Judge McBride, who delivered the opinion of the court, said:

It is suggested on this appeal that in the case of Stettler *v.* O'Hara this court did not pass upon the contention raised in the pleadings, and upon the argument, that the minimum wage act is inimical to that portion of section 1 of the fourteenth amendment to the Constitution of the United States which provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Having determined in the preceding case that the police power of the State legitimately extended to the right to prevent the employment of women and children for unreasonably long hours or at unreasonably small wages, and that the State had the right to use the machinery of a commission to determine to the extent stated in the opinion the length of time and at what wages such persons might be

employed, it would seem to follow as a natural corollary that the right to labor for such hours and at such wages as would reasonably seem to be detrimental to the health or welfare of the community is not a privilege or immunity of any citizen. Local self-government lies at the very foundation of freedom, and the private and local affairs of a community are sacred from the interference of the central power, unless oppressive and unreasonable encroachment on the liberties of the citizen renders such interference imperatively necessary, and such is not the case here.

MINIMUM WAGES—INDUSTRIAL WELFARE COMMISSION—POWERS OF COMMISSION—CONSTITUTIONALITY OF STATUTE—*Stettler v. O'Hara et al., Industrial Welfare Commission, Supreme Court of Oregon (Mar. 17, 1914), 139 Pacific Reporter, page 743.*—Frank O. Stettler brought suit against the members of the Industrial Welfare Commission of Oregon to vacate and annul an order of the commission and enjoin its enforcement. The constitutionality of Laws of 1913, page 92 (ch. 62), was brought in question by this action. The provisions of the act and the facts in the case are stated by the court as follows:

On February 17, 1913, the legislative assembly passed an act entitled "To protect the lives and health and morals of women and minor workers, and to establish an industrial welfare commission and define its powers and duties, and to provide for the fixing of minimum wages and maximum hours and standard conditions of labor for such workers, and to provide penalties for violation of this act." The title is followed by a declaration of the evils that it is desired to remedy, as follows: "Whereas, the welfare of the State of Oregon requires that women and minors should be protected from conditions of labor which have a pernicious effect on their health and morals, and inadequate wages and unduly long hours and unsanitary conditions of labor have such a pernicious effect; therefore, be it enacted by the people of the State of Oregon." The first section provides: "It shall be unlawful to employ women or minors in any occupation within the State of Oregon for unreasonably long hours; and it shall be unlawful to employ women or minors in any occupation within the State of Oregon under any such surroundings or conditions—sanitary or otherwise—as may be detrimental to their health or morals; and it shall be unlawful to employ women in any occupation within the State of Oregon for wages which are inadequate to supply the necessary cost of living and to maintain them in health; and it shall be unlawful to employ minors in any occupation within the State of Oregon for unreasonably low wages." Then follows the creation of the commission under the name of "Industrial Welfare Commission," to be appointed by the governor, and provisions defining its duties.

Among its duties are those of ascertaining and declaring, in a manner prescribed by the statute, standards of employment for women and children, including rates of wages, hours of labor, and sanitary and other conditions such as may affect health or morals. From the matters so determined by the commission, there may be no appeal on

any question of fact, but there is a right of appeal from the commission to the circuit court from any ruling or holding on a question of law included or embodied in any decision or order by the commission, and from the circuit court to the supreme court.

In due course, the commission made the following order:

The Industrial Welfare Commission of the State of Oregon hereby orders that no person, firm, corporation, or association owning or operating any manufacturing establishment in the city of Portland, Oregon, shall employ any woman in said establishment for more than nine hours a day, or fifty hours a week; or fix, allow, or permit for any woman employee in said establishment a noon lunch period of less than forty-five minutes in length; or employ any experienced adult woman worker, paid by time rates of payment, in said establishment at a weekly wage of less than $8.64, any lesser amount being hereby declared inadequate to supply the necessary cost of living to such woman factory workers, and to maintain them in health.

The amended complaint sets out all these matters in greater detail, to which the commission replied by way of demurrer on various grounds, the first of which raises the questions here discussed, namely: That "it does not state facts showing that the act or order complained of is an unreasonable exercise of the police power of the State." The demurrer was sustained, and the plaintiff elected to stand on the amended complaint without other facts being adduced. Judgment was rendered dismissing the suit, and the plaintiff appealed.

In its opinion, written by Judge Eakin, and upholding the constitutionality of the law, the court states that the purpose of the suit is to have determined judicially whether the regulation by the legislature of the hours of labor during which women may be employed in any mechanical or manufacturing establishment, mercantile occupation, or other employment requiring continuous physical labor, or the establishment of a minimum wage to be paid therefor is in violation of the State or Federal Constitution, some of the features of these questions being practically new to the courts of this country. Cases on both sides were considered at length, and it was conceded that the fourteenth amendment to the Federal Constitution is a bar to such legislation if it can not be justified as a police measure; and it was assumed that provisions enacted by the State under its police power that have for their purpose the protection or betterment of the public health, morals, peace, and welfare, and reasonably tend to that end, are within the power of the State, notwithstanding they may apparently conflict with the fourteenth amendment to the Federal Constitution. The principal question for decision therefore was whether the provisions of the act are within the police power of the State.

It appeared from the cases cited that statutes having for their purpose provision for maximum hours of labor for employees upon

public works, maximum hours for women and children employed in mechanical, mercantile, or manufacturing establishments, maximum hours for laborers in mines or smelters, and the fixing of minimum wages for laborers upon public works were constitutional, the court saying that the last is so held in Malette *v.* Spokane, 137 Pac. 500 (see p. 191), even where the expense is borne by private individuals, so that the only question for decision here is as to the power of the legislature to fix the minimum wage in such a case. Continuing the court said:

In speaking of the Oregon 10-hour law, Chief Justice Bean, in the case of State *v.* Muller [48 Oreg. 252, 85 Pac. 855, see Bul. No. 67, p. 877], says: "Such legislation must be taken as expressing the belief of the legislature, and through it of the people, that the labor of females in such establishments in excess of 10 hours in any one day is detrimental to health, and injuriously affects the public welfare. The only question for the court is whether such a regulation or limitation has any real or substantial relation to the object sought to be accomplished, or whether it is 'so utterly unreasonable and extravagant' as to amount to a mere arbitrary interference with the right to contract. On this question we are not without authority."

These are some of the grounds upon which maximum 10-hour laws are sustained, and we have cited them here as applying with equal force to sustain the women's minimum wage law, and as bringing it within the police power of the legislature. The State should be as zealous of the morals of its citizens as of their health. The "whereas clause" quoted above is a statement of the facts or conclusions constituting the necessity for the enactment, and the act proceeds to make provision to remedy these causes. "Common belief" and "common knowledge" are sufficient to make it palpable and beyond doubt that the employment of female labor as it has been conducted is highly detrimental to public morals, and has a strong tendency to corrupt them. The Legislature of the State of Massachusetts appointed a commission known as the commission of minimum wage boards to investigate conditions. In the report of that commission in January, 1912, it is said: "Women in general are working because of dire necessity, and in most cases the combined income of the family is not more than adequate to meet the family's cost of living. In these cases it is not optional with the woman to decline low-paid employment. Every dollar added to the family income is needed to lighten the burden which the rest are carrying. * * * Wherever the wages of such a woman are less than the cost of living and the reasonable provision for maintaining the worker in health, the industry employing her is in receipt of the working energy of a human being at less than its cost, and to that extent is parasitic. The balance must be made up in some way. It is generally paid by the industry employing the father. It is sometimes paid in part by future inefficiency on the part of the worker herself, and by her children, and perhaps in part ultimately by charity and the State. * * * If an industry is permanently dependent for its existence on underpaid labor, its value to the Commonwealth is questionable." With this common belief, of which Mr. Justice Harlan says "we take judicial notice," the court can not say, beyond all question, that the act is a plain, palpable invasion of rights secured by the fundamental law, and has no real or substan-

tial relation to the protection of public health, the public morals, or public welfare. Every argument put forward to sustain the maximum hours law, or upon which it was established, applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the State and as a regulation tending to guard the public morals and the public health.

Plaintiff, by his complaint, questions the law also as a violation of section 20 of article 1 of the constitution of Oregon. As we understand this contention, it is that the order applies to manufacturing establishments in Portland alone, that other persons in the same business in other localities are unaffected by it, and that it is discriminatory. The law by which plaintiff is bound is contained in section 1 of the act quoted above. If he will, he can comply with this provision without any action by the commission, and it applies to all the State alike. The other provisions of the act are for the purpose of ascertaining for those who are not complying with it what are reasonable hours of labor, and what is a reasonable wage, in the various occupations and localities in the State to govern in the application of section 1 of the act, and for the purpose of fixing penalties for violations thereof. Counsel seems to consider the order of the commission as a law which the commission has been authorized to promulgate; but we do not understand this to be its province. Section 4 provides: "Said commission is hereby authorized and empowered to ascertain and declare * * * (a) standards of hours," etc. By section 8 it is only after investigation by the commission, and when it is of opinion therefrom that any substantial number of women in any occupation are working unreasonably long hours or for inadequate wages, that it shall, by means of a conference, ascertain what is a reasonable number of hours for work and a minimum rate of wages, when it may make such an order as may be necessary to adopt such regulation as to hours of work and minimum wages; and section 1 of the act shall be enforced on that basis.

There is nothing in the record suggesting that there is a substantial number of woman workers in the same occupation as those included in the order complained of here working unreasonably long hours or for an inadequate wage in any other locality than Portland. Other cases as they are discovered are to be remedied as provided therefor, but the law is State-wide, and it does not give the plaintiff unequal protection of the law, nor grant to others privileges denied to him; neither does it delegate legislative power to the commission. It is authorized only to ascertain facts that will determine the localities, businesses, hours, and wages to which the law shall apply. Counsel urges that the law upon this question interferes with plaintiff's freedom of contract, and refers to the language used In re Jacobs, 98 N. Y. 98, to wit: "Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will," etc., as a change brought about by the larger freedom enjoyed in this country, and guaranteed by the Federal Constitution and the constitution of the various States in comparison with conditions in the earlier days of the common law, when it was found necessary to prevent extortion and oppression by royal proclamation or otherwise, and to establish reasonable compensation for labor; but he fails to take note that by

reason of this larger freedom the tendency is to return to the earlier conditions of long hours and low wages, so that some classes in some employments seem to need protection from the same conditions for which royal proclamation was found necessary. The legislature has evidently concluded that in certain localities these conditions prevail even in Oregon; that there are many women employed at inadequate wages—employment not secured by the agreement of the worker at satisfactory compensation, but at a wage dictated by the employer. The worker in such a case has no voice in fixing the hours or wages, or choice to refuse it, but must accept it or fare worse.

Plaintiff further contends that the statute is void for the reason that it makes the findings of the commission on all questions of fact conclusive, and therefore takes his property without due process of law. Due process of law merely requires such tribunals as are proper to deal with the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before it decides the issues are the essentials of due process of law. It is sufficient for the protection of his constitutional rights if he has notice and is given an opportunity at some state of the proceeding to be heard.

We think we should be bound by the judgment of the legislature that there is a necessity for this act, that it is within the police power of the State to provide for the protection of the health, morals, and welfare of women and children, and that the law should be upheld as constitutional.

MOTHERS' PENSIONS—CONSTRUCTION OF STATUTE—WIDOW—*Debrot v. Marion County, Supreme Court of Iowa (Feb. 19, 1914), 145 Northwestern Reporter, page 467.*—The district court of Marion County denied an application of Olive Debrot, a divorced woman, for the support of her three minor children under the mothers' pension act, and this decision was affirmed by the supreme court. The language of the act permits payments to the mother of dependent children only when she is a widow. The court, speaking by Judge Deemer, said in part:

It will be observed that section 2 of the act undertakes to define the word "widow," or to extend its ordinary meaning, by providing, in substance, that a mother whose husband is an inmate of any of the State institutions shall, for the purposes of the act, be considered a widow so long as the husband is confined therein. The effect of this section in broadening the term is, according to all the canons of construction, to exclude all other persons who might, by interpretation or construction, be thought to be within the terms or spirit of the original act, although not within its letter. The old maxim, "Expressio unius est exclusio alterius," is especially applicable to statutes, and of special significance where attempt is made to specifically broaden the scope of a general term. [Cases cited.]

Aside from this, however, it appears from a reading of all the statutes quoted that the common-law liability of both husband and wife for the support of their children is recognized, and provisions are made to enforce this liability by appropriate proceedings. This liability of either or both parents to support their minor children is not, of course, affected by a divorce obtained by one from the other. It

continues in spite of the divorce until the children reach their majority, or until the death of the parents. [Cases cited.]

There is no allegation in the application that the father of the children is unable to support them; and the only showing with reference to Debrot is that he is living in the State of Connecticut, and there procured a decree of divorce from his wife on service by publication. This divorce did not sever the relation of parent and child, although it may have dissolved the marital relations theretofore existing. We must construe the act in question without reference to the present residence of one of the parents, for, if the mother is a widow within the meaning of the statute under which relief is sought, it is entirely immaterial where her divorced husband lives, or what his financial ability.

RAILROADS—QUALIFICATIONS OF EMPLOYEES—CONSTITUTIONALITY OF STATUTE—FREIGHT CONDUCTORS—*Smith v. State of Texas, Supreme Court of the United States (May 11, 1914), 34 Supreme Court Reporter, page 681.*—W. W. Smith was arrested and convicted for violating chapter 46, Texas Laws of 1909, section 2 of which reads as follows:

If any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 nor more than $500, and each day he so engages shall constitute a separate offense.

Smith was 47 years of age, and had been in the railroad business for 21 years as fireman and as engineer on freight, mixed and passenger trains. On July 22, 1910, he acted as conductor of a freight train between two Texas towns, and this constituted the offense with which he was charged. He contended that the statute was unconstitutional as violating the provisions of the fourteenth amendment to the Constitution of the United States, and this contention the Supreme Court upheld, reversing the decision of the court below. Mr. Justice Lamar, in delivering the court's opinion, cited cases and discussed the general power of regulation of such employment in the interest of the public, and continued as follows:

This and the other cases establish, beyond controversy, that, in the exercise of the police power, the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class

can be created and be then given a monopoly of the right to work in a special or favored position.

The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other States, to act in the same capacity in the State of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to show their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION—ELECTRIC RAILWAYS—*Spokane & Inland Empire Railroad Co. v. United States, United States Circuit Court of Appeals, Ninth Circuit (Jan. 5, 1914), 210 Federal Reporter, page 243.*—This was an action against the company named for violation of the safety appliance act of March 2, 1903, on the ground of failure to provide certain cars with grabirons or handholds, and of use of certain others without automatic couplers.

The interurban line of the company extends from Spokane, Wash., to Coeur d'Alene, Idaho, and is 40 miles in length. The cars enter and leave Spokane over tracks of the street-railway system of that city, which is owned by the same company, for a distance of about 1 mile, but do not do a strictly street-railway business over this route. In affirming the judgment of the court below in favor of the United States the court of appeals decided that these facts did not bring the cars within the exception of those "used on street railways." It also overruled the company's exceptions to the exclusion of expert testimony as to whether the kind of handholds which were provided, consisting of an opening in the sills or buffers on the ends of the cars, were safe and suitable appliances. This was held to be a question for the jury to decide upon the evidence rather than the subject of expert testimony.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION—SWITCHING—*Chicago, Burlington & Quincy Railroad Co. v. United States, United States Circuit Court of Appeals, Eighth Circuit (Nov. 28, 1913), 211 Federal Reporter, page 12.*—This was an appeal by the railroad company from a judgment for the Government in an action for violation of the safety appliance act. The violations were alleged

in four counts, the first charging the use of a car having the coupling apparatus out of repair and inoperative, and the second, third, and fourth the running of three trains, consisting respectively of 42, 36, and 39 cars, with only 9, 10, and 9 cars having air brakes coupled. The act fixes a minimum of 50 per cent of the cars of a train, empowering the Interstate Commerce Commission to increase this percentage, and the commission had fixed on 75 per cent.

As to the first count the court of appeals affirmed the judgment of guilty, holding that section 2 of the act (requiring automatic couplers) applies to switching operations as well as main-line operations; that a defect at one end of a car is a violation of the statute, although the coupling apparatus on the next car is in perfect condition; and that the movement from one yard to another for the purpose of repair was not necessary as claimed by the company.

As to the movement of trains without the coupling of the air brakes on the required number of cars the judgment was reversed. This movement was between two yards of the railroad at Kansas City, Mo., on opposite sides of the Missouri River and 2 miles apart. The words "on its line," "in moving interstate traffic," "to run any such train in such traffic," were held to be properly applicable to trains moving from point to point rather than to switching operations, and the great inconvenience, and delay and congestion of traffic that would result from a compulsory observance of the provision of the section in such cases were pointed out. Two of the three judges sitting on the case concurred in this opinion. Judge Amidon delivered the opinion, and after a full discussion of the matter, which is too long for quotation here, said:

The identical question which is here presented was before the circuit court for the third circuit in Erie Railroad Co. *v.* United States, 197 Fed. 287 [see Bul. No. 112, p. 128], and, we think, was there properly decided, notwithstanding its criticism in United States *v.* Pere Marquette R. R. Co., 211 Fed. 220 [see this page below].

Judge Hook rendered a dissenting opinion, in which he argued that since these trains moved over the main line of the railroad, the danger from lack of control, and also from the necessity of brakemen standing on the tops of the cars, would be as great as in the case of a through train over the same route and distance.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION—SWITCHING—*United States v. Pere Marquette Railroad Co., United States District Court, Western District of Michigan (Sept. 5, 1913), 211 Federal Reporter, page 220.*—This was an action by the United States against the company named for violation of the safety appliance act. The charges resulted from the movement of a train with certain cars whose coup-

ling apparatus was defective, which train also did not have the air coupled up so that the brakes could be operated from the engine, for a distance of 2 miles over the main track of the railroad between two yards at Grand Rapids. The railroad company was adjudged guilty of these charges. As to the matter of the air brakes, Judge Sessions, in delivering the opinion, said in part:

Counsel for defendant rely upon the case of Erie R. Co. *v.* United States, 197 Fed. 287 [see Bul. No. 112, p. 128], decided by the circuit court of appeals in the third circuit. That case differs from the present one in some material respects, but in the main it supports defendant's contention. I have the profoundest respect for that court and its decisions, and it is with much diffidence and hesitation that I feel compelled to reach a different conclusion. In the Erie case, however, the court seems to have entirely overlooked, ignored, and disregarded the controlling effect of the modifying and explanatory act of 1903. After careful and patient study, I am also convinced that the decision in the Erie case is in conflict with both the spirit and the letter of the utterances of the Supreme Court.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION TRAINS—*La Mere v. Railway Transfer Co., Supreme Court of Minnesota, 145 Northwestern Reporter, page 1068.*—The plaintiff, Joseph La Mere, a switchman, was injured by being thrown from a car being hauled with several others by the defendant company, by an emergency stop which it was claimed was unnecessarily and negligently made by the engineer. The air brakes were connected on the string of cars. The most interesting point involved is as to whether this was a train in the meaning of the Federal safety appliance act. The conditions are shown in the following quotation from the opinion written by Judge Dibell, holding that the law does apply, and affirming a verdict of the district court of Hennepin County in favor of the plaintiff:

The defendant is a transfer company. It is conceded that the operation in which it and the plaintiff were engaged at the time of his injury was an interstate operation. It was taking some 15 cars, all or all except one loaded, sometimes called a "drag," from its yards to the Chicago, Milwaukee & St. Paul yards, referred to sometimes as the Milwaukee Transfer. An important question is whether these cars with the locomotive hauling them constituted a train within the meaning of the safety appliance act. The cars had been loaded at the mills and switched onto track numbered 7 which was set apart for the use of the Milwaukee road.

The defendant hauled the transfers for four roads. It connected the air on all trains except those of the Milwaukee. The Milwaukee was the shorter haul. The danger from not using air in the Milwaukee haul may have been different in degree from the danger in other hauls, and sometimes it may have been different in kind, and it may have differed at times in degree and in kind from a main-line haul,

at times being greater and at times less. In general the dangers were similar. They came from the fact that the engineer, without the air connected, was not in control of his train, and what the particular result might be on a long haul or a short haul, or on a main-track line, or on a haul through the transfer yards, either to the trainmen or to the public, no one could foretell.

It is not important that no caboose was attached. It is not important that when the train got to the Milwaukee yards the cars might be rearranged and go to different destinations as parts of different trains. It is not important that the engine was in a backward instead of a forward movement. The cars were on an interstate journey when they left track 7 and they made up a train. The trainmen were subject to the dangers against which the safety appliance act sought to guard them by requiring the air to be connected. The cars and engine come within the ordinary definition of a train.

RAILROADS—SAFETY APPLIANCES—CONSTITUTIONALITY OF STATUTE—ELECTRIC HEADLIGHTS—*Atlantic Coast Line Railroad Co. v. Georgia, United States Supreme Court (June 8, 1914), 34 Supreme Court Reporter, page 829.*—The Court of Appeals of the State of Georgia affirmed the judgment of the city court of Richmond County, which had convicted the railroad company named of violation of the provisions of the Civil Code of Georgia, sections 2697 and 2698, which statute requires railroad companies to equip each locomotive running on their main line after dark with a headlight which shall consume not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter, and to keep the same in good condition. The statute excepts tramroads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills. The Supreme Court also affirmed the judgment of conviction.

The railroad company contended that the statute was unconstitutional in depriving it of liberty of contract, and of property without due process of law, and of the equal protection of the laws; and also that the restriction was an interference with interstate commerce.

The court decided that, although a portion of the equipment of the company must go into disuse on account of the law, the provisions were justified under the police power, because they relate to safety in operation. It also decided that equal protection of the laws was not refused, even if receivers should be held to be without its provisions, in view of the temporary and special character of their management; and with regard to the matter of the exemption of tramroads, etc., speaking by Mr. Justice Hughes, said:

As to the exceptions made by the statute of tramroads, mill roads, etc., it is impossible to say that the differences with respect to operation and traffic conditions did not present a reasonable basis for classification.

The question of interference with interstate commerce was also raised, the locomotive in the case having been used at the time of the violation complained of in interstate traffic. It was held that the States were not denied their right to regulate the operation of railroad trains within their limits, even though such trains were used in interstate commerce, in the absence of Federal legislation in the special field of the statute.

"The requirements of a State, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another State, in the exercise of a similar power, may not impose the same regulation," the remedy for conflict being in the enactment of a paramount regulation by congressional action.

RAILROADS—SAFETY APPLIANCES—REPAIR—*United States v. Chesapeake & O. Ry. Co., United States Circuit Court of Appeals, Fourth Circuit (Feb. 27, 1914), 213 Federal Reporter, page 748.*—Action was brought against the company named for violation of the safety appliance act in hauling a car with its coupling apparatus defective because of a broken chain. The company set up as a defense the provision which permits a car which becomes defective in service to be carried to the nearest available point for the purpose of making repairs. The car in question was discovered to be out of repair on arriving at the Seventeenth Street yard of the company in Richmond, Va., on February 29, 1912. After being switched about several times it was hauled to the Broad Street yard, three-fourths of a mile away, and placed on a sidetrack for 12 days, where it had to be moved a number of times. It was then taken back to the Seventeenth Street yard and repaired. The repairs took about 10 minutes, and it appeared that they could as well have been made in the first place, that there was no necessity for the car to be taken to a shop, and that the Seventeenth Street yard had better facilities for making the repairs than the other yard. The court held that the danger from a car with a defective coupling is as great in movements about the yards as on the main line, and that the company was guilty of the offense charged.

SEAMEN—FAILURE TO PAY WAGES—CONSTRUCTION OF STATUTE—*The "City of Montgomery," United States District Court, Southern District of New York (Dec. 15, 1913), 210 Federal Reporter, page 673.*—This was a suit by a seaman to recover the penalty prescribed by U. S. Comp. Stat. 1901, page 3077, for nonpayment of wages within two days after the termination of his employment, as required by the statute. The articles under which the seaman shipped contained a

provision that wages should be payable after one month from the beginning of the voyage, even though it may have terminated sooner. The court decided that such an agreement was not valid in view of the statute. Judge Mayer, speaking for the court, quoted the statute in question and said in part:

It is true that the statute does not in terms declare void an agreement in contravention thereof, but, in speaking of the termination of "the agreement," it is clear that Congress had in mind that, no matter what "the agreement" was, the seamen's wages must be paid within two days after the man had duly performed the service required by "the agreement." Holding this view, I am of opinion that the statute is controlling, and that the provision in the articles here discussed was void and of no effect.

STRIKES—MENTION IN ADVERTISEMENTS FOR EMPLOYEES—CONSTITUTIONALITY OF STATUTE—*Commonwealth v. Libbey, Supreme Judicial Court of Massachusetts (Jan. 9, 1914), 103 Northeastern Reporter, page 923.*—Walter M. Libbey and J. F. Crane were separately convicted in the superior court of Essex County of advertising for employees without stating that a strike existed, and carried their cases to the supreme judicial court on exceptions. The latter court upheld the decision of the court below.

The statute involved is chapter 445 of the Acts of 1910, which requires that every employer who, during a strike or labor disturbance among his employees, publicly advertises in newspapers for persons to work in place of the strikers "shall plainly and explicitly mention in such advertisements * * * that a strike, lockout, or other labor disturbance exists." The chief question was as to the constitutionality of this statute. In delivering the opinion of the court Judge Rugg said:

The legislature may "make, ordain and establish all manner of wholesome orders, laws, statutes and ordinances" not repugnant to the constitution. Part 2, ch. 1, sec. 1, art. 4, of the constitution. This is strong language, and it always has been interpreted broadly in its application to statutes enacted from time to time by the legislature to satisfy the changing needs of society. But the constitution also guarantees to all citizens the blessings of liberty and the right to happiness and safety, and the right to acquire and possess property. In general terms also the Federal Constitution gives substantially the same assurances. The liberty which thus has such ample constitutional security does not signify absolute and unrestrained license to follow the dictates of an unbridled will. Constitutional freedom means a liberty regulated by law.

This statute is not open to the objection that it is class legislation. It applies to all employers similarly circumstanced. It is not arbitrary, and has a reasonable relation to the public interests. It does not destroy equality before the law, nor create special privileges. [Cases cited.]

It is urged that it hampers the right to conduct business beyond what is reasonable, and thus violates the right to acquire and possess property and to make contracts to that end. The situation in an industrial enterprise, when a strike, lockout or other labor disturbance is in progress, manifestly may be quite different from the standpoint of prospective workmen from what it is when peaceful conditions obtain. The social and economic surroundings of an employment might be attractive in the absence of labor troubles, and repulsive when they exist, to considerable numbers of men. Possibly the opposite may be true as to others in society. The disinclination on the part of some to seek employment in the place of strikers may arise from various causes. In view of these considerations it may have been thought that laborers ought to be given a true statement of the condition of labor in this regard, and that any advertisement should give this fact if it exists, as a protection to those who might answer either from a distance or from the neighborhood. It can not be pronounced unreasonable on the part of the legislature to take measures to shield those who labor from being induced in ignorance to seek employment in a place where are the features prevailing in a strike. The statute seems to have a reasonable relation to the accomplishment of the end, and the end itself is one within the scope of legislation.

It has been argued that the purpose of the statute is to harass the employer. But this can not be presumed unless no other rational interpretation is possible. Every assumption is made in favor of the constitutionality of an enactment of the legislature. This statute has a legitimate purpose and effect in protecting innocent searchers after work from being invited to seek employment where a strike is in progress in ignorance of the true state of affairs. It must be presumed that this was the real purpose of the legislative department.

The statute is not unreasonable in its terms. It requires no more than the statement of a fact, a representation of the truth, in the advertisement or solicitation for employees. It does not undertake to confine the statement to any form of words. It may include such amplification in respect to the details of the truth as the employer desires. If he is suffering from an oppressive or unlawful strike, that fact may be stated. The statute being enacted for the protection of innocent third persons, it is of no consequence whether the strike is justifiable or wrongful. The protection of the public is as important in the one case as in the other. This being the purpose of the act, it can not be said that it is invalid because it requires the announcement of the illegal act of others as a condition precedent to the effort to employ labor. If sometimes this may happen, it is incidental and not the necessary aim of the statute.

The statute does not undertake to deny to an employer whose men are on a strike freedom of action in employing others to take their places provided he tells the facts, and hence Mathews *v.* People, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241 [Bul. No. 50, p. 188], is not applicable.

An attack also is made on the constitutionality of St. 1912, ch. 545, which provides that Stat. 1910, ch. 445, "shall cease to be operative when the State board of conciliation and arbitration shall determine that the business of the employer, in respect to which the strike or other labor trouble occurred, is being carried on * * * to the normal and usual extent. Said board shall determine this question as soon as may

be, upon the application of the employer." The argument in support of this contention is founded on the assumption that the only way in which the termination of the labor trouble can be proved is by a finding of the board as pointed out in the statute. It is true that this statute relates to evidence of the cessation of the strike. But it does not undertake to provide the exclusive method of determining when a strike is at an end. That may be proved by any competent evidence. If a finding is made by the board that the strike is at an end, then there is no limitation upon the right of the employer to advertise for help. If no finding is made or even if a finding adverse to the employer is made, it is not binding upon an employer. The fact of the cessation of the strike may be proved in any legal way. In any prosecution it is necessary for the Commonwealth to establish that a labor disturbance existed at the time of the advertisement by competent evidence outside the statute. It follows that thus interpreted there is no vesting of judicial functions in a commission by the statute and that this part of it is not open to objection on constitutional grounds.

The statute is not confined in its operation to cases where the advertisement is printed in more than one newspaper. The plural word "newspapers" is used in a generic sense and applies to a publication in one or more papers.

SUNDAY LABOR—CLASS LEGISLATION—CONSTITUTIONALITY OF CITY ORDINANCE—*City of Marengo v. Rowland, Supreme Court of Illinois (June 4, 1914), 105 Northeastern Reporter, page 285.*—The city of Marengo, Ill., brought action against John Rowland for violation of an ordinance prohibiting the keeping open of barber shops on Sunday. The court affirmed a judgment for the defendant, and declared the ordinance unconstitutional as prohibiting a single business but permitting all others to be carried on. The case of City of Springfield *v.* Richter, 257 Ill. 580, 101 N. E. 192 (see Bul. No. 152, p. 169), was distinguished because the ordinance passed upon in that case forbade any usual business or labor, with certain exceptions held to be necessary; and similar ordinances held valid in other States were held not in point, because the statutes of those States forbid all work on the Sabbath, while that of Illinois only forbids the disturbance of the peace and good order of society by labor or amusement.

UNION LABOR—RATE OF WAGES—LABOR ON PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—*Wright v. Hoctor et al., Supreme Court of Nebraska (Feb. 13, 1914), 145 Northwestern Reporter, page 704.*—In this case the district court of Douglas County, at the instance of one Alonzo A. Wright, had enjoined the mayor, the members of the city council, and the city clerk of South Omaha, their successors in office, and certain other defendants from carrying out certain contracts relating to labor to be performed on the streets, sewers, etc., of

the city. A statute of the State undertook to provide that work done on streets, sewers, parks, etc., in cities of the class governed by the act (of which South Omaha was one), should be done by union labor and paid for at the rate of two dollars per day, eight hours to constitute a day's labor. (Laws of 1909, ch. 17, sec. 123.) It was claimed that, because of this statute and the insertion of a reference to it in the advertisement for bids (as the statute provides), competition in respect to the proposed improvements was restricted to such contractors as were able to employ union labor, and that fair and free competition was destroyed; that the union labor provision was unconstitutional, and that the rate of wages prescribed and required to be paid was excessive and unreasonable, increasing the cost of improvements to the plaintiff and other taxpayers of the city; for all which reasons the contracts were null and void. The provision as to an eight-hour day was also attacked, but was not ruled upon by the court.

The court below had held the union labor provision unconstitutional, which finding the supreme court affirmed, Judge Hamer, speaking for the court, saying in part:

It is now argued that the provision in the law concerning union labor will make no difference in the cost of improvements. While this may be true, the method proposed is undemocratic. The tendency to exclude bidders by providing that laborers shall belong to a certain restricted class is to prevent competition and increase the probable cost of improvements.

It is argued that the law can not be unconstitutional for the reason alleged that no man may put his finger upon that section of the constitution which forbids this manner of letting the contract.

The trial judge gave great care and study to the preparation of his opinion, and it is deserving of careful consideration.

Judge Hamer then reviewed a number of decisions involving like principles to the case in hand which had been considered below, among them being Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314 (see Bul. No. 22, p. 478), Atlanta *v.* Stein, 111 Ga. 789, 36 S. E. 932, and cases showing the attitude of the courts of last resort in Iowa, Montana, New Jersey, Tennessee, etc., in all of which such provisions were held objectionable as tending to create monopoly and restrict competition. Continuing, the court said:

It is maintained in the brief of defendants that the digging in the streets contemplated by the contracts is common labor. If that be true, that is an additional reason why the contract should not exclude it in favor of union labor. The common people would be given an opportunity to perform common labor. They are interested in the question as wage earners. They need the labor for the support of themselves and their families. If they are denied a chance to support themselves, they suffer directly, and the State is injured by their loss, the taxpayer is liable to be compelled to pay more taxes than he otherwise would, and he therefore sustains an

injury, and lack of prosperity to both wage earner and taxpayer brings loss and lack of prosperity to the State. The thing done is contrary to the spirit of our Government, which contemplates the best that may be honestly and fairly done for all its citizens. A favor to one citizen ought not to be sustained by the burden placed upon the shoulders of another. Therefore in this case the unskilled laborer who can dig in the streets ought not to be cut off from that work by a provision which calls for union labor; neither should the taxpayer be compelled to pay a higher rate because only union labor can be employed by the contractor. And there should be no fixed rate of wages provided by the legislature without reference to the going wages for that kind of work at the time and place where it is to be performed. The contracts were not let so as to admit of competition. Section 128, ch. 17, Laws of 1909, contains a provision that contracts of this character shall be awarded "to the lowest responsible bidder of the class [of material] so designated." The manner of letting these contracts would take the private property of the taxpayer without due process of law and is in violation of section 3, article 1, of the Bill of Rights.

We are of the opinion that the evidence fully sustains the findings and judgment of the district court on behalf of the plaintiff; that the so-called union labor provision found in the law governing cities of the South Omaha class is unconstitutional and void; that the tendency of such provision and its insertion in the advertisements calling for bids is to limit and restrict the sources of labor and to limit and restrict competitive bidding; that the contracts are void so far as they have been so declared by the judgment of the district court; and that the plaintiff is entitled to the relief given him.

Motions for rehearing were later overruled by the court; the opinion on rehearing, also written by Judge Hamer, is found in 146 Northwestern Reporter, page 997.

WAGES—ASSIGNMENT—CONSENT OF WIFE—CONSTITUTIONALITY OF STATUTE—*Cleveland, Cincinnati, Chicago & St. Louis Railway Co. et al. v. Marshall, Supreme Court of Indiana (June 9, 1914), 105 Northeastern Reporter, page 570.*—H. B. Marshall, an employee of the railway company named, made an assignment of his wages in favor of the two defendants named Scanlan, to pay for a watch. The assignment provided that the total amount should be due on discharge, and when he was discharged on October 16, 1912, nearly the whole of his wages for the portion of a month were held on the assignment. He brought action against the company for the wages, and, having offered to return the watch and pay a certain amount in settlement, against the other defendants for cancellation of the assignment. Marshall was a married man, living with his wife, and Acts of 1909, ch. 34, sec. 4, prohibits the assignment of wages by a married man without his wife's consent in writing and acknowledged. It was contended by the defense that this section applied only to

wage brokers, to whom sections 2 and 3 of the same act were limited; also, that the provision was unconstitutional. The court denied both of these contentions, and affirmed a judgment of the superior court of Marion County in favor of the plaintiff. The following quotation is from the opinion as delivered by Judge Morris:

Improvident debts of the head of the family constitute an important factor, not only in the destitution and illiteracy of the State's youth, but hinders the normal development of their physical, mental, and moral powers. By restricting the power of the householder to pledge his future earnings and those which he has not yet received, the tendency to heedless extravagance is measurably curtailed, and we are of the opinion that the legislation here in controversy is well within the limits of the State's police power, and offends no provision of either State or Federal constitution.

WAGES—PAYMENT—REDEMPTION OF SCRIP—CONSTITUTIONALITY OF STATUTE—*Regan v. Tremont Lumber Co., Supreme Court of Louisiana (Dec. 15, 1913), 63 Southern Reporter, page 874.*—The plaintiff Regan recovered judgment from the company named, basing the demand on the ownership of a large number of coupon books issued by the company to laborers and employees in lieu of money due them for labor and services performed. Act No. 228 of 1908 provides that such checks, etc., shall be payable in money and to the bearer, on demand, and that on failure so to pay recovery may be had with legal interest and 10 per cent attorney's fees. The constitutionality of the statute was attacked by the company on the grounds that it impairs the obligation of contracts, deprives of property without due process of law, and denies equal protection of the laws. In affirming the judgment of the court below, the court, speaking by Judge Land, said:

As the questions raised are Federal, it is proper to consider the adjudications of the Supreme Court of the United States on the subject matter.

In Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. 1 [Bul. No. 40, p. 619], the syllabus reads as follows:

"The act of the Legislature of the State of Tennessee * * * of 1899 (ch. 11, p. 17), requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers, * * * does not conflict with any provisions of the Constitution of the United States relating to contracts."

The provisions of the Tennessee statute are, in substance, similar to the provisions of act No. 228 of 1908. The constitutionality of this statute was affirmed both by the court of last resort of the State of Tennessee, and also by the Supreme Court of the United States.

We are constrained to follow that decision as the law of the land until it is reversed by the high court by which it was rendered.

WAGES—PAYMENT IN SCRIP—CONSTITUTIONALITY OF STATUTE—*Keokee Consolidated Coke Co. v. Taylor et al., United States Supreme Court (June 8, 1914), 34 Supreme Court Reporter, page 856.*—Taylor and others brought action to recover in cash on store orders payable only in merchandise, issued in payment for labor. A Virginia statute forbids the issuance by mining and manufacturing companies of orders not purporting to be redeemable for their face value in money. The objection was urged that the statute is class legislation, and inconsistent with the fourteenth amendment. The Court of Appeals of Virginia affirmed a judgment in favor of the plaintiffs, and the Supreme Court also affirmed these judgments in an opinion by Mr. Justice Holmes from which the following is quoted:

While there are differences of opinion as to the degree and kind of discrimination permitted by the fourteenth amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. [Cases cited.] The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need.

WAGES—PAYMENT ON DEMAND AFTER DISCHARGE—CONSTRUCTION OF STATUTE—PIECEWORK—*Kirven v. Wilds et al., Supreme Court of South Carolina (Aug. 24, 1914), 82 Southeastern Reporter, page 672.*—John K. Kirven, who had been a pieceworker, recovered judgment against his employers in the circuit court of Kershaw County for $100, the accumulated penalty provided by Civ. Code S. C. 1912, sec. 3812, for failure to pay wages due him on demand after his discharge. This judgment was affirmed, the court, after showing that there was ample evidence that the plaintiff was discharged, saying:

The only other question is whether plaintiff was a laborer for wages, so as to bring him within the provisions of the statute. He testified that he was paid according to the number of "hanks" he made. Wages may be measured by the piece as well as by the time employed. (40 Cyc. 240.)

WAGES—PAYMENT ON TERMINATION OF EMPLOYMENT—RAILROADS—CONSTITUTIONALITY OF STATUTE—*Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Schuler, Supreme Court of Indiana (June 12, 1914), 105 Northeastern Reporter, page 567.*—Section 2683c, Burns' Ann. Stat. 1914, reads as follows:

Any railroad company employing men shall within seventy-two hours after any employee voluntarily quits such service or is discharged, pay to such employee in full the wages due to the time of quitting of such service: Provided, demand is made therefor and upon failure so to do, such railroad company shall be liable to such employee for each day until such payment is made in a sum equal to the daily wage of the employee.

George E. Schuler brought action under this provision, and judgment was in his favor in the superior court of Madison County. On appeal this judgment was reversed and the statute declared unconstitutional. Judge Spencer, in delivering the opinion of the court, said:

There is nothing in the act under consideration which suggests a valid basis for the classification which it makes. It is not designed to regulate the business of common carriers, nor has it any reference to the hazards peculiar to the operation of railroads. In brief, no good reason appears for requiring railroads to pay in accordance with the provisions of this act those who leave their service, while manufacturing corporations and other employers of labor are excepted from its operation.

It will be noted that the act applies to any employee who voluntarily quits the service of a railroad, as well as the one who is discharged. It must therefore apply as well to one who voluntarily quits the service without just cause of complaint as to one who is discharged by the corporation without any reason therefor. If the act applied only to discharged employees a different question would be presented. When the act was passed there was no statute relating to the time of payment of wages of railroad employees, but in 1913 (Acts 1913, p. 47; section 7989a, Burns 1914) a statute was passed requiring all employers of labor to pay their employees semimonthly. If the act in controversy can be held valid, we would have a present situation where the faithful employee who is working regularly can only demand payment of his wages semimonthly, while one who voluntarily quits the service of a railroad company without cause must be paid in 72 hours. There is no just reason for such discrimination. The classification made in the act before us is arbitrary and without any valid reason for its basis.

WAGES—RATES ON PUBLIC WORKS—MUNICIPAL ORDINANCE—CONSTITUTIONALITY—POWERS OF MUNICIPAL CORPORATIONS—*Malette v. City of Spokane, Supreme Court of Washington (Dec. 31, 1913), 137 Pacific Reporter, page 496.*—This case was before the full court on a rehearing following a decision by the first division, which was at this time reversed. The earlier opinion was reported in Bulletin No. 112, on page 132, the statement of facts being as follows:

C. E. Malette was a property holder in the city of Spokane, against whose property an assessment was made to pay the cost of the laying of a sewer in a street on which his property abutted. An ordinance

of the city, following the State law, had declared eight hours to be a day's work on any work done for the city, and further fixed a wage rate of not less than $2.75 per day for all laborers employed by the day either directly or indirectly by the city; this rate was subsequently raised to a minimum of $3 per day of eight hours. Current rates of wages for labor of the class employed ranged at the time from $1.85 to $2.25 for a 10-hour day, and Malette objected to the assessment for the cost of the sewer construction on account of the excess of the wages named in the ordinance over the current rates of wages, 59 per cent of the cost of the work being paid out to common labor. The contentions of Malette were that the ordinance was unreasonable, contrary to public policy, and oppressive; and secondly, that the assessment was in contravention of the constitution of the State and of the United States in taking property without compensation and without due process of law.

The trial court, the superior court of Spokane County, had given judgment in favor of the city, sustaining the ordinance, which judgment had been reversed by the first division of the supreme court. In taking this position, the supreme court stated that it did not pass upon the constitutional questions involved, but held that an objecting property owner could avail himself of the privilege of insisting that the assessment upon him should be based upon the legitimate cost of the work, regarding the city as the agent given for a season "the privilege of disbursing the taxpayers' money, money that is not city nor public money, but money of the individual."

The present hearing was before the full court, the case being much more thoroughly argued than on the first presentation. Two of the judges concurring in the earlier opinion concurred at the present time in overruling the earlier decision, while three of the nine judges constituting the full bench dissented from the present opinion. The opinion in this case was delivered by Judge Ellis, and discusses extensively the points involved and the related cases. Dependence is largely placed in the cases State *v.* Atkin, 64 Kan. 174, 67 Pac. 519 (Bul. No. 40, p. 604); Atkin *v.* Kansas, 191 U. S. 207, 24 Sup. Ct. 124 (Bul. No. 50, p. 177); and Byars *v.* State, 2 Okl. Cr. 481, 102 Pac. 804 (Bul. No. 86, p. 332). These were cases in which eight-hour legislation was considered, which, as is pointed out in the present opinion, is in itself legislation tending to fix a minimum daily wage above the current rate for the same class of work, inasmuch as the law contemplates no reduction in the per diem wages currently paid in the locality where the work is performed, but does reduce the customary working time. It was held that this point was still further emphasized by the provisions of the Kansas statute that overtime work should be paid for at a rate one and one-half times that allowed for regular service. In this connection Judge Ellis said:

Assuming, as seems to be assumed both in argument and in the original opinion in the case before us, that any minimum of wages fixed above the current rate necessarily increases the cost of the work (a thing by no means certain), then it can not be denied that a provision such as above quoted from the Kansas law would have precisely the same effect. It is too plain for argument that every maximum hours law prescribing less than the number of hours usually constituting a day's labor, when coupled with a provision for minimum pay not less than the current rate for a day's labor, is a minimum wage law pure and simple, prescribing a wage above the current rate for the same class of labor. Every objection, therefore, which can be logically or legally raised against an undisguised minimum wage law, can be advanced, just as logically and just as legally, against the usual eight-hour law.

A considerable quotation was made from the opinion in the case Atkin *v.* Kansas, in which it was said by Mr. Justice Harlan, who delivered the opinion, that "It belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." Following this Judge Ellis said:

While the Supreme Court did not deem it necessary to place the decision on any other ground than the power of the State to prescribe the terms upon which contracts with it or its agent, the municipality, might be made, it is significant that it also suggests another ground, namely, the promotion of the "general welfare of employees, mechanics, and workmen, upon whom rests a portion of the burdens of government," and as tending to the production of better citizenship, thus unmistakably intimating that the act might also be soundly sustained as an exercise of the police power

It was contended on behalf of the plaintiff, Malette, that the fact that the present case arose at the instance of a protesting taxpayer or property holder took it out of the class of cases cited and that the nature of the payment by assessments removed it from the effect of the decisions referred to. Cases were cited showing the views of various courts on the point involved, the doctrine being laid down that "the manner of payment can not change the character of the work." Judge Ellis then said:

The foregoing authorities make it clear that, if street-improvement work paid for by special assessments is public work performed under authority conferred by the sovereign power of the State, no constitutional guaranty is impaired by the ordinance in question. That such work is public work can not be questioned. The power of the city to levy special assessments to pay for public work is referable solely to the sovereign power of taxation delegated to it by the State under direction of the constitution. We must not confuse the mode of payment for public work with the character of the work. We must not confound the mode of payment with an ownership or property interest in the subject matter to which the work is applied.

We must not confound the mode of taxation with the purpose of taxation. The work of improving a public street is public work and the street is a public street. The special tax is to pay for public work. The right to levy a special tax to pay for public work rests not in the citizen's property interest in the work itself, but only in the special benefit of the work to his property. The work is none the less public work done by the city as an agency of the State, though done also in a quasi corporate or administrative capacity, as distinguished from its purely governmental functions.

A further contention was that, even if the State had power to enact a law fixing minimum wages on public works, a city had no such power. "It is argued that the ordinance is void because it seeks to declare a matter of public policy, and it is asserted that neither this court nor the city council has any power to define the question of policy." As to this Judge Ellis said:

As far as this court is concerned, the truth of the claim is so elementary that it may be passed with a simple admission. As to the power of the council, the question can hardly be so summarily dismissed. It is the clear intention of the constitution to give to cities of the first class, of which the city of Spokane is one, the largest measure of local self-government compatible with the general authority of the State. Constitution, art. 11, sec. 10. It can "make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Constitution, art. 11, sec. 11. It can make "all regulations necessary for the preservation of public morality, health, peace and good order within its limits." Rem. & Bal. Code, sec. 7507, subd. 36. As to matters of local concern, wider powers than those conferred upon cities of the first class by the constitution and laws of this State can hardly be conceived. It seems plain, therefore that, unless the ordinance in question is contrary to some public policy of the State either expressed by statute or implied therefrom, it must be held valid.

As we have seen, the State eight-hour law contains in itself a minimum-wage provision as to emergency overtime, which is in excess of the prevailing wage. The eight-hour law manifests a public policy on the part of the State to better the condition of laborers employed upon public work. The purpose of the minimum-wage ordinance is precisely the same, and the policy which sustains the one warrants the other. We fail to find wherein the ordinance in question is contrary to any public policy of the State, either as declared or implied in any statutory enactment. On the contrary, it is in accord with the policy which underlies the eight-hour law.

Other objections of a somewhat technical nature were urged, which the court overruled.

The last objection considered was as to the reasonableness of the statute, Judge Ellis saying that, in its last analysis, the opinion on the first hearing rested on the assumption that any minimum of wages materially above the prevailing rate is unreasonable per se. The duty of the courts in the consideration of the reasonableness of statutes was discussed, with reference to authorities, and a report

of the State commissioner of labor on the increase in the cost of living was quoted from, following which Judge Ellis said:

In view of these conditions, can anyone say that a wage of $2.75 a day is, as a matter of law, more than a reasonable living wage? The unit, as applied to the problem of living, is the family, not the individual, and $2.75, or even $3, a day can hardly be complacently pronounced as an unreasonable sum for supporting such a unit. To hold that the payment of any sum which we can not say is above a reasonable living wage, though it may be above the prevailing rate of wages, is a mere gratuity, would be to sacrifice the fact to a mere term. Such a holding would be an indictment of our civilization.

The judgment of the court below was therefore affirmed, the statute being held to be constitutional and controlling in the matter.

WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—*Erie Railroad Co. v. Williams, Supreme Court of the United States (May 25, 1914), 34 Supreme Court Reporter, page 761.*—The railroad company named brought suit against John Williams as commissioner of labor to restrain him from instituting actions to recover penalties for noncompliance with the provisions of the labor law of the State of New York, which require plaintiff to pay its employees semimonthly and in cash; the object being to test the constitutionality of the law. The complaint was dismissed by the special term of the supreme court, and this decision was successively affirmed by the appellate division and by the New York Supreme Court, from which appeal was taken to the Supreme Court of the United States. In again affirming the judgment, and sustaining the constitutionality of the law, the court, speaking by Mr. Justice McKenna, said in part:

The contention of plaintiff is that the labor law is repugnant to the fourteenth amendment, "in that it deprives the company of property, and specifically deprives the company, and those of its employees to whom it applies, of liberty, without due process of law." The contention may be limited at the outset to the rights of the company. Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one, with the consequence of expense and inconvenience. It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power. [Cases cited.]

It would seem to be the contention of plaintiff that it acquired by its charter a vested right to deal with its employees according to its own judgment, and, as alleged in its answer, that it was vested with its powers as a railroad and to contract and be contracted with, for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as might or should be agreed on. We may, in answering the contention, put aside the rights of natural persons and the rights which

might exist under a constitution which did not reserve control in the State. The effect of the control reserved was to make plaintiff, from the moment of creation, subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body. And whether expedient or not is a question for the legislature, not for the courts. In other cases the effect of the reserved power of amendment is said to be to make any alteration or amendment of a charter subject to it which will not defeat or substantially impair the object of the grant or any right vested under the grant. [Cases cited.] Surely the manner or time of paying employees does not come within such limitation. It is a matter of pure administration, not comparable in its burden to those sustained in the cases which we have already cited.

The next contention of plaintiff is that the cost of paying twice a month is a direct burden on interstate commerce. It is not necessary to review and compare the cases in which this court has pointed out the difference between a direct and indirect burden of State legislation upon interstate commerce, or the power of the States in the absence of regulation by Congress. It is enough to say in the present case that Congress has not acted, and there is not, therefore, that impediment to the law of the State; nor is there prohibition in the character of the burden. The effect of the provision is merely administrative, and so far as it affects interstate commerce, it does so indirectly. The court of appeals, as we have seen, considered that the law relates to the wages of railway servants employed wholly within the State, and to those whose duties take them from the State into other States. In other words, did not make it applicable to those employed in other States, and it therefore does not embrace all of the employees of plaintiff, and the contention based upon its application to all is without foundation.

The last contention of plaintiff is that the statute violates the fourteenth amendment, "in that it denies to the employees of the Erie Railroad Company the equal protection of the laws." Considerable argument is made to support the contention, in which a comparison is made between the employees—mechanics, workmen, and laborers—to whom the law applies, and the other employees of the company, and it is declared that all, if any, suffer from monthly payments, and all are entitled, therefore, to receive the benefit of semimonthly payments. But, as we have said, employees are not complaining, and whatever rights those excluded may have, plaintiff can not invoke.

WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—IMPRISONMENT FOR DEBT—*State v. Prudential Coal Co., Supreme Court of Tennessee (Oct. 31, 1914), 170 Southwestern Reporter, page 56.*—The company named was indicted for violation of chapter 29, Acts of 1913 (1st ex. sess.), the act being a penal provision requiring the payment of wages in cash when due. The company filed a demurrer to the indictment, which was sustained by the criminal and law court of Morgan County, and this action was affirmed by the supreme court. The exact nature of the statute, and the authority

of the court for holding it unconstitutional, are given in the following extract from the opinion delivered by Judge Williams:

The statute under test provides that all corporations doing business within this State which shall employ any salesmen, mechanics, laborers, and which operate a commissary or supply store in connection with their business, shall pay the wages, balance then due such employee, in lawful money semimonthly on the 15th and 30th of each month, after deductions for advancements have been made.

It is provided in the second section of the statute that a violation of the first section, above outlined, shall be a misdemeanor punishable by fine therein set forth. Imprisonment is not in terms provided to be imposed.

The question thus raised is ruled, in principle, by the case of State *v.* Paint Rock Coal Co., 93 Tenn. 81, 20 S. W. 499, in which a statute was held unconstitutional which provided that it should be a misdemeanor for any person, firm or corporation to refuse to cash or redeem in lawful currency, any check or scrip within 30 days of issuance, and that, upon conviction, a prescribed fine should be imposed.

The court, after remarking upon the fact that it was not for any fraudulent intent of the person or corporation issuing the check or scrip that he or it was sought to be thus punished, said:

"The act of the legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the nonpayment of debts evidenced by check, scrip, or order, and for such crime provides a penalty, which may or may not be followed by imprisonment. In that way and for that reason the act is violative of the spirit, if not the letter, of the constitutional provision above cited. It is an indirect imposition of imprisonment for the nonpayment of debt, and is therefore clearly within the constitutional inhibition."

On failure to pay any fine adjudged, by operation of law imprisonment would be imposed on the violator of the statute, if valid.

Obviously the purpose of the statute in question was to enforce the payment of contract wages, and at stated periods, under the penalty prescribed, and it must fall as unconstitutional.

WORKMEN'S COMPENSATION—ABROGATION OF DEFENSES—COMPULSION—LIMITING AMOUNT OF RECOVERY—CONSTITUTIONALITY OF STATUTE—*Kentucky State Journal Co. v. Workmen's Compensation Board, Kentucky Court of Appeals (Dec. 11, 1914), 170 Southwestern Reporter, page 1166.*—This case was before the court of appeals on questions of the constitutionality of the workmen's compensation act of the State, chapter 73, Acts of 1914. The law provided, among other things, that all persons, firms, and corporations regularly employing six or more persons for profit for the purpose of carrying on any class of business designated in the act should report to the compensation board created by the statute, giving the place of their business, the number of their employees, the amount of their pay roll, and such other information as the board might request, by filling out

blanks furnished by it and returning them to the board. The Kentucky State Journal Co. refused to fill out the blanks submitted to it, and action was brought in the circuit court of Franklin County to compel it to do so. Judgment was against the company in this court, but the case was appealed, the court of appeals reversing the judgment on the ground that the law in question was unconstitutional.

The provisions of the act which were designated by the judge who delivered the opinion as "the storm center of the fight" were those permitting an employee to accept the benefits of the compensation act and waive all causes of action conferred by the constitution or statutes of the State or by the common law, such waiver to be binding upon himself and all persons claiming under or through him; providing that such a contract of waiver shall be conclusively presumed where the employer had elected to make payments into the compensation fund of the State if the employee continues to work without filing a notice of rejection before receiving an injury, provided that the employer has given notice of his coming under the act by posting printed or typewritten notices in conspicuous places about his establishment; providing that the employer of a workman who rejects the provisions of the compensation act after the employer has elected to accept them shall have all the defenses of contributory negligence and assumed risks in their full extent, no other defense being withdrawn from the employer; and providing that where the employer elects not to come under the act he shall be deprived of the defenses of fellow service, assumed risks, and contributory negligence. These provisions were held to be compulsory in effect and to establish limits on the amounts recoverable in violation of the constitution of the State, so that the entire statute must fall.

The opinion of the court was delivered by J. L. Dorsey, one of two special judges appointed on account of the interest of some of the judges in the result of this trial. The decision was rendered by a divided court, three of the seven favoring the upholding of the statute on the ground that it was in effect, as in form, elective, and citing the series of decisions by the courts of last resort of Washington, Wisconsin, Ohio, and other States in which statutes of this same general nature have been declared constitutional.

Judge Dorsey, having stated the facts and quoted the provisions of law particularly in question, spoke for the most part as follows:

Appellant's contention is that this act is invalid, and while counsel for appellant base their reasons for reversal on many grounds, this court will content itself with an examination and inquiry into the following four grounds:

(1) It is claimed that the act is violative of section 54 of the constitution, which provides, "The general assembly shall have no power

to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

(2) The act is compulsory in that both the employers and employees are compelled to accept its provisions, and, being compulsory, it deprives appellant of its property without due process of law, and violates section 54 of the constitution.

(3) The act confers upon the workmen's compensation board judicial powers contrary to sections 109 and 135 of the constitution.

(4) The act is in contravention of section 241 of the constitution, which reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporation and persons so causing the same," etc.

Referring to the provisions of the act (sec. 29) as to agreements to accept benefits under the act, and waive all other rights of action, the court said:

Under this section the compensation of the injured man is limited to the amount specified in the schedule of the act. This constitutes a limitation upon the amount of his recovery under section 54 of the constitution providing that the legislature "Shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property." But we think it is within the power and right of an employee to waive this limit of recovery for injury, by contract, if such contract is freely and voluntarily made.

There may never have been a word or a syllable between the employer and the employee in regard to a contract for employment to labor, yet the act provides that such contract shall be conclusively presumed to have been made between the employer and employee, if the employee continues to work for the employer after the employer has posted notices in some conspicuous places about his place of business, to the effect that he has paid his premiums into the fund and accepted the provisions of the act.

We will go a little further and examine the provisions of section 32 of this act. Suppose the employee, desiring to rely upon the causes of action given him by the constitution and laws of this State, does not accept the so-called benefits of this act, then in that event, under section 32 of this act, the employee, prior to receiving an injury, is compelled to give notice to his employer and to the board that he will not accept the provisions of this act. This notice must be served as provided by the Civil Code for serving notices. So if, after this notice has been served, the employee should be injured or killed while in the service of the employer, he or his personal representative may sue his employer to recover damages; then his right to recover is barred by the provisions of this act, if his injury was caused or contributed to by the negligence of any other employee of said employer, or if the injury was due to any of the ordinary hazards or risks of the employment, or if due to any defect in the tools, machinery, appliances, instrumentality, or place of work, if the defect was known or could have been discovered by the injured employee by the exercise of ordinary care on his part, or was not known or could not have been discovered by the employer by the exercise of ordinary care in time to have prevented the injury, nor

in any event if the negligence of the injured employee contributed to such injuries. Now when his right to recover is restricted by such qualifications and conditions as these, we think these qualifications and conditions constitute, within the meaning of section 54 of the constitution, not only a limitation upon the amount to be recovered, but practically destroy his right to recovery.

When the employer accepts the provisions of this act, the employee is automatically drawn into this so-called contract and made subject to its provisions upon pain of being deprived of all his causes of action. It can not then be said that he has voluntarily elected to accept the provisions of the contract because he is told that unless he accepts the provisions of this act he will be deprived of all these causes of action.

In the light of section 54 of the constitution, we must treat the contract made by the employee under the provision of this act as compulsory and therefore void.

If any employer should determine that he wanted to carry his own risk and make his own contracts, instead of having the law to make a contract for him, he can do so. He can operate his industries and pursue his business, however hazardous, and ignore this act entirely. But what is the result? The law says to this employer:

"You may go on with your business industries, but if one of your employees is injured or killed, you shall not avail yourself of the following defenses: The defense of the fellow servant; the defense of the assumption of risk; or the defense of contributory negligence."

These are practically all the defenses the employer has, and they are taken from him unless he accepts the provisions of this act. He can not, under these conditions, successfully defend any suit for personal injury. If he is sued by an injured employee, about the only question a jury will have to determine will be the amount of recovery.

Under these conditions an employer has practically no choice, no volition. If he continues to operate his business, he is compelled to pay his premiums into the fund and accept the provisions of the act.

We can not subscribe to the proposition, that this is a voluntary contract, even on the part of the employer.

The act under consideration is further vigorously assailed because, as contended by appellant's counsel, it contravenes section 241 of the constitution of the State of Kentucky [providing for recovery for injuries causing death].

If an injury to an employee should result in his death, his personal representative is authorized to recover damages from the negligent person or corporation causing his death. This is an absolute right given by this section of the constitution to his personal representative to recover damages for such negligence as has resulted in his death. And it is immaterial, under this section of the constitution, whether the money recovered goes to the children or parents, or becomes a part of his personal estate. The disposition of the money after his death can not affect the right of the personal representative to recover. It may go to his heirs, or it may become a part of his personal estate and go to his creditors.

The provisions of the act defining beneficiaries were then cited, as well as that giving the compensation board the right to collect benefits

for its own use where no beneficiary under the act is found. As to this the court said:

It seems clear to us that such parts of this act as take from the personal representative or estate of a deceased employee, who left no dependents surviving him, any part of the compensation due such representative or his estate, and directs its payment into this fund for the benefit of other people, is a violation of the above section 241 of the constitution. The legislature has no right to limit the damages recovered, for the death of an employee negligently killed, to his dependents.

Nor do we think the legislature has the right to take what is due the estate of one man and give it to another. While the legislature may say how the recovery may go and to whom it shall belong, it can not say this recovery may be had from the employer; then in the next breath give it to this fund. It then necessarily follows that such parts of this act under consideration as give to this board of compensation without the voluntary contract of the employee the right to recover from the employer for the death of the employee leaving no dependents, and such other parts of the act as coerce the employee to consent or to make a contract that such compensation shall be paid into this compensation fund, are unauthorized and void.

Reference was then made to the compensation acts of the various States having laws of the same or a similar nature, following which the opinion continues:

It will be observed here that there was no constitutional provision in the constitution of Washington, Ohio, Wisconsin, or New York similar to section 54 of the Kentucky constitution, which denied to the Legislature of the State of Kentucky, "the power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." The workmen's compensation act in all of the States above named, as well as in New Jersey, Massachusetts, and California, differ from the Kentucky act in that there is an appeal granted to the State courts, or a jury is permitted to fix the amount of compensation.

This is the first workmen's compensation act ever passed by our legislature, consequently we have no decisions in this State to guide us, nor do the compensation acts of the other States furnish us very much light, because the constitutions of these States materially differ from the constitution of Kentucky. The Kentucky constitution has limitations and restrictions above referred to that are not found in any of these States which have adopted compensation statutes. And for this reason a lengthy discussion of other compensation acts would be superfluous. This court is bound by the limitations contained in the Kentucky constitution.

Referring to objections made to the adequacy of the provisions of the statute, and the policy therein adopted, the court said:

A sufficient answer to all this is that these are matters addressed entirely to the wisdom of the legislature and can be regulated as necessities may require.

The opinion concludes as follows:

The right of the State to regulate the management of industries arises from the fact that their operation may affect injuriously the health, safety, morals, or welfare of persons engaged in such employments. And these come within the police power of the State, a power sometimes difficult to understand and usually more difficult to define. It is contended for appellee that the act in question grows out of the pursuit and control of industries, by reason of which its operations come within the police power of the State. This is perhaps true, and the legislature has the right to create a compensation board and put it into operation free from the objectionable features of the present act.

This court looks with great favor upon a workman's compensation act that would deal justly with the employer and employee, one that would permit both to voluntarily take shelter under its provisions. And it is not the purpose of the court or the intention of this opinion to lay down any rule that will preclude the legislature from enacting a compensation act that will conform to the constitution, as we are clearly of the opinion that the legislature may in conformity to the constitution adopt an effective compensation law. But this court can not consent that the legislature has the power to put this compensation act in operation by means of compulsory contracts.

Whether the constitutional restrictions herein above discussed are wise or unwise, this court is bound to obey them. It has been well said by an eminent judge that: "The constitution is the paramount law; the judge, legislature, and every citizen are bound by it. The powers of legislation are limited by it, the rights of the citizen are guaranteed and protected by it, and the courts are bound by their oaths to enforce it."

On a petition for rehearing, which was overruled (Jan. 27, 1915), Judge Dorsey said:

In the petition for a rehearing we are requested to modify and extend the opinion. While in no particular receding from the position taken in the opinion herein, we have thought proper to make certain statements therein more explicit:

First. The provisions of the present compensation act, as far as they affect the employer, are unobjectionable, as they do not conflict with any provisions of the constitution.

Second. Any employee coming within the provisions of the act may voluntarily agree to accept its provisions fixing and limiting his recovery in case of injury.

Third. He may likewise voluntarily accept the provisions of the act fixing the amount that shall be recovered in the event of his death, and said sum shall be paid to his dependents, if he leaves any, and if not, to his personal representative. The legislature has no power to direct that this sum shall in any event be paid into the compensation fund.

Fourth. Some provision should be made in the act whereby the employee signifies his acceptance of the provisions of the act by some affirmative act on his part. Silence on this subject should not be construed into acceptance.

Fifth. Provision should be made in the act for appeal to a court of competent jurisdiction for review in all cases where compensation is

denied or where a less sum is allowed by the board than that claimed by the injured employee.

For the reasons indicated in the opinion, the act in its entirety is void.

WORKMEN'S COMPENSATION—ABROGATION OF DEFENSES—EXCLUSION OF SMALL EMPLOYERS—CONSTITUTIONALITY OF STATUTE—*Jeffrey Manufacturing Co. v. Blagg, Supreme Court of the United States (Jan. 5, 1915), 35 Supreme Court Reporter, page 167.*—This action was based on provisions of the workmen's compensation act of Ohio, the question being raised as to the constitutionality of a provision abrogating the defenses of certain employers. This act (sections 1465–37 to 1465–108, G. C.), in its original form, established an elective compensation system with an insurance fund to be maintained by premium payments by employers accepting its provisions. Employers of five or more persons failing to accept the provisions of the act were deprived of the defenses of fellow service, contributory negligence and assumption of risks. Under an amended constitution the law in its present form is compulsory, but the case in hand arose under the elective act. The defendant company, plaintiff in error in the present instance, was sued by Harry O. Blagg to recover damages for injuries received by him while in its employment, and, not having accepted the provisions of the act, it was deprived of the defenses named. Blagg recovered a judgment in the court of common pleas of Franklin County, Ohio, which judgment was affirmed in the court of appeals and the supreme court of the State. The case was then brought on a writ of error to the Supreme Court of the United States on the question of constitutionality, and specifically as to the validity of the provision distinguishing between employers of five or more workmen and those employing less than five persons. The Supreme Court, speaking by Mr. Justice Day, sustained the law as constitutional in an opinion which, following the statement of facts, reads mainly as follows:

The fact that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones, is conceded in argument, and, is, we think, so obvious, that the State legislature can not be deemed guilty of arbitrary classification in making one rule for large and another for small establishments as to these defenses.

The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employee in

a shop with five employees with those having less. No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, can not be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. [Cases cited.]

This court has many times affirmed the general proposition that it is not the purpose of the fourteenth amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority.

Certainly in the present case there has been no attempt at unjust and discriminatory regulations. The legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employees. It included, as we have said, all of that class of institutions in the State.

This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it, but if the State has the right to pass police regulations based upon such differences,—and this court has held that it has,—we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours.

We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employees, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law, and leaving the employers of less than five out of the act was classification of that arbitrary and unreasonable nature which justifies a court in declaring this legislation unconstitutional.

It follows that the judgment of the Supreme Court of the State of Ohio is affirmed.

WORKMEN'S COMPENSATION—ACCEPTANCE OF ACT BY EMPLOYER—TIME OF TAKING EFFECT OF ACT—*Coakley v. Mason Manufacturing Co., Supreme Court of Rhode Island (July 10, 1914), 90 Atlantic Reporter, page 1073.*—Marian Coakley brought an action in the superior court of Providence and Bristol counties against the com-

pany named to recover damages for personal injuries received May 19, 1913. The company's defense was based on the fact that on the 26th day of September, 1912, it had filed its acceptance of the compensation act, so that it was liable only under the terms of this act, which had been passed by the legislature in the previous April, to take effect October 1. It was contended by Coakley that this acceptance was not valid, and that the act was not in effect for any purpose previous to October 1; but the court held that the acceptance was valid, and any proceedings must be brought under the act, which view the supreme court affirmed.

WORKMEN'S COMPENSATION—"ACCIDENT"—DEFINITE TIME AS FACTOR—*Liondale Bleach, Dye & Paint Works v. Riker, Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 929.*—Judgment was rendered for the employee, Riker, in the court of common pleas of Morris County, under the workmen's compensation act. This was reversed on appeal, and a new trial granted by the supreme court. Riker had worked in the bleachery of the defendant company 10 days when he was affected with a rash, pronounced to be a condition of eczema, which might have resulted from the acids used in the bleachery.

In rendering the decision, Judge Swayze, who delivered the opinion, reviewed the most important English cases bearing on the point as to whether this state of facts constituted an "accident" under the statute, and concluded as follows:

We need not, of course, consider cases where there has been an accident and disease has followed. We have considered that question in Newcomb *v.* Albertson, 89 Atl. 928 [see p. 247].

The English courts seem at last to have settled that, where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no "injury by accident" within the meaning of the act. This seems a sensible working rule, especially in view of the provisions of the statute requiring notice in certain cases within 14 days of the occurrence of the injury—a provision which must point to a specific time.

We need not consider in this case the question of the effect of a finding by the trial judge as in Brintons, Limited, *v.* Turvey [an English case in which a wool comber was infected by anthrax]. Not only is there no such finding of fact, but the learned trial judge rested upon a construction of the statute which makes the word "accident" include "those events which were not only the result of violence and casualty, but also those resulting conditions, which were attributable to and caused by events that take place without one's foresight or expectation." This, however, is to make the employer's liability turn on resulting conditions rather than on the fact of injury by accident. There may indeed be compensation awarded for resulting conditions where you can put your finger on the accident from which

they result; but the ground of the action fixed by the statute is the injury by accident, not the results of an indefinite something which may not be an accident.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—*Henry Steers, Inc., v. Dunnewald, Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 1007.*—The plaintiff, Lena Dunnewald, recovered judgment for compensation in the court of common pleas of Hudson County for the death of her intestate, which judgment was reversed by the supreme court. Dunnewald was employed in building a bridge over a river near its outlet in a bay. He was to be at work at 11 o'clock on the evening of April 13, 1912, to assist in placing the new drawbridge construction in place of the old. He left his house to go to work at 9 o'clock, having some miles to go, the last part of which was across a trestle, etc., and was difficult and dangerous. His body was found several days later in the bay. The supreme court held that the facts would not authorize an inference that the death was caused by accident arising out of the employment, although the inference might be drawn that it was caused by accident in the course of the employment. As both elements were necessary to support a recovery under the act, no recovery could be had, and the judgment of the court below was reversed. The English cases similar to this one were discussed as supporting this decision.

WORKMEN'S COMPENSATION—ACTIONS—DEFAULT OF CONTRIBUTIONS—*Barrett v. Gray's Harbor Commercial Co., United States District Court, Western District of Washington (Dec. 8, 1913), 209 Federal Reporter, page 95.*—The Washington workmen's compensation act, Laws of 1911, chapter 74, section 4, requires employers to pay to the State, to create an accident fund, a percentage of wages paid, such payments to be made in advance, based on past pay rolls, and to be adjusted at the end of each year on the basis of the actual pay roll for that year. It further provides that any shortage on such an adjustment shall be made good before February 1, following; and by section 8, that if any workman be injured while the employer is in default for any payment and after demand for the same, the employer shall not be entitled to the benefits of the act, but the workman shall have a right of action. The commission created is empowered to make regulations for the administration of the act. The company named was notified on February 28 of a shortage due on its adjustment, with a demand for payment within 30 days. The plaintiff was injured during that time, and before the payment had been made, but it was afterward made during the time limited. He brought suit, and the company demurred to the complaint. This

demurrer was sustained, and the plaintiff held to have no right of action, on the ground that the demand was presumably in accordance with the regulations of the commission, and did not become effective until the expiration of the 30 days, and that on payment within that time the company was entitled to the benefit of the act.

WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION—COMMUTATION TO LUMP SUM—*Mockett v. Ashton, Supreme Court of New Jersey (June 7, 1913), 90 Atlantic Reporter, page 127.*—Mockett was injured while in the employ of one Ashton, and compensation in a lump sum was awarded by the court of common pleas of Camden County. In granting the defendant a new trial, Judge Swayze, who delivered the opinion of the supreme court, said:

The judge found that the petitioner's eyesight was affected about one-third; that he had distressing pains in his head, and his nervous system was much below par; that his disability was partial in character and permanent in quality. He therefore decided to commute petitioner's compensation to $1,000. Since the petitioner claims the benefit of the statute, the statute must be our guide. The schedule contained in the statute does not provide specifically for the injuries involved in this case. The compensation, therefore, must bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule. We are not informed what sum per week the trial judge thought justified under this statute, nor how he reached his result. The statute provides that the amounts payable periodically as compensation may be commuted to a lump sum provided the same be in the interest of justice. We can not pass upon the justice of the result reached by the trial judge unless we know the sum payable periodically, the method by which he reached his result, and the reasons that induced him to commute the periodical payments into a lump sum. Long *v.* Bergen Common Pleas, 84 N. J. Law, 117, 86 Atl. 529. The case does not even show that he ever determined, as the statute requires, the relation borne by the petitioner's disabilities to those produced by the injuries named in the schedule, nor that he even determined the amount of the periodical payments before commuting them. It seems that he treated the case as if it arose under the common law, and awarded, as a jury might have done in an ordinary action, such sum as seemed to him just.

WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION—DISABILITY—*De Zeng Standard Co. v. Pressey, Supreme Court of New Jersey (Nov. 6, 1914), 92 Atlantic Reporter, page 278.*—This was a proceeding under the workmen's compensation act. The court, in an opinion by Judge Parker, affirmed the judgment of the court of common pleas of Camden County, deciding some questions of interest in interpreting provisions of the act as to amount of compensation

and nature of disability necessary to entitle a claimant to compensation. The opinion is quoted for the most part, as follows:

This case arises under the workmen's compensation act, and the principal question argued is whether the petitioner should receive an award for the permanent impairment of the function of his right arm, when it is shown that he has been earning the same pay as he earned before the accident.

The petitioner as a carpenter in the employ of the prosecutor earned $20 a week. He sustained an accident arising out of and in the course of his employment which caused a fracture of the bone of the forearm known as the "radius" at or near the elbow, and which is admitted to have caused the permanent loss of 30 per cent of the use of his arm. After two weeks he went back to work under the same employer, at the same wages, and after a time entered the employ of his son at the same wages. Later on when work became slack he worked independently, receiving the same pay for the time he was actually employed.

In this proceeding the court awarded him 30 per cent of $10 for the period of 200 weeks, under the provision of the act:

"Where the usefulness of a member or any physical function is permanently impaired, the compensation shall bear such relation to the amount stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule."

The 30 per cent, however, was awarded upon the number of weeks as a base, and consequently the award was the sum of $10 per week for a period of 60 weeks. This is not the method sanctioned in James A. Banister Co. *v.* Kriger, 84 N. J. Law, 30, 85 Atl. 1027 [see Bul. No. 152, p. 178], where this court sustained an award for the full period with relation to the percentage of the weekly wage on application of the minimum clause.

Applying that rule to the present case, the award would have been for 200 weeks at a minimum of $5 per week; but the petitioner does not question the form of the award, and plainly the prosecutor is not injured by it.

The prosecutor's principal claim is that there can not be a statutory "disability" when it appears that the earnings of the petitioner had not been impaired. With this we can not agree. It may well be that for a time an injured employee might be able to earn the same wages as before the accident; but, as we read the act, the disability intended thereby is a disability due to the loss of a member, or part of a member, or of a function, rather than to mere loss of earning power. Even if this were not so, it does not follow that the injured employee had not sustained a distinct loss of earning power in the near or not remote future and for which the award is intended to compensate. If it were a question of damages at common law, the elements of damage would consist of present loss of wages, probably future loss of wages, pain and suffering, and temporary or permanent disability, which loss the jury would be at liberty to assess quite independently of the fact that the plaintiff was earning the same wages, except so far as that fact might be evidential with regard to the extent of the disability.

Next it is argued that, because the petitioner worked for the prosecutor for 55 weeks at full wages, these 55 weeks should be

deducted from the 60 weeks for which the award was made. The answer is that the prosecutor was under no obligation to employ the petitioner at $20 a week or any other sum, and that inasmuch as he chose to do so without any understanding, express or implied, that petitioner was not worth those wages, or that part of them should be treated as moneys paid under the compensation act, he must be presumed to have paid the money as wages and because he thought the petitioner was worth that amount.

WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION—LOSS OF MOTION OF ARM—PAYMENTS BY INSURANCE COMPANY—*Barbour Flax Spinning Co. v. Hagerty, Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 919.*—Judgment was rendered in favor of the petitioner, Hagerty, in the court of common pleas of Hudson County, for $5 per week for 200 weeks, for the loss of motion of his right arm at the elbow, consisting of permanent inability to bend it more than 90 degrees. The amount of compensation awarded was the same as the law provides for the loss of an arm. The law provides that compensation for injuries not specified shall bear such relation to the amounts stated in the schedule of the act as the disabilities bear to those produced by the injuries named in the schedule. On appeal the supreme court held that the award could not be justified under the provision just mentioned, and therefore reversed the decision and remanded the case for a new trial.

It was in evidence that the petitioner Hagerty had received the statutory weekly compensation for his injury for a period of 52 weeks, for which no credit had been given. As to this the court said:

The petition avers that it was received from the insurance company of the defendant. The admission at the trial was that it was paid by the defendant. If that is true, or if the premium for the insurance had been paid by the defendant, credit should have been given. If, however, the payment was by virtue of insurance paid for by the petitioner, the defendant is entitled to no credit therefor.

WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION—PARTIAL DISABILITY—*O'Connell v. Simms Magneto Co., Supreme Court of New Jersey (Nov. 25, 1913), 89 Atlantic Reporter, page 922.*—The only question in this case was as to the amount of compensation. The injuries consisted of fractured skull, broken collar bone and ribs, injury to eye, paralysis of right side of mouth, injury to right nostril and impairment of use of right ear and right arm. Making an allowance for each of these, and totaling them, the judge of the lower court arrived at a total of 340 weeks, and judgment was rendered awarding compensation to the petitioner for that length of time.

On appeal, the judgment was reversed and the case remanded for revision of the compensation, Judge Swayze, who delivered the opinion, saying:

The evidence of the petitioner shows conclusively that the disability of the petitioner is far from total. Under the statute only 400 weeks' pay could have been allowed for total permanent disability, such as loss of both hands, arms, feet, or eyes. None of the injuries suffered by the petitioner are specifically provided for in the schedules contained in the act, and allowance therefor must have been made under the provision that the compensation in other cases shall bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule.

There is no evidence that the disabilities of the petitioner stand to total disability in the proportion of 340 to 400. On the contrary, the evidence makes it clear that the proportionate extent of the disability is very much less. The difficulty arose probably from the desire of the trial judge to award what he thought was fair compensation. This was, however, disregarding the statute, not following it except in form.

WORKMEN'S COMPENSATION—BENEFITS—IMPAIRMENT OF EARNING CAPACITY—*International Harvester Co. v. Industrial Commission of Wisconsin, Supreme Court of Wisconsin (May 1, 1914), 147 Northwestern Reporter, page 53.*—Ernest Koenig, an employee of the company named, was injured March 5, 1912, by a particle of steel entering one of his eyes. The piece of steel was removed by a magnet, but the employee was incapacitated for work for 10 weeks and 4 days, and there was permanent impairment of the sight of the eye. He was paid for his loss of time and doctor's bills as provided by the act. He resumed work for the company at his former employment, operating a drill press, and up to the time of the hearing for compensation had earned apparently a little more per day at piecework after the resumption of work than before the accident. The industrial commission in its decision said that it was "satisfied from its investigation of injuries of this character and from the testimony that a man injured as applicant was injured can perform the labor that applicant was doing prior to the injury without difficulty." It further said: "The commission is also convinced that in most employments a one-eyed man is physically able to earn substantially the same wage as a man with two eyes."

The commission also found that the applicant's loss of wage because of permanent partial disability was $2.16 per week, and ordered the company to pay him $1.41 per week for 15 years. This finding was based on the likelihood that it would be less easy for the employee to secure work on account of his defective sight. The statute provides that the loss in wages for which compensation may be made shall consist of such percentage of the average weekly earnings of the injured

employee as shall fairly represent "the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident."

The court discussed the grounds on which the award of the commission can be set aside, which are stated in the statute as follows: (1) That the commission acted in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award. It held that the first ground would cover cases where the commission made a finding of fact without anything upon which to base it, and after full consideration of the supposed basis of the finding that the employee's deficiency in earning power amounted to 15 per cent of his former wages, which basis consisted largely of the results of investigations made by the commission itself, and consideration of the statutes of other States, etc., the court decided that there was no material evidence, also that the loss of earning power of a man with one eye was not the subject of judicial notice; and that the judgment should be reversed and the cause remanded to the commission for further hearing, or judgment entered for the Harvester company, as the circuit court should determine.

Three judges dissented, holding that "it was in evidence that the claimant lost an eye, and, in the exercise of common knowledge and observation, the commission was authorized to infer from this that his capacity to obtain employment was impaired."

WORKMEN'S COMPENSATION—BENEFITS—LOSS OF MEMBER—*Limron v. Blair et al., Supreme Court of Michigan (June 1, 1914), 147 Northwestern Reporter, page 546.*—Phillip Limron made application to the receivers of the Pere Marquette Railroad Co. for an award of compensation for injuries sustained. These consisted of the loss of a foot, and other injuries, which were still producing total disability at the time of the hearing, the disability apparently being largely due to injuries to the shoulder. The law provides for payment of one-half wages for the period of total disability not exceeding 500 weeks, and that in case of injury consisting of loss of certain members the disability shall be deemed to exist for certain periods, that for loss of a foot being 125 weeks. The industrial accident board awarded the payment to the injured employee in this case for the time of his actual total disability, and for 125 weeks to commence at the conclusion of such disability, less 6 weeks' disability incident to the amputation of the foot, the total period not to exceed 500 weeks. The court reversed this award, holding that he should be paid compensation for not less than 125 weeks in any case, but for only that length of time unless his total disability lasted longer than that period, in which case compensation would be paid for the period of disability only.

The court expressed the view that the statute "does not provide a specific indemnity for the loss of a member in addition to compensation for disability," since it "speaks in terms of disability," and "when the period of disability ends compensation ceases."

WORKMEN'S COMPENSATION—BENEFITS—PERMANENT INJURY AND SUBSEQUENT DEATH—*In re Burns, Supreme Judicial Court of Massachusetts (May 21, 1914), 105 Northeastern Reporter, page 601.* Bridget Burns filed a petition under the workmen's compensation act for the injury and death of her husband, John J. Burns. A decree was entered in her favor in the superior court of Suffolk County in accordance with a decision of the industrial accident board, and the insurer appealed. The decree was affirmed. Burns received a fracture of the spine, with severance of the spinal cord, which caused paralysis of the legs and all portions of the body below the fracture. He was taken to a hospital and given medical care, but an extensive bedsore formed because of the necessity of his remaining motionless, which finally resulted in blood poisoning and death. The court decided that the decision of the industrial accident board must be sustained on matters of fact where there was evidence to support them; and this principle was applied to the finding that the death was proximately caused by the injury and to the finding that the injury was not caused by the serious and willful misconduct of the employer. The court remarked that this latter phrase involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.

The court also held that compensation was rightly given for the death of the husband as resulting proximately from the injury and for the permanent incapacity of both legs. Although there was no direct physical or external injury to the legs, it was held that their uselessness resulting from the broken spinal cord was an injury to them. It was held, however, that this compensation for permanent incapacity ceased after the death of the injured person, at least in the present case, where no award was made for a definite time on account of it.

WORKMEN'S COMPENSATION—BENEFITS—PERMANENT INJURY NOT CAUSING INCAPACITY—*In re Ethier, Supreme Judicial Court of Massachusetts (May 20, 1914), 105 Northeastern Reporter, page 376.*—In this case it was held that the Massachusetts workmen's compensation act and its amendment, which provides that the same amount as for loss of the member shall be paid "in case an injury is such that the hand, foot, thumb, finger, or toe is not lost, but is so injured as

to be permanently incapable of use," does not provide for damages for permanent injury for the injury of a phalange not resulting in the permanent incapacity of the entire finger.

WORKMEN'S COMPENSATION—BENEFITS—SEPARATE ALLOWANCES—*In re Nichols, Supreme Judicial Court of Massachusetts (Feb. 27, 1914), 104 Northeastern Reporter, page 566.*—The administratrix of a deceased employee began a proceeding for compensation, and the decree of the superior court of Suffolk County awarded her the damages specified by the act for the death of an employee. The employee himself had received 12 weeks' compensation for the loss of "at least one phalange of a finger" in addition to the amount for disability. Afterwards blood poisoning developed and he died. The insurer contended that the payment for loss of the finger should be deducted from the compensation awarded to the widow. The court, however, disallowed this deduction, since the payment for 12 weeks for the loss of a part of a finger is expressly stated to be "in addition to all other compensation."

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—*In re Cheevers, Supreme Judicial Court of Massachusetts (Nov. 24, 1914), 106 Northeastern Reporter, page 861.*—The compensation act of Massachusetts excepted from its provisions cases where "employment is but casual," until an amendment in 1914 removed this exception. Cheevers was engaged in the teaming business on his own account, employing men and having three or four teams, but was occasionally employed by a coal dealer, who engaged him personally with his team, to handle coal. The last period of employment included February 7, 8, 10, 11, 12, 13, 15, and 25, 1913, the last-named date being that of the injury. The last previous period had been February 1, 2, 5, 6, and 7, 1912. Under these circumstances the court held that the employment was casual, and affirmed a decision of the industrial accident board denying compensation.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—*In re Howard, Supreme Judicial Court of Massachusetts (June 17, 1914), 105 Northeastern Reporter, page 636.*—Arthur Howard was injured in the employ of the Edison Electric Illuminating Co., and the insurer claimed that the employment was casual. This contention was based upon the fact that, Howard's employment being to trim trees to keep the wires of the company clear, he was at the particular time of the accident trimming a tree through which none of its wires ran. He was acting, according to the statement of agreed facts, under the

orders of his foreman, who in turn was acting under the orders of the superintendent of the company. The court upheld a decree granting compensation, saying:

In the present case Howard was employed to trim trees, and was to receive his orders from the company through Kennedy. It was no part of his business to inquire into the right of the company to trim any particular tree. He was to receive his orders from Kennedy and to obey them. At the time he was hurt he was doing what he had been hired to do. The work was not casual.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—*Sabella et al. v. Brazileiro, Supreme Court of New Jersey (Oct. 1, 1914), 91 Atlantic Reporter, page 1032.*—This case arose from the death of a longshoreman, which resulted from injury occurring two hours after he began work at a ship. The principal question was whether the employment was casual; and it was held that the work of a class of longshoremen who are ready to work when called upon and are not at work for any one employer constantly, because the latter has a ship in port only a part of the time, is not casual, the court saying that "an employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period."

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—AMOUNT OF COMPENSATION—*Schaeffer v. De Grottola, Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 921.*—George De Grottola petitioned the court of common pleas of Essex County, which awarded him compensation of $10 per week, the maximum compensation, against his employer Schaeffer. On appeal, this award was affirmed. The employee began work on Monday morning for this employer, shaving skins of a kind not usually handled in his establishment, and was injured about 11 o'clock. He was working by the piece, and the arrangements as to continuance were somewhat indefinite, but the court decided that the employment was not "casual," but work in the regular business without limit as to time. As to the amount of compensat on, which would be one-half his weekly earnings, it was held that, as he had earned $1.60 up to 11 a. m., he might properly be found to be earning at the rate of $4 per day and therefore entitled to the maximum limit of $10 per week.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—WAITERS—*In re Gaynor, Supreme Judicial Court of Massachusetts (Feb. 27, 1914), 104 Northeastern Reporter, page 339.*—The decision in this case

turned upon the question as to whether the employment of one Gaynor was covered by the terms of the workmen's compensation act. The industrial accident board had made an award in his favor, and the superior court of Suffolk County issued a decree affirming this decision. This was reversed by the supreme judicial court on the ground that the employment came within the exception of the statute of "one whose employment is but casual." The employee had been hired to act as a waiter at a banquet on a certain day, receiving stipulated wages and his transportation to and from the point of service, and was injured while preparing to serve the banquet. He had never worked for the same employer before, and the employment was to terminate on that day. This was customary in the business of catering, the employers not usually employing any waiters regularly. Under these circumstances the court determined that the employment was "casual," so that no compensation could be received for the injury.

WORKMEN'S COMPENSATION—CLASSIFICATION OF EMPLOYMENTS—RAILROAD CONSTRUCTION—*State v. Chicago, Milwaukee & Puget Sound Railway Co., Supreme Court of Washington (July 15, 1914), 141 Pacific Reporter, page 897.*—This was an action by the State to recover a premium payment from the company named under the State insurance law. The industrial insurance department of the State had classified certain work done by the railroad company as tunnel construction, requiring under the law a premium rate of 6½ per cent. The company insisted that the work should be classified as steam railroad construction work, upon which a contribution at the rate of 5 per cent is required. The view contended for by the company was accepted by the superior court of King County, whereupon the State appealed and secured a reversal of the judgment of the court below, with a direction to enter judgment in accordance with the views maintained by the State.

The compensation act of the State, chapter 74, Acts of 1911, provides for a number of classes of hazardous and extrahazardous employments, fixing the premium rates for each class, rates for tunnels and for railroad construction being as above indicated. It is further provided (sec. 4, subd. 3) that if in a single establishment several occupations are carried on which are in different risk classes the premium shall be computed according to the pay roll of each occupation if clearly separable, otherwise an average rate shall be charged for the entire establishment. The supreme court held that this provision controlled the case, since the pay roll for the tunnel construction was separable. The opinion was delivered by Judge Main, Judge Chadwick dissenting and holding that the enter-

prise rate should be a single one, covering all classes of occupations thereon. From the opinion of Judge Main the following is quoted:

The trial court found, not only the actual pay roll for workmen employed in the tunnel, but that the railroad other than the tunnel had been previously constructed and was in operation. If the operations involved in the construction are so interrelated as not to be clearly separable, then the enterprise classification would prevail. In other words, when the various occupations are separable, each occupation takes the rate of its particular class. But where they are not separable the equalized classification for the enterprise fixed by the statute controls.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—*Deibeikis v. Link-Belt Co., Supreme Court of Illinois (Feb. 21, 1914), 104 Northeastern Reporter, page 211.*—Joseph Deibeikis brought action against the company named for injuries alleged to have been sustained while employed in its machine shop. The company pleaded in defense that before the injury both parties had elected to be governed by the terms of the workmen's compensation act (Laws of 1911, p. 315, which was in force at the time of the happening of the injury, but has been superseded by Laws of 1913, p. 335); that the company had posted the required notices, and had done all that the act required of it; that the employee had accepted certain sums of money under the act, and that the company was ready to pay any further sums due; that the employee was governed by the terms of that act, and should adjust his grievances thereunder instead of bringing an action on the case. The plaintiff demurred on the ground of the unconstitutionality of the act. The demurrer being overruled, judgment was entered against him, upon which he appealed. The supreme court upheld the constitutionality of the act. Judge Cooke in delivering its opinion took up the provisions of the act in detail, as follows:

As we understand the points made, the grounds relied upon are that the act is unconstitutional for the following reasons: (1) It is not a proper exercise of the police power; (2) it is class legislation; (3) it delegates judicial powers; (4) it vests the judiciary with executive powers; (5) it deprives appellant of the right of trial by jury; (6) it subjects appellant to unreasonable search; (7) it deprives appellant of his right to contract and of his natural right of waiver. Statutes similar to the one here under discussion have been passed in various States of the Union, and in a number of those States the courts have decided some of the questions here raised by appellant contrary to his contentions. [Cases cited.]

Taking up the points raised by appellant in the order in which they have been set out above, we are unable to see where it can be contended that this act is an attempt to exercise the police power. It will be observed that the act is elective, and that no employer or employee is compelled to accept or come within its provisions unless

he chooses to do so. Therefore, unless the employer or the employee elects to come within the provisions of the act, he is not affected by any of the provisions thereof. This is subject, however, to one exception. Under the conditions specified in section 1, an employer is deprived of the common-law defenses of assumed risk, contributory negligence, and that the injury or death was caused, in whole or in part, by the negligence of a fellow servant. To deprive an employer, under such circumstances, of the right to assert those defenses is not an exercise of the police power, but is merely a declaration by the legislature of the public policy of the State in that regard. The right of the legislature to abolish these defenses can not be seriously questioned.

The rules of law relating to the defenses of contributory negligence, assumption of risk, and the effect of negligence of a fellow servant were established by the courts, and not by our constitution, and the legislature may modify them or abolish them entirely, if it sees fit to do so. [Cases cited.]

The classification made by section 2 of the act [which names the occupations to which the act applies] is not questioned or attacked in any way, but appellant seems to rely upon sections 21 and 22 as constituting class legislation. The classification in section 2 seems to be a perfectly valid and reasonable one. If it is valid and reasonable, there appears no ground upon which to challenge the validity of sections 21 and 22. These sections merely limit an "employee," as the term is used in that act, to include only such as may be exposed to the necessary hazards of carrying on any employment or enterprise enumerated in section 2. These sections are meant to exclude any one who may be occupying a mere clerical position, and whose work is such that he is not subject to any of the hazards of the general business in which the employer is engaged. This is a proper and reasonable classification, and does not violate any inhibition of our constitution.

It is contended that section 3 makes an improper classification, in that it deprives the employee of his common-law remedies, while the employer is permitted to retain them. This is clearly a misapprehension, as the proviso in that section enlarges the remedy of the employee, and correspondingly restricts that of the employer. By this proviso, in case an employee receives an injury as the result of the intentional omission of the employer to comply with statutory safety requirements, the employer, although having elected to come within the provisions of this act, can not avail himself of anything in the act to affect his liability under such circumstances.

The other objections urged may all be answered by the statement that the act is elective and not compulsory. Being elective, the act does not become effective as to any employer or employee, unless such employer or employee chooses to come within its provisions. Having once elected to come within the provisions of the act, as long as such election remains in force the act is effective as to the party or parties making the election, and, in case an employer and an employee both elect to come within the provisions of the act, the act itself then becomes a part of the contract of employment, and can be enforced as between the parties as such. Under this view, it can not be said that by this act judicial power is delegated to boards of arbitrators, contrary to the provisions of our constitu-

tion. Parties to a contract may make valid and binding agreements to submit questions in dispute or any disagreement that may arise to a board of arbitrators composed of persons or tribunals other than the regularly organized courts, and such agreements will be enforced. Either party feeling aggrieved at the award has the right [under provisions of the act] to appeal to a court of record, where the matter is heard de novo, and where either party has the right to demand a trial by jury. It will thus be seen that, even though the employee should elect to come within the provisions of the act, he is not wholly deprived of a trial by jury.

It is contended that section 9 also deprives the employee of his liberty and property, that section 10 violates the inhibition against unreasonable search and seizures, and that sections 11 and 13 deprive the employee of his right to contract and of his natural right of waiver. These contentions are all fully answered by the statement that the employee is not compelled to submit to the provisions of the act, but has the power to elect whether or not he will come within its terms and be bound by them. If any of the provisions of the act are objectionable to him, he is not required to subject himself to the act. If he does elect to do so, he can not be heard to complain that the contract he has voluntarily entered into is an unsatisfactory one.

The act is not subject to the objections urged, and the judgment of the circuit court is accordingly affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—*Matheson v. Minneapolis Street Railway Co., Supreme Court of Minnesota (July 3, 1914), 148 Northwestern Reporter, page 71.*—Ole Matheson brought action against the street railway company named for personal injuries. He was an employee of the city of Minneapolis, and while engaged in laying paving along and near the railway track of defendant, in one of the streets of that city, was struck by one of the defendant's street cars and received injuries which necessitated the amputation of his leg. He alleged in his complaint that the injury was caused by the negligence of the defendant. Defendant, in its answer, among other things, alleged that plaintiff, the city, and defendant had all accepted, were acting under, and were governed by the provisions of part 2 of chapter 467, Laws of 1913 (secs. 8195–8230, G. S. 1913), commonly known as the workmen's compensation act; and that plaintiff's rights were limited and confined to and were measured and determined by the relief provided for in part 2 of that act. Plaintiff demurred to this portion of the answer, contending that the statute relied on was unconstitutional, and appealed from an order overruling the demurrer. On this appeal the court sustained the constitutionality of the workmen's compensation act and affirmed the judgment of the court below.

The act comprises part 1 and part 2, the latter being an elective compensation law, while the former provides that employers electing

not to become subject to the provisions of part 2 shall be deprived of the defenses of the employee's negligence (unless willful), assumption of risks, and fellow service.

Judge Taylor, who delivered the opinion of the court, having stated the foregoing facts, said, in part:

It is claimed that the act violates the equality provisions of the State and Federal constitutions for the reason that it abrogates these three defenses, in actions under part 1, brought against employers who elect not to accept the provisions of part 2, but permits such defenses to be interposed, in actions under part 1, brought against other employers, and also for the reason that the act excludes from its provisions domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are within the legislative domain of the United States. That the defenses mentioned may be entirely abolished, or abolished as to certain classes of employments only, is too well settled to require argument. [Cases cited.] The power to abolish such defenses rests upon the principle that no person has any property right or vested interest m a rule of law, and that the legislature may change such rules at its pleasure. [Cases cited.]

Plaintiff contends, however, that the classifications made by the act are unwarranted, and that the constitutional requirement that all persons shall receive the equal protection of the laws is infringed unless such defenses are abrogated as to all employers, or remain available to all employers, and unless the act applies to the classes excepted from its operation as well as to those included therein.

We think it is within the discretion of the legislature to place in a class by themselves those employers and those employees who, for the reason that they are engaged in interstate commerce, are subject to the laws which have been, or may be, passed by Congress. Within the domain of interstate and foreign commerce, the power of Congress is supreme; and the legislature may well refrain from including, within the operation of the State laws, those persons as to whom such laws are, or may be, rendered nugatory by the laws of the United States. Deibeikis *v.* Link-Belt Co., 261 Ill. 454, 104 N. E. 211 [p. 216]. The suggestion that the present law does not exclude from its operation all who are engaged in interstate commerce, but only those who are engaged in such commerce by railroad, is sufficiently answered by the decisions affirming the validity of laws which apply only to those engaged in interstate commerce by railroad.

Other courts have held, and we think for sufficient reasons, that the exclusion of domestic servants, farm laborers, and persons whose employment is casual only, from the operation of laws providing compensation for injured workmen is within the proper discretion of the legislature. [Cases cited.]

We also think that the legislature is well within its prerogative when it places in one class employers who become subject to the provisions of part 2 of the act, and in another class employers who do not become subject to such provisions; also when it places in one class employees who become subject to such provisions, and in another class employees who do not become subject thereto. Employers who become subject to part 2 thereby tender to their employees, as a consideration for exemption from common-law liabilities, rights and privileges which

did not previously exist, and offer to assume the burden of duties and obligations which were not previously imposed upon them. Employees who become subject to part 2 thereby tender to their employers immunity from common-law actions as a consideration for the rights and remedies provided for by part 2. These propositions become binding contracts in respect to all who accept them, and remain as continuing offers to those who have not accepted them. An employer or employee, who, at his option, may secure all the advantages possessed by any other, is hardly in a position to claim that he is discriminated against. The defenses of contributory negligence, assumption of risk, and negligence of a fellow servant were doubtless abrogated in the cases specified, and not abrogated in other cases, to induce an acceptance of the provisions of part 2 of the act. But notwithstanding this purpose, the act permits any employer to place himself within either class of employers at his election, and to change from one to the other if he so desires; it also permits any employee to place himself within either class of employees at his election, and to change from one to the other if he so desires. Such legislation is not discriminatory and is not inhibited by the constitution. Furthermore, if its validity rested upon the distinction between the two classes of employers and the distinction between the two classes of employees, we could not say that such distinction is so fanciful and arbitrary, or so wanting in substance, that the legislature is prohibited from applying rules to one class which it does not apply to the other. This is in harmony with the holding of other courts.

The act provides that every employer and every employee shall be presumed to have accepted and become subject to part 2 of the act, "unless otherwise expressly stated in the contract, in writing, or unless written or printed notice has been given," in the manner prescribed in the act, that he has elected not to become subject thereto. It is beyond question that the legislature has power to create this presumption and to require those who elect not to come under the provisions of part 2, to give notice thereof in the manner prescribed. The act also provides the manner in which one who is subject to the provisions of part 2 may thereafter change and become not subject thereto, and the manner in which one who is not subject to such provisions may thereafter change and accept them. The choice is no less voluntary and optional because a party is deemed to have accepted these provisions, unless he give notice to the contrary, than it would be if he were deemed not to have accepted them until he gave notice to that effect.

The section of the act most vigorously assailed is section 33 (sec. 8229, G. S. 1913), which provides for cases in which the employee is entitled to compensation from his employer under part 2, for injuries which occurred under circumstances also creating a liability against a third party. In case such third party is also subject to the provisions of part 2, the employee may either recover from his employer the relief prescribed by the act, or may bring an action against such third party, but can not proceed against both. If he proceed against the third party, his recovery is limited to the relief prescribed by the act. If he takes compensation from his employer under the act, the employer becomes subrogated to his right of action against the third party and may recover the aggregate amount payable to the

employee with costs, disbursements, and reasonable attorneys' fees. In case such third party is not subject to the provisions of part 2, the employee may maintain an action against him without waiving any rights against the employer and the damages recoverable are not limited to the relief prescribed by the act; but, if the employee recover from such third party, the employer is entitled to deduct, from the compensation payable by him under the act, whatever amount is actually received by the employee from the third party. In other words, if a sum equal to, or exceeding, the compensation payable under the act is actually collected from the third party, the employer is relieved from liability, but, if the sum actually collected be less than the amount payable under the act, he must make good the deficiency. If, instead of prosecuting an action against such third party, the employee collects compensation from his employer, the employer becomes subrogated to the rights of the employee against the third party and may maintain an action against him for the recovery of the damages sustained by the employee, but, after reimbursing himself for the compensation payable to the employee, and for the costs, attorneys' fees, and expenses of collecting the damages, the employer must pay over to the employee any surplus remaining of the amount collected. We find nothing in these provisions contravening any of the provisions of the constitution. They apply to and bind only those who have voluntarily accepted and agreed to them.

A careful examination of the entire act satisfies us that it contains nothing prohibited by either the State or Federal constitution. The fifth amendment to the Federal Constitution applies only to proceedings under the Federal laws, and has no bearing upon the instant case. Section 4 of article 1 of the State constitution, securing the right of trial by jury in all cases at law, expressly provides that such right may be waived. Where employer and employee both become subject to the provisions of part 2 of the act, they thereby waive a jury trial as to matters governed by such provisions. Such right remains unchanged, however, as to all other matters and all other persons. The rights set forth and declared in section 8 of article 1 of the constitution do not appear to have been infringed. The prohibition contained in section 13 of article 1 has no bearing upon the case whatever. The fact that the provisions of part 2 of the act apply to those only who elect to be governed thereby, obviates the objections to the act, not hereinbefore considered, which are based upon the provisions contained in the fourteenth amendment to the Federal Constitution and section 2 of article 1 of the State constitution.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ELECTION—PROCEEDINGS—*Young v. Duncan, Supreme Judicial Court of Massachusetts (June 17, 1914), 106 Northeastern Reporter, page 1.*—Hazel Young was injured while in the employ of Jefferson E. Duncan. She brought a common-law action, and a plea in abatement made by the defendant was sustained on the ground that the employer was a subscriber under the workmen's compensation act, and the case was decided in favor of the defendant on this point.

Part I, section 5, of the act provides that: "An employee * * * shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or, if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within 30 days of such subscription." The plaintiff claimed that this rule did not apply, since the employer had not given to her the notice required by part 4, section 21, as amended by Statutes of 1912, chapter 571, section 16, which requires every subscriber to "give notice in writing or print, to every person with whom he is about to enter into a contract of hire, that he has provided for payment to injured employees by the association." This section provides no penalty for its nonobservance, nor does it in terms affect the status of the employee in any respect. The court held that the requirement for notice by employees in section 5, in the case of employers who were under the act, was in no wise modified by or dependent upon the provisions of section 21; and that the employee's failure to give notice was a waiver of the right to sue. Judge Rugg, who delivered the opinion, said in part on this point:

If the employee's right to avail himself of the act depended upon actual notice to him of the fact of insurance by the employer, hardship to the employee often might result. There would be strong ground for the argument that the only right of an employee would be at common law unless the employer gave the required notice; a consequence manifestly at variance with the general purpose of the act and one which in many instances would work great hardship. There is no indication in the act itself that part 1, section 5, and part 4, section 22 [21], were intended to be correlative or interdependent. Each stands alone with distinct uses and purposes. As thus interpreted the act is plain and easy of comprehension. If an employee desires to avoid the act, and preserve his common-law rights, he must give notice to that effect in the absence of fraud when he enters the employment rather than when he is notified of insurance by the employer, or he is held to have availed himself of the act. This construction in the vast majority of cases will forward the beneficent aims of the act better than any other.

It was also urged that as so interpreted, part 1, section 5, was unconstitutional as depriving the employee of a right of trial by jury, and of property rights. As to this contention Judge Rugg said:

It is urged that it deprives the plaintiff of her constitutional right to a trial by jury. If that question properly is presented and insisted upon, undoubtedly an employee has a right to trial by jury on the point whether the employer was in truth a subscriber under the act and whether notice had been given by the employee at the time of the contract of hire of an election to rely upon his common-law rights in cases where claim is asserted that such notice had been given.

The issue of fact whether the parties have come under the operation of the act may be tried to a jury. It may be assumed that a right of action for personal injuries at common law is a property right. But the right of trial by jury respecting it goes no further in a case like the present than the right to have the question whether she had retained such a common-law right under the act determined by a jury. But, so far as that right existed in the case at bar, it was waived.

The section in question affects no existing property right. It deals with no property right after it has come into being. It affects a situation which antedates any property right arising out of tort. It simply establishes a status between subscribers under the act and their employees in the absence of express action by the latter manifesting a desire to elect a different status. No complaint justly can be made that the section compels the employee to elect without sufficient knowledge. Ignorance of the law commonly is no excuse for conduct of failure to act. The employee is not required to act without inquiry as to the fact of insurance by the employer. He has only to ask for information. That is nothing more than is required in most of the affairs of life in order that one may act intelligently.

The requirement that the election be made at the time of the contract for hire is reasonable. Difficulties of a serious nature might be presented if the right of election were allowed to be exercised after the happening of the accident.

The possibility that the employee in a given instance may not know all his rights does not affect the constitutional aspects of the law.

The employee is not compelled to give up any common-law or constitutional right. It is a matter of choice whether he avails himself of the one or the other. Reasonable provisions are made for the exercise of his election.

The section is not open to objection as class legislation, or as denying equal protection of the laws. It applies to all employees alike. In this respect it is no more vulnerable than the employers' liability act, which establishes remedies for the benefit of employees, the weekly payment law or many other acts of like nature. The act is constitutional and is not open to criticism in the respects urged by the plaintiff. It follows that judgment rightly was ordered for the defendant in the action at law.

The employee had made no claim under the compensation act. The insurer, following the law, had notified the industrial accident board of the accident, and a commission of arbitration was formed, which made an award in favor of the plaintiff. A claim for review by the industrial accident board, filed by her, was withdrawn, and the superior court entered a decree in accordance with the findings of the arbitration committee. The act as amended provides that when a decree of the superior court has been entered "there shall be no appeal therefrom * * * where the decree is based upon a decision of an arbitration committee." The court held that this was a reasonable provision, and that there was no ground of appeal from the decree of the superior court.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—EXCLUSIVENESS OF REMEDY—ELECTION—*Shade v. Ash Grove Lime & Portland Cement Co., Supreme Court of Kansas (Apr. 11, 1914), 139 Pacific Reporter, page 1193, 144 Pacific Reporter, page 249.*—Frank D. Shade brought action against the company named for damages for personal injury. The action was dismissed on the ground that the employee's remedy under the compensation law of the State was exclusive. Shade thereupon appealed. The supreme court held that while the action should have been brought under the compensation act, it should not have been dismissed, but an award made under the proper act. Judge Benson, who delivered the opinion of the court, in discussing this point, spoke in part as follows:

The petition contained averments sufficient for a cause of action under the factory act (Gen. Stat. 1909, secs. 4676–4683), under which it was obviously drawn; but it also contained charges of negligence sufficient to sustain a cause of action independent of the act.

The first [compensation] act applied to employers within its purview, who elected to come under its provisions, and to accept thereunder, but by the later statute, which took effect March 12, 1913, it is declared that the employer shall be deemed entitled to come within its provisions unless he shall file with the secretary of state a notice of his election not to accept thereunder, and the employee is put in the same situation. The plaintiff was injured March 13, 1913. The defendant filed a statement of its election not to come under the act on March 17. The plaintiff never filed a like declaration. It will therefore be seen that on March 13, the date of the injury, both parties were under the provisions of the act; neither having elected to the contrary, although the defendant did so a few days afterward.

It follows that the plaintiff could not recover otherwise than under the workmen's compensation act, but it is not perceived how this deprived the court of jurisdiction of the person and subject matter, or afforded grounds for a dismissal of the action. The district court clearly had jurisdiction. The action should be reinstated for the pursuit of any appropriate remedy that the present petition or any reasonable amendment may warrant.

The judgment is reversed, and the cause remanded for further proceedings.

This case again came before the court on a rehearing on November 14, 1914. The court in its opinion, delivered also by Judge Benson, affirmed the former opinion as to the exclusiveness of the remedy, and in addition upheld the constitutionality of the act, the ollowing quotations giving the line of reasoning pursued:

It was held in the former opinion that, where the employer and employee are both under the compensation act, the remedy afforded by that statute is exclusive. It is argued that this conclusion is unsound, and that it should be held that the employee may still resort to the factory act for relief. Upon a reexamination of the question, the court remains satisfied with the views stated in the former decision for the reasons stated in that opinion, and in the opinion in McRoberts *v.* Zinc Co., 144 Pac. 247 [see p. 236].

It should also be observed that an employee is not deprived of the right to the benefit of the factory act nor of common-law remedies without his consent. They remain open to his election, if made before the injury, by filing a declaration "that he elects not to accept thereunder"; that is, under the provisions of the compensation act. Laws 1913, ch. 216, sec. 8.

The provisions of the Federal and State constitutions, guaranteeing due process and equal protection of law invoked by the plaintiff are not violated by this statute, as decided in many jurisdictions. The act classifies occupations with reference to the nature of the business and number of employees. This feature is strenuously objected to as a violation of the constitutional safeguards referred to. Similar provisions are found in like statutes of other States, and have generally been sustained.

After discussing some of the decisions referred to, the opinion takes up other objections as follows:

The objection based upon the supposed deprivation of a right of trial by jury is equally untenable, as determined in many adjudicated cases. The same is true of the arbitration feature and the rules for determining compensation. Without reviewing seriatim all the specific objections made to this statute under the general charge that it violates constitutional safeguards, it is sufficient to say that they have all been met in judicial decisions in other jurisdictions after the most thorough and patient examination. It seems unnecessary, now that the validity of such laws has been so generally maintained, to review the many adjudicated cases, and restate in detail the well-settled principles upon which they are based. Briefly it may be said that the operation of the system of compensation provided by the statute rests upon the free consent of employer and employee, given in the manner provided by the act. Without such consent on his part, the employee retains all his remedies under common and statutory law. It is a matter of election.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—TITLE—WAGES—*Huyett v. Pennsylvania Railroad Co., Court of Errors and Appeals of New Jersey (Oct. 16, 1914), 92 Atlantic Reporter, page 58.*—This was a case arising from death by injury in the course of employment, the plaintiff being administratrix of the deceased employee. The judgment in the supreme court was in favor of the plaintiff, and the company appealed. The court of appeals quoted the opinion and affirmed the judgment of the supreme court in favor of the plaintiff, deciding two points raised.

The first was as to the constitutionality of the act, the contention of the defense being that as the title of the act mentioned only "injuries received by an employee," provision for payments of compensation for death was not properly included. The court said: "Whether the injuries result in death or not, they are naturally and properly spoken of as injuries received by an employee."

The second question related to the definition of "wages," the amount of compensation being based on "wages received at the time of injury" in certain cases, on "daily wages" in others, and on "wages" in a third case. The deceased employee was earning, at the time of his fatal injury, a somewhat larger amount than he previously had been earning. The court held that all the provisions referred to wages at the time of injury, and that any injustice caused by these provisions must be corrected by the legislature rather than by the courts.

WORKMEN'S COMPENSATION—CONTRACT OF EMPLOYMENT MADE IN ANOTHER STATE—*American Radiator Co. v. Rogge, Supreme Court of New Jersey (Nov. 5, 1914), 92 Atlantic Reporter, page 85.*—This was a proceeding by John F. Rogge as administrator against the company named for compensation for the death of a workman in the course of employment with the company. The employee died in New Jersey from an injury received in that State, but the contract of employment was made in New York. The supreme court affirmed the judgment rendered for the plaintiff under the New Jersey compensation act in the court of common pleas of Union County, holding that the act covers all accidents occurring in the State, and that the only method by which an employer desiring to avoid coming under the provisions of section 2 regarding compensation can do so is by giving notice of rejection as provided in the act.

WORKMEN'S COMPENSATION—DEPENDENCY—FINDING OF BOARD—*In re Bentley, Supreme Judicial Court of Massachusetts (Feb. 27, 1914), 104 Northeastern Reporter, page 432.*—The industrial accident board found from the evidence that the wife of the decedent Bentley was not dependent upon him at the time of the injury and that his child was partially so, neither having been living with him at the time, and awarded $1 per week for 300 weeks to the child alone. The claimants appealed, but the findings of fact not being subject to review, and the evidence not having been reported, it could not be contended that they were not warranted as matter of law. The order was therefore sustained as correct.

WORKMEN'S COMPENSATION—DEPENDENCY—FINDING OF BOARD—*In re Herrick, Supreme Judicial Court of Massachusetts (Feb. 27, 1914), 104 Northeastern Reporter, page 432.*—The superior court of Suffolk County issued a decree awarding compensation to the daughter of George Herrick, and the insurer of his employer appealed. All the evidence having been reported, the supreme judicial court held that it was a question of law whether there was some evidence on which

to base the finding that the daughter was dependent on her father. It decided that there was such evidence and therefore affirmed the decree of the court below.

Judge Sheldon, speaking for the court, said in part:

She [the daughter] received practically all of his wages; she testified that all of her support came from him. That but for her sense of duty, because she thought that her father needed her care, she might have continued to earn enough for her own support, and to be independent of him, can not be decisive as matter of law against her claim. The board well might base its conclusions upon the facts as they were and not upon what might have been the case if her sense of filial duty had been weaker.

WORKMEN'S COMPENSATION — DEPENDENCY — PRESUMPTIONS — WIFE LIVING APART FROM HUSBAND—*In re Gallagher, Supreme Judicial Court of Massachusetts (Oct. 24, 1914), 106 Northeastern Reporter, page 558.*—Mary E. Gallagher was the widow of an employee who received an injury on December 17, 1912, and died from its effects on January 15, 1913. She had been living apart from him for justifiable cause for about four years, and he had contributed to her support by order of court. She had been obliged, however, to labor and earn a large part of the needful amount. The industrial accident board held that under these circumstances she would be conclusively presumed to be wholly dependent upon her husband, as a wife living with her husband is presumed to be by a provision of the act. On appeal by the insurer this decision was reversed. The court called attention to the fact that since the death of Gallagher the legislature, at the session of 1914, had amended the act by providing that if, at the time of the husband's death, the industrial accident board shall find the wife was living apart for justifiable cause or because he had deserted her, she is conclusively presumed to be wholly dependent upon her husband, but held that the industrial accident board should determine the question of dependence in the present instance under another clause of the statute, which provides that the award shall be made in accordance with the facts as they existed at the time of the injury.

WORKMEN'S COMPENSATION — DEPENDENCY — PRESUMPTIONS — WIFE LIVING APART FROM HUSBAND—*In re Nelson, Supreme Judicial Court of Massachusetts (May 19, 1914), 105 Northeastern Reporter, page 357.*—Alice E. Nelson instituted proceedings under the workmen's compensation act for the death of her husband, Alvin R. Nelson. The superior court of Suffolk County decreed compensation to her and the employer appealed.

The act provides that a wife living with her husband shall be conclusively presumed to be dependent on him. In the present case the wife and husband had lived apart several times for periods of a few months, and at the time of his death had not lived together in the sense of occupying the same house for nearly a year, she being in Nova Scotia during the last six months while he was at work in Boston. There had been no talk of permanent separation or divorce, but she appears to have been largely supporting herself and their child for the year mentioned. Under these circumstances the court held that they were not "living together" in the sense meant by the language of the statute, and that the industrial accident board should ascertain the extent of dependency as a matter of fact.

WORKMEN'S COMPENSATION—DEPENDENTS OF MINORS—*Dazy v. Apponaug Co., Supreme Court of Rhode Island (Jan. 2, 1914), 89 Atlantic Reporter, page 160.*—This was a petition by the father of a minor who had been killed as the result of an accident while in the employ of the company named. The superior court of Kent County had rendered a decree granting compensation only to the extent of the $200, which is, under the provisions of the act, to be paid as expenses of last sickness and burial where there are no dependents; and this was affirmed by the supreme court, on the ground that after the death of the son the family was still able to save some money weekly. Judge Vincent, speaking for the court, said in part:

The superior court found that the father was not wholly or partly dependent for support upon the earnings of his son at the time of the injury and therefore was not entitled to receive compensation under the terms of the workmen's compensation act. The superior court, however, ordered the respondent to pay to the petitioner the sum of $200 for the expenses of the last sickness and burial of the son.

We think that the decision of the superior court was correct. The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with the ordinary necessaries of life suitable for persons in their class and position. Boyd Workmen's Compensation, sec. 234. The petitioner is not bound to deprive himself of the ordinary necessaries of life to which he has been accustomed in order to absolve the respondent from the payment of damages, nor can he on the other hand demand money from the employer for the purpose of adding to his savings or investments. The expression "dependent" must be held to mean dependent for the ordinary necessaries of life for a person of his class and position and does not cover the reception of benefits which might be devoted to the establishment or increase of some fund which he might desire to lay aside.

WORKMEN'S COMPENSATION—DEPENDENTS OF MINORS—BENEFITS—*In re Murphy, Supreme Judicial Court of Massachusetts (June 17, 1914), 105 Northeastern Reporter, page 635.*—Daniel Murphy instituted proceedings against the Bigelow Carpet Co. and its insurer for compensation for the death of his minor son, Walter Murphy. The boy had earned $5.67 per week, and contributed all of this to his father for the support of his family, which consisted of the father, mother, and nine children, including Walter. The act provides that in the case of partial dependents "there shall be paid such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the earnings of the deceased at the time of his injury." The industrial accident board found that, although the father was a partial dependent in the sense that he had other income, the earnings of himself and other children, the rule quoted obviously did not apply in such a case, and the amount of compensation should be the same as for a total dependent, in this case the minimum amount permitted by the statute, or $4 a week, for the 300 weeks specified in the act. The court adopted this view, saying in its opinion delivered by Judge Hammond:

In the present case the father had a large family which he was legally bound to support, and this he was bound to do, whether the children could help or not. The amount contributed by Walter went to help the father in the support of the whole family. Whether it is wise to distinguish as to the support of the individual members of the family in a case like this, as the insurer suggests, is for the legislature.

WORKMEN'S COMPENSATION—DEPOSITIONS FOR USE OF INDUSTRIAL ACCIDENT BOARD—LETTERS ROGATORY—POWER OF COURTS—*In re Martinelli, Supreme Judicial Court of Massachusetts (Oct. 23, 1914), 106 Northeastern Reporter, page 557.*—Sylvio Martinelli as administrator petitioned the superior court of Hampden County to issue letters rogatory to obtain the testimony of witnesses in the Kingdom of Italy to be used in hearings before the industrial accident board for the recovery of payments under the workmen's compensation act for the death of two persons for whose estates he was administrator. The petition was granted in the trial court, and the insuring company concerned took exceptions thereto and appealed the case, the appeal resulting in the action of the court below being reversed.

Speaking of the uses of letters rogatory, and the power of a court to issue the same, Judge Rugg, who delivered the opinion of the court, used in part the following language:

Letters rogatory as a means of procuring the evidence of witnesses in foreign States are not much in use in this Commonwealth. The

statutes make ample provision to this end by means of depositions. The power to issue a commission rogatory in order to prevent a failure of justice is inherent in a court. But it always has been recognized that such power can be put forth only in aid of a cause actually pending in the court, which issues the letters.

It is not averred in the application nor contended in argument that the proceedings before the industrial accident board are pending in the superior court. Manifestly they are not so pending. The machinery of the workmen's compensation act does not contemplate the ascertainment of facts in that court.

It is not within the power of a court, even of general jurisdiction, to issue letters rogatory to obtain testimony to be used before a tribunal over whose procedure and trials it is given no authority until the case itself may be brought before it for review. Therefore, it is not within the authority of the superior court to procure evidence for use before a tribunal over whose proceedings it has no more intimate supervisory power than it has over the industrial accident board.

WORKMEN'S COMPENSATION—DISTRIBUTION OF COMPENSATION—*In re Janes, Supreme Judicial Court of Massachusetts (Feb. 28, 1914), 104 Northeastern Reporter, page 556.*—John C. Janes, the employee, died as a result of injuries which arose out of and in the course of his employment. Janes was a widower. The industrial accident board found that his two minor children were living with him at the time of the injury and were wholly dependent. One child died about a week after the father's death. The decree of the superior court was to the effect that the sum payable as compensation should be divided between the guardian of the surviving child and the administrator of the deceased child. The guardian of the living child did not appeal from this decision, but the insurer did. The court decided that the insurer had no right of appeal in the matter of the distribution of the compensation, the amount being the same in any case. This ruling was said not to intimate an opinion as to the soundness in law of the decree sought to be called in question.

WORKMEN'S COMPENSATION—ELECTION—INCAPACITY—*Gorrell v. Battelle, Supreme Court of Kansas (Nov. 14, 1914), 144 Pacific Reporter, page 244.*—James H. Gorrell brought action under the workmen's compensation act against A. C. Battelle. Compensation was awarded in the district court of Franklin County for partial incapacity for the maximum period and in a lump sum, whereupon the defendant appealed. The petition alleged that the defendant had not filed with the secretary of state an election not to accept the terms of the act. This allegation was denied, and on appeal it was contended that the plaintiff should have proved that no such election had been made.

This was, however, overruled by the court, as is shown by the following paragraphs from the syllabus prepared by the court:

The statutory presumption that all employers affected by the workmen's compensation act (Laws 1911, ch. 218, amended by Laws 1913, ch. 216) are within its provisions obtains until the contrary appears, and nonliability to an action for compensation because of an election to stand outside the provisions of the act is an affirmative defense.

An employer, who in good faith denies liability on the ground of such an election, should ask the court to investigate that subject first, and thereby save the time and expense of a further trial. In all but the most exceptional cases, the certificate of the secretary of state will settle the dispute, and the court may require the production of such certificate at any time. Unless the record on appeal clearly discloses that the defense was specifically and unequivocally brought to the attention of the trial court while it had possession of the case, this court will consider the defense as abandoned.

Plaintiff was a carpenter and a brick mason by trade and, in a period of dullness in those trades, was employed by the defendant as a car repairer. His right eye was struck by a piece of steel and destroyed and the sight of the left eye greatly injured, so that he had been able to get only laborer's work and had not been able to do even that satisfactorily. Compensation was awarded on a weekly basis and commuted to a lump sum. The court affirmed the judgment below as to this also, as is shown by the following paragraph of the syllabus:

The workmen's compensation act awards compensation for incapacity to work as a result of injury. This means compensation for loss of earning power as a workman as a result of injury, whether the loss manifest itself in inability to perform obtainable work or inability to secure work to do.

WORKMEN'S COMPENSATION—ELECTION—MINORS—NOTICE—CONSTITUTIONALITY OF STATUTE—*Troth v. Millville Bottle Works, Supreme Court of New Jersey (Oct. 9, 1914), 91 Atlantic Reporter, page 1031.*—Troth, an employee of the bottle works, filed a petition against it for compensation for injury to an eye, and an order that the defendant pay the petitioner $5 per week for 100 weeks was entered by the Cumberland court of common pleas. Troth was a minor and an apprentice, his contract dating from September 25, 1909, and expiring on the same date in 1913. The injury occurred December 22, 1911, and the compensation act took effect earlier in 1911, but, as is apparent, after the contract of employment was made.

A notice that the employer would not be bound by the terms of section 2 of the act, which provides for workmen's compensation, had been posted and also given by means of the pay envelopes. The court held that this was not, in the case of a minor, a sufficient compliance with the statute, which provides that the section shall apply unless notice is given to the parent or guardian of the minor.

As to the constitutionality of the law as applied to preexisting contracts, the court quoted and followed the Wisconsin decision in Borgnis *v.* Falk, 133 N. W. 209 (see Bul. No. 96, p. 799), and held the provision valid.

The judgment of the court below was accordingly affirmed.

WORKMEN'S COMPENSATION—ELECTION OF REMEDIES—EXCLUSIVENESS—*The "Fred E. Sander," United States District Court, Western District of Washington (Mar. 6, 1914), 212 Federal Reporter, page 545.*—James A. Thompson brought action in admiralty against the vessel named for damages for personal injuries received by him. In his libel the employee admitted the receipt of $360 from the Industrial Insurance Commission of the State of Washington, but averred that the same was a gratuitous payment out of a fund provided by the State, that the defendant had never contributed anything to said fund, and that the amount was in no manner accepted as payment for the injuries. In taking exceptions to the libel, the defendant contended that the receipt of this money under the compensation act constituted an election which barred the bringing of an action, and the court upheld this contention. Judge Neterer, who delivered the opinion, said:

> The common-law right of action being withdrawn, it is immaterial whether payment has been made by the employer to the "accident fund" or not. The fact that the defaulting employer is not protected against actions for injury in case of default of payment after demand will not defeat the injured workman's right to take under the act, should he so elect.
>
> But for the enactment of the workmen's compensation act of the State of Washington, libelant would have two remedies; one his common-law action for damages against the owners, and the other a proceeding in admiralty. The selection of the one remedy would bar a proceeding in the other. A party can not enforce both remedies, and will be required to elect whether to pursue his common-law remedy or proceed in admiralty. The workmen's compensation act, while it took away the common-law action, provided in its stead another remedy. If the libelant determined to obtain relief from the substitute which is provided for his common-law remedy, and received compensation under such act, then he can not proceed in admiralty and thus obtain double compensation for the injury of which he complains.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—"WILLFUL ACT"—*Mc Weeny v. Standard Boiler & Plate Co., United States District Court, Northern District of Ohio (Jan. 15, 1914), 210 Federal Reporter, page 507.*—John J. McWeeny was very seriously injured while in the employ of the defendant company. He sued the company, in spite of the fact that the company had complied with the

provisions of the workmen's compensation act of Ohio, relying on the provision of section 21–2 of that act that nothing in the act shall affect the civil liability of the employer when the injury has arisen from the willful act of the employer or any of his agents or servants, or from the failure of any of them to comply with any statute for the protection of the life or safety of employees. He recovered a verdict of $14,000, and the company moved for a new trial, which was denied. The nature of the willful act claimed by the plaintiff, and the view taken by the trial court as to what constitutes such an act, is shown in the following extracts from the opinion of the court as delivered by Judge Day:

The plaintiff and other employees of the defendant company together with a man named Fisher, the foreman, having charge of the work, were engaged in erecting a large sheet-iron tank to be used for the storage of chemicals. This tank was composed of large iron plates which were lifted in position by means of a derrick and boom erected upon a scaffolding placed within this large metal tank. Shortly before the accident occurred, the attention of Fisher, the foreman, was several times directed to the fact that the mast of the derrick was leaning 2 feet, that one of the guy lines was weak, and several of the men said to him that the mast should be straightened and the guy lines should be tightened and replaced. Fisher refused to do this, and, notwithstanding the fact that his attention was called to the defects in this derrick several times and that a strain of a ton load was being placed upon the guy lines and the derrick, the foreman with an oath directed McWeeny and the other men to proceed with the lifting of the heavy iron plate. They did so, and while engaged in this work the scaffolding and derrick collapsed, injuring McWeeny and several other of the men.

The evidence tends to show that the foreman at the time of this unfortunate occurrence was himself in a place which was of no danger to him.

From an examination of these sections [20–1 and 21–2] it is apparent that, where an employer has complied with the provisions of this act in paying the premiums into the funds and in posting the necessary notices, the employee in case of injury, or his representative in case of death, can not recover for negligence or the want of ordinary care; but if the injury results from a willful act, or from the violation of a statute or ordinance or order of any duly authorized officer, which statute, ordinance, or order was enacted for the protection of the life or safety of the employee, then in such event the employee can either take the benefits provided under this act or sue in court to recover.

The defendant contends that the willful act in contemplation of this statute must have been an act done intentionally with a purpose to inflict injury. The court charged at the trial, in part:

"To constitute a willful act in this case, you must find that the action of Fisher was such an action as to evince an utter disregard of consequences so as to inflict the injuries complained of. In other words, the negligent action was such recklessness reaching in degree to utter disregard of consequences which might probably follow. If

the action of Fisher in ordering McWeeny to work on this scaffold and in connection with this derrick was done under such circumstances as to evince an utter disregard for the safety of McWeeny and the other employees working there in connection with him, then that action was a willful act."

If the contention urged by defendant that a willful act had to be an act coupled with an intention to injure the employee were the correct construction of those terms of the statute, then the employers of laborers, so long as they themselves or their employees did not criminally injure their employees, could incur no liability no matter how recklessly or carelessly they conducted their business without any regard to the safety of those employed.

Extreme cases of this sort will seldom arise. I can not believe that the legislature intended that the term "willful act" should be narrowed down to mean a deliberate intent to do bodily injury and nothing else.[1] This compensation act was passed for a purpose; its primary purpose was to protect the men engaged in the various occupations in Ohio.

In my opinion, the case was fairly tried, and the issues fairly submitted, and the motion for a new trial will be overruled.

WORKMEN'S COMPENSATION—EMPLOYMENT DURING PART OF YEAR—COMPUTATION OF WEEKLY PAYMENT—*Andrejwski v. Wolverine Coal Co., Supreme Court of Michigan (Oct. 2, 1914), 148 Northwestern Reporter, page 684.*—Anne Andrejwski brought proceedings under the compensation act for the death of her husband, which occurred on November 18, 1912, as the result of an accident in the course of his employment in a mine of the company named. The employer and employee had elected to come under the compensation act, and the plaintiff was the sole dependent and entitled to compensation. The only question was as to the amount of the weekly payment to be made to her. The mine in which the deceased worked was not operated during the whole of any year. For the year immediately preceding it had been operated 148 days, and coal had been sent up and paid for "on his number" on 131 days, the pay for it amounting to $507.45. It was customary, however, for two or three of the miners to work together, and send the coal up on the number of one of them, so that this did not indicate correctly the amount earned by him. During the remainder of the year he had worked as a cement-block layer and earned $487.14. The section relating to amount of compensation, on the construction of which the award in this case depended, is as follows:

SEC. 11. The term "average weekly wages" as used in this act is defined to be one fifty-second part of the average annual earnings of the employee. If the injured employee has not worked in the employ-

[1] It may be noted that the legislature of Ohio, in February, 1914, amended the law so as to define the term "willful act" to mean "an act done knowingly and purposely with the direct object of injuring another."

ment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employee has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time.

The court held that the methods of determining the weekly wages provided by the first, second, and third sentences of the section quoted were applicable only to employments which continue during substantially the entire calendar year, and that these methods could not reasonably and fairly be applied to the present case. The method which the court concluded should be used in computing the compensation in this case is shown by the following quotation from the opinion as delivered by Judge McAlvay:

To charge this employment with compensation for injuries to its employees on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, as such compensation would be based on the theory of impossible earnings by the employee in that employment which operated upon the average a trifle over two-thirds of a working year. This was recognized and provided for by the legislature by omitting from the fourth classification any requirement relative to the average daily wage or salary of an injured employee. This construction, in principle, appears to be supported by the English cases involving questions of like character. [Cases cited.]

In the record is an exhibit showing the annual earnings paid by appellant to the deceased from 1904 to 1912, inclusive, amounting to $5,175.21. From this table we find that the average annual earnings paid to him during that period were $575.02, which we will take as a basis for the computation of the compensation to which the claimant is entitled. Having determined his average annual earnings there remains nothing further to do, except to determine the average weekly wages, by dividing this sum by 52, the result of which is $11.06, as such average weekly wages. One-half of this amount, being $5.53, would be the amount to be paid weekly to the claimant for a term not exceeding 300 weeks.

WORKMEN'S COMPENSATION—EVIDENCE NECESSARY TO SUPPORT FINDING—*Reck v. Whittlesberger, Supreme Court of Michigan (July 24, 1914), 148 Northwestern Reporter, page 247.*—Rudolph Reck, a baker, died January 12, 1913, of septic pneumonia, resulting, as his physician testified, from an infected wound in his hand. This was claimed to have been caused on December 26, 1912, from a nail in some fuel with which he was firing an oven in the defendant's bakery. No one in the shop knew of the accident at the time. He finished his work that day and worked nearly two days thereafter, and did not call a physician until January 2. The physician who attended him testified that death resulted from the wound, and the industrial accident board based its award on the determination of the arbitration committee that the applicant for compensation, Reck's widow, was entitled to $2,250. The board, finding no direct evidence, admitted hearsay evidence, consisting of what Reck told his family and fellow employees as to the cause of the injury. In accordance with the law, the employer notified the board of the accident before Reck's death and made a second report after it, both reports stating that a nail was run into or scratched Reck's left hand while he was throwing wood into the furnace. The court held that, while the "elementary and fundamental principles of judicial inquiry should be observed," so that hearsay evidence should not be admitted, yet the decisions of the accident board should not necessarily be reversed under the rule that error is always presumed to be prejudicial. Since the reports of the employer, made while the sources of information as to the cause of the accident were fresh and available, were sufficient evidence on which to base the finding of the board, the court affirmed its order.

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF REMEDY—PROCEEDINGS UNDER COMMON LAW—NATURE OF AWARD—MEASURE OF DAMAGES—*McRoberts v. National Zinc Co., Supreme Court of Kansas (Nov. 14, 1914), 144 Pacific Reporter, page 247.*—E. F. McRoberts was injured while in the employment of the company named and sought to recover in an action, claiming both benefits under the compensation act and damages at common law. Under the compensation act of the State election to accept its provisions is presumed in the absence of an affirmative rejection, which action had not been taken, so that both parties were within its provisions. The company demurred to the declaration, contending that McRoberts was not entitled to claim on both bases but must elect the ground of his procedure. The district court of Wyandotte County overruled the objections of the company, and the case proceeded to trial on the question of damages at common law, the court saying that the claim under the compensation law would be taken under advisement for

future action. The result of the trial was a verdict for the plaintiff in the full amount claimed, whereupon the company appealed, insisting that the remedy provided by the compensation law is exclusive where it applies. This contention was sustained by the supreme court, citing its decision in Shade *v.* Cement Co., 92 Kan. 146, 139 Pac. 1193 (see p. 224). The decision in the case cited had not been announced when the present case was tried nor when the appeal was taken, but it was conceded at the present time that the case should be settled under the compensation law in accordance with the ruling in the Shade case. The question was therefore submitted as to whether, under the record as presented, the judgment of the court below might be treated as an award of compensation. The court held that this was impossible, since to do so would be for it to try and determine an issue that was not considered nor decided by the trial court. Judge Johnston, speaking for the court, said in part:

The elements which enter into a recovery of compensation differ radically from those which warrant a recovery of damages, and the evidence which would support the issue in one is inappropriate to offer in support of the other. Compensation for partial or total disability depends mainly on the average earnings of the injured employee for certain periods preceding the injury, while the damages awarded were not measured by earnings, but were based on the loss which resulted from pain and suffering endured by appellee and to be endured in the future, as well as the loss sustained by the disfigurement of his hand. The extent of the incapacity resulting from the injury is an important question for determination. Is the disability total or partial, and, if partial, is it of a permanent nature? The age of the employee is a consideration, as well as the grade of employment in which he had been engaged for the year preceding the accident; and, in determining what is a just average of the earnings of the employee, it is important to know whether his employment had been casual or continuous, and whether he had been engaged by more than one employer. No issue was formed on the matter of earnings, and the attention of the jury was not called to the evidence relating to wages and the award which the jury made was not based on an average of earnings. On the contrary, as we have seen, the jury were instructed to measure the recovery by the pain and suffering which appellee had endured before the trial and would probably undergo in the future—a measure wholly inconsistent with that prescribed in the compensation statute. Maximum and minimum limitations are placed on the average of the earnings of an employee, and there is also a provision that payments for total and partial disability shall in no case extend over a period of eight years. Here, as we have seen, no consideration was given to any limitation, and the jury were authorized to award damages that appellee might sustain throughout his life by reason of the injury. If compensation is to be contested, an issue should be framed between the parties as to the right to compensation, each having an opportunity to offer testimony in support of the issue, and the compensation should be measured as the statute provides. There is no basis on which this court

can treat the verdict as an award of compensation, nor is it warranted in directing a judgment for any amount on the record, as it stands.

The judgment was therefore reversed and the case remanded for a new trial under the compensation act.

WORKMEN'S COMPENSATION—EXTRAHAZARDOUS EMPLOYMENT—WORKMAN—*Wendt v. Industrial Insurance Commission, Supreme Court of Washington (June 23, 1914), 141 Pacific Reporter, page 311.*—Clara Wendt made application to the industrial insurance commission of Washington for an allowance under the compensation act for the death of her husband, George Wendt. The commission rejected the claim but the superior court of Pierce County overruled this decision and allowed the claim. On appeal by the commission, this judgment was affirmed, the employment being declared extrahazardous within the meaning of the act. Wendt's employer, the Stone-Fisher Co., conducted a department store, and in connection therewith had a repair shop for their delivery wagons and automobiles, separate from the store, and equipped with power machinery of various kinds run by an electric motor. The company employed from one to three carpenters in putting up shelving in the store and other work, and Wendt was the head carpenter previous to his death on March 20, 1912. On that day he attempted to turn on the current so as to use a grindstone to sharpen his chisel. In doing so his hand came in contact with the copper contacts of the switch. The wire which carried the current to the repair shop had become crossed with a high-tension wire, and he was instantly killed by a current of 2,700 volts which passed through his body.

Judge Morris, who delivered the opinion of the court, having stated certain provisions of the act, said:

Section 4, in referring to the particular classes of industry covered by the act, includes in class 5 of construction work "carpenter work not otherwise specified"; in class 29, under the heading "Factories (using power-driven machinery)," "working in wood not otherwise specified"; in class 34, under the same heading, "machine shops not otherwise specified." The same section provides that, if an employer, besides employing workmen in extrahazardous employment, shall also employ workmen in employments not extrahazardous, the provisions of the act shall apply only to the extrahazardous departments and employments and the workmen employed therein. It being shown that the deceased at the time of his injury was employed in a "workshop where machinery is used," that the workshop was a place "wherein power-driven machinery is employed and manual labor is exercised, * * * over which place the employer of the person working therein has the right of access or control," and that he was injured "upon the premises," it seems to us there is no escape from the conclusion that his injury is within the purview of the act.

As to the contention that the employer must also be engaged in an extrahazardous business, the court said:

The act recognizes in section 4 that the same employer may at the same time be engaged in employments both within and without the purview of the act, so far as the hazardous character of the employment is concerned; in which case the act shall apply only to the extrahazardous departments, and to the workmen employed therein. And in this connection it matters not which is the principal business, and which is the incidental business. If the employer conducts any department of his business, whether large or small, as an extrahazardous business within the meaning and defined terms of this act, his workmen would come within the class designated by the act, and be entitled to the protection of the act. Such interpretation we believe falls within the letter as well as the spirit of an act that, because of its humaneness and declaration of a new public policy, should be interpreted liberally and broadly in harmony with its purpose to protect injured workmen and their dependents independent of any question of fault.

WORKMEN'S COMPENSATION—FARM LABORERS—*In re Keaney, Supreme Judicial Court of Massachusetts (Feb. 27, 1914), 104 Northeastern Reporter, page 438.*—Patrick Keaney instituted a proceeding under the workmen's compensation act to secure compensation for an injury suffered while employed at farm labor by a market gardener. The industrial accident board and the superior court of Suffolk County decided against his claim, and he appealed, but the decree of the court below was affirmed. The employer hired four drivers and four helpers, who were largely engaged in delivering his products in the city of Boston. These men worked on the farm when not employed in delivery, while others, including Keaney, were constantly employed in farm labor. The employer had adopted the act as to the drivers and helpers by securing insurance intended to cover them only, and the contention on behalf of the injured employee was that in so doing he had placed himself under its provisions as to all his employees. The court held that this would probably be true in cases other than those of the excepted classes of employers and employees, but that if a farmer desired to come under the act in part he might do so. Judge Rugg, who delivered the opinion, said further:

The act is a practical measure designed for use among a practical people. There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable. On the other hand, if he does not desire to make it available for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed

or dangerous or whom he may desire to protect for any other reason, there is nothing in the act reasonably interpreted to show why he may not do so. If construed to compel farmers to insure for all their laborers if they undertake to insure any of them, the inevitable tendency would be to discourage resort to the act in any respect.

WORKMEN'S COMPENSATION—"FORTUITOUS EVENT"—HERNIA—*Zappala v. Industrial Insurance Commission, Supreme Court of Washington (Nov. 17, 1914), 144 Pacific Reporter, page 54.*—The industrial insurance commission rejected the claim of John Zappala for compensation for an alleged injury causing hernia. On appeal to the superior court of Chehalis County the claimant secured a jury verdict in his favor, and the case came before the supreme court on the appeal of the commission. The opinion of the latter court sustained the judgment of the court below, being delivered by Judge Morris. Speaking of the main question of the interpretation of the language of the act, and quoting the testimony of the injured man as to the circumstances of the injury, he said:

The determinative question arises under section 3 of the act, providing that:

"The words 'injury' or 'injured,' as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease."

The respondent was in the employ of a cooperage company, and on the day of the alleged injury was pushing a heavily loaded truck. The language of the respondent in describing the circumstances under which the injury was received was:

"That the car ran harder than usual, and he tried three or four times to start it but could not move it. Then he put all his strength into it, gave a jerk and hurt himself; felt a sudden pain; could not move for a little while; put his hands where he felt the hurt and called for help; looked at himself and saw a swelling, a small lump where he was hurt; that he had never had any pain there before or any previous rupture."

After discussing the definition of the word "fortuitous," and the principles of interpretation involved, the opinion continues:

The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck. To hold with the commission that if a machine breaks, any resulting injury to a workman is within the act, but if the man breaks, any resulting injury is not within the act, is too refined to come within the policy of the act as announced by the legislature in its adoption and the language of the court in its interpretation. When the appellant admits that the breaking of the truck because of the application of unusual force with resultant injury to the workman is covered by the act, then it must admit that the tearing of muscles or the rupture of fibers, or whatever it is that causes

hernia, while exercising unusual effort, is likewise covered by the act; for there can be no sound distinction between external and internal causes arising from the same act and producing the same result.

Following the above, both the British and American cases are discussed and quoted as upholding the conclusion that a hernia occurring under such conditions should be regarded as a fortuitous event.

WORKMEN'S COMPENSATION—"INCAPABLE OF USE"—*In re Meley, Supreme Judicial Court of Massachusetts (Oct. 23, 1914), 106 Northeastern Reporter, page 559.*—Thomas H. Meley brought a proceeding against his employer and the latter's insurer under the compensation act for injuries to his hands. The insurer appealed from the award of the industrial accident board. A provision of the amendment to the act was in controversy which is to the effect that the additional amounts to be paid "in case of the loss of a hand, foot, thumb, finger, or toe," shall also be paid "in case the injury is such that the hand, foot, thumb, finger, or toe is not lost but is so injured as to be incapable of use; provided, that when the incapacity ceases the additional payment shall also cease." The industrial accident board had held that the right hand was incapable of use, and the court held that there was evidence to support this finding, since it showed that the flexor tendons of nearly all the fingers and of the thumb were cut, and that the hand could be used only as a hook. The court also held that the statute warranted giving additional compensation for an injury to one finger of the left hand.

WORKMEN'S COMPENSATION—INCAPACITY FOR WORK—*In re Sullivan, Supreme Judicial Court of Massachusetts (May 23, 1914), 105 Northeastern Reporter, page 463.*—William T. Sullivan suffered on February 7, 1913, an injury which resulted in the amputation of an arm. He was able to work on May 31, but on account of the loss of his arm did not secure work until October 25, although he tried diligently to do so during the meantime. The court held that the phrase "incapacity to work" in the compensation act covers not only physical incapacity, but inability to obtain work resulting directly from a personal injury, and that the petitioner was entitled to compensation for the entire time until he began work.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Terlecki v. Strauss et al., Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 1023.*—The petitioner in this case was injured while engaged in combing

particles of wool out of her hair at the completion of her day's work, her hair being caught in moving machinery. A judgment of the court of common pleas of Mercer County awarding her compensation was affirmed, the court holding that this injury was received in the course of and arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CLIMBING OFF ROOF FOR LUNCH—INTENTIONAL AND WILLFUL MISCONDUCT—*Clem v. Chalmers Motor Co., Supreme Court of Michigan (Jan. 5, 1914), 144 Northwestern Reporter, page 848.*—Charles S. Clem was killed while in the employ of the defendant company, and the State industrial accident board allowed a claim of $3,000 for his death which award was on certiorari proceedings affirmed, one judge dissenting on the ground that the injury was due to intentional, willful misconduct. The nature of the accident and the contentions of the defendant are sufficiently shown in the following extracts from the opinion as delivered by Judge Moore. Having quoted some of the provisions of the compensation act (No. 10, Acts of 1912), Judge Moore said:

We have quoted sufficiently from the act to show that it is a very marked departure from the old rule of liability on the part of the employer to the employee. It is clear that as to the employer, who has accepted the provisions of the act, the risks of the employee, arising out of and in the course of his employment, are not assumed as heretofore by the employee but must be compensated for according to the provisions of the act, unless the employee is injured by reason of his intentional and willful misconduct.

The first question, then, is: Did Mr. Clem receive a personal injury arising out of and in the course of his employment? And the second question is: Was he injured by reason of his intentional and willful misconduct? The questions are so interwoven that they may well be discussed together. Mr. Clem, with others, was employed on a December day constructing a flat roof on a large building only 19 or 20 feet high. It would add not only to the comfort of these men but to their efficiency as workers to have them about 9 or 10 o'clock partake of a luncheon, which from the fact that hot coffee was served was called a coffee lunch. The luncheon was ordered by the foreman of the company. It was prepared on the premises, and when it was ready the men were directed by the subforeman to go and partake of it. All of them started to do so. They did not in doing so leave the premises of the appellant. All of them but three went down the ladder. Mr. Clem went down the rope which projected over the eaves 7 feet. If he had kept hold of the rope until he reached the end of it, if he was a man of ordinary height and his arms were of the ordinary reach, his feet would be within 5 or 7 feet of the ground. If, when the call to come to lunch was made, Mr. Clem, in responding to the call, had inadvertently stepped into an opening in the uncompleted roof or in company with the others had, in the attempt to reach the ladder,

got too near the edge of the roof and fallen and been hurt, would it be claimed that the injury did not arise out of and in the course of his employment? The getting his luncheon under the conditions shown was just as much a part of his duty as the laying of a board or the spreading of the roofing material. The injury, then, having arisen out of and in the course of his employment, can it be said that compensation shall be defeated because of his intentional and willful misconduct? His primary object was like that of all the other men to get to and partake of his luncheon. There is nothing to indicate that he intended or expected to be hurt. Nearly all the other men went down by the ladder. He went down by a rope where, if his plans had carried, he would have had to make a drop of only 5 to 7 feet. Is that such intentional and willful misconduct as to defeat compensation under the act? There is scarcely a healthy, wide-awake 10-year old boy who does not frequently take a greater chance and without harm. For a man accustomed to physical toil, judged by what is occurring daily, it can not be said that such an act should be characterized as intentional and willful misconduct within the meaning of the statute.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYEE GOING OFF PREMISES FOR LUNCH—*Hills v. Blair et al., Supreme Court of Michigan (July 24, 1914), 148 Northwestern Reporter, page 243.*—Leone H. Hills made application for an award of compensation before the industrial accident board against the receivers of the Pere Marquette Railroad Co. on account of the death of her husband, who had been a section hand on the railroad. The board awarded compensation to the applicant, and the receivers appealed. Hills on the day of the accident, November 16, 1912, had failed to take his dinner as was usual, it being customary for the crew to eat their lunch at a car house. At noon he started to hurry to his home along the tracks, a distance of about 2,000 feet. As he went along a footpath between the tracks, a freight train was approaching from his rear. A little later his body was found about half the distance from the car house to where he would have left the track near his home, having evidently been thrown against a switch standard, which was bent. It was in dispute whether he probably, in walking or running alongside the train, went too near it and was thrown by it, or whether he attempted to board it to ride, or after having so boarded it attempted to get off when he found that the speed was increasing and the train was not to stop at that station. The board having taken the former view in accordance with the theory of the plaintiff, the court held that it should adopt the same view, there being no direct evidence as to how the accident occurred. It held, however, that the injury did not arise out of and in course of the employment, and the order granting the award was reversed, the employee having left the place of his employment during the inter-

mission allowed for the eating of lunch, and not remaining on the premises, in which case the relation of employer and employee would not have been broken.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYEE GOING OUT TO LUNCH—*In re Sundine, Supreme Judicial Court of Massachusetts (May 21, 1914), 105 Northeastern Reporter, page 483.*—F. L. Dunne & Co. were merchant tailors; Edward Olsen made clothing for the company in its workshop, and Emily Sundine was employed by Olsen. The insurance company holding Dunne & Co.'s risks admitted that under the Massachusetts compensation act it was liable for injuries to the employees of the independent contractor, but contended that the injury did not arise out of and in the course of employment. The injury was sustained while the employee was out of the workshop for the purpose of getting lunch, and upon a flight of stairs which was not under the control of either the company or Olsen, but which furnished the only access to the shop. Judge Sheldon, in expressing the decision of the court that the compensation must be paid, said:

Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose, and was revived only upon her return to the workroom. It was an incident of her employment to go out for this purpose.

Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor Dunne & Co., had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises, where she was employed, the means which she practically was invited by Olsen and by Dunne & Co. to use.

It was a necessary incident of the petitioner's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose "out of and in the course of" her employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PUNCHING TIME CLOCK—*Rayner v. Sligh Furniture Co., Supreme Court of Michigan (Apr. 7, 1914), 146 Northwestern Reporter, page 665.*—The employee, Rayner, was running to punch the time clock, which he was required to do when the noon whistle blew. He ran into another employee, whom he could not see on account of obstructions on the floor, and received injuries which eventually resulted in his death. The court held that going to punch the clock was a part of his employment, and affirmed the award made by the industrial accident board granting compensation to his widow.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—RIDING TO AND FROM WORK—*In re Donovan, Supreme Judicial Court of Massachusetts (Feb. 27, 1914) 104 Northeastern Reporter, page 431.*—The employee Donovan secured a decree in his favor in the superior court of Suffolk County. From this the insurer of his employer appealed, and the point of interest was as to whether the injury, which occurred while the employee was riding from his place of work in a wagon furnished by the employer, was within the scope of the act. The court decided that it was, affirming the decree of the court below. In the opinion delivered by Judge Sheldon, the discussion of the English cases on the point by Prof. Bohlen in 25 Harvard Law Review, 401 et seq., was referred to, and the court said:

From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. [Cases cited.]

The finding of the industrial accident board that Donovan's transportation was "incidental to his employment" fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real, feature or detail of the contract.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—*Bayne v. Riverside Storage & Cartage Co., Supreme Court of Michigan (July 24, 1914), 148 Northwestern Reporter, page 412.*—Lillian Bayne instituted proceedings for compensation for the death of her husband because of an accident alleged to have arisen out of his employment with the company named. The employee, a strong, well man, employed in moving furniture, quit work August 27, 1913, after lifting at apparent disadvantage a heavy article, complaining that in lifting it he had hurt his back. He took to his bed and next day a physician was called. He became much worse and another physician, called September 6, found him suffering from pneumonia of two or three days' duration, and in serious condition. This physician had him removed to a hospital, where he died.

It appeared that on August 24 Bayne had danced on a boat, had become heated, and complained of being chilled; that on the afternoon of the 26th he had carried a heavy object, and in setting it down thought he "must have kinked his back"; and on the morning

of the 27th said the jar of his wagon going over the car track hurt his back. Physicians were heard, other than the one who originally attended him, and some were of opinion that there was no connection between the alleged injury and the pneumonia, while others asserted that the disease was directly caused by the injury. The court therefore upheld the determination of the board awarding compensation, concluding its opinion as follows:

Assuming that the court would have the right to brush aside wholly improbable expert testimony or correct the commission for not doing so, we do not feel warranted in saying that the opinion evidence favorable to claimant is wholly improbable. There is therefore a dispute of fact, which the commission has determined.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—EFFECT OF PREVIOUS INJURY—*Milliken v. A. Towle & Co., Supreme Judicial Court of Massachusetts (Jan. 8, 1914), 103 Northeastern Reporter, page 898.*—The industrial accident board rendered a decision awarding damages in the amount of $1,950 to Caroline Milliken as dependent of Frank T. Milliken, deceased, and the superior court of Suffolk County issued a decree in accordance with this decision. The insurance company holding the employer's risk appealed, and the decree was reversed by the supreme judicial court, on the ground that the injuries received did not fall within the classification of the statute.

Four or five years before the death of Milliken, and while employed by the same company as teamster, he had suffered a fall from his wagon, striking on his head. Three months before October 8, 1912, and also on that day, he showed evidence of lapse of memory. At 5 o'clock on the date given above he was directed to drive his wagon to the stable to be put up for the night. He wandered about, and finally left his horse, wandered into a swamp, and remained there until morning buried, except for his head, in the cold mud and water, from which experience he contracted pneumonia and died. Judge Loring, in delivering the opinion of the court to the effect that these facts did not constitute an "injury arising out of his employment," said:

The industrial accident board found: "That the loss of memory with which the employee, Milliken, was seized was not in itself a fatal disorder, and that he would not have met his death as he did but for the horse and wagon and his effort to get them to the stable."

The dependent's [claimant's] contention is that Milliken's death was caused by pneumonia brought on by his falling into the swamp and lying there all night; that, under these circumstances, falling into the swamp and lying there all night was a personal injury which caused his death.

The fact that Milliken "would not have met his death as he did but for the horse and wagon and his effort to get them to the stable"

goes no farther than to show that the personal injury suffered by Milliken was a personal injury "in the course of his employment."

The difficulty in the case arises from the provision that the personal injury must be one "arising out of" as well as one "in the course of his employment."

There is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. The distinction between the case at bar and a case within this clause of the act is well brought out by what is suggested by a remark of the majority of the industrial accident board. If the horse driven by Milliken had run away and Milliken had been thereby thrown out and killed, the personal injury in fact suffered in that case would have been one which from the nature of his employment would be likely to arise, and so would be one "arising out of his [the employee's] employment."

It seems plain that if Milliken's death was caused by a personal injury, it was the one which happened some four or five years before the occurrence here complained of and before the workmen's compensation act was passed.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—DISEASE—CAUSATION—*Newcomb v. Albertson, Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 928.*—William E. Albertson entered a petition against Leverett Newcomb under the workmen's compensation act. Judgment was rendered for the petitioner in the court of common pleas of Cumberland County, and the case was taken up on certiorari, when the judgment of the lower court was affirmed.

Albertson was employed as a chauffeur and sustained a fracture of the arm because of the crank of the automobile "back-firing." While under treatment in the hospital, where he went with the privity and acquiescence of the employer, an abscess of the thumb developed, caused by an unpadded splint. Ankylosis of the thumb followed, and this in turn caused injury to the first two fingers. In deciding that these injuries arose in the course of the employment, Judge Swayze, who delivered the opinion of the court, said:

Section 11 of the workmen's compensation act (P. L., p. 136) provides for compensation for personal injuries to an employee by accident arising out of and in the course of his employment. The defendant expressly confines his argument to the award of compensation for the injury to the thumb and two fingers. The only question for us is whether those injuries were due to the accident. The question is not, strictly speaking, whether the accident was the proximate cause of the ankylosis of the thumb, or whether the infection was the natural result of the accident.

An English case was then quoted, in which it was said:

It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually

happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have followed.

Continuing, the court said:

In the present case it is said that the chain of causation is broken because the infection was due to the failure of the physician to take proper precautions. There is no finding to that effect, and the evidence is not before us. We can not assume that the infection could be caused only by the negligence of the physician, and it is therefore unnecessary to decide whether such negligence would amount to such a break in the chain of causation that the employer would not be liable. We think that the trial judge was right in finding that the injury in fact resulted from the accident and in holding the employer liable.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—EFFECT OF PREEXISTING DISEASE—*Voorhees v. Smith Schoonmaker Co., Supreme Court of New Jersey (Nov. 6, 1914), 92 Atlantic Reporter, page 280.*—The facts of this case, in which the court affirmed a judgment of the court of common pleas of Somerset County in favor of the widow of a deceased employee, are given in the portion of the opinion of Judge Parker, who spoke for the court, quoted below:

The principal question raised is whether the court of common pleas was justified in finding that the death of Ira Voorhees, the employee, resulted from an accident arising out of and in the course of his employment. The deceased, a man of middle age or over, worked in a woodworking shop of prosecutor, and at the time of the seizure just preceding his death was working at a task of furrowing 16 posts, each six inches square and weighing about 100 pounds apiece. To do this he had to get each post up on the table of the furrowing machine and push it forward against the knives by body pressure, which was exerted by pushing his abdomen forcibly against the end of the post. Each post had to be run through twice. After Voorhees had finished 13 of the posts he sat down, evidently in great pain, and shortly afterward sent for a doctor, who had him taken home, where he died 3 days later. He vomited blood and passed bloody stools, and the doctor pronounced the trouble internal hemorrhage. After death the undertaker, as he testified, found the body in such condition that he had it buried a day earlier than originally intended. It was in evidence that there was a large bruise on the abdomen where the pressure had been exerted on the ends of the posts.

The effort of the defense was to show that death was produced by a rupture resulting from cancer. The family refused to consent to an autopsy, but that was their right. It must be conceded that much of the evidence points to cancer and an internal rupture of some kind. But it was quite plain, and the trial court was fully justified in finding, that the rupture occurred while the deceased was in the very act of doing some unusually heavy work. So that, even if deceased was suffering from internal cancer, it was quite

within the province of the court to find that the proximate cause of death was the unusual and forcible pressure on parts weakened by disease, which but for the unusual strain would have held out for a considerable period.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—EVIDENCE OF CAUSE OF DEATH—*Muzik v. Erie Railroad Co., Supreme Court of New Jersey (Jan. 9, 1914), 89 Atlantic Reporter, page 248.*—This case under the workmen's compensation act rested on the question as to whether the fact that the death of the employee arose in the course of his employment must be proved by direct evidence, or would be inferred from the circumstances which existed in the case.

The decree of the lower court was reversed for correction in minor particulars, but the effect of the decision was to uphold the finding in favor of the plaintiff. Judge Voorhees, who spoke for the court, said:

The first point made by the defendant is that there is no evidence that Muzik's death was caused by an accident in the course of his employment. It is true that no direct evidence of these facts was produced. The man was found after the train had gone out, some 3 or 4 feet from the railroad, lying with his feet toward the track, with an injury in his head, and died shortly; the case being one of a broken neck.

The Bergen County court of common pleas found that the deceased came to his death by accident, while in the railroad's employ, and in the course of it. I do not think that we can question this finding. The facts shown clearly indicate that the deceased was struck by the train after he had given the waybills, in pursuance of his duty as such employee, to the train agent, and this, of course, would be while in the course of his employment.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—REVIEW BY COURTS—*De Constantin v. Public Service Commission, Supreme Court of Appeals of West Virginia (Sept. 29, 1914), 83 Southeastern Reporter, page 88.*—The plaintiff, De Constantin, was the acting royal consul of Italy, and made application to the court for an order requiring the public service commission to allow a rejected claim for compensation on behalf of the dependents of Giuseppe Zippi.

Zippi was killed by a train on the main line of the Baltimore & Ohio Railroad. He was in the employ of a firm engaged in construction work on a portion of the road. While his death occurred a few minutes before the time for him to begin work in the morning, the evidence did not show that the main line where it happened was the only or even the proper route for access to his place of work, and the commission rejected the claim on the ground that the injury was not in the course of employment. The court sustained this view and

refused the order applied for. Its conclusions as to the two questions involved are shown in the following syllabus prepared by the court:

The jurisdiction to review acts of the public service commission, respecting the administration of the workmen's compensation fund, conferred upon the supreme court of appeals by section 43 of chapter 10 of the Acts of 1913, is original, not appellate.

An injury incurred by a workman in the course of his travel to his place of work, and not on the premises of the employer, does not give right to participation in such fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and returning from his work.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—USE OF FORBIDDEN APPLIANCE—*Reimers v. Proctor Publishing Co., Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 931.*—The father of Gustave A. Reimers entered a petition under the compensation act and secured a judgment in his favor in the court of common pleas of Hudson County. This was reversed by the supreme court. The son had been injured while using an automobile in distributing newspapers, the testimony showing that he had been expressly forbidden to use the same. As to this Judge Swayze in delivering the opinion said:

The principal question in the case for us is whether there was evidence justifying an inference that the death was by accident arising out of and in the course of the employment. There was evidence justifying an inference that the decedent was employed by the defendant as a general utility man, and that among his duties was the distribution of newspapers. He had at one time used an automobile of the defendant, and had met with an accident which damaged the machine. The defendant then borrowed an automobile, and its president and one of his sons, who was in its employ, both forbade decedent to use the car. Nevertheless he used it frequently to distribute the newspapers. There is no evidence that anyone except the president had authority to authorize its use; but the use was so frequent and so public that, if there was nothing more in the case, the trial judge would have been justified in finding that the decedent was authorized to use it notwithstanding the prohibition. The difficulty is that both the president and his son testified that the decedent had been told not to use the car on the day the present accident happened. The son in particular told him, just before he went out, to let the car alone. There is no conflicting evidence on this point, and, if these witnesses are to be believed, the decedent took the car on the occasion when the accident happened in disobedience of express orders just received. If there was authority to use it before, there was a revocation.

WORKMEN'S COMPENSATION—INJURY OF EMPLOYEE BY NEGLIGENCE OF THIRD PARTY—*Meese et al. v. Northern Pacific Railway Co.,*

United States Circuit Court of Appeals, Ninth Circuit (Feb. 16, 1914), 211 Federal Reporter, page 254.—This was an action to recover damages for the death of Benjamin Meese. Meese was an employee of a brewing company, and was engaged at the time of the accident which caused his death in placing Government stamps upon barrels which were being rolled down skids and placed on cars on a siding of the railway alongside his employer's plant. The railway company caused a train to be run upon the siding against the car on which he was standing, causing several barrels to roll upon him. It was not contended that the agents of the railway company were not negligent, but the contention was that the wife and children must recover, if at all, under the workmen's compensation act of Washington. The court decided that the statute providing for recovery for death caused by negligence was not repealed by the compensation act, as far as third persons are concerned in such cases, as appears from the following extracts from the opinion, which was delivered by Judge Morrow:

With respect to the declaration of policy contained in the first section of the act, it is to be noticed that it is specifically directed against "the common-law system governing the remedy of workmen against employers for injuries in hazardous work." The present action is not one arising under the common-law system, and it is not against the employer of the decedent. The plaintiffs in error, as the wife and children of the decedent, had no right of action against the defendant at common law, whether the defendant was an employer or a third person not an employer. Their right of action was purely statutory, and is based upon sections 183 and 194 of the [Rem. & Bal.] Codes and Statutes of Washington.

The question here is: Have the plaintiffs in error a remedy under the prior statute? They have if that statute has not been repealed by the compensation act. It is not claimed that it has been repealed by that act in express terms. Can it be said that it has been repealed by implication? It is plain that it has not, when we consider that by the compensation act it is provided that if a workman is injured away from the plant of his employer by the negligence or wrong of another not in the same employ, and the injury results in the death of the workman, his widow, children, or dependents may elect whether to take under the compensation act or seek a remedy against such other. What that remedy against the other is is clearly indicated by the remainder of the section pointing to a right of action under the prior statute.

WORKMEN'S COMPENSATION—INJURY OF EMPLOYEE BY NEGLIGENCE OF THIRD PARTY—SETTLEMENT—SEPARATE CLAIM AGAINST EMPLOYER—*Newark Paving Co. v. Klotz, Supreme Court of New Jersey (Feb. 24, 1914), 91 Atlantic Reporter, page 91.*—Hattie Klotz, petitioner in this proceeding for compensation, was administratrix of a workman who had been employed by the defendant company.

Klotz was employed by the company to wheel stone and cement to a concrete mixer at work on the repavement of a street. He went to this work at 7 o'clock in the morning, but, when he arrived there, it was found that, owing to the pipes of the concrete mixer having been frozen, no work could be done until this had been repaired. Before the mixer was fixed so as to permit the resumption of work, Mr. Klotz, while fixing up his wheelbarrow, was struck by a street railway car and killed.

Prior to the trial in this case, the petitioner received $800 from the street railway company, and released, by a release under seal, that corporation from liability.

Having held that the evidence justified a finding that Klotz's death was due to an accident arising out of and in the course of his employment, the court further held that the settlement with the corporation whose wrong caused death did not bar the recovery of compensation, and that the employer had not a right by way of subrogation to the claim of the employee against that corporation. The judgment of the court of common pleas of Essex County in favor of the petitioner was affirmed.

The reasons for this conclusion are set forth in the following quotation from the opinion of the court, which was delivered by Judge Swayze:

> If the statutory compensations were subject to deductions by reason of payments made by a third person, the tort-feasor, to the person injured or to his dependents, in satisfaction of the liability for the tort, this object of the statute [of a fixed amount of compensation for a definite period] would be thwarted, and in effect the commutation to a lump sum would take place without any order of the court and at the will of the injured party or his representatives. If, on the other hand, the employer were allowed to recover of the tort-feasor by action in the name of the employee or his representative, he would be able to recover in advance of payments by him and at a time when the extent of his own liability could not be ascertained. These considerations suffice to show that the right to compensation under the statute and the right to recover damages of the tort-feasor are of so different a character that the rule of law appealed to by the prosecutor is inapplicable. The release, therefore, of the claim against the street railway could not be a bar to the right to compensation under the statute.

It was conceded that this conclusion made it possible for an injured workman to secure double compensation—a difficulty that was sought to be met by a subsequent amendment. There is also an amendment to the original act which subrogates the employer to the rights of the injured workman to an action against the negligent third person, or releases the employer from liability if an adequate compensation has been recovered by the injured man from such third

person. This amendment, however, was not in effect at the time of the injury, and was held by the court not to furnish a guide for its rulings in the present case.

WORKMEN'S COMPENSATION—MEDICAL AND HOSPITAL SERVICES—*In re Panasuk, Supreme Judicial Court of Massachusetts (May 21, 1914), 105 Northeastern Reporter, page 368.*—From a decree in the superior court of Suffolk County in favor of the employee, Theodore John Panasuk, in a proceeding under the workmen's compensation act, the insurer, the American Mutual Liability Insurance Co., appealed, the decree of the lower court being affirmed.

The Massachusetts compensation act provides for the furnishing by the insuring association, during the first two weeks after injury, of medical and hospital services and medicines. The employee concerned was at work for the Taunton Wool Stock Co., and a splinter became embedded in his hand, causing an abscess and necessitating a surgical operation and several dressings thereafter. The industrial accident board found that the employee was an illiterate foreigner, unable to read, write, speak, or understand the English language. A notice, signed by the Taunton Dye Works & Bleachery Co., a separate corporation from that for which the employee worked, was posted near his working place, giving the name of the insurance association and the names of "Doctors to whom to go in case of accident and receive free medical attendance." The employee reported his injury to the foreman, who did not advise him regarding his right to medical attendance, and he went to a physician, who found need of an immediate operation. The physician wrote to the superintendent of the employer, which did not then furnish any attendance. It was held that the industrial accident board had jurisdiction to consider the question of the right of the employee to compensation for the amount paid by him for medical attendance; and that the duty of the association to "furnish" medical treatment means something more than a mere passive readiness to provide it if called for; rather, an active effort to render the necessary aid.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL TREATMENT—REFUSAL TO PERMIT OPERATION—*Jendrus v. Detroit Steel Products Co. et al., Supreme Court of Michigan (Dec. 20, 1913), 144 Northwestern Reporter, page 563.*—Helen Jendrus brought suit against the company named and the insurance company which carried its compensation risks for the death of her husband, Joseph Jendrus. A finding for the claimant for the amount of compensation provided for death by injury, made by the arbitration committee,

was affirmed by the industrial accident board, and on certiorari it was again affirmed by the supreme court. The defendants' claim was that death was caused not by the accident, but by the refusal of the employee to allow an operation to be performed when first proposed, and that the refusal of medical and surgical treatment offered by the employer barred him from compensation.

The opinion of the supreme court, delivered by Judge Stone, quotes the opinion and finding of facts by the industrial accident board as follows:

In this case the deceased, Joseph Jendrus, was injured by a severe blow on the abdomen. The doctors attending the injured man diagnosed the injury as a probable rupture of the intestine, and advised an operation. The accident occurred about 1 o'clock in the afternoon of February 14. At about 8 or 8.30 in the evening the doctors sought to operate on the injured man. It appears that he could not talk English, and communication was had with him through an interpreter. The injured man shook his head, indicating a refusal to be operated on. The matter of an operation was again brought up by the doctors on the following morning, February 15. Jendrus, at that time, refused to submit to the operation, but consented at about 11.30 a. m. The operation was performed about 1.30 p. m. on February 15. It seems that during the operation the patient vomited, and the vomit was drawn into the lungs, causing pneumonia, and resulting in his death a few days later. The operation disclosed a rupture of the intestines which was not sutured, and the post-mortem examination showed the same to be in process of healing at the time of death. All communication with the deceased after the injury was through an interpreter. The board is of the opinion that the refusal to be operated on when first requested and the further action of deceased in delaying consent to the operation until nearly noon on the day following the accident was not so unreasonable and persistent as to defeat the claim for compensation in this case. He did submit to the operation after being convinced that it was absolutely necessary.

The opinion of Judge Stone concludes:

In none of the cases cited by appellants' counsel was the operation anything more than a minor operation for a trifling injury. We think the cases clearly distinguishable from the instant case, which involved a major operation of a serious nature. None of the testimony in the case goes to the length of showing that Jendrus' life would have been saved had the operation been submitted to at 8 o'clock on the evening of February 14, which was the first time that Dr. Hutchings had reached the conclusion that an operation was necessary. Peritonitis had already set in, and the vomiting had commenced, and vomitus of a fecal nature was then being expelled. That it was the injury which caused the peritonitis is not questioned; that it was the peritonitis which caused the vomiting of fecal matter is not questioned; that it was the taking of fecal matter into the lungs which caused the pneumonia is claimed by all of the surgeons who testified. There is testimony that he might have recovered without any operation, although that result could not have been reasonably

expected. Under all the circumstances of the case, including the fact that Jendrus was a foreigner, unable to speak or understand the English language, that he was suffering great pain on the evening of the 14th, that he was unacquainted with his surroundings, and that he did consent to, and did submit to, an operation within 15 or 16 hours after it was first found necessary, in the judgment of the surgeons, we can not hold, as matter of law, that the conduct of Jendrus was so unreasonable and persistent as to defeat the claim for compensation by his widow. Neither can we hold that Jendrus by his conduct in the premises in causing a delay in the operation was guilty of intentional and willful misconduct. We can not say, as matter of law, that the industrial accident board erred in its conclusions of law in affirming the action of the committee on arbitration. No other questions of law are presented by the record.

WORKMEN'S COMPENSATION—NONRESIDENT ALIEN BENEFICIARIES—INJURIES CAUSING DEATH—*Gregutis v. Waclark Wire Works, Supreme Court of New Jersey (Apr. 14, 1914), 91 Atlantic Reporter, page 98.*—This was an action by Eva Gregutis as administratrix to recover damages for the death of a workman who left dependents resident in Russia, but none in the United States. It was conceded that there was no right of recovery under the State compensation act, since nonresident beneficiaries are excluded therefrom. The question was raised whether or not the act of 1848 allowing recovery for injuries causing death was applicable in the present instance, the court (a single judge sitting) ruling that it was not. The opinion of Judge Bergen is in part as follows:

That such nonresident aliens have a right of action under certain conditions is settled in this State (Cetofonte *v.* Camden Coke Co., 78 N. J. Law, 662, 75 Atl. 913, [Bul. No. 90, p. 833]), but such right depends upon the condition that a party, injured through the negligence of the defendant, would, if death had not ensued, be entitled to maintain an action in respect thereof (P. L. 1848, p. 151; 2 Comp. Stat. 1910, p. 1907, sec. 7).

I think it must be conceded that, if the deceased had suffered an injury, not resulting in death, he would have been bound by the compensation provided for in the act of 1911 (P. L., p. 134), and could not have brought suit for his injuries in disregard of that act, and, if he could not, then it would follow that the condition upon which a right of action is given to the personal representative of a deceased person is not present. In addition to this, the act of 1911 covers all cases of death, and compensation therefor, where the contract of the employee is subject to section 2 of the act, and to that extent the act of 1848 is inconsistent with it, as the later act provided a different procedure and rule of damages, and, being inconsistent, it can not be applied to the class of cases enumerated in the statute of 1911, for that act repeals all inconsistent legislation.

The conclusion I have reached is that, where an employee contracts to work under section 2 of the employers' liability act, the damages to be paid by the employer in case of death are limited by that act,

and that an action by next of kin can not, in such case, be maintained in disregard of the act. Compensation is given, in lieu of damages, to dependents, and not to next of kin as such. The power of the legislature to give or withhold a right of action in such case, and to declare to whom, and in what amount, compensation shall be made, can not be doubted.

This complaint admits an employment governed by the second section of the statute of 1911, but avers that because, under that act, nonresident dependents are excluded from compensation, it does not apply to them, although it would apply to the compensation of the employee if he were seeking compensation for injuries on his own behalf. This does not state a cause of action in the present state of the law on this subject.

The case was subsequently taken to the court of errors and appeals (92 Atlantic Reporter, p. 354), in which the judgment of the supreme court was affirmed, the court stating that the "death act" (2 Comp. St. 1910, p. 1907) limited recovery to cases where the decedent would, if death had not ensued, have been entitled to maintain an action. It cited paragraph 7 (sec. 2) of the workmen's compensation act of 1911, which provides that when an employer and an employee shall by agreement, either express or implied, accept the provisions of the act, compensation for personal injuries or death shall be made in accordance with the provisions of the act; the next paragraph provides that this agreement shall be a surrender of all rights to any other method of settlement, and shall bind personal representatives, widow, and next of kin. Continuing, Judge Trenchard, who delivered the opinion of this court, said:

By force of these provisions, therefore, the decedent, if he had suffered an injury not resulting in death, would have been limited to the recovery of the compensation provided for in section 2 and by the procedure and in the forum provided in the workmen's compensation act, and he could not have brought suit for his injury in disregard of that act. It follows, therefore, that the condition upon which a right of action is given to the personal representatives of a deceased person by the death act is not present in the case at bar.

Whether, in a proceeding begun under the workmen's compensation act in the common pleas court, the administratrix could recover under paragraph 12 (2), "expenses of last sickness and burial not exceeding two hundred dollars," upon the theory that there were "no dependents," is a question we have not considered, since it is not before us.

The judgment below will be affirmed, with costs.

WORKMEN'S COMPENSATION—PERMANENT INJURY—AGED EMPLOYEE—AMOUNT OF COMPENSATION—*Bateman Manufacturing Co. v. Smith, Supreme Court of New Jersey (Feb. 25, 1914), 89 Atlantic Reporter, page 979.*—James E. Smith was injured, while employed by the company named, by a radiator falling and crushing his right

leg. He was 73 years old and, on account of his age and the inability of the bones to knit, this accident caused permanent disability in his occupation as plumber, which requires standing.

The judge of the court of common pleas of Camden County awarded compensation for total disability or for 400 weeks. This award was reversed by the supreme court and compensation awarded for 175 weeks, the compensation specified for loss of a leg. In rendering this decision the court said that the award must be limited by the schedule contained in paragraph 11 of section 2 of the act and that the age or health of the employee, although causing an accident to have a different effect, does not affect the amount of compensation.

WORKMEN'S COMPENSATION—PERMANENT INJURY—DEATH—AGED EMPLOYEES—*City of Milwaukee v. Ritzow et al., Supreme Court of Wisconsin (Oct. 6, 1914), 106 Northwestern Reporter, page 480.*—The Wisconsin workmen's compensation act provides that in case of the permanent injury of an employee who is over 55 years of age the compensation shall be reduced by 5 per cent, if over 60 years of age by 10 per cent, and if over 65 years of age by 15 per cent. Other subdivisions provide that, in case of the death of an injured employee, a sum equal to the compensation for permanent injury or disability shall be paid as benefits to the surviving dependents of the employee. In the present case the employee, a man 80 years of age, was killed in the course of his employment, and the industrial commission awarded his widow an amount equal to four times his last average annual earnings, which is the amount provided for permanent disability, without making any 15 per cent reduction. The circuit court of Dane County affirmed this award, and the city appealed to the supreme court. The latter court held that the term "permanent injury" was used in the ordinary sense, and did not include injury resulting in death, in spite of the fact that the reason for the reduction in such cases might be stronger than in cases where the employee survives with permanent disability. The full award was therefore affirmed, two judges dissenting, the court saying that it was so easy for the legislature to specify if it had desired to reduce death benefits as well as those for permanent disability that its failure to do so inclined the court to the view that such was not its intention even though the "reason of the statute as to reduction of compensation applies stronger to the condition not included in its strict letter than to that which is."

WORKMEN'S COMPENSATION—PERMANENT TOTAL OR PARTIAL DISABILITY—LOSS OF FINGERS—AMOUNT OF BENEFITS—*Sinnes v. Daggett et al., Supreme Court of Washington (July 30, 1914), 142 Pacific*

Reporter, page 5.—The industrial insurance commission awarded compensation for partial disability in the amount of $1,200, in addition to $45 for loss of time, to Thomas Sinnes, for the loss of several fingers on each hand. He appealed, the superior court of King County affirmed the award, and he again appealed, contending that his disability was total and permanent.

The accident occurred while he was in the employ of the Moore Logging Co. The compensation act provides that permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis, or other condition permanently incapacitating the workman from performing any work at any gainful occupation. It also states that permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, etc.; and that for permanent partial disability the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, and not in any case to exceed the sum of $1,500.

The supreme court held that the questions involved were questions of law; that the injury was within the definition of permanent partial disability, and there was no reason for the granting of a jury trial; and that the amount of compensation was within the discretion of the commissioners, limited only by the prescribed maximum of $1,500. The action of the court below in dismissing the appeal was therefore affirmed, and the award of $1,200 allowed to stand as originally made.

WORKMEN'S COMPENSATION—PERSONAL INJURY—OCCUPATIONAL DISEASE—LEAD POISONING—*Adams v. Acme White Lead & Color Works, Supreme Court of Michigan (July 25, 1914), 148 Northwestern Reporter, page 485.*—Sarah E. Adams made claim against the defendant named for compensation. The industrial accident board entered an award in her favor, and the defendant brought certiorari, when the decision was reversed. The husband of the claimant, Augustus Adams, left work in the defendant's plant at the closing hour May 29, 1913, and was unable to resume work, dying on June 27, 1913. He had been employed since the previous December at work which brought him in contact with red lead.

The industrial accident board held that the language of the Michigan act, which specifies, "a personal injury arising out of and in the course of his employment," omitting the words "by accident" originally found in the English statute, was broad enough to include occupational diseases. It also found that it would not be justified in holding the part of the act referred to invalid on constitutional grounds. In discussing the question whether the act includes and

covers occupational diseases, the supreme court held that an occupational disease is not an accident, since it is expected that, in spite of the greatest precaution, a certain percentage of employees will contract such diseases; that the occurrence of such a disease therefore lacks the element of being unforeseen and unexpected, which is characteristic of an accident. The purpose of the act is taken up, and it is shown that it is intended to provide compensation for injuries, either directly or by suit against employers not accepting the act, whether or not the injury resulted from an employee's negligence or the negligence of a fellow servant, and without regard to any assumption of risks. Since no action at all was allowed at common law for occupational diseases, this was taken as an indication that the words "personal injury" were intended to mean injury by accident. The requirement that the employer shall make a report within 10 days of the happening of the accident resulting in a personal injury was shown to tend in the same direction, since it may be in many cases impossible for the employer to know that disability is the result of an occupational disease resulting from the employment within that length of time.

The Massachusetts decisions (In re Hurle, 217 Mass. 223, 104 N. E. 336, [p. 260]; Johnson *v.* London Accident & Guarantee Co., 104 N. E. 735, [p. 259]), which hold occupational diseases to be included under the law of that State were distinguished, on the ground that the word "injury" is used throughout the act, in the place of "accident" in the Michigan act; and a decision in New Jersey (Hichens *v.* Magnus Metal Co., N. J. Law Journal (Com. Pl. June 25, 1912), p. 327), is cited as upholding the present decision not to consider such diseases as included.

The court further held that if the legislature intended to include occupational diseases, that part would be unconstitutional, as violating the provision of the constitution that "No law shall embrace more than one object, which shall be expressed in its title." The controlling words in the title of the workmen's compensation act are said to be "providing compensation for accidental injury to or death of employees," which language it was held would not allow to be included in the body of the act provisions for compensation for occupational disease.

WORKMEN'S COMPENSATION—PERSONAL INJURY—OCCUPATIONAL DISEASE—LEAD POISONING—*Johnson v. London Guarantee & Accident Co. (Ltd.), Supreme Judicial Court of Massachusetts (Apr. 4, 1914), 104 Northeastern Reporter, page 735.*—The industrial accident board found that the employee, who was 72 years of age, and had been employed at lead grinding for 20 years, had been incapacitated by lead poisoning since March 13, 1913, and the superior court of Suf-

folk County issued a decree awarding him damages. The company appealed. Judge Crosby, in delivering the opinion of the court affirming the decree of the court below, said:

The main inquiries raised by the appeal are: (1) Has the employee suffered a personal injury within the meaning of the act? (2) If so, what was the date of the injury? (3) If the date of the injury was subsequent to July 1, 1912 [the date of taking effect of the amended act], did it arise out of and in the course of his employment?

Under the act, "personal injury" is not limited to injuries caused by external violence, physical force, or as the result of accident in the sense in which that word is commonly used and understood, but under the statute is to be given a much broader and more liberal meaning, and includes any bodily injury.

Aside from the decisions under the English act which provides for compensation for "personal injuries by accident," it is clear that "personal injury" under our act includes any injury or disease which arises out of and in the course of the employment, which causes incapacity for work and thereby impairs the ability of the employee for earning wages. The case of Hood & Sons *v.* Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, is decisive of the case at bar. In that case it was held that for a person to become infected with glanders was to suffer a bodily injury by accident.

This question recently has been considered fully in Hurle's Case, 104 N. E. 336 [see p. 260], which decided that an employee having suffered an injury which resulted in total blindness caused by absorbing poison in the course of his employment, which incapacitated him from labor, had suffered a "personal injury" within the meaning of the act.

In view of the finding of the board that Johnson had suffered from lead poisoning fourteen years before and had had no recurrence of the disease until he became incapacitated for work on or about March 13, 1913, and the further finding that there had been "an absorption of lead poisoning since July 1, 1912, and that the date when the accumulated effect of this poisoning manifested itself, and Johnson became sick and unable to work, was the date of the injury," we are of opinion that the board was warranted in finding that the injury was received when he became sick and unable to perform labor. Until then he had received no "personal injury," although doubtless the previous absorption of lead into his system since July 1, 1912, finally produced the condition which terminated in the injury. [Citing a number of British cases.]

As the physical incapacity of the employee for work has been found by the board to have been caused by the gradual absorption of poison into his system subsequent to July 1, 1912, resulting in personal injury on or about March 13, 1913, there seems to be no reasonable conclusion other than that such injury arose out of and in the course of his employment. (Hurle's Case, and cases cited.)

WORKMEN'S COMPENSATION—PERSONAL INJURY—OCCUPATIONAL DISEASE—OPTIC NEURITIS—*In re Hurle, Supreme Judicial Court of Massachusetts (Feb. 28, 1914), 104 Northeastern Reporter, page 336.*—William Hurle made claim against the Plymouth Cordage Co., em-

ployer, and the American Mutual Liability Insurance Co., insurer. The insurer appealed from a decree of the superior court of Suffolk County, made on the findings and decision of the industrial accident board ordering the insurer to pay certain amounts to the employee, and the supreme judicial court affirmed this decree. Judge Rugg in delivering the opinion of the court states the facts of the case and discusses the point on which the decision hinges, in part, as follows:

This is a case under the workmen's compensation act. The facts as found by the industrial accident board are that the employee is totally incapacitated for work by personal injury which arose out of and in course of his employment, and which caused total loss of vision in both eyes, and which resulted from an acute attack of optic neuritis induced by poisonous coal tar gases. His work was about furnaces for producing gas by the burning of coal, in the top of which were several holes through which after opening a cover he could watch the fire. It was his duty to see that the furnaces were supplied with coal and burning evenly and to prevent incandescent spots caused by the burning by forced draft. It was necessary for him to open one or another of these holes about 70 times a day, and whenever these holes were opened poisonous gases were given forth. The inhalation of these caused his blindness.

The question to be decided is whether this was a "personal injury arising out of and in the course of his employment" within the meaning of those words in Stat. 1911, ch. 751, p. 2, sec. 1. Unquestionably it arose out of and in the course of his employment. The only point of difficulty is whether it is a "personal injury."

The words "personal injury" have been given in many connections a comprehensive definition. They are broad enough to include the husband's right to recover for damage sustained by bodily harm to his wife, the alienation of a husband's affections, the seduction of one's daughter and other kindred tortious acts.

At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present. Hunt *v.* Lowell Gas Light Co., 8 Allen 169, 85 Am. Dec. 697; Allen *v.* Boston, 159 Mass. 324, 34 N. E. 519; Deisenreiter *v.* Malting Co., 92 Wis. 164, 66 N. W. 112; Wagner *v.* Chemical Co., 147 Pa. 475, 23 Atl. 772 [and other cases cited].

The English workmen's compensation act affords compensation only where the workman receives "personal injury by accident." It adds to the personal injury alone required by our act the element of accident. Yet it has been held frequently that disease induced by accidental means was ground for recovery.

The opinion then refers to the case of Hood & Sons *v.* Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, in which it was decided that infection from glanders while cleaning a stable was included in the phrase "bodily injuries accidentally suffered," and concludes as follows:

There is nothing in the act which leads to the conclusion that "personal injuries" was there used in a narrow or restricted sense.

The provisions as to notice of the injury (part 2, secs. 15 to 18, both inclusive, as amended by Stat. 1912, ch. 172, and ch. 571, sec. 3) indicate a purpose that information shall be given as to the time, place, and cause of the injury as soon as practicable after it is suffered. But this requirement can be complied with in the case of an injury caused by the inhalation of a poisonous gas producing such results as here are disclosed, as well as in the case of a blow upon the body. An argument may be drawn from the provisions of part 3, sec. 18, as amended by Stat. 1913, ch. 746, sec. 1, in favor of a liberal interpretation of "personal injuries." By the section as originally enacted the duty was imposed upon every employer to keep a record of all injuries, but he was required to make return to the industrial accident board only of "an accident resulting in a personal injury." By the amendment, which of course has no effect upon the legal rights of the parties in the present action, but which may be resorted to for discovery of legislative intention, the employer is required to make return of "the occurrence of an injury" and to state "the day and hour of any accident causing the injury." If these words are accurately used, a distinction is drawn between the injury and the accident causing the injury. The authority conferred upon the board of directors of the Massachusetts Employees' Insurance Association by part 4, sec. 18, is to "make and enforce reasonable rules and regulations for the prevention of injuries" and not for the prevention of accidents. See also Stat. 1913, ch. 813. The name "industrial accident board," which is the administrative body created by part 3, is a mere title and can not fairly be treated as restrictive of its duties.

The difference between the English and Massachusetts acts in the omission of the words "by accident" from our act, which occur in the English act as characterizing personal injuries, is significant that the element of accident was not intended to be imported into our act. The noxious vapors which caused the bodily harm in this case were the direct production of the employer. The nature of the workman's labor was such that they were bound to be thrust in his face. The resulting injury is direct. If the gas had exploded within the furnace and thrown pieces of cherry hot coal through the holes into the workman's eyes, without question he would have been entitled to compensation. Indeed there probably would have been common-law liability in such case. Dulligan *v.* Barber Asphalt Co., 201 Mass. 227, 87 N. E. 567. There appears to be no sound distinction in principle between such case and gas escaping through the holes and striking him in the face whereby through inhalation the vision is destroyed. The learned counsel for the insurer in his brief has made an exhaustive and ingenious analysis of the entire act touching the words "injury" or "injuries," and has sought to demonstrate that it can not apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if accident had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word "injury" and not "accident" was employed by the legislature throughout this act. It would not be accurate but lax to treat the act as if it referred merely to accidents. Warner *v.* Couchman, [1912] A. C. 35, at page 38.

WORKMEN'S COMPENSATION—RAILROAD EMPLOYEES—ELECTION—*Connole v. Norfolk & Western Railway Co., United States District Court, Southern District of Ohio (Sept. 2, 1914), 216 Federal Reporter, page 823.*—T. J. Connole brought action against the railway company named. The defendant company moved to strike out a paragraph of the petition in which the allegation was made that the company was his employer as defined in the Ohio workmen's compensation or State insurance act, and had not complied with the provisions of the act. The compensation act gives a right of action to the employee in cases where an employer under the act is in default on premiums to the State insurance fund, the employer being in such action deprived of the defenses of fellow-service, contributory negligence, and assumed risk.

The defendant's claim is stated as follows in the opinion delivered by Judge Sater:

The defendant's position is that, even if both were engaged in purely intrastate business at the time plaintiff was injured, the defendant, being also an interstate carrier engaged in interstate commerce, is not amenable to the provisions of the Ohio act unless it and some, at least, of its workmen working only in this State, with the approval of the State liability board of awards, had voluntarily accepted the provisions of such act by filing their written acceptances thereof with such board, and unless such acceptances had also been approved by such board; and that in that event the defendant would be subject to the provisions of the act for the period only for which the premiums called for by the act had been paid.

The earlier portions of section 51 make the act applicable to employers and employees engaged in interstate or foreign commerce (notwithstanding any Federal act affecting them) to the extent only that both are engaged in intrastate work alone at the time of the happening of an injury to an employee; that is to say, the work must be clearly separable and distinguishable from interstate or foreign commerce to bring the employer and its injured employee within the terms of the statute. After thus making the act applicable to such persons, the section further provides:

"And then only [shall the provisions of the act apply to them] when such employer and any of his workmen working only in this State, with the approval of the State liability board of awards, and so far as not forbidden by the act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included within its terms, during the period or periods for which the premiums herein provided have been paid."

The court sustained the defendant's contention, interpreting section 51 of the act as excluding railroad companies and their employees who are engaged in both intrastate and interstate commerce except when they have made active election to come within the provisions of the act, and ordering the paragraph of the petition under consideration to be stricken out.

WORKMEN'S COMPENSATION—REVIEW OF DECISIONS OF INDUSTRIAL BOARD—CERTIORARI—*Courter v. Simpson Construction Co., Supreme Court of Illinois (Oct. 6, 1914), 106 Northeastern Reporter, page 350.*—Mrs. Amanda E. Courter instituted a proceeding before the industrial board, as guardian of a minor son, for compensation for the death of her divorced husband, George B. Courter, who stepped upon a rusty nail while in the employment of the defendant company and died a few days later as a result of the injury. The industrial commission awarded a weekly sum of $8.41, one-half the wages of the deceased, for 416 weeks, to be paid to the guardian until the son became of age, and afterwards to himself. The defendant brought certiorari for a review of the decision. The act attempted to make the decisions of the board reviewable by the supreme court on certiorari, but the court held that it could not assume this jurisdiction, the provision of the act being invalid as violating the clause of the constitution limiting the original jurisdiction of the supreme court to certain classes of writs, of which certiorari is not one. It held, however, that the legislature had no constitutional authority to take away the right of review by the courts, since such action would be violative of the "due process of law" provision of the constitution. It held, further, that the question whether the board acted illegally or without jurisdiction might be reviewed by writ of certiorari, and that this writ should issue from the circuit courts, they being the only ones having original jurisdiction over that writ.

WORKMEN'S COMPENSATION—REVIEW OF FINDINGS OF BOARD OF ARBITRATION—*In re Diaz, Supreme Judicial Court of Massachusetts (Feb. 28, 1914), 104 Northeastern Reporter, page 384.*—The industrial accident board awarded compensation to Diaz, who had been injured in an elevator accident, and the superior court of Suffolk County issued a decree in accordance with their finding. Section 11 of the workmen's compensation act of 1911, as amended by Stat. 1912, ch. 571, sec. 14, provides that a decree of the committee of arbitration awarding compensation to an injured employee shall have the same effect as though rendered in an action heard by a court, except that there shall be no appeal therefrom on questions of fact. There being no question of law raised in this case, the court determined that the finding had the same weight and effect as the verdict of a jury, and would be upheld as there was some evidence to sustain it.

WORKMEN'S COMPENSATION—RIGHT OF ACTION BY PARENT FOR LOSS OF SERVICES OF MINOR CHILD—*King v. Viscoloid Co., Supreme Judicial Court of Massachusetts (Dec. 1, 1914), 106 Northeastern*

Reporter, page 988.—The mother of a minor son injured in the employ of the company named brought action under the common law for the loss of his services. It was agreed that, even though the son had received full compensation under the law, she was entitled to recover unless this right of action was barred by the provisions of the workmen's compensation act. The court held that the minor did not and could not waive this independent right of the parent, nor had the act, either expressly or by implication, taken away this common-law right, and ordered a judgment in her favor for the sum previously agreed upon as the proper one i the plaintiff was entitled to recover.

WORKMEN'S COMPENSATION—SEAMEN—SCOPE OF LAW—*The "Fred E. Sander," United States District Court, Western District of Washington (Oct. 20, 1913), 208 Federal Reporter, page 724.*—John A. Thompson brought an action in rem in admiralty to secure damages for personal injuries alleged to have been suffered by reason of the negligence of the owners and those in charge of the schooner named, which sailed between San Francisco and Puget Sound points in Washington. He had been injured while loading and storing piling in the schooner's hold. The agent of the owners intervened as claimant for the vessel, and filed exceptions to the libel, on the ground that the workmen's compensation act of Washington abolished actions for personal injuries. Judge Neterer decided, however, that a State has no power to abolish or limit jurisdiction of courts of admiralty for maritime torts conferred by the Constitution, and consequently overruled the exceptions.

WORKMEN'S COMPENSATION—SERIOUS AND WILLFUL MISCONDUCT—*In re Nickerson, Supreme Judicial Court of Massachusetts (May 23, 1914), 105 Northeastern Reporter, page 604.*—Lester Nickerson received fatal injuries while in the employ of the Boston Woven Hose & Rubber Co., and his widow brought proceedings under the compensation act. The insurer claimed that he was guilty of serious and willful misconduct, which would bar the receipt of benefits by his dependent. Nickerson was employed to do general cleaning, painting, and whitewashing, and some of his work had to be done near machinery and shafting, which portion he had been instructed to do during the noon hour, when the machinery was shut down. About half past 11 on the day of the injury he had a conversation with the superintendent about work on a wall near shafting, and was told that that work should be done at noon, that it was about half past 11, and that the superintendent would ascertain the exact time and tell him. A few minutes later he went to work, and was caught,

his body drawn into the shafting, and injuries inflicted which caused death. The court affirmed a decree of the superior court of Suffolk County granting compensation, holding that the term "serious and willful misconduct" means something more than negligence or even gross negligence, and that disobedience to orders, to constitute such misconduct, must be deliberate, not merely a thoughtless act on the spur of the moment.

WORKMEN'S COMPENSATION—"SERVICE GROWING OUT OF AND INCIDENTAL TO EMPLOYMENT"—EMPLOYEE ON WAY TO WORK—*City of Milwaukee v. Althoff et al., Supreme Court of Wisconsin (Feb. 3, 1914), 145 Northwestern Reporter, page 238.*—The circuit court of Dane County entered a judgment affirming an award of $2,138.11 as compensation made in favor of Minnie Althoff, on account of the death of her father, William A. Althoff. The deceased, in accordance with a city ordinance fixing the hours of labor at eight, began work at 8 a. m. and finished at 5 p. m. He was required to report to his foreman at 7.30 each morning to receive instructions as to where he was to work. On the morning of May 3, 1912, he reported thus, and on receiving his instructions proceeded toward the place where he was to work. While on the way he fell on a sidewalk and injured his knee. He died on September 21, 1912, and it was found on sufficient evidence that his death was due to the injury which he received when he fell. On appeal the supreme court affirmed the judgment, holding that the accident was within the terms of the statute, which provides that compensation shall be paid where the employee at the time of the accident is "performing service growing out of and incidental to his employment." The following is quoted from the remarks of Judge Barnes, who delivered the opinion of the court:

In the instant case, when the servant reported to his foreman and received his instructions for the day and proceeded to carry out these instructions by starting for the place where he was to work, we think the relation of master and servant commenced, and that in walking to the place of work the servant was performing a service growing out of and incidental to his employment.

WORKMEN'S COMPENSATION—SETTLEMENT WITH THIRD PARTIES LIABLE FOR INJURY—RELEASE—SEPARATE CLAIM FOR DEATH—DEDUCTION FOR WAGES—*In re Cripp, Supreme Judicial Court of Massachusetts (Feb. 27, 1914), 104 Northeastern Reporter, page 565.*—Julia Cripp, as widow of a deceased employee, secured a decree awarding compensation in the superior court of Suffolk County. Cripp was injured by coming in collision with a street railway car while driving a truck. He settled with the railway company on the

day of the injury, and gave a release. He was able to work for a time, but the injuries ultimately caused his death. The statute provides that "where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against the person to recover damages, or against the association for compensation under this act, but not against both, and if compensation be paid under this act the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person." It was held that the employee made an election in settling with the company, the same as though he had brought suit, but that the widow's rights upon his death were distinct. As to this Judge Braley, who delivered the opinion of the court, said:

Stat. 1911, ch. 751, is not penal, but is based on the theory of compensation. Primarily its object is to provide, in place of wages which he can no longer earn, the means of subsistence for the employee injured without "serious and willful misconduct" on his part, if he survives, or for the widow, and other dependents, if death ensues either with, or without, conscious suffering. The insurer under section 6, where death results, is to pay the dependents wholly relying upon the employee's earnings for support, compensation, and by section 7, a wife living with her husband at the time of death is conclusively presumed to be such dependent. The right of recovery expressly given to the widow can not accrue until his death. Having been created for her benefit it is independent of his control, and under section 22 can be discharged only by herself where she is the sole dependent, or by those authorized to act in her behalf.

The law provided that in case of death, payments should be made to a dependent widow for a period of 300 weeks from the date of the injury. In refusing to allow a deduction for the time the employee worked after the injury and before death, the court said:

It is also urged, that the board erred in not deducting, from the period computed, the time during which the employee resumed work. The decision was right. The statute says that compensation shall accrue from the date of the injury. (Stat. 1911. ch. 751, pt. 2, sec. 6.) The only exception is that, where before death weekly payments have been made to the employee, the amount payable to dependents begins from the date of the last of such payments. We see no sufficient reason for enlarging the exception. A practical working rule easily applied has been provided, which should not be set aside even if in some cases its application may seem somewhat inequitable. If a change is deemed advisable it should come through legislative enactment.

WORKMEN'S COMPENSATION—SUBROGATION OF EMPLOYER TO RIGHT OF ACTION AGAINST THIRD PERSON—ASSIGNMENT OF RIGHT—*McGarvey v. Independent Oil & Grease Co., Supreme Court of Wis-*

consin (Apr. 9, 1914), 146 Northwestern Reporter, page 895.—The plaintiff, an employee of the Harley-Davidson Motor Co., while in the course of his employment, was injured by actionable negligence of the Oil & Grease Co., the defendant. Plaintiff made claim against his employer, the motor company, for compensation, and the claim was settled. Under the workmen's compensation act this operated to transfer the employee's right of action against the Oil & Grease Co. to the motor company. The latter company for a sufficient consideration and in due form assigned this right to the employee, and he commenced action in the circuit court for Milwaukee County. The defendant demurred because the motor company was not joined as a party plaintiff. The demurrer was overruled and the defendant appealed. The supreme court affirmed the judgment of the court below, holding that such a right of action, existing in favor of the employer by subrogation, could be assigned as any other cause of action.

WORKMEN'S COMPENSATION—TOTAL AND PARTIAL DISABILITY—*Duprey v. Maryland Casualty Co., Supreme Judicial Court of Massachusetts (Nov. 4, 1914), 106 Northeastern Reporter, page 686.*—Joseph T. Duprey brought proceedings against the casualty company as insurer of his employer, and the insurer appealed from a decree in his favor in the superior court of Suffolk County on findings of the industrial accident board. This decree was affirmed.

It was admitted that the injuries, which occurred October 12, 1912, were received in the course of employment. The employee had been paid as compensation the sum of $7.50 per week, an amount equal to one-half his wages, during the period from the injury until June 12, 1913. The committee of arbitration decided that total disability ceased at that date and stated that Duprey agreed that payment for partial disability for two years, based on one-half the weekly wages, would be just, and it made an award accordingly. The industrial accident board found that the employee was incapacitated for all work except what he could do while seated, and that he had endeavored to find such work and was not able to do so. It therefore awarded him a weekly compensation of $7.50, based upon total disability, from June 12, 1913.

The court held that the employee did not waive his rights by his agreement before the committee to a settlement on the basis of partial disability, and that the insurer could not now object to the admission of the evidence of a physician before the board in addition to the evidence taken by the committee, since it did not make objection before the board. It also held that the fact that the employee was a man of failing physical powers and would be incapacitated for work

in a few years did not bar him from compensation if his incapacity to work was the result of his injuries. It held finally that he was totally incapacitated for work by being unable to do any work which he could obtain, although he had a limited physical capacity for some work.

WORKMEN'S COMPENSATION—WORKMAN—CHILD UNDER 14 YEARS EMPLOYED BY FATHER IN MILL—*Hillestad et ux. v. Industrial Commission of Washington, Supreme Court of Washington (July 14, 1914), 141 Pacific Reporter, page 913.*—Isaac A. Hillestad and wife brought proceedings before the industrial commission for compensation for the death of their son, 13 years of age. The complainants owned and operated a shingle mill. The son was anxious to work, and his father at length promised him a packer's job when it should be vacant. In the meantime the boy went to work collecting bolts, which were scattered about up the creek 80 rods from the mill, and floating them down, and while thus employed was drowned. The industrial commission rejected the claim, but in the superior court of Whatcom County there was a verdict for the claimant, from which the commission appealed. The supreme court decided that, there being no agreement for wages or earnings, the boy was not a workman under sections 3 and 4 of the act, the former of which defines a workman as any person in the employment of an employer carrying on any of the industries scheduled in section 4, and the latter providing that in computing the pay roll the entire compensation received by every workman engaged in extrahazardous employment shall be included, whether in the form of salary, wage, piecework, profit sharing, premium, or otherwise. The court held that these provisions contemplate that there must be an actual contractual relation between the parties to work for pay of some sort. In the absence of proof of such relation, it was held that the father assumed the risk in allowing his son to work at a hazardous employment.

It was further held that a child under 14 employed in any factory, mill, etc., in violation of section 6570 of Rem. & Bal. Code is entitled to no compensation, and that this rule applies even though there is no positive connection between the violation of the law and the death of the child; and that the employment in driving bolts down the stream was employment in such a mill. It therefore reversed the decision of the court below and sustained that of the industrial commission, and ordered the claim to be dismissed.

DECISIONS UNDER COMMON LAW.

BOYCOTT—INJUNCTION—RIGHT TO STRIKE—UNFAIR LISTS—*Burnham v. Dowd, Supreme Judicial Court of Massachusetts (March 31, 1914), 104 Northeastern Reporter, page 841.*—Fred G. Burnham and others were engaged in a wholesale and retail business, part of their trade being in masons' supplies. Edward F. Dowd and his associates were members of a voluntary unincorporated labor union in Holyoke, Mass., this union being connected with the building trades council of the city, representing some 14 unions. These unions cooperated in the customary agreements as to working with persons not members of the unions, or doing work for "unfair" employers, or handling "unfair" material. In July, 1911, one Gauthier employed nonunion masons in some construction work in Holyoke, for which Burnham furnished materials. In August the union voted to refuse to handle any building material of any firm that furnished stock to Gauthier or to any "unfair" contractor. Notice of this action was sent to the building trades council, which in turn notified Burnham that Gauthier was "doing work contrary to laws of building trades council," and was "therefore recognized by us as being unfair," and expressed the hope that Burnham would cooperate in the matter. Burnham continued to supply material to Gauthier, and was subsequently declared unfair, notice of this declaration being sent to various owners and contractors in the city, in substance threatening to strike if they should purchase masons' supplies from the plaintiff.

This action was brought for the purpose of securing an injunction against the union and council to prevent their carrying out the threatened action, which would tend to result in the loss of their business; damages were also sought. In the superior court of Hampden County the matter was referred to a master, whose report was before the supreme judicial court for consideration. This report disclosed the facts set forth as constituting an injury to the plaintiffs' business, against which an injunction should be allowed as well as damages for injuries already caused. In sustaining these findings Judge Sheldon stated the facts as given above, and continued, saying in part:

These contractors and owners feared, and it was intended that they should fear and they were justified in fearing, that these threats would be carried out; and in consequence thereof they ceased or refrained from buying supplies of the plaintiffs, as otherwise they would have done, and the plaintiffs' sales of masons' supplies were considerably diminished and their profits lessened in consequence of these facts. This state of affairs will continue, to the serious loss and

damage of the plaintiffs, unless they shall promise not to sell to any one considered unfair by the union.

The defendants did not act from actual personal malice toward the plaintiffs; but their acts were done in pursuance of their union principles and purposes, as above stated, and without caring for the injurious consequences to the plaintiffs. Indeed these injurious consequences were anticipated and contemplated by the defendants. They did not attempt to declare or enforce any boycott against the plaintiffs, except as this is included in the acts that have been mentioned.

The defendants have no real trade dispute with the plaintiffs. No one of the members of the union is, or so far as appears ever has been, employed by the plaintiffs. The plaintiffs have not interfered or sought to interfere with the employment of any of those members, or with the rates of pay, the periods of labor, or any of the conditions of such employment. The matter that lies at the foundation of these proceedings is a dispute between the union and Gauthier. He employs or has employed nonunion labor; the defendants (including under this term all the members of the union) object to this. They have a right to say that they will do no work for him unless he will give to them all the work of their trade, that they will do all or none of his work. That was settled by our decision in Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753 [Bul. No. 70, p. 747]. But the second point decided in Pickett *v.* Walsh, supra, is in our opinion decisive of the principal question raised in this case. It was there held that the members of a labor union who are employed by a contractor to do work upon a building, and who have no dispute with that contractor as to work which they or their fellows are doing for him, can not lawfully strike against him for the mere reason that he is doing work and employing some of their fellows upon another building upon which nonunion men are employed to do like work, not by him, but by the owner, of that building. The language and reasoning of that decision are applicable here. The reason of the decision was that, as the court said, such a strike "has an element in it like that in a sympathetic strike, in a boycott and in a blacklisting, namely: It is a refusal to work for A., with whom the strikers have no dispute, because A. works for B., with whom the strikers have a dispute, for the purpose of forcing A. to force B. to yield to the strikers' demands." So in the case at bar, the threat of the defendants was to strike against owners and contractors, with whom the defendants had no dispute, for the purpose of forcing those owners and contractors to refuse to buy masons' supplies from the plaintiffs, and thus by the loss of business and the profits to be derived therefrom, force the plaintiffs to refuse to sell to Gauthier or others whom the defendants might call unfair, and thus put a pressure upon those persons which should force them to cease employing nonunion masons and to give all their mason work to the defendants. This was a step further than what was held in Pickett *v.* Walsh to be an unlawful combination for an unjustifiable interference with another's business. It was in intention and effect a boycott; and it was none the less so because it was aimed at only one branch of the plaintiffs' business. There is no more right to interfere with one branch of a merchant's business, to obstruct it and lessen its profits, and so far as may be done to destroy it entirely, than there

is to interfere with, obstruct and destroy the whole of that business. The difference is merely one of degree, not of kind.

The defendants contend earnestly that each one of them has a perfect right to refrain from dealing himself, and to advise his friends and associates to refrain from dealing, with the plaintiffs, and that they have a right to do together and in concert what each one of them lawfully may do by himself. But that is not always so. It is especially true in dealing with such questions as these that the mere force of numbers may create a difference not only of degree, but also of kind. Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492 [Bul. No. 95, p. 323]. So in Pickett *v.* Walsh, it was held among other things that "what is lawful if done by an individual may become unlawful if done by a combination of individuals." This principle is peculiarly applicable to cases like the one at bar. There is no such thing in our modern civilization as an independent man. No single individual could continue to exist, much less to enjoy any of the comforts and satisfactions of life, without the society, sympathy and support of at least some of those among whom his lot is cast. Every individual has the right to enjoy these, and is bound not to interfere with the enjoyment of them by others. That right indeed is usually one of merely moral obligation, incapable of enforcement by the courts, but it is none the less an actual wrong for any body of men actively to cause the infringement of that right in definite particulars; and especially where such an infringement is made possible only by the concerted action of many in combination against one and results in direct injury to his business or property, the courts should interfere for the protection of that person.

The question of damages remains to be dealt with. Upon that we find no error in the master's report. That the plaintiffs have sustained substantial damages is manifest; and the mere facts that it may be impossible to determine the total amount of their loss, and that it may be difficult to ascertain with absolute certainty the money value of even the damages that can be proved, is no reason for refusing to allow to the plaintiff what has been found to be capable of substantial proof. Doubtless merely speculative damages or any damages that have not been proved can not be recovered; but this does not require absolute mathematical demonstration or prevent the drawing of reasonable inferences from the facts and circumstances in evidence.

The result is that the plaintiffs are entitled to a decree enjoining the defendants from keeping the names of the plaintiffs upon their unfair list, from threatening to strike or to leave the work of any owner, builder or contractor by reason of such persons having purchased masons' supplies from the plaintiffs or having dealt otherwise with the plaintiffs, and from ordering or inducing a strike against an owner, builder or contractor for such reason, and that the plaintiffs shall recover from the defendants the sum of $500 with interest from the date of the filing of the master's report, and their costs of suit, and have execution thereof.

CONTRACT OF EMPLOYMENT—EMPLOYMENT FOR LIFE—REFORMATION OF WRITTEN CONTRACT OBTAINED BY FRAUD—*Pierson v. Kingman Milling Co., Supreme Court of Kansas (Mar. 7, 1914), 139*

Pacific Reporter, page 394.—Frank Pierson brought action against the company named for reformation of a contract. Pierson had been injured while in the employ of the company in 1906, one leg being broken and the other so badly hurt that it was amputated. The next day he signed a release in consideration of medical services, etc., which paper was read to him, as he claimed, in such a way as to include a provision that he should, in pursuance with an agreement already reached orally between him and the secretary and treasurer of the company, be employed by it for life. This provision, as a matter of fact, was not written into the document. He was personally unable to read the paper at that time on account of his weakness, the anaesthetic, etc. As soon as he was able to go to work he was employed by the company, and continued to work for it until May, 1911, when he was discharged. On the trial of the case in the district court of Kingman County the judgment was for the defendant. On appeal, this was reversed and the case remanded.

The court decided first that the statute of frauds did not prevent the enforcement of the contract because it was not signed by the company; for it was possible for it to have been performed within one year, because the employee might have died within that time.

The plaintiff's wife was present at the time the paper was read and signed, and it was argued that the opportunity which she had, but of which she did not avail herself, to read the document constituted constructive notice to Pierson of its contents, and that he could not bring the action for fraud after two years because of the statute of limitations on that kind of actions. The court, however, adopted the rule that if one of the parties assumes to read the contract to the other, and purposely misreads it, he can not take advantage of the other's want of care in relying upon his reading of it.

It was also held that if the agreement to furnish employment was actually a part of the contract, the paper was not a unilateral contract, but should be reformed to show the actual contract.

As to the contentions of the defense as to the indefiniteness of the contract, and the matter of the ratification by the company of the contract made by the secretary and treasurer, the court, speaking by Judge Mason, said:

> This court is of the opinion that the contract relied upon by the plaintiff is not too indefinite to admit of enforcement; that it rests with the employer to select the character of work to be done, so long as it is suitable to the employee's capacity; and that the compensation, unless fixed by agreement, is to be such as is ordinarily paid for similar services. The contract is also objected to on the ground that the duration of the employment is too indefinite. We think this objection unsound, and this view is supported by the authorities. [Cases cited.]

The most difficult question presented is whether there was any evidence of original authority on the part of the secretary and treasurer of the company to make the contract for life employment, or of subsequent ratification of his action. We shall assume that there was no showing sufficient to support a finding of original authority on the part of Jay Holdridge to bind the company by a contract with the plaintiff to give him employment during his life, but we think there was sufficient evidence of ratification to take that question to the jury.

Giving to the evidence the liberal interpretation to which it is entitled when attacked by demurrer, we think the inference might reasonably be drawn that the plaintiff was given employment in pursuance of the agreement to provide him with permanent work; that both the president and vice president, as well as the secretary and treasurer, knew of his belief that the writing contained a provision on the subject; and that a ratification of the promise thereby resulted.

CONTRACT OF EMPLOYMENT—GROUNDS FOR DISCHARGE—DISOBEDIENCE OF RULES—*Corley v. Rivers, Supreme Court of Mississippi (Apr. 27, 1914), 64 Southern Reporter, page 964.*—The employee Corley brought suit for the balance of wages as manager of the defendant's plantation, after his discharge from his employment, the contract having been for one year, and he having served somewhat over two months, and received two months' pay. The jury in the circuit court of Tallahatchee County returned a verdict in favor of the plaintiff for the full amount, and a remittitur was entered by the court, which deducted the amount which he received during the year from other employment after his discharge. On appeal the supreme court reversed the judgment, Judge Reed saying in delivering the opinion:

Appellant had rules for the government of his plantation. Under these, the manager was enjoined not to abuse or whip tenants, and he was not permitted to carry a pistol.

The evidence shows that appellee had trouble with the tenants. He whipped two of them on different occasions. Thereupon appellant informed appellee that he did not want his tenants abused and whipped, and that appellee ought not to carry a pistol. Appellant further said that appellee must get rid of the one he was carrying or he would be discharged. Appellee refused to give up his pistol and left the employment.

The rules shown in this case are reasonable. We commend them. To us they seem consistent with justice and the fair administration of the law in the land. The owner must have found them advisable for the successful management of his business.

When appellee entered the service of appellant, it became his duty to observe these rules. His failure to comply with them was sufficient to render his services as manager unsatisfactory, and to justify appellant in discharging him.

Appellant should only be held liable to pay for the balance owing for services up to the time when appellee left the plantation. Upon

the trial, appellant tendered this amount. Judgment should have been for the same, with such costs as may have accrued in the case till the tender was made.

CONTRACT OF EMPLOYMENT—TERM—*Resener v. Watts, Ritter & Co., Supreme Court of Appeals of West Virginia (Dec. 9, 1913), 80 Southeastern Reporter, page 839.*—H. A. Resener who was employed as a traveling salesman by the company named quit its service and brought suit in May, 1910, to recover commissions alleged to be due him under the terms of his contract of employment. Verdict was in his favor in the circuit court of Cabell County, W. Va., but the company secured an award of a new trial, whereupon Resener took the case to the State supreme court of appeals. The award of a new trial by the lower court was here reversed, and judgment was entered on the verdict. The right to recover depended upon whether the employment was for a year or at will, and it was decided that the employment was for the latter.

The following syllabus by the court states the conclusions reached:

An employment upon a monthly or annual salary, if no definite period is otherwise stated or proved for its continuance is presumed to be a hiring at will, which either party may at any time determine at his pleasure without liability for breach of contract.

The burden of proving that such hiring was obligatory for a year rests on the party who seeks to establish that the contract covered that period.

Unless the understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party.

EMPLOYER AND EMPLOYEE—CONDITIONAL RESIGNATION—DISCHARGE—DAMAGES—*Nesbit v. Giblin et al., Supreme Court of Nebraska (June 23, 1914), 148 Northwestern Reporter, page 138.*—Fred L. Nesbit was employed by Giblin & Co. as a traveling salesman, and was under contract for one year from December 21, 1909, at a salary of $2,100. In May, 1910, the firm wrote to the salesman criticising him for selling certain furnaces at a lower price than they thought proper. He replied on May 20, stating that he would be glad to have his resignation accepted, and that he would remain in Milwaukee, where he then was, until he heard from them. They did not answer, and in a few days he went on to Minneapolis, his next field of work, and continued to take orders. June 6 the firm wrote him in regard to certain advertising matter, stating that they would continue to issue it until November, and would forward copies to him as issued, thus showing the expectation that he was to continue in their employ. June 20, the firm wrote him that they accepted his resignation of

May 20. He replied that conditions as to opportunities to secure other employment had changed, and as they had not accepted his resignation at the time, he considered himself still in their employ. They then took steps to terminate his employment, and he was unable to obtain employment until the latter part of December, 1910. The judgment in the district court of Douglas County was in his favor for $1,054.13, and the defendant appealed. The supreme court affirmed the judgment, stating that the following instruction of the trial judge, the giving of which was one of the grounds of appeal, was correct:

You are instructed the letter written by the plaintiff on the 20th or 21st day of May, 1910, was not of itself a letter of resignation, but was what might be termed in law a conditional resignation, and by the terms and conditions of said letter the defendants had the right to accept or reject the said resignation on or before the time fixed by the said letter of said date. And in this connection you are further instructed the defendants did not comply with the terms and conditions of said letter on that date, and as a matter of law, had no right to accept said resignation at a later time than that fixed by the terms and conditions of said letter, unless you find from a preponderance of the evidence that the plaintiff was guilty of misconduct toward the defendants subsequent to the time he left Milwaukee for Minneapolis, or unless you further find that the defendants had discovered other misconduct of the plaintiff that occurred prior to the time they answered the letter written by the plaintiff at Milwaukee, Wis., dated on the 20th or 21st day of May, 1910.

EMPLOYER AND EMPLOYEE—LIABILITY OF EMPLOYER FOR WRONGFUL ACTS—ASSAULT ON THIRD PARTY—*Matsuda v. Hammond et al., Supreme Court of Washington (Dec. 27, 1913), 137 Pacific Reporter, page 328.*—Mrs. Hammond was the owner of a market stand, the business of which was conducted by John Bell. Bell went to Matsuda's place of business to collect a bill and during an argument that ensued, assaulted Matsuda, who brought an action for damages against both Bell and Mrs. Hammond, his employer. He obtained a judgment in the superior court, Pierce County, Wash., which on appeal was set aside by the supreme court of the State, as to its effect on Mrs. Hammond, on the ground that the act of Bell was one not authorized by his employer so as to make her liable.

Judge Fullerton, for the court, said in part:

An employer is liable for the unlawful and criminal acts of his employee only when he directly authorizes them, or ratifies them when committed, or, perhaps, continues an employee in his employment after he has knowledge that the employee has committed, or is liable to commit, unlawful acts while in the pursuit of his employer's business. The liability does not arise from a mere contract of employment to do a legitimate and lawful act.

EMPLOYER AND EMPLOYEE—LIABILITY OF EMPLOYER FOR WRONGFUL ACTS—FALSE IMPRISONMENT—*Birmingham Ledger Co. v. Buchanan, Court of Appeals of Alabama (June 11, 1914), 65 Southern Reporter, page 667.*—Alfred Buchanan brought action against the newspaper company named for unlawful imprisonment. Judgment was in his favor in the circuit court of Jefferson County, and on appeal this was affirmed.

The plaintiff was one of a number of newsboys who were detained by agents of the defendant company until an extra should be gotten out, one of the objects of the detention being to prevent the boys from selling the papers of other publishers. The court held that lack of evidence that the door was locked or other steps taken by any agent of the company whose name could be given by witnesses was not important, since the circumstances and conditions furnished sufficient proof that an agent or agents of the company caused the imprisonment. That the evidence was adequate as to the acts being in the course of employment was held by the court, as shown by the following quotation from the opinion, which was delivered by Judge Walker:

Nor was proof lacking that each of such representatives of the defendant who participated in the wrong complained of was acting within the "course of his employment" in the sense in which that and similar expressions are commonly used in statements of the doctrine of respondent superior as a part of the law of principal and agent. For the conduct of its agent to impose liability upon the defendant it was not necessary for the latter to have authorized anybody forcibly to detain a newsboy in order to secure his services when desired. If the wrong was committed by the agent while he was executing his agency on the defendant's premises, not for a purpose of his own having no relation to the business of the defendant, but as an incident to the carrying on of that business, in the transaction of which he was engaged at the time, the defendant is liable though it did not authorize the agent to resort to such means in rendering the service for which he was employed. [Cases cited.] There was evidence tending to prove that the participation of each of the agents of the defendant who were referred to in the several counts of the complaint in the wrong to the plaintiff for which the defendant is sought to be charged with liability was an incident to the making of preparations for the circulation and sale of an issue of the defendant's paper, which obviously was one of the main objects of the business in which the defendant was engaged, the furtherance of which was not foreign to the business the agent was employed to transact.

As to the allowance of punitive damages the court said:

The court properly refused the written charge requested by the defendant, to the effect that the plaintiff could not recover punitive damages. Such damages may be awarded for an unlawful detention of one's person committed with actual malice or its legal equivalent. The malice required as an element for the recovery of such damages exists if there is a wanton disregard of the rights of the injured party.

EMPLOYER AND EMPLOYEE—LIABILITY OF EMPLOYER FOR WRONGFUL ACTS—TRESPASSERS—AUTHORITY OF RAILROAD BRAKEMAN—*Tarnowski v. Lake Shore & Michigan Southern Railway Co., Supreme Court of Indiana (Feb. 5, 1914), 104 Northeastern Reporter, page 16.*—This was an action by a father for the death of his minor son, who was alleged to have been killed by being kicked and pushed from a moving freight train on which he was a trespasser, by a brakeman named Hunt employed by the railroad company named. A verdict had been directed for the defendant in the circuit court of St. Joseph County, and the plaintiff appealed. The question involved related to the company's authorization of the brakeman to eject trespassers. Judge Morris, speaking for the court, said:

Appellee concedes that the conductor was authorized to eject trespassers and tramps from the train, and that it was competent for him to delegate such authority to Hunt, but that no such delegation was proven. That defendant was liable for an injury wantonly inflicted on a trespasser by an employee in ejecting him from the train, while the employee was acting within the scope of his authority, is not denied. If the evidence was such as to warrant a finding that the conductor authorized the brakeman to keep tramps or trespassers off the train, this judgment must be reversed.

The court determined that the evidence was sufficient to warrant such a finding and should have been submitted to the jury, and the judgment was therefore reversed and the case remanded for a new trial.

EMPLOYERS' ASSOCIATIONS—VIOLATION OF RESOLUTION TO MAINTAIN OPEN SHOPS—RECOVERY OF LIQUIDATED DAMAGES—*United Hat Manufacturers v. Baird-Unteidt Co., Supreme Court of Errors of Connecticut (July 13, 1914), 91 Atlantic Reporter, page 373.*—This case was by stipulation of the parties taken from the superior court of Fairfield County to the Supreme Court of Errors of Connecticut for its advice upon a finding of facts. The plaintiff is a nonstock corporation of the State of New York, composed of 56 companies, corporations, and individuals engaged in the manufacture of fur felt hats, with places of business in the States of Connecticut, New York, New Jersey, Massachusetts, and Pennsylvania. The defendant was a corporation located at Bethel, Conn., and was a member of the association.

The purposes and objects of the association, as recited in its certificate of incorporation, were to improve business conditions of its members, to maintain harmonious relations between them, and to promote, subserve, and encourage social intercourse between them.

Its by-laws provide that the decisions, prohibitions, orders, and regulations of the association and its board of directors shall be obligatory upon all members of the association, who agree to pay to

the association the sum of $5,000 as liquidated damages for the violation or failure to comply with any such decision, etc. This sum is not to be considered as a penalty, but as damages, and it is stipulated that it shall not be necessary to prove any special damages. No member may resign until after 90 days' notice in writing, nor until all dues, fines, etc., are discharged. The board of directors has authority to settle all disputes between members of the association and their employees except as to cessation and resumption of work, the use of the union label, and the forfeiture of bonds, penalties, etc.

The United Hatters of North America is an unincorporated association of journeymen hatters having over 9,000 members, and owning a union label, which it permits to be placed in hats manufactured in factories employing its members solely and commonly called "union or closed shops."

From July 1, 1907, to January 14, 1909, the members of the plaintiff and its predecessor (the Wholesale Fur Felt Hat Manufacturers' Association) employed exclusively in their factories members of the United Hatters' association.

The plaintiff's predecessor entered into an agreement, to which the plaintiff succeeded, with the United Hatters that any disagreement between employer and employee should be submitted to arbitration. The United Hatters continued to act under this agreement until a difficulty arose which led to a resolution by the United Hat Manufacturers (plaintiff herein) to discontinue the use of the union label in all shops unless the United Hatters would put their men back at work in the establishment in which the difficulty occurred. All union employees thereupon went out on strike, and the plaintiff association, after about 10 days, undertook to open by employing workmen individually instead of through stewards, i. e., on an open-shop basis, under a resolution passed at a meeting at which the defendant company was represented. Some employers were able to resume work in this way, but the Baird-Unteidt Co., being in a strongly unionized district (the Danbury district), was unable to get workmen, and, together with other manufacturers similarly situated, undertook to get the plaintiff association to rescind its open-shop resolution, which failing, they tendered their resignation from the association, the defendant not being indebted at the time to the association unless for the $5,000 claimed as damages for its violation of the resolution in hiring union workmen, which action was taken less than 90 days from the first notice of intention to withdraw from the association. The board of directors thereupon authorized the president of the plaintiff association to proceed against the withdrawing members for a recovery of the damages provided for in the by-laws, which action was afterwards ratified by the association, though not by the three-fourths vote required for the levy of a fine or assessment. No evidence of special

damage was offered, but the sum of $5,000 was claimed as damages for the breach of the resolution.

The opinion of the court was delivered by Judge Wheeler. As to certain claims made by the defendant with regard to the illegality of the association and of its by-laws, he said:

The defendant claims this action must fail, since the plaintiff association is, because of its organization and its by-laws, illegal, and therefore its resolution, whose violation is the basis of the action, was invalid. The foundation of this claim is threefold, because: (1) The real purpose and object of the association was to permit it to order a suspension of work by its members; (2) to make agreements relative to the use of the union label; and (3) because the members of the plaintiff were engaged in interstate commerce, the association was a violation of the Sherman Act (act July 2, 1890, ch. 647, 26 Stat. 209 [U. S. Comp. Stat. 1901, p. 3200]), as its purposes were in restraint of trade.

Employers, as well as employees, may form associations for mutual protection and benefit. Each member of such an association submits his freedom to contract, to a greater or less extent, to the will of the association. The consideration of submission is the benefit presumed to flow from the action of members bound together for common ends. Unity of action of the members gives strength to the association, without which it can not serve its purposes or accomplish its ends. By-laws and regulations are a part of the machinery by which the association operates. Members must therefore submit, while membership continues, to all lawful by-laws and regulations enacted by the association for its government.

The objects of this association, as stated in the articles of association and by-laws, are most worthy. Neither they nor the finding show that the purpose of the association was to permit it to order a suspension of work and to agree in reference to the use of the union label. It is too late to question the right of a labor union to make by-laws providing for strikes and to issue its order for a strike in an effort to secure lawful objects by lawful means. Reynolds et al. *v.* Davis et al., 198 Mass. 294, 84 N. E. 457 [Bul. No. 77, p. 393]. And it may prosecute the strike by any means neither illegal nor in violation of the equal or superior rights of others.

So, too, the association of employers may enact a by-law giving it the right to order a shutdown of the factories of its members, provided the objects sought be within its lawful purposes and the means used be lawful. And the employer has the right freely to hire his labor in the market without denial or unfair restriction of this right. The order of the association to stop work may curtail this right, but it is not, for this reason, illegal.

A by-law providing for a fine upon the members of either an employers' or a laborers' association for disobedience of its lawful orders is not unlawful. Each may involve coercion of its members; it may temporarily take away the livelihood of the employee, and it may injure, and, if continued, ruin, the business of the employer. Each member has agreed to this species of coercion in the belief that the common interest of all will best be served by the united action of many. Obedience to the lawful orders of the association is the condition of membership voluntarily encountered by previous assent to the

by-laws. If the defendant intended to claim that this part of the by-laws was illegal, we have already answered that a by-law of this character was not illegal.

The argument of the defendant rests upon the premise that this resolution "that each member offer situations to operatives as individuals" amounted to an order for a cessation of work. If the employees accepted employment as individuals, it is said they would forfeit their membership in the union. If they maintained their membership, the employers could not run their factories.

As the hatters' union dominated this industry in the Danbury district, enforcement of the vote would mean, it is said, a lockout and suspension of work. Therefore it is argued the vote was equivalent to a lockout. The argument assumes these consequences. The facts of record show that consequences of this character were not intended. The vote is not to be read in the light of possible consequences. Its meaning is undoubted. A vote that each member offer situations to operatives as individuals is a declaration for the open shop. Its purpose was to preserve to employers the right to contract for their labor regardless of its membership in the union. The right to so contract is one of the inalienable rights of every employer of labor. Every employer and employee has, under the law, such freedom of contract. The law will not take it from him, much less declare illegal his effort to establish his right to it.

We see nothing in the record upon which to found the argument that the use of the union label was the object of the plaintiff. So far as appears, the label had nothing whatever to do with the resolution in question.

We do not think it is necessary to discuss the proposition that a vote by employers to conduct their factories as open shops and to exercise their right to hire their labor as individuals, and not as members of a labor union, is a restraint of trade within the Sherman Act. Nor do we think the proposition tenable that the object of the association was the making of the arbitration agreement which the plaintiff had with the United Hatters, and that it was void because it involved the exclusive employment by the members of the plaintiff of union labor. The arbitration agreement does not bear this construction, and its making was a mere incident of the business of the plaintiff. Moreover, it did not relate to, or enter into, the vote for the open shop.

The recovery is sought for the violation of a resolution of the plaintiff, under section 2 of Article VIII of the by-laws that:

"All members agree to pay to the association the sum of $5,000 as liquidated damages for the violation of, or failure to comply with, any of the decisions, orders, prohibitions, and regulations, passed or made by the association, in accordance with these by-laws."

The opinion then takes up the provision of the by-laws just quoted, and shows that it is properly construed not as a penalty, but as liquidated damages.

It also takes up the matter of the resignation, and shows that it became effective upon its receipt by the association on September 9, so that the running of defendant's shop after September 20 as a union shop was not a violation of the by-laws of the association of which it had ceased to be a member.

Taking up the question of the agreement entered into at the time the shop was opened, the court concludes its opinion as follows:

The only other violation of which the plaintiff complains is the entering into the so-called Father Kennedy agreement and the opening of its factory in pursuance thereof.

The open-shop resolution of January 28, if enforced, would deprive the United Hatters of the jurisdiction and control of all employees of the members, and would prohibit the employment of exclusively union labor. That it would precipitate a contest with a powerful labor organization was self-evident. The first resolution, that of January 14, voting to discontinue the use of the union label, was voted for by the defendant. The finding does not show whether the resolution of January 28 was, in fact, voted for by the defendant or not. It matters not; it was duly adopted, and bound all members, the nonacquiescent as well as the acquiescent.

All of the factories of the Danbury district, except the two open-shop factories, remained closed after the United Hatters withdrew their men on the day following the January 28 resolution. Many efforts were made to settle the strike. Finally two of the clergy, acting as self-appointed mediators, brought about an agreement signed by all the members of the plaintiff in the Danbury district and by the officers of the United Hatters. This was an agreement in which each of the contracting parties agreed, in consideration of the promises of the other, to do certain things. It was an evident attempt to devise a plan under which work could be resumed pending the 90 days' notice of intent to resign of the members of the plaintiff and upon the resignations becoming effective, securing the return of these members to the closed shop, and to the complete resumption of the jurisdiction of the United Hatters over the employees of each member. The plan was designed to avoid the liability which this action seeks to enforce. The very fact that these members entered into an agreement with the United Hatters concerning the opening of their shops and the conditions under which the members of the hatters' association should resume work was a breach by these members of the open-shop resolution.

The agreement was a cover, so manifest that it needs no argument to demonstrate it, for the purpose of having the factories of the members ostensibly run as open shops, but in reality run as closed shops under the jurisdiction of the United Hatters.

The open-shop resolution meant that the employers should be free to hire where they pleased and at such wage as the market for labor fixed, and that the employee should be free to choose his employer and to make his own conditions of employment. The agreement took from each the right to freedom of contract. These employers knew what they were engaged upon, for, simultaneously with this agreement, they agreed with each other to idemnify against any liability which might arise to the plaintiff. Had they in good faith intended to run an open shop, would they have felt it essential to make provision for the contingency of their agreement being held to be a violation of their obligation to the plaintiff? In fact, the agreement was to hire exclusively union labor. The contracting employers included all the manufacturers with two exceptions in the chief industry of the Danbury district.

We held in Conners *v.* Connolly et al., 86 Conn. 641, 86 Atl. 600 [see Bul. No. 152, p. 289], such an agreement against public policy and void. Meritorious as the effort of these mediators to settle a strike of fatal consequence to large communities was, we can not let our sympathy for the peacemaker cause us to forget that the security of society depends in great measure upon the preservation, inviolable, of the obligations of men.

We think this agreement a plain violation of the resolution of January 28.

Finally the defendant claims the plaintiff had no authority to institute this action, since it was not authorized by a three-fourths vote of all the members of the plaintiff, as is required by Article IX, section 1, of the by-laws in proceedings relative to any fine or assessment.

We have expressed the opinion that the recovery of the $5,000 under section 2 of Article VIII is not an action brought to recover a fine or assessment, but a sum determined as liquidated damages for a breach of any of the lawful decisions, orders, prohibitions, and regulations of the plaintiff, and hence section 1 of Article IX has no relation to an action to prosecute the collection of this sum. Such an action is an incident of the business of the plaintiff, and committed, as are the ordinary business affairs of every corporation, to its directors, whose authority is complete, except as curtailed by charter, by-laws, or the law. In this case there was no such curtailment. The plaintiff ratified the action of the directors, but we think this did not add to the powers already vested in them by virtue of their office.

The superior court is advised to render its judgment in favor of the plaintiff for $5,000, with interest from June 14, 1909.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISKS—INCOMPETENT FELLOW SERVANT—*Walters v. Durham Lumber Co., Supreme Court of North Carolina (Apr. 22, 1914), 81 Southeastern Reporter, page 453.*—S. A. Walters obtained a judgment against the lumber company in the superior court of Durham County, N. C., for injuries sustained while employed by it. This judgment was affirmed by the supreme court of the State, on appeal. Several points were before the court, but those of particular interest relate to the liability of the master when injury is due to the incompetency of a fellow employee, and the risk assumed by an employee from the negligence of such fellow servant. These points were disposed of by Judge Walker, delivering the opinion of the court, in effect as follows:

"If the master becomes aware that the servant has become, for any reason, unfit for the service in which he has employed him, in such a sense as to endanger the safety of his other servants, it will become his duty to discharge the unfit servant; and if, failing in this duty, one of his other servants is injured by the negligence of the unfit servant, he will have an action for damages against the master." Thompson on Negligence, sec. 4050.

The charge as to the assumption of risk was correct and in accordance with the law as we have often declared it, and also substantially

in response to defendant's own prayer. Plaintiff assumed the risk involved in the negligence of his fellow servant, but not that arising out of the negligence of the master in selecting him, if he knew that he was incompetent, as the risk in that event would be caused by the master's own negligence.

EMPLOYERS' LIABILITY—DUTY OF EMPLOYER TO INSTRUCT—NEGLIGENCE—*McCarty v. R. E. Wood Lumber Co., Supreme Court of Appeals of West Virginia (Nov. 4, 1913), 80 Southeastern Reporter, page 810.*—Lee McCarty was a boy 17 years of age, employed by the company named at taking lumber from a conveying table in its mill and loading it on a truck. While stooping to block the truck, his clothing was caught by a set screw in a revolving shaft and he was drawn to the shaft and severely injured. Judgment was given in his favor against the company in the circuit court of McDowell County, W. Va., in the sum of $15,000, which judgment was affirmed by the supreme court of appeals of the State. The following quotation from the opinion of Judge Robinson explains the position taken by the court:

At the time of the injury plaintiff had worked only five days. When he was put to work at the end of the table no instructions as to lurking dangers were given him, nor was he at any time warned. Defendant claims that there was no duty on it to instruct or warn plaintiff as to dangers from the revolving shaft, that the shaft was plainly visible to plaintiff, and that he was of sufficient age and discretion to know that it was dangerous. But a careful consideration of the evidence leads us to the conclusion that the danger of the set screw in the revolving shaft was not so patent as of itself to warn plaintiff. It was so situated as not to be patent to him while engaged in his duty. He was not required to make close inspection of the shaft. It was the master's duty to have it reasonably safe. Under all the circumstances shown it can not be said to have been so. One might avoid the shaft and the sprocket wheels, as it seems plaintiff did, and still be caught by the long projecting set screw not so patent as were the major parts of the machinery. It was clearly defendant's duty to instruct plaintiff of the presence of the set screw. Situated as it was, a little thing hidden generally by the presence of the table and the truck, a prudent man might not observe it for many days of service in proximity to it. Moreover, plaintiff was young and inexperienced in working about machinery. This fact made it even more incumbent on defendant to instruct him as to the danger of the surroundings in which he was placed to work.

EMPLOYERS' LIABILITY—MUNICIPALITIES—GOVERNMENTAL FUNCTIONS—CLEANING STREETS—*Mayor and Aldermen of City of Savannah v. Jordan, Supreme Court of Georgia (Sept. 19, 1914), 83 Southeastern Reporter, page 109.*—T. B. Jordan was injured by the breaking of the

axle of a cart in which he was hauling street garbage for the street and lane department of the city named. It appeared that his superiors had had notice of the defective condition, and had ordered him to continue the use of the cart; but the city claimed exemption from liability on the ground that it was exercising a governmental function delegated to it by the State, and the court took this view and sustained the city's demurrer to the complaint, reversing the action of the superior court of Chatham County. The following is an extract from the syllabus prepared by the court:

The duty of keeping the streets of a municipality free from matter which, if allowed to remain, would affect the health of the public is a governmental function, the exercise of which would exempt the municipality from liability to a suit for damages to an employee without fault, who is injured by reason of a defective cart in which he is hauling "the sweepings of the streets" of such municipality, and which has been furnished him for that purpose by the agents of the municipality.

EMPLOYERS' LIABILITY—OBEDIENCE TO ORDERS—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—SAFE PLACE TO WORK—*Magnuson v. MacAdam et al., Supreme Court of Washington (Jan. 7, 1914), 137 Pacific Reporter, page 485.*—Magnuson was employed by MacAdam as a common laborer paving streets. While an attempt was being made to move a concrete mixer by its own power, Magnuson was ordered by the foreman to take hold of a tongue attached to the front axle of the machine, to guide the machine. He obeyed the order and was injured by the tongue swerving and striking him as one of the front wheels struck a stone on the street. A judgment was given in his favor in the superior court, King County, from which MacAdam appealed to the State supreme court, where the judgment was affirmed. The point of interest and the basis of the conclusions of the court are stated below in the language of Chief Justice Crow:

Respondent (Magnuson) insists that appellant (MacAdam) was negligent in failing to provide him with safe appliances and a safe place in which to work, while appellants, in support of their motions, contend that all dangers incident to respondent's employment were open and obvious, or by the exercise of ordinary care and prudence could have been known to him, and that he assumed the risk of such dangers.

Respondent had a right to rely upon the orders and superior knowledge of the foreman, who represented appellants.

The evidence shows that the attempt to move the machine by its own motive power was under the immediate supervision of appellants' foreman, and that respondent acted in obedience to his specific orders. It was the foreman's duty to look after respondent's safety. This being true, respondent did not assume the risk, nor can he be held guilty of contributory negligence as a matter of law. [Cases cited.]

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE—*Stone v. Atlantic Coast Line R. Co. et al., Supreme Court of South Carolina (Dec. 15, 1913), 80 Southeastern Reporter, page 433.*—The widow of Samuel B. Stone brought suit to recover damages for the death of her husband, alleged to have been caused by the negligence of the railroad company and a conductor and an engineer in its employ. Stone was a car repairer, working in the yard and under the rules of the company. One rule of the company required that a blue flag or light be displayed by men working under or around cars, and other employees were forbidden to move or couple another car to a car on which the blue signal was displayed. Stone had a blue flag protecting the car on which he was at work, but removed it at the request of the yard conductor in order that a train might come in on the track to get some cars. He then crossed over to another track and sat down under the end of a box car. The car was struck by a train, injuring Stone and causing his death. The company contended that death was due to the negligent violation of its rules by the decedent, and that there was no liability on its part. The widow obtained a judgment, however, in the common pleas circuit court of Richland County, S. C., and this judgment was reversed by the State supreme court. The following language, taken from the opinion of the court, shows the grounds for reversal:

In this case, there is no testimony tending to excuse the violation of the rule. There is not a particle of testimony that the conductor or engineer or any one else knew that Stone had gone under the car. It is argued that he did it to get out of the rain in order that he might read over his list of "bad orders," or cars to be repaired, or make entries in his books of repairs that he had already made. It would be a mockery of justice to say that the master must make, promulgate, and enforce rules for the safety of his servant, and allow the servants to set them at naught upon such a flimsy pretext, and hold the master liable for injuries resulting therefrom.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—MINORS—ASSUMPTION OF RISKS—*Adams v. Chesapeake & O. Ry. Co., Supreme Court of Appeals of West Virginia (Feb. 13, 1914), 80 Southeastern Reporter, page 1115.*—One Adams, a boy 17 years of age, was employed as a section hand by the railway company. After having worked for seven or eight hours on the tracks, he was stationed at a dangerous cut to keep the track free from obstruction during the night and was struck by a train and killed at 4 o'clock on the morning of March 1, 1910, after having been on duty for about 20 consecutive hours.

Fannie Adams, administratrix, obtained a judgment of $2,000 against the company in the circuit court of Cabell County, W. Va., and this judgment was affirmed by the supreme court of appeals of

the State. The company contended that no liability attached to it, as the decedent had assumed the ordinary risks of the employment, but the court rejected this contention. The duty of an employer toward a minor employed in a hazardous place is made clear by the language below, taken from the opinion of Judge Poffenbarger:

The law imposes a peculiar duty upon masters in favor of minor servants, on account of their inexperience and inability to appreciate danger. One who employs a minor and places him at work in a dangerous place is under a duty to apprise him of the danger and show him how to avoid it, except in very plain cases of obvious danger, and the younger the servant the higher the duty of the master. As shown by the declaration and proof, the plaintiff's decedent was only 17 years old, wherefore it was the duty of his employer to apprise him of all dangers connected with his work, or incident to his service, of which he did not have knowledge. No ground upon which to distinguish the danger from overwork and loss of sleep of the servant from other dangers attendant upon it is perceived. Where minors are concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishment of the servant's comprehension of the particular risk rests upon the employer.

EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—APPROVED MACHINES—*Ainsley v. John L. Roper Lumber Co., Supreme Court of North Carolina (Mar. 11, 1914), 81 Southeastern Reporter, page 4.*—A judgment was given against the lumber company named in the superior court of Beaufort County for the negligent killing in August, 1912, of one of its employees—a boy 14 years of age. The boy was operating a lathing machine when he was struck by a piece of wood thrown back by the saw, and killed. One contention of the company was that as the lathing machine used was one "known, approved, and in general use," no legal liability attached to it by failure of the machine to work properly. It was proved, as evidence of the unsafe condition, that not infrequently pieces of timber were hurled back from the machine, threatening the safety of the employee, and that these pieces of timber made dents and marks on the wall 20 feet back.

In affirming the opinion of the lower court, Judge Hoke, who spoke for the State supreme court, said:

It is the accepted rule in this State, applied in numerous decisions of the court, that "an employer of labor, in the exercise of ordinary care, that care that a prudent man should use under like circumstances and charged with a like duty, must provide for his employees a reasonably safe place to do their work and supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are known, approved, and in general use." [Cases cited.

Judge Hoke then quoted from the opinion in the case, Marks *v.* Cotton Mills, 135 N. C. 136, 47 S. E. 432, after which he said:

From this we think it follows that an employer is not protected, as a conclusion of law, because he is operating a machine which is "known, approved, and in general use," but, although such a machine or appliance may have been procured, if its practical operation should disclose that employees are thereby subjected not to the ordinary risks and dangers incident to their employment but to obvious and unnecessary dangers which could be readily removed without destroying or seriously injuring the efficiency of the implement, such conditions, if known or if allowed to continue, might permit the inference of culpable negligence against the employer; that he had not, in the particular instance, measured up to the standard of care imposed upon him by the law, a position upheld by many authoritative cases and by text writers of approved excellence.

EMPLOYERS' LIABILITY—STATUS OF EMPLOYEE RIDING FROM WORK—STREET RAILWAYS—PASSES—*Indianapolis Traction & Terminal Co. v. Isgrig, Supreme Court of Indiana (Feb. 5, 1914), 104 Northeastern Reporter, page 60.*—This action was brought against the street railway company named for negligence in causing the death of the decedent, who had been its employee, and a judgment for plaintiff for $5,000 was given in the Hamilton circuit court. He was riding to his home after completing his work, and had been given a pass, which contained a stipulation exempting the company from liability for death or injury while using the same.

One question arising was as to whether the decedent was a passenger or a fellow servant with the operators of the car. The court followed its former decisions in deciding that he was a passenger.

This left only the controversy as to whether the terms of the pass were binding upon him and upon his widow and child. As to this Judge Erwin spoke as follows in delivering the opinion of the court, which sustained the decision of the court below:

If that question must be answered in the affirmative, then the cause must be reversed. If it is answered in the negative, then the other alleged errors are not available. The answer to this question seems to depend upon the fact as to whether the appellee was a passenger for hire, or whether the pass given was a gratuity bestowed upon the servant. It seems to be settled in many of the States that, where a pass is issued as a gratuity, the clause providing that the holder assumes all risks of accident is binding. It is equally well settled that, where there was a consideration for the transportation that a stipulation on the ticket or pass that the carrier should be exempt from liability for injuries resulting from the negligence of its servants, such stipulation is contrary to public policy and void. [Cases cited.] The evidence in this case established the fact, without any dispute, that the appellant gave to all its employees tickets such as the one shown to have been given decedent, and it is fair to presume that this one was given as a part of the wages of decedent.

EMPLOYERS' LIABILITY—STATUS OF EMPLOYEE RIDING ON ENGINE IN VIOLATION OF RULES—TRESPASSER—*Dixon v. Central of Georgia Ry. Co., Court of Appeals of Georgia (Jan. 20, 1914), 80 Southeastern Reporter, page 512.*—Dixon was employed as a fireman by the railroad company and was killed while riding on one of its engines as a passenger, having left the passenger coach in which he was riding and got upon the engine, contrary to the rules of the company. His widow brought suit for damages in the city court of Americus, Ga., where judgment was given in favor of the company, this judgment being affirmed by the court of appeals. The following syllabus by the court explains the grounds upon which its action was based:

Where a locomotive fireman in the employment of a railway company was riding upon a train as a passenger, and voluntarily left the coach in which he was riding and got upon the engine, either by the express permission or without the disapproval of the engineer, it not appearing that there was any rule or custom of the railway company permitting the employee to ride upon the engine, but it being on the contrary a violation of the rules of the company for him so to do, he was a trespasser, and his widow had no cause of action against the railway company for his homicide, resulting from the derailment of the train, caused by a switch which was defective, or which had been negligently left open.

EMPLOYERS' LIABILITY—STATUS OF EMPLOYEE RIDING TO WORK—*Klinck v. Chicago Street Railway Co., Supreme Court of Illinois (Feb. 21, 1914), 104 Northeastern Reporter, page 669.*—Charles A. Klinck, an employee of the company named, while attempting to board one of its cars, was thrown to the ground and seriously injured, the injury being due, as was alleged, to the negligence of the employees in charge of the car. He secured a verdict of $6,500 in the superior court of Cook County, which judgment was affirmed by the appellate court, whereupon the railway company appealed to the supreme court, which affirmed the decisions below. The circumstances were determined to be such as to warrant the jury in finding in the plaintiff's favor on the questions of negligence and due care, and this left remaining the questions whether the plaintiff was a passenger or an employee in his relation at the time he was injured, and, if a passenger, whether the condition indorsed on his employee's ticket, purporting to release the company from liability for personal injuries, was a bar to his recovery in the action.

Judge Cooke, speaking for the court, said in part:

The great weight of authority, however, is to the effect that when the employee, either by virtue of his contract of employment or under a rule or custom of his employer, is accorded the same means and privileges of transportation over the lines of his employer as an ordinary passenger for hire, then, while riding upon his employer's

cars at a time when, under his contract of employment, he is neither under the control of his employer nor obliged to perform any service for him, he is to be regarded as a passenger, and that, under such circumstances, it is immaterial that the employee be either going to or coming from his place of work.

The opinion then discusses the cases setting forth this rule, and distinguishes those cited by the company as upholding their view that the injured man stood in the relation of an employee, and continues as follows:

The ticket on which Klinck was intending to ride having been given to him, under his contract of employment, as part of the consideration for his services, he was a passenger for hire, and the stipulation on the back of the ticket releasing plaintiff in error from liability for personal injuries was therefore void. In Dugan *v.* Blue Hill Street Railway Co., 193 Mass. 431, 79 N. E. 748, it was said: "Where a pass is issued as a gratuity the clause providing that the holder assumes all risks of accidents is binding but where such a pass is issued to an employee as one of the terms of his employment the clause is not binding." [Cases cited.]

EMPLOYERS' LIABILITY—WARNING OF NEW DANGERS—STRIKES—INJURY TO GUARDS—*McCalman v. Illinois Central Railroad Co. et al., United States Circuit Court of Appeals, Sixth Circuit (June 30, 1914), 215 Federal Reporter, page 465.*—Charles E. McCalman brought suit for damages for personal injuries against the company named and another railroad company, and judgment was for the defendants on a directed verdict in the United States District Court for the Western District of Tennessee. During a strike McCalman had been employed as a guard, and with others was located at a certain crossing. Deputy marshals were sent to that crossing in response to a telephone message that there was trouble there, without warning to either group of the presence of the other. The marshals mistook the guards for strikers, attacking them without warning or provocation, and in the clash that resulted the plaintiff was shot and permanently and seriously injured. On appeal by the plaintiff the judgment was reversed and the cause remanded for jury trial.

Judge Warrington, who delivered the opinion of the court, said in part:

It must be conceded that the plaintiff was engaged in a hazardous employment during the conditions usually attending such a strike as the one then prevailing at the Nonconnah yards; and yet it is now plain enough that a new and distinct peril was added to that employment, though whether this was due to any breach of duty on the part of the defendants is the problem. Three engines had been torn up, and for quite a while "a state somewhat of riot and insurrection" had prevailed there.

It is a general rule as respects any hazardous occupation that the master shall inform his servants of all perils to which they will be exposed, which are or should reasonably be known to him, except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom may reasonably be avoided. This duty of the master so to inform his servants extends to any change made by him which introduces into their service a new element of danger. And the duty so imposed upon the master is of a primary character and is therefore nondelegable.

The defendants bore a contractual relation to McCalman and so owed him the duty not to enhance the peril of his service without notice. Plainly it would not have been sufficient merely to notify him of the coming of the deputies, though even this, as we have seen, was not done. The chief danger rationally to be apprehended lurked in the telephone message, "There was trouble at Nonconnah"; and the deputies approached the crossing with that belief. The nature of the danger, if under all the circumstances it was one reasonably to be anticipated, did not lessen defendants' duty to McCalman; for the knowledge of these new conditions would have enabled him to decide whether to remain at the crossing or discontinue his service.

The judgment is reversed, with costs, and the cause remanded.

EMPLOYERS' LIABILITY INSURANCE—MALPRACTICE OF COMPANY'S PHYSICIAN—*May Creek Logging Co. v. Pacific Coast Casualty Co., Supreme Court of Washington (Nov. 17, 1914), 144 Pacific Reporter, page 67.*—This was an action by the logging company named to recover on its policy of insurance written by the casualty company, which policy undertook to indemnify the insured company against specified kinds of losses. The logging company had been compelled in an action at law to pay damages to one of its employees, Klodek, for the malpractice of a surgeon employed by it; see 129 Pacific Reporter, page 99, Bulletin No. 152, page 241. Medical and surgical treatment were furnished Klodek under an arrangement by which the company collected a monthly fee from its employees, in consideration of which it undertook to furnish and provide suitable medical care and treatment for its injured employees. In its complaint the company alleged that this custom of providing medical and surgical treatment was known to the insurance company, and contended that the liability of the latter company covered such a condition as arose in the present case. The logging company had tendered to the casualty company the defense of the action when Klodek had sued for the malpractice of the logging company's physician, but the casualty company declined. Judgment was against the logging company in the sum of $4,500, which judgment was on appeal affirmed, requiring at the settlement the sum of $4,856.85, and this action was brought to recover this sum, together with the fees and expenses amounting to $1,000, with interest on the total. In the superior court of King County

judgment had been rendered for the casualty company on its demurrer to the complaint of the logging company, whereupon this appeal was taken, the appeal resulting in the judgment of the court below being affirmed. Judge Fullerton delivered the opinion of the court, first stating the facts as above, after which he said:

The trial court sustained the demurrer on the ground that the loss suffered by the appellant was not a loss covered by the conditions of the policy. This conclusion we think is the only conclusion that can be properly drawn from the facts shown by the record. The respondent's liability of course depends upon the conditions of its policy. If it has thereby undertaken to answer for losses arising from claims of damages on account of the negligent failure of the appellant to perform a special contract wherein it undertook to furnish an employee with hospital, medical, and surgical services, then it is liable to answer to the suit of the appellant, otherwise not. We can not think the policy bears this interpretation. It purports to cover only losses arising from claims of damages by the appellant's employees on account of accidental injuries suffered by the employees while in the prosecution of the appellant's logging business, and the departments dependent upon and the operations connected therewith. Hospital, medical, and surgical services are no part of the logging operations, and the injured employee while in the hospital was performing no service connected with the appellant's logging business. And while the appellant alleges that it is the custom of logging companies to deduct a hospital fee from the wages of each of its several employees, and use the fee in the payment of services to be rendered such employees as become sick or injured and that the respondent knew of this custom, we can not think the facts in any way alter or modify the terms of the insurance. Aside from the fact that the recovery was had upon a specific contract, and not upon the custom, the insurance is only against losses arising from negligence in the logging operations, not from losses arising from negligence in the maintenance of the hospital.

INTERFERENCE WITH EMPLOYMENT—ACTIONS—EVIDENCE—*Johnson v. Aetna Life Insurance Co., Supreme Court of Wisconsin (May 1, 1914), 147 Northwestern Reporter, page 32.*—Frank E. Johnson brought action against the Aetna Life Insurance Co. for procuring his discharge from his employment with the Simmons Manufacturing Co. The jury in the circuit court of Milwaukee County rendered a verdict in his favor, and assessed actual damages at $294 and punitory damages at $5,000. In lieu of the granting of a new trial the plaintiff was permitted to remit $4,000 punitory damages, and judgment was entered on the verdict as amended, whereupon the company appealed, securing a reversal of the judgment of the court below. Johnson had been injured in the employ of the manufacturing company, had resumed work after recovery, and had brought suit for the injury. His case in the suit against the insurance company rested on the fact that it had written to Vincent, the superin-

tendent of the manufacturing company, advising him to discharge the employee, on the ground that it was not for the interest of the manufacturing company to retain employees who had brought suit against it for damages. The testimony of Vincent and of Mr. Simmons (presumably the president and chief owner of the manufacturing company) was to the effect that Vincent disregarded this communication, and did not bring it to Simmons' attention; that Simmons noticed that Johnson was still working, and on his own initiative ordered Vincent to discharge him.

Judge Barnes, who delivered the opinion of the court, stated the questions to be decided, and discussed the law applicable to the first, showing that such an interference with employment, if proved, would create a right of action, as follows:

This appeal presents two questions: (1) On the facts found by the jury, was the plaintiff entitled to judgment? (2) Has the finding of causal connection between the acts complained of by the plaintiff and his discharge sufficient support in the evidence?

The first question must be resolved in favor of the plaintiff. We agree with defendant's counsel that if their client was justified in doing what it did in the way of procuring Johnson's discharge, the fact that it acted from malicious motives would not give a right of action. The presence of malice would permit the recovery of punitory damages, if defendant acted without justification, but would not in itself create a cause of action where none existed without it. Malice makes a bad case worse, but does not make wrong that which is lawful. [Cases cited.]

But the plaintiff had the right to dispose of his labor wherever he could to the best advantage. This is a legal right entitled to legal protection. Such right could be interfered with by one acting in the exercise of an equal or superior right. As against all others, the plaintiff was entitled to go his way without molestation; and, if any one assumed to meddle in his affairs, he did so at his peril. [Cases cited.]

Undoubtedly cases might arise where an insurer such as the defendant might be justified in saying to the insured that it would cancel its policy unless a certain employee was discharged. Such employee might be so careless of his own safety or the safety of his fellow servants that the insurer might not care to assume the added hazard that would be liable to follow from such conduct. We have no such case before us, however. The jury might well find in the present case that the purpose which the defendant had in mind was to deprive the plaintiff of his earning power so that he could not successfully carry on his suit to recover damages for the injuries which he had received. This savors too strongly of oppression to be considered a legitimate reason for a third party interfering with the relations between employer and employee.

On the question of evidence, however, the court held that while the writing of the letter was enough to make out a prima facie case, and to entitle the plaintiff to a judgment if no other testimony was offered, yet, since there was no evidence showing causal connection between

the letter and the discharge, and there was positive uncontradicted evidence that the discharge resulted from other causes, there was no conflict of evidence to go to the jury, but the judgment, as a matter of law, should be for the defendant. Two judges dissented from this view of the case.

INTERFERENCE WITH EMPLOYMENT—CONSPIRACY—ACTIONS FOR DAMAGES—*Bausbach v. Reiff et al., Supreme Court of Pennsylvania (March 30, 1914), 91 Atlantic Reporter, page 224.*—A previous report of this case (85 Atl., p. 762) was noted in Bulletin No. 152, page 271. There the Supreme Court of Pennsylvania reversed the action of the court of common pleas of Schuylkill County in granting a nonsuit, and remanded the suit to that court for trial. The result was a verdict in favor of the defendants, and the plaintiff alleged exceptions, the result being a second reversal with orders for a new trial.

Bausbach brought action against Reiff and a number of others for the loss of his employment with a brewery company, where he had been chief engineer for five years. He had reported the theft of merchandise from the company by an employee, who had been discharged as a result of this disclosure as to his conduct. On July 18, 1910, a committee of employees presented to the manager of the brewery a paper, signed by the defendants, reading as follows: "We, the undersigned, do hereby declare that we refuse to work after twenty-four hours' notice to the employers of the Rettig Brewing Co. as long as George Bausbach is employed at same plant." As a result Bausbach was immediately discharged.

In the opinion delivered by Judge Potter, the court states that the third assignment of error is as follows:

If you find, of course, that these men were justified in requesting the dismissal of this man Bausbach, the plaintiff, on account of his making it so unpleasant for them that they did not care to work with him, that is the end of this case; your verdict should be in favor of the defendants.

The opinion continues:

The first, second, twelfth, and thirteenth assignments are to language used in the charge and in answering points with respect to which substantially the same question is raised, and that is whether employees, to whom a fellow workman is for any reason disagreeable, may lawfully combine for the purpose of procuring his discharge by notifying the employer that they will refuse to work if the workman to whom they object is retained.

Several quotations are made from the authorities as to conspiracy for this purpose, the following being from the opinion in De Minico *v.* Craig, 207 Mass. 593, 94 N. E. 317 (Bul. No. 95, p. 349):

The plaintiff had a right to work, and that right of his could not be taken away from him or interfered with by the defendants, unless it

came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what "is distasteful" to some of them, is not in our opinion a superior or an equal right. * * * One who betters his condition only by escaping from what he merely dislikes, and by securing what he likes, does not better his condition within the meaning of those words in the rule that employees can strike to better their condition.

The opinion then applies this principle to the facts of this case as follows:

In the light of these authorities, which point out a sound distinction between what a single individual may lawfully do and that which a combination of individuals may do, the instructions of the trial judge which are the subject of the first three assignments of error were inadequate and erroneous. The united action of the defendants was put upon the same basis as that of any single one of them; the trial judge using by way of illustration a supposed act by Reiff, the first defendant named. It does not appear that the jury were instructed that an act which might be lawful if done by one person might become unlawful if a number of persons combined to do it. The only fair interpretation which could be placed upon the instructions given was that, "if Frank G. Reiff or any other one of these defendants" had the right to threaten to stop work if plaintiff was not discharged, the entire 28 men who signed the paper might lawfully combine to do the same thing. This was not a sound statement of the law. Again, it appears that the jury were instructed that, if plaintiff "worked on the nerves" of his coemployees, if he made himself "objectionable," "obnoxious," "unpleasant," or "distasteful" to them, they had the right to unite to procure his discharge by threatening to strike. This was going too far. The jury might very well have been instructed that, if plaintiff's habits, or his character, or his conduct while at work towards his fellow workmen was such as to render him an unfit associate for ordinary workmen of good character, it would have been sufficient reason for interference by his fellow workmen with his employment. They had the right to combine to advance their own interests in any proper way, but not for the purpose merely of inflicting injury upon another. It appears from the evidence that some of the defendants had disagreements with plaintiff, and gave some reasons for disliking him. But none of them testified that these difficulties caused them to sign the paper. Eighteen of the defendants gave no testimony whatever, and there was nothing to show that plaintiff had in any way made himself obnoxious or distasteful to them, nor was there anything in the evidence to show that they signed the paper for any other reason than that alleged by plaintiff, which was that he had reported to the company a theft by the night watchman. The first, second, third, twelfth, and thirteenth assignments are sustained.

The trial court had struck out from the testimony a paper given Bausbach by the company's manager at the time of his discharge, stating in effect that he had been discharged through no fault of his

own, but at the demand of employees, because he had reported the dishonesty of one of them. The opinion cites and quotes authorities on the subject of res gestae, and concludes that as a verbal statement to the same effect made by the manager to the employee at the time of discharge would have been admissible as a part of the res gestae, there was no good reason for excluding the written statement.

The court held that it was unnecessary to consider the remaining assignments of error, as those considered were sufficient to warrant the granting of a new trial. The judgment was therefore reversed.

INTERFERENCE WITH EMPLOYMENT—PROCURING DISCHARGE—CONSPIRACY—*Heffernan v. Whittlsey et al., Supreme Court of Minnesota (June 26, 1914), 148 Northwestern Reporter, page 63.*—E. W. Heffernan brought action against F. C. Whittlsey and the railroad company by which he had been employed for damages for procuring his discharge. The plaintiff, who was a telegraph operator, had been in the employ of the company as ticket seller. Whittlsey was station agent in charge of the same station. They had had trouble over the commissions on telegrams, and Heffernan being sustained, Whittlsey retired as agent. Plaintiff continued as operator and ticket seller until he was discharged. The ground for the discharge was that he had sold several tickets to a certain point over a certain route at the higher rate of fare which would be charged over another route and failed to credit the company with the excess received. The railroad company in its answer alleged that it had reasonable grounds to believe, and did believe, that the charges were true. Whittlsey admitted that he caused the charges against plaintiff to be investigated, alleged the truth of the charges and his belief and good faith in the matter. Both denied conspiracy and the other allegations. The jury in the district court of Waseca County gave a verdict for damages against both defendants, and, on motions for judgment or a new trial being denied, the defendants separately appealed, with the result that the judgment as to the company was reversed, while that as to Whittlsey was affirmed.

The court held that the view of the trial court was correct, that the railroad company had a right to discharge plaintiff without cause, and that some other act must, therefore, be proved against it, and the only claim was that it conspired with Whittlsey falsely to charge plaintiff with dishonesty in his position. The only basis for this, since Whittlsey had no connection with the company, was the claim that one Phillips, the detective who procured the evidence which caused the investigation, was in its employ. The jury had returned a special finding that Phillips was so employed, and the court held that the verdict could not stand unless there was suffi-

cient competent evidence to support this finding. The burden of proof of this was on the plaintiff. Whittlsey testified that he employed Phillips on his own account and paid for his services. The officers of the railroad testified that Phillips was not employed by them; that they had no suspicion of plaintiff and knew nothing about any charges or investigation until the evidence gathered by Phillips was presented to them. The defense attempted to get Phillips as a witness, but did not succeed. The admissions of Phillips of employment by the company, which were admitted on the trial, were ruled inadmissible and the other evidence insufficient. Continuing, the court, speaking by Judge Bunn, said:

The admission of these declarations was prejudicial error, as without them the evidence is too slight to enable us to say that it is sufficient to justify the verdict; much less is it sufficient to warrant holding that the error did not affect the result.

We will not discuss the question whether in any event the company can be held liable for doing a lawful act with a bad motive and with malice. If the evidence sustained the charge of a conspiracy between the company and Whittlsey to make false charges against plaintiff's integrity in order to procure his discharge, resulting in his being "blacklisted," it is probable that there would be a liability. Joyce *v.* Great Northern, 100 Minn. 225, 110 N. W. 975. But that there is no liability in the absence of malice can not be doubted. In the present case we find the evidence of a malicious conspiracy entered into between Whittlsey and the company, or joined in afterwards by the company, insufficient to make applicable as against the company the doctrine contended for by plaintiff.

As to defendant Whittlsey, the evidence is sufficient to justify a finding that the charges made against plaintiff were false, and that he acted out of motives of ill will, and with a desire to injure plaintiff. The verdict as against him was justified by the evidence, and we think it should stand, notwithstanding that, as against the company, it must be set aside.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—EFFECT ON INDIVIDUAL CONTRACT—*Gulla v. Barton, Supreme Court of New York, Appellate Division, Third Department (Nov. 11, 1914), 149 New York Supplement, page 952.*—Joseph Gulla sued Lizzie Barton, as surviving partner of a brewery firm, for wages alleged to be due him. On trial of the case at the trial term for Madison County the plaintiff put in his evidence, and at that point a nonsuit was granted on motion of the defendant. The plaintiff appealed, with the result that a new trial was granted.

The plaintiff had worked in the brewery of the defendant for 69 weeks, for which service he had been paid $9 per week. During this time an agreement was in force between the defendant and the Maltsters' Union, of which plaintiff was a member. This union was a

local body incorporated in New York, and a branch of an international union. Under this agreement the union was to prevent strikes and allow the use of the union label, while the employer was to conduct the business as a union brewery, and to pay all employees $18 per week. Upon learning of this agreement, the employee asserted that he would bring action for the additional $9 per week to which he believed himself entitled, and from that time he was paid $18 per week for his labor. Judge Kellogg, who delivered the opinion of the court, after stating the facts substantially as above, said:

The agreement referred to was a valid contract, which may be enforced in any proper manner. The renewal of the agreement [for a second year] indicates that it was beneficial to the defendant's firm. The union entered into the contract for the benefit of the plaintiff and the other employees in the defendant's brewery, and for the benefit of all union workmen.

It is urged, however, that the plaintiff can not maintain an action upon the agreement, and that he has waived the benefits of it by contracting for himself. Apparently he did not know of the agreement between defendant and the union until a dispute arose between the plaintiff, the defendant, and other employees. The evidence does not show any act of the plaintiff, made with a knowledge of the facts, which would waive the benefits of the contract with the union in his behalf. We have, therefore, a situation where the plaintiff received from week to week the wages contemplated by the contract of employment between himself and the defendant, and his union unbeknown to him had made a contract for his benefit, based upon a separate consideration passing from the union, that he as a member thereof should receive a greater compensation. In payment for the labels and the use of the union name in marketing the brewery product, the defendant had agreed to pay a stated wage to the plaintiff and to the other men working with him as members of the union. The union label had force and value, and the union had strength by reason of the moneys which it received as fees and dues from the plaintiff and other members. The plaintiff is therefore connected with the consideration and was a party intended to be benefited by the agreement. Smith *v.* State of New York, 203 N. Y. 106, 96 N. E. 409. The judgment appealed from should therefore be reversed, and a new trial granted.

LABOR ORGANIZATIONS—INDUCING BREACH OF CONTRACT—INJUNCTIONS—*New England Cement Gun Co. v. McGivern et al., Supreme Judicial Court of Massachusetts (May 26, 1914), 105 Northeastern Reporter, page 885.*—The company named brought action against several officers and members of the Journeymen Plasterers' Benevo lent Union of Boston, No. 10, to secure an injunction. A master was appointed in the proceeding, who heard the testimony, and the case was reported for decision by the full court on the pleadings and his report. It is stated in the opinion that no exceptions were taken to

the report of the master. He found that the plaintiff company was engaged in the work of mixing and applying to the surfaces of buildings a kind of plaster called gunite by means of a so-called cement gun, which mixes sand, cement, and water, and is operated by two men, one operating the gun or mixing machinery, and the other the nozzle through which the gunite is applied by means of compressed air. Since the work of the nozzle man is very hard, it was customary to have the gun man and nozzle man exchange places every half day, or, if the nozzle man was a plasterer, and the skilled plasterer who usually followed to smooth up the work had learned the nozzle man's duties, for them to exchange. Further facts are given as follows:

The object of the local union, as defined in its constitution, is:

"To unite together all the practical journeymen plasterers working within the jurisdiction of this union for the purpose of securing united action in whatever may be regarded as beneficial to their united interest."

And the master specifically finds that:

"One of the main objects of the International Association and of Union No. 10 is to exercise a control by concerted action over the relations of practical plasterers and those who may, from time to time, require their services."

In the fall of 1912 McGivern, on behalf of the union, told the company's superintendent, referring to a certain building, that the latter would have to employ union plasterers to operate the nozzle, or he would call a strike, and for a time union plasterers were so employed. On February 28, 1913, the gun company entered into a contract with the Old Colony Real Estate Trust to coat with gunite the walls of a building which the trust was erecting. The officers of the union, learning that the gun company did not intend to employ union men, informed Farley, an acting trustee of the trust, that there would be trouble. After part of the interior plastering had been done the plasterers, and also the lathers and metal workers, left and refused to return to work until a contract was made for the outside work to be done by the contractor who was doing the inside plastering, and who would use union men. The gun company wrote a letter to the trust releasing it from its contract. The records of the union showed the receipt of a report from Taylor, one of the defendants and the union's business agent, on the matter of this job, and a vote to take action in the way of striking on the inside work, as was actually done.

It appeared that the gun company had no objection to employing union men, but that the plasterers' union did not recognize the regular workmen using the machinery as plasterers, unless of course they were first ordinary plasterers, and there appeared to be no union to which they were eligible.

The opinion, delivered by Judge De Courcey, further states:

The master made certain specific findings and conclusions, among which are these:

"4. That there is a division of sentiment among members of the unions as to the use of the cement gun and process, the defendant McGivern and others being in favor of its use, and others in the majority being hostile to its use, based upon the fear that it will reduce the work of practical plasterers; that the present attitude of the local union officials is that the union should control the operation of the nozzle of the gun, and not the rest of the machinery; that the demand of the defendants is that the plaintiff employ skilled plasterers only, who are members of the union, to operate the nozzle, as well as to follow after the nozzle in smoothing the surface covered; that the object of the defendants is to compel the plaintiff to unionize its business and to run a closed shop so far as the work of plastering goes, in order to secure all of that work for the members of their union under union conditions; and that it was to accomplish this object that the strikes were called on the job upon the Howard Street building.

"5. That the defendants have conspired together for the purpose of creating and enforcing a boycott against the plaintiff and of hindering and interfering with the prosecution of its business and of injuring the same unless it accedes to their demand.

"6. That the defendants, in pursuance of said conspiracy, are engaged in watching and seeking out work proposed to be given to the plaintiff and in coercing those in control thereof not to make with the plaintiff any contract for such work, and in causing the rescission of such contracts as they discover to have been made with the plaintiff."

"8. That the strikes were strikes against a subcontractor for the purpose of forcing him to coerce the main contractor to coerce the owner of the building to coerce the plaintiff to yield to the demands of the union.

"9. That the defendants have instituted a boycott against the plaintiff and intend to continue enforcing the same, unless prevented from so doing."

The court discussed the law applicable to the case, and expressed its decision that an injunction should be granted, as follows:

Without further recital of the details, it is apparent that the record discloses a combination on the part of the defendants to do acts which the law does not justify, notwithstanding that the ultimate motive by which they were inspired was to advance their own interests. The plaintiff had a written agreement with the owners of the building to apply the coating of gunite. Under our decisions it was unlawful for the defendants, by means of strikes and otherwise, to intentionally induce the owners to take away from the plaintiff its rights under that agreement. Such conduct is not legally allowable as so-called trade competition or defense of self-interest.

A combination to procure a breach of contract is an unlawful conspiracy at common law. [Cases cited.] Further, if Monahan, who had the subcontract to do the interior plastering, also had the contract for this exterior work, his union workmen, unless prevented by their contract of employment, might have gone out on a strike unless

he agreed to give all of the plastering work to them or their associates, because we assume that the application of stucco or cement to the exterior of a building may be found to be work such as practical plasterers have a right to compete for.

But it was not lawful for them to strike to compel Monahan, with whom they had no trade dispute, to compel the general contractor to compel the owner to compel the plaintiff to give to the defendants the work they demanded. In other words, it was an unjustifiable interference with the plaintiff's business to injure others in order to compel them to coerce the plaintiff. Martin, Modern Law of Labor Unions, sec. 77, and cases cited. The acts of coercion and procuring breaches of contract mentioned in the sixth finding plainly are not justified by the law of this Commonwealth. It is unnecessary to consider further the unlawfulness of such a secondary or compound boycott in view of the full discussion of the subject in the recent opinions of this court in Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753 [Bul. No. 70, p. 347], and Burnham *v.* Dowd, 104 N. E. 841 [page 270], in which cases are collected the authorities in this and other jurisdictions.

The plaintiff is entitled to a decree enjoining the defendants from causing or taking part in any boycott against the plaintiff's business, by coercing others, through intimidation or threats, to withdraw from the plaintiff their beneficial business intercourse, and from causing or inciting any sympathetic strike against the plaintiff or its customers for the purpose of preventing the use by the plaintiff of its machinery or process for applying gunite, or for the purpose of compelling it to discharge any of its nonunion workmen.

LABOR ORGANIZATIONS—INJUNCTION—BOYCOTT—*Gill Engraving Co. v. Doerr, United States District Court, Southern District of New York (May 19, 1914), 214 Federal Reporter, page 111.*—The Gill Engraving Co. brought action against William Doerr, individually and as business agent for the New York Photo-Engravers' Union No. 1, and others. The decision disposes of a motion for an injunction against the defendants pendente lite, by dismissing said motion. The controversy had been going on for a number of years between the company and the union, which included most of the photo-engravers in New York. The company at first conducted an open shop, but finally employed only nonunion workmen. In March, 1914, the union took action by which the members refused to do any work for customers of their employers who did not agree to have all their work done in union shops. The Gill company appeared to be the only concern of importance affected by this action. The result was that the larger part of the customers of the company left it, so that it lost most of its business and the rest was threatened. In expressing the decision of the court that these facts did not warrant the issuance of an injunction, Judge Hough spoke as follows:

As to the purpose with which defendants have acted, I am of opinion that hostility to the Gill company is subordinate and incidental.

All nonunion businesses are treated alike; naturally the greater the business the greater the aggregate dislike, but the quality of hatred is the same, irrespective of size. That Gill company is hurt is gratifying but incidental; the procedure would be the same were complainant nonexistent. Doerr told nearly the whole truth when he wrote, "We will do all of (your customers') work or none." If he had added "and if they can get it done otherwise after this we will think up something else," he would have told the whole truth, because the great and all-absorbing object of defendants' endeavors was and is to get all the work in the trade, or at any rate all the work worth having, for their own members.

Before applying the law to the findings of fact, much that was mentioned in argument may be laid aside. It is not shown that any national statute has been violated; nor that any principle peculiar to national law (e. g., interstate commerce) is concerned; nor that the question presented is complicated by disturbance of the peace, physical trespass, or violence; nor that any Government function (e. g., mail transportation) has been interfered with. These exclusions make the case purely local. The jurisdiction of this court is an incident, depending on the New Jersey incorporation of a business wholly conducted in New York City. Therefore I think it desirable that the law of New York should be applied so far as I am capable of discovering it, unless the decisions of Federal courts superior to this compel different treatment.

It is asserted that the defendant's acts constitute a crime under New York Penal Code, section 580. I decline to consider such violation as ground for injunctive relief pendente lite. I am sure that penal statutes are meant to be enforced in criminal courts; their use as bases for injunction is usually illegitimate and always illogical; even the not infrequent fact that prosecuting officers do not enforce the statute against some citizens and rigidly enforce it against others does not justify an attempted administration of criminal law by courts of equity.

It is further urged that the defendants have engaged in a conspiracy or combination in violation of sections 340, 341, General Business Law of New York (the Donnelly Act). It seems plain enough that this is true, but it is settled that for such cause a private party on his own suit is not entitled to injunctive relief. Irving *v.* Neal, 209 Fed. 471 [see p. 162]; Paine Lumber Co. *v.* Neal, 212 Fed. 259 [see p. 164]; affirmed in 213 Fed. (C. C. A., April 7, 1914). Therefore this motion is to be decided by what is usually called common law; i. e., the law of New York as evidenced by the decisions of its courts, supplemented only by the inquiry as to whether any controlling divergence of opinion is found in the appellate tribunals to which this court is more directly responsible. The leading cases in New York [cases cited] all show that the court sits primarily to decide a question of fact, viz: What is the object of the combination?

Applying this rule to this case, it is held that the object of defendant's combination is not to injure Gill company, though such injury has occurred and was foreseen. The object is to increase the power of the union, so as to get more, better, easier, and better-paid work for its members; this is now regarded as laudable.

As to the means employed, everything lately done and alleged as ground for present action consists in threatening strikes. This is the

exercise of a legal right. If defendants have sought to attain a legal end by legal means, that a motive, or part of a motive, was hate of Gill company is immaterial.

That wrong and injury are being done in this matter is plain enough. Why does the law refuse or neglect to correct it? Andrews, J., has, I think, given the best answer in Foster *v.* Retail Clerk's Assn., 78 N. Y. Supp. 860:

"Injury * * * is never good, but to suffer it may entail less evil than to attempt to check it by legal means. * * * In the last analysis this freedom to commit injury, and the bounds imposed upon it are regulated by what has been thought to be public policy."

The cases cited could be used to show that no bounds have been imposed in New York on wrongs quite as great as that wrought upon complainant.

Defendants have called attention to one fact not found in any case known or shown to me. The Gill company has declared war on the union by discharging all members found in its shop. It is said this should deprive complainant of the aid of equity, and Sinsheimer *v.* United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321, is relied on. It is not seen why a person otherwise entitled to protection for his business is deprived of it because he will not employ a certain class of workmen; the nonpreferred workmen are not, therefore, given any right to injure the man who does not prefer them.

In the United States courts for this circuit, National Fireproofing Co. *v.* Mason Builders' Assn., 169 Fed. 259 [Bul. No. 84, p. 427], is controlling. It accepts the New York cases fully, piously regrets the injuries committed, and writes the epitaph of litigation such as this by declaring that, when equal legal rights clash, equity is helpless. This is true; it would have been just as true to point out that the result of legalizing strikes, lockouts and boycotts under any circumstances must be that those who understand the use of such legal tools can always keep within the law and accomplish their main purpose while inflicting all necessary "incidental" injury.

Considering that the rules as laid down in New York have not been shown to be transgressed, motion denied.

LABOR ORGANIZATIONS—INJUNCTION—CONSPIRACY—BOYCOTT—*Hoban v. Dempsey, Supreme Judicial Court of Massachusetts (Feb. 28, 1914), 104 Northeastern Reporter, page 717.*—The opinion in this case, delivered by Judge Rugg for the court, in affirming the decree of a single justice dismissing a bill praying for an injunction against the carrying out of a contract between the agents of steamship companies and an organization of longshoremen, states the facts and fully discusses the law applicable thereto:

The plaintiffs are members of a labor union of longshoremen. There are two groups of defendants, the one members of a different labor union of longshoremen, and the other representatives of certain trans-Atlantic steamship companies. The plaintiffs seek to enjoin the defendants from proceeding with an agreement which consists of 30 articles covering most, if not all, of the conditions of labor likely to

arise in the course of such employment. One paragraph provides in substance that all longshoremen employed by the contracting trans-Atlantic steamship lines shall be members of the defendant union whenever such men are available, and whenever such men are not available, then other men may be employed until the defendant union can supply men, but in any event men not members of the defendant union may be employed until the end of the day. It is contended that this clause is so illegal that performance of the contract ought to be enjoined at the instance of third parties. A trial was had before a single justice who, at its conclusion, found that the "contract was freely and fairly entered into between the contracting parties without any purpose or motive on the part of the representatives of the International Longshoremen's Association [the defendant union] to injure the plaintiffs or to coerce them into joining the union or unions, although I am satisfied that the legal effect of the contract may deprive the plaintiffs of employment by the trans-Atlantic steamship lines," and ruled as matter of law that the bill could not be maintained and entered a decree dismissing it. The plaintiff's appeal brings the case here.

It is familiar law that the findings of fact made by a single justice are not to be set aside unless plainly wrong. There was testimony from witnesses from both groups of defendants that their purpose in entering into the contract was not to harm the plaintiffs, but primarily to secure the welfare of each party to it. The steamship agents testified that they had previously dealt with several different organizations or local unions; that the committees representing these bodies were cumbersome in numbers, not small enough to make an effective body, and in consequence, in case of disagreement as to working conditions, there was difficulty in getting an adjustment; and that work was not done expeditiously and well, and it was felt that if an agreement was made with one strong union, under good control and management, it would be easier to get an adequate supply of labor and to settle troubles that might arise; and that no coercion or intimidation was exercised over them by the defendant union, and that they acted voluntarily with a view single to their own interests in signing the contract. The advantage to the defendant union lay in securing a permanent arrangement covering all labor conditions, with preference in employment for their own members. The uncontradicted direct testimony was to the effect that the dominant motive on the part of both parties was to gain benefits for themselves and in no sense to harm the plaintiffs. Of course the defendants must be presumed to have intended the natural results of their acts, whatever may have been their oral statement respecting it. But it is plain from this summary of testimony that the finding that there was no purpose to injure the plaintiffs or to compel them to join the defendant union was supported by evidence. The tortious acts and motives which frequently have been found to exist in cases involving industrial disputes are absent in the case at bar. There have been no violence, threats, or intimidation.

The question remains whether upon the facts found the plaintiffs are entitled to relief. This is a simple case where employers and a union of employees have made an agreement freely and without any kind of constraint, the terms of which do not require the breaking of

contractual relations with anyone, to the end that all the work of a specified kind be given to the members of a union so far as they are able to do it, for a limited period of time. There was nothing of the boycott about the contract, for an essential element of the boycott is intentional injury to somebody. An agreement of this sort under the circumstances disclosed is within the protection of Pickett *v.* Walsh, 192 Mass. 572, 584, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 [Bul. No. 70, p. 747]. It is within the lawful principles as to the conduct of business expounded at length and with great clearness in Martell *v.* White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341 [Bul. No. 53, p. 958]. See, also, Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598; s. c. on appeal [1892], A. C. 25. Those principles are the law of this Commonwealth. It is not necessary to repeat or restate them. They are decisive against the contentions of the plaintiffs.

Although there is evidence which would warrant a finding that the defendant union represents "practically the whole of the longshoremen of the port of Boston," this has not been found as a fact. It is apparent both from the frame of the bill, the trend of the trial as disclosed on the record, and the findings of the single justice, that the hearing did not proceed upon the theory of an unlawful monopoly or a violation of the Sherman Antitrust Act. Those issues were not tried out. Such questions can not be raised at this stage of the case and they are not passed upon.

LABOR ORGANIZATIONS—INJUNCTION—CONTEMPT—PICKETING—EVIDENCE—*Sona et al. v. Aluminum Castings Co., United States Circuit Court of Appeals, Sixth Circuit (June 13, 1913), 214 Federal Reporter, page 936.*—This case was before the court of appeals on a writ of error to the District Court of the United States for the Eastern District of Michigan, to review a judgment by that court sentencing to imprisonment George Sona and one Sudsinski for contempt of court. The persons named were pickets in a strike by a local of the International Molders' Union against the company named. The company had secured a restraining order and preliminary injunction, of which the persons named had notice. It was in evidence that Sona had assaulted an employee of the company, doing him "serious bodily harm," and that Sudsinski, though committing no assault, had been guilty of picketing, impeding, and obstructing the streets, alleys, and approaches to the premises of the company in a threatening and intimidating manner. These acts were regarded as contempt of court, and a sentence of imprisonment was assessed on each party. A number of technical questions were involved as to the sufficiency of the petitions and affidavits which led to the arrest, and while certain defects were apparent, the court held that these had been waived by the subsequent proceed-

ings and the acts of the defendants, and the judgment was affirmed. On the question of evidence the court said in part:

As to the sufficiency of the proof to sustain conviction: As to the assault charged against Sona, no question of the sufficiency of the proof could well be made; there was direct testimony thereof. As to Sudsinski, the question, of course, relates only to the charge of obstructing and intimidating. Complainant concedes that the injunction was not intended to restrain peaceable picketing, and the district judge rightly, as we think, so interpreted the order.

There was express testimony that it was the regular practice for picketers to march back and forth in front of the plant for about an hour each morning and evening, including the time when employees were entering and leaving the plant; that Sudsinski was one of the regular and prominent picketers, usually walking with two or three and sometimes about a dozen picketers in a "bunch"; that the picketers marched either in single file or by twos; and that, during this picketing, there were in the immediate vicinity of the plant from 20 to 50 and sometimes 100 people, apparently largely strikers, walking back and forth. The controlling question was one of fact whether this picketing was peaceable or whether, on the other hand, it was calculated to intimidate and obstruct employees. There was testimony tending to show a purpose to intimidate and obstruct. One of the witnesses testified that he had heard some of those so walking around or standing "hollering different things"; that he at one time heard them "call the other men cattle"; and that Sudsinski was in the crowd that particular evening. Respondent Sona, as a witness, admitted that he knew that "there had been a lot of trouble around there"; that he had heard that men had been assaulted on the street cars on their way to work and been pulled off street cars; that he had heard that the company had to protect its men by cooking and serving meals inside the works. (There was express testimony that the employees were boarded by the company after the strike was declared.) Sudsinski would not unnaturally be as familiar with those general conditions as was Sona. The latter and his associates in the alleged assault followed the employees alleged to have been assaulted from the works to the place where the collision occurred. Judge Angell, who presided at the hearing below and who saw and heard all the witnesses, was convinced, as shown by his finding, that the picketing in question was done in such a manner as to intimidate, threaten, and obstruct the employees of the company, and all persons seeking employment from it. In view of the testimony referred to, we can not say, as matter of law, that the court was not justified in reaching the conclusion arrived at notwithstanding the absence of testimony of actual violence or disorderly conduct on Sudsinski's part.

LABOR ORGANIZATIONS—INJUNCTION—CONTEMPT—VIOLATION BY INCITING OTHERS TO VIOLENCE—*United States v. Colo et al., United States District Court, Western District of Arkansas (Sept. 1, 1914), 216 Federal Reporter, page 654.*—On May 9, 1914, the United States District Court for the Western District of Arkansas, in the case of

Mammoth Vein Coal Mining Co. *v.* Hunter et al., rendered a decree enjoining the defendants in that case, and all other persons, from interfering with the property of the company or with its nonunion miners. On the 13th of June the company filed a motion for an attachment against several striking union men for violation of the decree, and on the 20th filed a similar motion against still others. The cases against all the defendants who had been arrested were tried together. On July 27, after the evidence on the original cases had been taken and the cases submitted, a motion was made to reopen them to allow additional testimony to be introduced, growing out of an alleged attack on mine No. 4 by an armed mob, the killing of two of the company's employees, and the burning and blowing up of its property. The motion was sustained as to P. R. Stewart, but was denied as to all others. Motions were then filed for attachments for contempt against John Manick, Frank Gripando, Loyd Claborn, Pink Dunn and George Burnett, charging them with having been members of the mob. Testimony was then introduced as to the occurrences of July 17.

Three of the defendants were charged with intimidation of certain miners on a train going to mine No. 4 on June 15. After some review of the testimony in regard to this, Judge Youmans, who delivered the opinion of the court, said:

After a consideration of all of the testimony, I am convinced that Burris, Robinson, and Manick did use threats on that occasion against the employees of the company and endeavored to intimidate them, and that in so doing they knowingly violated the court's orders. In my opinion the presence of armed guards and a deputy United States marshal, who met the train at the stopping point, alone prevented an attack on the employees.

As to a charge against Robinson the court said:

Sandy Robinson is separately charged with having cut some sacks of feed belonging to the Mammoth Vein Coal Mining Co. on the platform at Prairie Creek. This was on May 18. The feed was being unloaded from a Midland Valley car for the purpose of being taken to mine No. 4. The testimony is that Robinson was there and engaged in an altercation with a mine guard, and that he took out his pocketknife and cut five sacks. I am convinced that this is true, notwithstanding his denial, and the testimony of witnesses tending to show that he was not there.

With regard to the nature of the charges against Stewart, Judge Youmans said:

The defendant P. R. Stewart, at the time of the occurrences herein mentioned, was president of District No. 21 of the United Mine Workers of America. He was present during the trial of the case of Mammoth Vein Coal Mining Co. *v.* Hunter et al. He heard all the testimony, sat with counsel for the defendants during the trial, and heard the opinion of the court when it was handed down. He therefore had full knowledge of the issuance of the injunction and its

terms. The charge against him consisted of certain statements made by him. On May 25 Stewart went from Fort Smith to Midland in an automobile in company with Paul Little, State prosecuting attorney. While at Midland, Stewart made some statements in front of McGee's drug store.

After quoting from the testimony of Little and other witnesses and of Stewart himself as to this occurrence, which testimony showed that Stewart suggested that the strikers should be armed and that he would assist them in procuring arms, Judge Youmans said:

It will be seen that Mr. Stewart did not deny any of the testimony given by the witnesses as to what he said in front of McGee's store at Midland. He explains it by saying that he "had information that a guard named Bailey, and some other guards, had insulted some girls," and that that made him pretty mad. He said:

"It was my idea to arm the men in the Hartford Valley so that they could protect their own homes, and so that they could protect the women and children."

There was nothing, so far as the attitude of the State and county officers towards offenses committed by employees of the Mammoth Vein Coal Mining Co. was concerned, to warrant him in assuming authority to supplant the legal methods for the enforcement of the law. He made a speech at Hartford the next night at a gathering at which Mr. Little was present.

After quoting the testimony of Little to the effect that the remarks of Stewart on this occasion were similar to those on the previous day, the opinion continues:

Stewart made this statement at Hartford more than 24 hours after he had made the statement in front of McGee's store at Midland. If the first statement was made in anger, the second was made after his temper had had ample time to cool. It was made after the prosecuting attorney had, in response to inquiries, stated the information he had gathered. There was no reason to presume that the officers and the courts were not able to cope with all violations of the law. Notwithstanding this, Mr. Stewart saw fit to repeat his threat, and that, too, in the presence of the prosecuting attorney, who permitted it to pass unrebuked.

The conviction can not be avoided that the real object of Stewart was to prevent the operation of the mine as an "open shop."

The coal company had determined to run its mine as an "open shop." The union was opposed to such operation. If the coal company had no legal right to run its mine as an "open shop," there must have been some way, by orderly procedure in the courts, to prevent it. The union was endeavoring to prevent such operation, but not by legal proceedings. If it could accomplish its purpose by legal means, no one had a right to complain. Its first effort was not by legal means. On the 6th of April its members and sympathizers assembled on the company's property, assaulted its employees, and compelled them to stop work. That method was unlawful. At the instance of the coal company, all persons engaged in that attempt, and all others, were enjoined from in any manner interfering with the company's property or employees. Notwithstanding the injunction, assaults were threatened. Shots were fired into the mine

inclosure. It was necessary to keep armed men about the mine. From some time in June to the 15th of July deputy United States marshals were stationed at the mine. Even when men went to Midland for supplies, it was necessary for them to go armed.

Certain evidence was then reviewed, after which the court said:

The conclusion is unavoidable that if the members of the union had obeyed the orders of the court, or if the officers of the county had shown the same disposition to prosecute violations of the law when committed by union men as when committed by employees of the company, it would not have been necessary for the latter to carry arms.

It was the policy of Stewart, according to the argument of counsel, to have the union maintain such an attitude as would make the employment of armed guards, if not actually necessary, at least apparently so from the viewpoint of the coal company, and thus cause to be added, to the usual cost of the production of coal, such sum, by the expense of maintaining guards, as would result in loss to the company, and bring about the suspension of operation as an "open shop." According to that plan, the company was to be kept in a constant state of apprehension of an attack to the extent that it would continue to maintain guards, but it was in fact the intention of Stewart that the attack should never be made. Such an experiment in tight-rope walking could not result otherwise than in failure.

Putting on Stewart's acts and speeches the construction most favorable to him, he incited to action forces which he could not control. Occupying a position in which his influence could have operated powerfully for the maintenance of law and order, he saw fit to so deport himself as to incite to and encourage mob violence. He knowingly played with fire with a reckless disregard for consequences. His conduct was at variance with his declaration made on the witness stand, of respect for the court's order and his intention to be governed thereby.

Language or conduct intended to incite others to a violation of the court's order is a contempt of court. U. S. *v.* Debs, 64 Fed. 724; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900; U. S. *v.* Haggarty, 116 Fed. 510 [Bul. No. 43, p. 1291]; U. S. *v.* Gehr, 116 Fed. 520. The effect of Stewart's policy, speeches, and conduct is seen in the events of the 17th of July.

The occurrences of the date just mentioned, when the attack by the union men on mine No. 4 took place, were reviewed, and the evidence of participation by the various defendants taken up. The conclusion reached is shown by the following quotation from the opinion:

The testimony on behalf of Claborn is sufficient to raise a reasonable doubt in his favor, and he will be discharged. Burris, Robinson, Stewart, Manick, Gripando, Dunn, and Burnett will be adjudged guilty of contempt.

The term and place of imprisonment of each is designated at this point and the opinion concludes as follows:

It is proper to say, in this connection, that a conviction upon a charge of contempt for an offense which is also a crime does not bar a prosecution for the crime.

LABOR ORGANIZATIONS—INJUNCTION—RIGHT TO RELIEF—MANDAMUS DIRECTING ISSUE—PEACEABLE PARADING—*Baltic Mining Co. v. Houghton Circuit Judge, Supreme Court of Michigan (Dec. 10, 1913), 144 Northwestern Reporter, page 209.*—The Baltic Mining Co. and others had procured from the circuit judge of Houghton County a preliminary writ of injunction restraining certain acts of violence and intimidation charged in their original bill of complaint. A few weeks later the judge issued an order dissolving the writ previously granted by him, on the ground that it had been unadvisedly issued, since he did not have the power to take such a step. The present proceeding was to procure from the State supreme court a writ of mandamus directing the circuit judge to set aside and vacate this order of dissolution, thus leaving the preliminary injunction in force. This writ was issued on hearing before the court, some explanation also being made as to the effect of the original injunction so reinstated.

The original bill of complaint on which the injunction was issued was directed against the Western Federation of Miners, its district and local unions and their officers and members. This complaint stated that when a general strike was inaugurated in July, 1913, upward of 4,000 miners employed by the complaining company, not allied with the union, refused to participate in the strike and sought to continue labor, but were interfered with by threats and violence until work was suspended in many places. Allegations were made of assaults, picketing, threatening parades, riotous and threatening gatherings in large numbers, and "in instances too numerous to mention or specifically set forth" of assaults and beatings of employees of the petitioners. The defendants filed no answer to this complaint, but moved a dissolution of the temporary injunction granted, on the ground that the allegations in the complainants' bill were too general in their nature, not properly verified, and not supported by any showing on which a temporary injunction should or could have been granted. The court adopted this view and dissolved the injunction, but reserved the right to issue a restraining order without notice, upon showing made by affidavits by the complainants. About a week afterwards affidavits were submitted setting forth the conditions that had developed immediately after the dissolution of the injunction. The following is quoted from the opinion of the court in this connection:

The affidavits, 84 in number, are freighted with narratives of rioting, acts of violence, threats, insults, and intimidation of men, women, and children too numerous to attempt to repeat here, fully substantiating and showing continuation of the unlawful conduct by defendants alleged in complainants' bill. The affiants testify positively from personal experience and observation. The affidavits are not only made by employees of complainants and their families,

but by others, officials and private citizens, in many walks of life. They tell of the strikers, members of the defendant federation, and their sympathizers parading with noise and insults and threats, attacking, assaulting, and driving back peaceable workmen going to their employment, of men irregularly grouped together in bands of from ten to a dozen to mobs of six and seven hundred at various times both day and night, with threatening demonstrations and words, of their laying in wait for and attacking employees of complainants as they went to and from their work, assaulting them with clubs and rocks, snatching from them their dinner pails and trampling them upon the streets, applying to them vile and vulgar epithets, threatening violence not only to themselves, but to their families, to kill, to dynamite, and to blow up their houses. They tell of peaceable citizens of long residence in those communities, with their established homes and families there and whose only offense was an attempt to continue work where and as they had been employed for many years, being assaulted on the highways, mobbed, their clothing torn from them, spit upon, coal ashes and slops thrown on them, bottles and rocks hurled at them often inflicting serious injuries, even in sight of their wives watching from their homes, of boarding houses and homes of nonunion men being surrounded and stoned, with taunts and insulting threats, of women and girls struck with missiles and injured on such occasions, of mobbing trains, defying the civil authorities, resisting and assaulting officers, of resort to firearms in which employees of complainants and others were wounded, and other overt acts of lawlessness, disorder, and violence clearly substantiating the allegations in complainants' bill, and fairly indicating concerted action on the part of defendants to promote the strike by an aggressive policy of force and intimidation. Upon such showing the trial court again refused to grant any relief, and this application for a mandamus followed.

The court then took up the grounds on which its conclusion was reached that the injunction should not have been dissolved, using in part the following language:

Briefly stated, respondent's answer is that, though disposed to grant a restraining order, he had no power to do so because of the insufficiency of the bill.

The question before us, therefore, is, primarily, one of law. The return shows respondent exercised no discretion as to the injunction, holding, as a matter of law, that he had no power to do so.

The bill is certainly not demurrable. It states a case with sufficient averments and general allegations of facts which, if sustained by proof on final hearing, would entitle complainants to the relief asked.

The contention that the bill of complaint is not properly verified is untenable. As before stated, it is sworn to positively by seven affiants of their own knowledge, with the usual reservation found in the form of such jurats, "except as to matters therein stated upon information and belief," and the material allegations in the bill essential to entitle complainants to relief if proven are stated without qualification.

The chief charge of insufficiency against the bill is that its averments are too general, more in the nature of conclusions than distinct statements of facts, and state no specific acts of particular

individuals, with time, place, and attending circumstances such as good pleading demands. While it is permissible, and sometimes requisite, to set forth the facts and acts relied on fully and with particularity in a bill, as a rule general certainty is sufficient in a pleading in equity. It is not required to relate the details. "It is not necessary to charge minutely all the circumstances which may prove a general charge; for those circumstances are properly matters of evidence which need not be charged to let in proof." Story, Eq. Pleading, section 28. As a pleading this bill contains a sufficient, though general, statement of the essential ultimate facts involved in the controversy, which, taken as true, confer on the court authority to grant permanent relief by injunction, and if necessity is shown, temporary relief until final hearing. We are impelled to hold that the respondent misconstrued the law and his official duty, under the showing made.

When such an application is made for preliminary protection, the questions to be passed upon and determined from the showing are only the necessary factors in granting or denying a temporary restraining order. "It is not necessary that the complainant's rights be clearly established, or that the court find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, to be investigated in a court of equity, and, in order to prevent irremedial injury to the complainant before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation." Goldfield Consol. Mines Co. *v.* Goldfield M. U. No. 220 (C. C.), 159 Fed. 513 [Bul. No. 78, p. 586]. And this is especially true when not only the safety of property but the peace of a community and the choice of action and even the lives of peaceable citizens and their families, when in the pursuit of their lawful avocations, are menaced by disorder, threats, and violence.

The power and duty of courts of equity to restrain, on proper application, conspiring labor organizations and their members, as well as others in the conspiracy, from molesting by violence, threats, and intimidation, or any other unlawful interference with, those engaged in any lawful employment and those employing them, is too well established and too thoroughly reviewed by our own authorities to call for citations from other States or discussion here.

We are constrained to hold that the writ prayed for must issue herein, directing respondent to vacate his order setting aside and dissolving the temporary injunction theretofore granted by him and continue the same as indicated in the order to show cause issued by this court, until final hearing of said injunction suit, or until changed conditions shown to the court render the same no longer necessary. This court, as such, is not concerned with strikes or their continuance, as such. Courts do not grant injunctions to restrain strikes lawfully conducted. They are only concerned with them when lawlessness and acts of violence and intimidation develop from them.

To avoid any misapprehension, let it be understood, and, if necessary, further provided, that parades directed to and loitering at and around the premises of complainants or the homes of their employees, and so timed and conducted as to meet and obstruct such employees

going to and from their work during morning and evening changes of shift, and any and all meeting and parading accompanied by acts of violence, threats, insults, or hostile demonstrations toward complainants or their employees either by act or word are in no sense "peaceable meeting and parading," but directly to the contrary, and all such conduct must be regarded as strictly within that provision of the injunction prohibiting defendants "from impeding, obstructing, molesting, or disturbing the employees of the said complainants or any of them by threats, violence, insults, gatherings, parades, or any form of intimidation whatsoever or by any acts of any kind calculated or intended as or for intimidation of the said employees or any of them."

Let a writ of mandamus be issued as above indicated.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—CONSPIRACY—BOYCOTT—INJUNCTION—*Clarkson v. Laiblan et al., St. Louis Court of Appeals (Dec. 2, 1913), 161 Southwestern Reporter, page 660.*—James L. Clarkson brought action in equity for an injunction against Frederick Laiblan and others, officers of Local Union No. 1 of the International Brotherhood of Composition Roofers, Damp and Water Proof Workers of St. Louis, Mo., which is affiliated with the Building Trades Council of St. Louis. Clarkson had been a member of the local union from 1903 to 1906, at which time he went into the roofing business on his own account and became an employer, which fact terminated his membership in the union. In January, 1909, he sold out his business to the St. Louis Roofing Co., and the company attempted to employ him as a foreman. Patrick F. Garvey, the business agent of the local union, was present at the shop on the morning of February 21, 1909, when Clarkson was handed a slip of paper assigning him to the position as foreman of a gang of roofers. After ascertaining that not all the union men present were to be put at work, Garvey protested against work being given to Clarkson, with the result that the order to the latter was recalled. On March 16, 1909, Clarkson entered into a contract with the St. Louis Roofing Co. to roof a number of buildings as a subcontractor. Thereupon Garvey threatened a strike, and this contract was as a result canceled by the St. Louis Roofing Co. Further facts, and the grounds for the decision affirming the decree of the St. Louis circuit court for the plaintiff, are stated as follows in the opinion written by Judge Nortoni:

It appears that there are about 225 roofers in all in St. Louis and all but about 20 of them belong to the union. Nearly, or about, one-half of this number were in the employ of the St. Louis Roofing Company at the time. Moreover, it appears that 90 per cent of all the men engaged in the various building trades, save bricklayers, are members of the various building trades local unions, which are affiliated

together. It does not appear that any of the defendants personally, save Garvey, interfered with the plaintiff, or that they personally threatened his employer, the St. Louis Roofing Company, but the case concedes that Garvey was the business agent of the union of which the other defendants were officers. Among other things, it was the duty of Garvey to see that none but union men were permitted to work, without special permission from himself or the union. Among other things, plaintiff testifies that Garvey informed him that he "could stay at his own little business,"—that is the business that he had theretofore sold out. And it appears clear enough that Garvey's threats communicated first to the foreman and then to the manager of plaintiff's employer caused him to lose his position as a foreman of the gang, and afterwards occasioned the cancellation of his several contracts. None of the defendants took the stand, and the case rests alone upon the evidence of plaintiff and his several witnesses, who fully corroborate him throughout. Obviously the court did not err in decreeing a perpetual injunction against all of the defendants on this evidence. It is certain that a man's occupation, whether it be that of a roofer, laborer, or what not, partakes of the character of property, and he is entitled to have it protected by the process of injunction, when other persons confederate and conspire to and actually interfere with its prosecution in such a manner as to work substantial injury upon him. The evidence is abundant that Garvey was acting within the scope of his authority as business agent of the union, and carrying out both the letter and the spirit of its rules and regulations in so doing. It is certain that neither one man nor a multitude organized together have the right to coerce an employer, through threats to impair his business or cause a loss to him, to discharge another person from his services. See Swaine *v.* Blackmore, 75 Mo. App. 74. Here, through the organization of the union and the membership therein were entirely proper and lawful, the end sought to be achieved in coercing plaintiff's employer to discharge him and to terminate and refuse further beneficial business intercourse with him was unlawful. Therefore, the confederation being present, a conspiracy against the rights of plaintiff appears well established.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—INJUNCTIONS—DAMAGES—*Fairbanks et al. v. McDonald et al., Supreme Judicial Court of Massachusetts (Nov. 24, 1914), 106 Northeastern Reporter, page 1000.*—The plaintiffs in this case claimed membership in a voluntary unincorporated local trade-union, while defendants were members and officers of another local trade-union. The purpose of the suit was to restrain defendants from interfering with the employment of plaintiffs and other members of their local union and for damages for unlawful interference with their employment resulting in their discharge by their employer. A decree was rendered in favor of the plaintiffs in the superior court of Essex County, and the defendants appealed. The decree was affirmed, the reasons given

being shown in the opinion delivered by Judge Sheldon, which is largely quoted herewith:

In addition to the facts found by the master, we are clearly of opinion that it must be inferred from the facts reported by him that Atwill and Gage, acting for the members of their union, intended to compel the plaintiffs' employers to discharge the plaintiffs and to refuse to give to the plaintiffs any further employment, and that this was done, not for the purpose of securing for the members of the defendants' union all the work that was to be had from these employers, but to deprive the plaintiffs of employment and make it impossible for them to obtain their livelihood by their labor, unless they should become members of the defendants' union upon whatever onerous terms the latter should choose to impose.

The defendants did not say to their employers, "You must give us all your work or none of it," as they might have done without exceeding the limits of allowable competition. They required their employers to refuse absolutely to employ the plaintiffs, for the purpose of putting upon the latter an unfair pressure. In contemplation of law, they acted from malice toward the plaintiffs, and did to them an unlawful injury, by causing their exclusion from the labor market.

This case resembles in principle Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841 [see p. 270], and much of the reasoning of that decision is applicable here.

The main object of the bill is to protect the plaintiffs from the irreparable injury to which they are exposed by the unlawful acts of the defendants. It is only incidentally that the plaintiffs seek to recover damages for the losses already caused to them.

Substantial damages have been given only to the plaintiff Fairbanks. Upon the findings of the master we can not say that he was not entitled to the sum allowed him. Burnham *v.* Dowd, and cases cited. He has not however been given damages for the permanent loss of access to the labor market, and is not barred from having further relief by way of injunction.

It is too plain for discussion that neither one of the plaintiffs was required, before bringing this bill, to seek relief within the defendants' union or to exhaust any remedy that might there have been available. The decree appealed from contains however some minor errors, which ought to be corrected. So modified, the final decree appealed from must be affirmed.

LABOR ORGANIZATIONS—LEGALITY—INTERFERENCE WITH EMPLOYMENT—CONSPIRACY—*Mitchell et al. v. Hitchman Coal & Coke Co., United States Circuit Court of Appeals, Fourth Circuit (May 28, 1914), 214 Federal Reporter, page 685.*—The company mentioned brought suit against John Mitchell and others to restrain them from attempting to organize the company's mine workers and to induce them to join the union known as the United Mine Workers of America. The United States District Court for the Northern District of West Virginia issued a decree granting a permanent injunction. This decision is found in 202 Fed. 512, and noted in Bulletin No. 152, pages

137–151, where the history of the controversy between the company and the United Mine Workers is quite fully detailed. In the present decision the decree was reversed, with instructions to dismiss the suit. After reviewing the facts, Judge Pritchard, who delivered the opinion, expressed the court's idea of the importance of the matter as follows:

That it is advisable to secure a just and fair solution of the labor problem by which equal protection to capital and labor may be secured is undoubtedly the wish of every patriotic citizen regardless of his station in life. That one who toils for his living is justified in employing all lawful methods for the preservation of his right as an American citizen to secure fair remuneration for his services is established by the Federal and State courts. That such a person also has the right to join with others similarly situated, in order to promote their welfare as a class, is also established as the law of the country. But while this is so, it is equally well settled that the mine owner is entitled to the full protection of the law in the conduct of his business and the enjoyment of his property.

After quoting from the opinion of Judge Dayton in the district court, the court says as to the lawfulness of labor organizations:

The learned judge insists that the common law under which labor organizations have been declared unlawful in England is still in force in West Virginia, and that therefore this organization is unlawful, unless by statutory enactment the common law has been modified or abrogated to such an extent as to allow an organization of this kind to exist in that State.

We do not deem it profitable to enter into an extended discussion of this phase of the question, believing as we do that, while there are decisions at common law by the courts of England in support of the contention that labor unions are unlawful, yet such rule has not prevailed in this country, except in a few of the earlier decisions of our courts. Even in England combinations of this character were only proceeded against, as a general rule, when they were criminal or prohibited by statutory law.

Next the purposes of the union are discussed, and the decision made that they are lawful. The following are extracts bearing upon this point:

The court below in its opinion referred to a number of provisions contained in the constitution and rules of this organization which in its judgment rendered the same unlawful; the first being that a member is required to promise that he will cease to work whenever called upon to do so by the organization.

A careful examination of this provision fails to show on its face anything unlawful, while on the other hand common experience teaches us that a rule of this character is essential for the preservation of labor organizations. Without a provision of this kind, there would be no power of securing concert of action; no means by which united effort could be secured for the accomplishment of the aims and purposes of the organization.

It is also insisted by the court below that under these rules the operator has no right to employ nonunion men even if he should desire to do so.

If the United Mine Workers of America in pursuance of this rule should resort to coercion, threats, intimidation, or violence for the purpose of preventing the mine owner from employing nonunion men, such conduct would be unlawful, and the courts would promptly restrain anyone who might be a party to such transaction. Indeed, it would be unlawful for an individual to undertake, by coercion, intimidation, or threats to prevent a mine owner from exercising his own free will as to the employment of nonunion laborers, or as to any other thing which he might deem necessary to be done in order to protect his property rights.

However, in this instance, the plaintiff has adopted a policy by which only nonunion men may be employed. If the plaintiff may for the purpose of protecting its interests adopt a policy by which only nonunion men can secure employment at its mines, and such conduct be sanctioned by the law, by what process of reasoning can it be held that the defendants may not adopt the same method in order to protect their interests? If the plaintiff is to be protected in the use of such methods, and the defendants are to be restrained from using lawful methods for the purpose of successfully meeting the issue thus raised by the plaintiff, then indeed it may be truthfully said that capital receives greater protection at the hands of the courts than those through whose efforts capital in the first instance was created. But such is not the law, and when we consider the testimony as respects the conduct of the defendants, at and before the institution of this suit, we are of the opinion that the plaintiff has not by a preponderance of the evidence shown that these defendants employed unlawful methods as alleged in the bill.

It further appears that the plaintiff is paying the nonunion men the same wages that are being paid union men. Therefore, under these circumstances, is it not as reasonable to infer that the plaintiff is endeavoring to place the laborers of that section in a position where it would be master of the situation, as it is to infer that the defendants are seeking to destroy the business of the plaintiff? While it is true that the plaintiff has a perfect right to refuse to employ union labor, is it not equally true that union labor, as we have stated, may by the employment of legitimate means do that which is necessary to keep its forces together?

Shutting down a mine by calling out men in obedience to their obligation is what is known as a "strike." Rule No. 10, which relates to strikes, is in the following language:

"No strike shall take place at any time under the jurisdiction of subdistrict 5 of district 6, except for specific violation of agreement. That is, screens irregular; failure to pay on pay day without explanation; violation of mining laws by operators, or reductions of scale wages until the grievance of the mine affected has been thoroughly investigated by the officers of district 6, U. M. W. A. and operators interested. Any man or men that cause a stoppage of work at any mine in violation of this rule, shall be subject to dismissal at the will of the company."

This very clearly sets forth the causes wherein strikes are justifiable. The evidence in this case fails to show that these defendants have at any time tried by violence, intimidation, or fraud to induce the union men to quit working for the plaintiff.

A consideration of the purposes of this organization as set forth in its constitution impels us to the conclusion that there is nothing contained therein to justify the contention that its purposes are unlawful.

At the final hearing the plaintiff [company] introduced certain documentary evidence bearing upon the question as to whether the defendants [Mitchell and his associates] had entered into a combination with operators and coal producers in Ohio, western Pennsylvania, Illinois, and Indiana, competitive fields, to compel the plaintiff to submit to contractual relations with the United Mine Workers of America relating to the employment of labor and production, contrary to the wishes of plaintiff.

The documentary evidence consisted of the declarations of a small percentage of the miners and operators who were present at these conferences. It was not shown that either before or after these declarations were made that those participating in the conference had entered into a conspiracy for an unlawful purpose. Indeed, these declarations were brought out in response to a proposition on the part of the miners for an increase of wages. A fair interpretation of the evidence shows that it was the purpose of the defendants to induce the miners of West Virginia to become members of the organization, and thereby secure as high wages as possible, compatible with the successful operation of the mines of that State by the respective owners. They had a perfect right to form a combination to accomplish such purposes by peaceable and lawful methods, and so long as they refrained from resorting to unlawful measures to effectuate the same they could not be said to be engaged in a conspiracy to unionize plaintiff's mine.

As we have already stated, the evidence fails to show that any unlawful methods were resorted to by these defendants in this instance. Therefore the court erred in holding the organization to be unlawful upon the theory that it was guilty of a conspiracy.

The opinion of the court below is based upon the ground that the defendants, and those associated with them prior to and at the time of the institution of this suit, had formed themselves into a conspiracy for the purpose of unionizing the plaintiff's mines without its consent, and for violation of the constitution, common and statutory law of West Virginia.

Chief Justice Fuller, in Pettibone *v.* United States, 148 U. S. 197, 13 Sup. Ct. 542, defined "conspiracy" as follows:

"A 'conspiracy' is * * * a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Being of opinion that this is a lawful organization, it necessarily follows that, in order to entitle the plaintiff to the relief which it seeks, it must be made to appear that at, and before the institution of, this suit, the United Mine Workers of America were attempting to carry out the purposes of their organization by the use of unlawful means.

Considerable evidence was introduced by the plaintiff as to what occurred in the vicinity of the plaintiff's mine. [Quotations are here made from the evidence.]

While it is not denied by the defendants that they sought by peaceable methods to induce those employed by the plaintiff to join

the union, yet they stoutly contend that at no time since the mine has been operated as a nonunion mine have they employed unlawful methods.

While Hughes was a representative of the organization, his authority only permitted him to use argument and persuasion to induce the employees to become members of the organization.

Even though it appears by the evidence in question that the conduct of the defendants [United Mine Workers] was reprehensible in the highest degree at the time that the mine was being run on a union basis, we conceive of no possible theory upon which such evidence would be competent as affecting the conduct of the defendants in this instance, inasmuch as the evidence fails to show that after the mine began to be operated on a nonunion basis that they united and conspired to use violence, intimidation, and coercion to prevent the plaintiff from operating its mine. In other words, this record clearly shows that the plaintiff for the avowed purpose of protecting its interests adopted a policy by which its mines were to be operated on a nonunion basis. At the time of the adoption of this policy by the plaintiff, the negotiations between plaintiff and defendants ceased, therefore the question now presented is: Have not the defendants the right as an organization to use all means within their power to organize miners into unions, provided that in so doing no unlawful methods are employed?

As to the view of the court below that the Sherman antitrust law had been violated by the United Mine Workers, the opinion reads:

The court below, among other things, expressed the view that the United Mine Workers of America constituted a combination or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, under what is known as the Sherman antitrust law.

We do not deem it necessary to discuss this proposition at any great length. In the first place, there is nothing in the pleadings to raise the question as to whether the United Mine Workers of America are liable under the statute in question, and any evidence that may have been introduced bearing upon this point was therefore immaterial and should have been rejected. There is another reason why we think that this question can not under any view of the case arise in this controversy, to wit, we do not understand that a private person can question the validity of a combination or conspiracy under the Sherman antitrust law for the purpose of having the same declared to be unlawful.

The court below also reached the conclusion that the defendants have caused and are attempting to cause the nonunion members employed by the plaintiff to break a contract which it has with the nonunion operators. The contract in question is in the following language:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employee of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run nonunion while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Com-

pany I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company, that I will not make any efforts amongst its employees to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read."

It will be observed that by the terms of the contract that either of the parties thereto may at will terminate the same, and while it is provided that so long as the employee continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employees to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employees under this contract, if they deem proper may, at any moment join a labor union, and the only penalty provided therefor is that they can not secure further employment from the plaintiff. Therefore, under this contract, if the nonunion men, or any of them, should see fit to join the United Mine Workers of America on account of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the nonunion miners to become members of their organization.

Under these circumstances, we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization.

In concluding the opinion, Judge Pritchard said in part:

It should be understood once and for all that, so long as capital employs legitimate means for the protection of property rights, it is to be accorded the protection of the law; but this does not mean that capital may, by improper methods, form combinations for the purpose of preventing labor from organizing for mutual protection. Likewise, it should be definitely understood that the laboring men have the right to use peaceable and lawful methods to unite their forces in order to improve their condition as respects their ability to earn a decent living; give their children moral and intellectual training; and secure the enactment of legislation requiring mine owners to adopt such methods as may be necessary to keep their mines in a sanitary condition, and, above all, to adopt methods to minimize, as much as possible, the occurrence of the awful catastrophes by which so many human lives have been lost.

For the reasons stated the decree of the court below is reversed and the cause remanded, with instructions to dismiss the bill.

LABOR ORGANIZATIONS—LEGALITY—INTERFERENCE WITH EMPLOYMENT—STRIKES—*Bittner et al. v. West Virginia-Pittsburgh Coal Co., United States Circuit Court of Appeals, Fourth Circuit (May 28, 1914), 214 Federal Reporter, page 716.*—The questions involved in this action were the same as those in Mitchell et al. *v.* Hitchman Coal & Coke Co., 214 Fed. 685 [see p. 315]. In this case, however, the evidence showed that violence, intimidation, and coercion were resorted to by the defendants in the case. The district court had granted a preliminary injunction restraining them from the acts of violence, etc., and also from the use of persuasion and other peaceable methods, and from aiding the striking miners by furnishing them money from what was known as a relief fund, etc. The defendants made a motion to modify the decree so far as it restrained them from the peaceable methods, and, this motion being disallowed, appealed. Judge Pritchard, in expressing the court's decision that the decree should be thus modified, said:

We think the decree of the lower court in so far as it restrains the defendants from any acts of violence, intimidation, and coercion is proper in view of the evidence. While this is true, nevertheless we are of opinion, for the reasons stated in the case of Mitchell *v.* Hitchman Coal & Coke Co., that the court below erred in entering that portion of the decree whereby it is provided that these defendants shall be restrained from resorting to peaceable and lawful methods for the purpose of organizing the miners of that section.

It follows that the decree of the lower court should be modified by adding thereto the following proviso:

Provided, however, that this restraining order is not intended to prevent any of said employees of the plaintiff company from quitting work for said plaintiff and from severing the relations of master and servant existing between the plaintiff and said employees at the time this order is entered, or from striking or persuading his fellow employees to quit work and strike for their mutual protection and benefit.

Provided, further, that this injunction is not intended to prevent any employee of the plaintiff who had ceased to work for said plaintiff to use persuasion, but not violence, to prevent other men from accepting employment with the plaintiff in his place.

Provided, further, that this injunction is not intended to prevent the employees of plaintiff from joining any lawful labor union and from receiving the nonemployment benefits paid by such union.

Provided, further, that this injunction is not intended to prevent the defendants, their associates, agents, and fellow members of the United Mine Workers from supporting any of plaintiff's former employees who have ceased to work for said plaintiff, nor is this injunction intended to prevent any member of the labor union to which such employees ceasing to work for the plaintiff belong from legally assisting said employee in securing better terms of employment and in endeavoring to persuade, without violence, any other laborer from taking the place of said striking employee.

The decree of the lower court as thus modified is affirmed.

LABOR ORGANIZATIONS—LIBEL BY PRINTING IN PAPER PUBLISHED BY ASSOCIATION—DAMAGES—*United Mine Workers of America et al. v. Cromer, Court of Appeals of Kentucky (June 19, 1914), 167 Southwestern Reporter, page 891.*—Reid Cromer brought action against the United Mine Workers of America and G. B. Reed, to recover damages for libel. Judgment in the circuit court for Laurel County was in favor of the plaintiff in the sum of $500, and the defendants appealed, the appeal resulting in the judgment of the court below being affirmed.

The first ground assigned for reversal was that the United Mine Workers of America is not a corporation, but a voluntary association, and is not therefore suable in the name of the association. It was held, however, that this defense was waived by not being raised in the proper manner, the association having answered to the merits of Cromer's pleas.

As to the case itself, Judge Clay, in delivering the opinion of the court, spoke as follows:

The libel complained of was printed in the United Mine Workers' Journal, a newspaper published at Indianapolis, Ind., under the auspices of the United Mine Workers of America, and is as follows:

"The strike breakers in our little strike here are not practical men. They are here to defeat our purpose. They will not be desirable when we return to work, and will be ordered peremptorily by their employer to move on, go elsewhere over to Indiana, Illinois, etc., to again illegitimately enjoy benefits and conditions established by union, good and honest men. Believing that it behooves us to keep you readers informed as to who these men are, we are concluding with a list of the names of the detestable scabs and blacklegs whom we want you to be continually on the lookout for."

In the list of names printed in the paper is the name of Reid Cromer. It appears from the petition that Reid Cromer was a miner. There was a strike in the vicinity in which he was employed. He and his associates did not participate in this strike, but continued to work. It is further charged in the petition that the defendants falsely and maliciously, and with the intent and purpose of injuring plaintiff in his calling and occupation as a coal miner, made the publication complained of. After setting out the publication, it was alleged that defendants, by the use of the words "detestable scabs and blacklegs," meant that plaintiff and his associates were detestable cheats and gamblers, and these words were so understood by their acquaintances and the public generally; that the effect of such publication was to bring them into the contempt, hatred, ridicule, disgrace, and odium of their acquaintances and the public. It was further charged that the publication was intended to and did prevent plaintiff from obtaining employment in his occupation as a coal miner, and that he had been damaged in the sum of $3,000. In addition to a general denial of the allegations of the petition, defendants pleaded that the words "scabs and blacklegs," as used in the article complained of, are universally accepted among miners, and especially among the miners of Laurel County, and by all the persons who knew the plaintiff, as

meaning that the plaintiff was a person who assisted in breaking strikes, and who accepted lower wages for his work than those who were known as "the United Mine Workers." The ordinary meaning of the word "blackleg" is a swindler; a dishonest gambler. It also means a strike breaker. Webster's International Dictionary. In the latter sense it is used as a term of opprobrium by workingmen. It is well settled that all written words, which hold the plaintiff up to contempt, hatred, scorn, and ridicule, and which, by thus engendering an evil opinion of him in the minds of right thinking men, tend to deprive him of friendly intercourse in society, are libelous per se. [Cases cited.] The rule that words are to be understood in mitiore censu [in the less objectionable sense] has been superseded. Words are now construed by the courts in their plain and popular sense. Under this rule, the words "detestable blackleg" are, we think, libelous per se.

LABOR ORGANIZATIONS—POWERS—FINES UPON MEMBERS—INVESTIGATION—*Monroe et al. v. Colored Screwmen's Benevolent Association No. 1 of Louisiana, Supreme Court of Louisiana (Oct. 21, 1914), 66 Southern Reporter, page 260.*—John M. Monroe and others brought petition for mandamus against the labor union named, which is Local No. 237 of the International Longshoremen's Association. In February, 1912, a strike was declared by the two locals of the association in Gulfport, Miss., and the defendant association passed a resolution assessing a fine of from $5 to $25 against any of its members who should go to Gulfport and work while the controversy was on. In May the twenty-two plaintiffs in this case went to Gulfport and engaged in work for the employers concerned in the strike. On the next day the defendant association was notified, and it assessed fines of from $5 to $25 on the several plaintiffs. Later plaintiff Monroe was before the association at meetings, and asked an investigation, and one was made by a special committee, which went to Gulfport, and reported that the work was not done by the plaintiffs with the consent of the Gulfport locals, as the plaintiffs claimed, but against their wishes. On their failure to pay the fines the plaintiffs were expelled from the association, and their working cards withdrawn, without which it was impossible to secure employment in their line in New Orleans; and the mandamus was sought to compel the association to furnish the cards.

Judge Provosty delivered the opinion of the court, affirming a judgment for the respondent association in the civil district court of the parish of Orleans. After stating the facts and the contentions of the parties, he spoke as follows:

In support of their contention of their having been condemned without a hearing, they show that under section 4 of article 30 of the by-laws and article 24 of the constitution of the defendant association they are entitled to a trial before the grievance committee of the association.

It is true that there is such a committee, and that it is "the duty of said committee to investigate all grievances and report the result of their investigation to the association, at the next regular meeting for final disposition," but we think that the plaintiffs have had the full benefit of a hearing before a committee of their own choice, and that, under all the circumstances of the case, they had had all the hearing they can possibly be entitled to.

And, besides, there can be and is no denial of the fact that the work they did in Gulfport was without the consent of the locals of that city; and hence that the said section 3 of the rules of the international association was violated, the penalty of which is expulsion. Of what possible use, then, could any further hearing be to them? Their only contention in that connection is that the strike in Gulfport was ended; and that therefore they violated no rule of the association. But the said section 3 of the rule of the international association is not confined to strikes, but reads:

"Any member who may allow himself to be employed at any work coming under the jurisdiction of another local without the consent of the local having jurisdiction of the work, shall," etc.

So that the plaintiffs violated this rule even if the strike was ended.

On the question of whether the Gulfport locals had already adjusted their differences with the ship agents and stevedores or were still "asking for recognition and regulation in handling cotton," the judgment of the said investigating committee, rendered as it was after hearing and approved by the association, is conclusive upon the courts. 6 Cyc. 827.

As to the said section 3 of the rules of the international association being in violation of the Sherman Antitrust Act, the learned counsel of plaintiffs has not pointed out in what respect it is. The contention, if well founded, would render unlawful such associations as the defendant, the lawfulness of which is well recognized. Cyc., Labor Unions; Longshore-Printing Co. *v.* Howell, 26 Or. 527, 38 Pac. 547.

LABOR ORGANIZATIONS—RELIEF FUNDS—DISPOSITION—LIABILITY FOR WRONGFUL USE—*Attorney General ex rel. Prendergast et al. v. Bedard et al., Supreme Judicial Court of Massachusetts (June 17, 1914), 105 Northeastern Reporter, page 993.*—Joseph Bedard and others appealed from a decree in equity issued from the supreme judicial court, Suffolk County, requiring them to pay into court certain amounts of money alleged to have been in their hands as a trust fund, and to have been wrongfully appropriated or expended. The information, after alleging the raising of a fund by subscription for the relief of the strikers, alleged on information and belief that the personal defendants, conspiring and agreeing together, had used substantial portions of the fund for purposes entirely different from those for which it was donated by the contributors and for purposes other than the proper promotion of the objects of the trust; that it had in part been improperly used for the private and personal uses of the defendants and their associates; that they or some of them had drawn sums there-

from as salaries; that substantial amounts had been contributed for the board and private expenses of one of the defendants, who was confined in jail; that large amounts had been paid for the transportation to other cities of children for uses in connection with appeals for further contributions; that sums had been paid to counsel and others engaged in defending one of the defendants and others against criminal charges; and that large sums had been turned over to the Industrial Workers of the World.

The decree of the lower court was affirmed with modifications necessary to make plain the exact liability of the several defendants. Judge Sheldon said in part, in delivering the court's opinion:

According to the averments of the bill, the fund in question was raised by subscriptions as a relief fund, to relieve the necessities of a very great number of men who had engaged in a strike, and who thus had been left without any means of maintaining themselves and their families. The fund was raised and should be applied for the purposes of a public charitable trust. [Cases cited.]

The evidence heard by the master is not reported, and we can not say that his findings were wrong. The defendants received the money in question as a trust fund. They must account for it, and can be credited only with disbursements which actually were made for proper purposes. They must be charged with everything for which they have not properly accounted. This is a sound principle, and is abundantly supported by authority. [Cases cited.] It was for the defendants to keep the trust fund distinguished from other moneys in their hands; and the consequences of any failure on their part to comply with this duty must fall upon themselves. [Cases cited.]

We can not doubt that the defendants, the custodians and managers of this fund, are under the same obligations as if they expressly had been made the trustees thereof. [Cases cited.]

LABOR ORGANIZATIONS—RIGHT TO STRIKE—PROCURING DISCHARGE—*Roddy v. United Mine Workers of America et al., Supreme Court of Oklahoma (Mar. 10, 1914), 139 Pacific Reporter, page 126.*—J. H. Roddy brought action against the United Mine Workers of America and against the district and local organizations affiliated with the same and their individual members, for damages suffered by him by reason of loss of his employment. It was alleged that the defendants had procured his discharge by threats to strike if the plaintiff, a nonunion man, was retained. Judgment in the district court of Coal County was for the defendants, and on appeal this was affirmed. Judge Brewer in delivering the opinion discussed the question involved, cited the authorities, and set forth the views of the court as follows:

We take it as fundamental that any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason.

We think under the better authority that what an individual may do, a number of his colaborers may join him in doing, provided the thing to be done is lawful. We quote the words of Chief Justice Alton B. Parker, in Nat'l Protective Assn. *v.* Cumming, 170 N. Y. 320, 63 N. E. 369 [Bul. No. 42, p. 1118]:

" * * * Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike, that is, to cease working in a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law."

In Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367, it is said: "So far as appears by these instructions none of the appellants were under any continuing contract to labor for their employer. Each one could have quit without incurring any civil liability to him. What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence, or attempts at intimidation."

And in Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, it is said: "One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employee for damages, whatever may have been his motive in procuring the discharge."

Quotations were made from Cook's Trade and Labor Combinations on the question of the right to strike, expressing views similar to those set forth above, and the opinion concludes:

A petition based on the charge that the plaintiff, a nonmember of a labor union, was discharged from his employment because of the demands therefor made by the authorized agents and committees of a labor organization, who informed the common employer that if such nonunion man was not discharged the union men would strike does not state a cause of action for damages against either the labor organization or the individual members thereof, and a demurrer to such petition was properly sustained.

LABOR ORGANIZATIONS—STRIKES—CONSPIRACY—INCITEMENT TO COMMIT CRIME—LIABILITY AS PRINCIPAL—*People v. Ford, District Court of Appeals, Third District of California (Sept. 10, 1914), 143 Pacific Reporter, page 1075.*—Richard Ford and H. D. Suhr were indicted separately for the murder of one E. T. Manwell on the 3d of August, 1913, in Yuba County, Cal. Conviction was had in the superior court of Yuba County in a joint trial, the verdict being for murder in the second degree, with a sentence of life imprisonment.

Both defendants appealed, and by stipulation the appeal of defendant Suhr was to be heard upon the same transcript of record as that of Ford. The judgment of the court below was affirmed by the court of appeal as to both defendants, and a rehearing was denied by the supreme court on November 9, 1914.

The circumstances leading up to the killing of Manwell were briefly that the defendants were officers and active workers of the Industrial Workers of the World, referred to in the opinion as the I. W. W. The disturbance resulting in the crime under consideration arose out of conditions in the hop fields of Yuba County, the conditions of employment being complained of and a strike organized with the attempt to enforce certain demands as to conditions of employment. It appears from the evidence that on the day of the killing of Manwell there were at a large ranch owned by one Durst some 2,000 or 2,500 people of different nationalities, men, women, and children, gathered to pick hops, the picking having begun about the middle of the preceding week. Insanitary lodging conditions and unnecessary hardships in the performance of work aroused dissatisfaction, which found expression on Saturday, August 2. Suhr and Ford sent telegrams to different points, informing their associates in the I. W. W. of a strike on the Durst ranch, and asking for speakers and money to support the strikers. The opinion states that:

Much testimony was admitted describing in detail the conditions existing at the Durst hop fields. We do not think it necessary to set out this testimony. It showed a situation calling for some radical reform measures in order to make it a desirable place for such numbers of people to work, both in respect of their moral and physical well-being. Bad as these conditions were, however, they furnished no justification for the tragic events of that Sunday and need not be dwelt upon. Ford was the leader and spokesman of these hop pickers. He conducted their meetings, of which there were several, during Sunday before the 5 o'clock meeting at which Manwell was killed. These meetings were in the main orderly, but plainly disclosed Ford's mastery and power to lead and control the more or less excited and turbulent body of persons comprising a considerable part of the assembled masses of striking and disappointed people, looking to their leader for guidance and relief. Suhr's telegrams show that it was an I. W. W. movement. In the earlier part of the day Constable Anderson made an effort to arrest Ford, but being challenged to produce a warrant, and not then being able to do so, and after some rather rough handling by persons around Ford, he desisted, but later a complaint was sworn to before a justice of the peace at Wheatland, and a warrant was duly issued thereon and placed in Anderson's hands.

Manwell was killed at a meeting of the hop pickers at about 5 o'clock, and a deputy sheriff died of gunshot wounds received at that time. Two hop pickers were killed, and other serious injuries inflicted on parties on both sides. There was no claim that Ford

fired the shot which resulted in Manwell's death, though confessions made by Suhr were such as to give rise to the inference that he may have done so. As to the contention of the defendants, appellants in the present instance, the opinion reads:

As we understand defendant's position, it is that defendant was at most engaged in conducting a strike, which was not an unlawful act, or that, if he was committing a trespass, it was but a misdemeanor; that, whatever his acts or his words spoken which may have led to the killing, they should have been alleged, and as his acts and words concerned only an undertaking not unlawful, or, if unlawful, was but a misdemeanor, the killing as matter of law, must be held not to have been murder in either degree; that, unless the defendant's acts and words constituted a felony, he could not be held for murder because they resulted in the death of some one, and at most his offense would be manslaughter because lacking the essential elements of murder. It is hence contended: First, that evidence of a conspiracy was not admissible and can not be considered because the conspiracy was not pleaded; and, second, that evidence which fell short of showing a conspiracy to commit a felony would not support the verdict. We confess to some difficulty in discovering precisely defendant's contention, but have given it as we understand it. The indictment was for murder and was charged in the language of the statute. We entertain no doubt as to the admissibility of evidence of a conspiracy under such an indictment, where the murder was committed while the conspirators were engaged in the consummation of some other unlawful act.

Upon the question of the responsibility for the acts of the conspirators, we conceive the law to be that where one person unites with one or more other persons in an enterprise to commit an unlawful act, whether a felony or misdemeanor, with the intention to withstand all opposition by force, and is present aiding and abetting the deed, and murder is committed by some one of the party in pursuance of the original design, or the unlawful act results in death, he is guilty as the principal or immediate offender.

It was not the theory of the prosecution, as claimed by defendant, "that every labor leader is responsible for all the acts of striking workmen, and that each labor leader can be tried under an indictment baldly stating that the said labor leader has personally done a specific thing, in this case murder, whereas, in fact, it is sought to hold him responsible for the act of another." The theory of the prosecution was that Ford, as the leader in this instance, was engaged in the unlawful act of resisting arrest by a peace officer armed with a lawful warrant, and that by his words and acts he incited the persons then under his leadership to aid and assist him in such unlawful act, and that Manwell met his death through the act of one or more of these conspirators thereunto induced by Ford.

Another complaint was that the trial judge had refused to give charges as to the lawfulness of a strike and a boycott, and that men have a right to quit work for any reason or no reason singly or in a body, and peaceably to picket or request others to cease work. As to this the court said:

It is urged that, under the instructions given, the jury might have assumed that striking or picketing or boycotting was an unlawful act, and, to prevent such assumption by the jury, defendant was entitled to have the instructions given. There was no evidence that the killing occurred while the conspirators were in the act of striking, picketing, or boycotting. There was evidence that many of the hop pickers quit work Sunday morning on their part a strike; that a boycott was declared and was in operation early in the day against certain businesses being carried on in the camp—a store, a restaurant, a near-beer booth, and a shooting gallery.

Manwell was killed at a meeting of hop pickers held at about 5 o'clock of that day under circumstances which will hereinafter be more fully set forth. Suffice it at this point to say that, while it may be assumed that the hop pickers were assembled at this meeting originally to consider or talk over their grievances, it soon, under the leadership of Ford, took on altogether a different complexion. He made it known to the people that the officers of the law were approaching with an intention to arrest him, and he called upon his followers to stand by him and prevent his being taken. This they did promptly upon the coming of the officers into their midst, and there quickly followed, not only Manwell's death, but other tragic and fatal happenings which showed that the sole purpose of the actors was to prevent Ford's arrest at all hazards. The tragedy may be said to have remotely had its origin in the strike; that is, if there had been no strike, there might have been no officers there, and no occasion for their being there. But, so far as the strike and the occurrences of the earlier part of the day are concerned, they became collateral to the events happening at 5 o'clock and immaterial to the issue being tried. The legal right of the parties to strike was not an issue and furnished no justification for killing Manwell in their effort to protect their leader, Ford. from arrest.

The opinion details at length the evidence showing the circumstances of the killing of Manwell, including the appeals of Ford to the strikers to stand loyal and not let the officers take him, saying, "If they do come, I hope you tear them into dog meat," the crowd responding, "Yes, make mincemeat out of them." Having summed up this evidence, the court said:

The principles of law already to some extent pointed out, it seems to us, are clearly applicable to the case here presented, and that the jury were fully justified in finding defendant Ford guilty as a principal in the murder of Manwell, although he did not himself fire the fatal shot. The conclusion of the jury that the unwarranted attack upon the sheriff and his assistants while in the execution of a lawful duty, resulting in the death of a deputy sheriff and Manwell, was the direct result of Ford's acts and conduct was, we think, fully justified by the evidence.

The testimony as to Suhr was then reviewed, and both the evidence of witnesses and his confessions apparently voluntarily made were found to support the judgment in his case, so that after an examination of the whole case the judgment as to both defendants was affirmed.

LABOR ORGANIZATIONS—STRIKES—PICKETING—*In re Langell, Supreme Court of Michigan (Jan. 5, 1914), 144 Northwestern Reporter, page 841.*—Proceedings were brought against Harry Langell for contempt of court in violating a strike injunction, and he having been found guilty, the case came before the supreme court on a writ of certiorari. The judgment was affirmed by the majority of the court, while three signed a dissenting opinion. The majority opinion was written by Judge McAlvay, and from it the following is quoted:

The petition in these proceedings gives a sufficient résumé of the bill to show it charged that complainant in the manufacture of engines at its foundry and plant in Lansing, Mich., employed a large number of men; that on May 18, 1912, many of these employees, including petitioner, being members of this molders' union, went on a strike and, acting in concert, had been guilty of illegal acts with intent to injure the business of complainant and compel it to accede to their demands as to a scale of wages and hours of work and by acts of violence toward its employees had intimidated them and caused many of them, who desired to do so, to refrain from working for complainant and picketed its premises for the purpose of intimidating its employees and injuring its business, thereby causing its employees to refrain from work; that such picketing and other unlawful conduct and violence had continued for a long time before the filing of its bill of complaint, and such picketing was then being maintained continuously about its premises, and intimidated its employees and others from coming to work or transacting business with it.

The said injunction restrained all of the defendants, including petitioner, as follows: "(*a*) From in any manner interfering with the employees of the complainant by way of threats, personal violence, intimidation, or any other unlawful means calculated or intended to prevent such persons from entering or continuing in the employment of the complainant or calculated or intended to induce any such person or persons to leave the employment of the complainant. (*b*) From congregating or loitering about or in the neighborhood of the premises of the complainant with intent to interfere with employees of complainant or from picketing said premises or the approaches thereto, or in any manner interfering with the employees of complainant or from in any manner interfering with or obstructing the business or trade of complainant. (*c*) From in any manner interfering with the free access of employees of complainant to complainant's premises in the city of Lansing, their place of work, and from in any manner interfering with the free return of said employees to their place of business or to their homes or elsewhere."

Copies of the restraining order were, on July 5, duly served upon the defendants, including the petitioner in these proceedings. On July 6 following, the petitioner, who resided about 2 miles from complainant's premises, at 5.30 o'clock in the morning, stationed himself in the highway directly opposite to one of the entrances to complainant's premises and remained there while its employees were passing and crossing the street to enter complainant's premises to go to work. Three or four other members of the molders' union also were present in the vicinity standing 50 feet or more from the petitioner. They said nothing to the workmen as they passed and made

no physical attempt to interfere with them. They were standing at or about the same places occupied by pickets on the preceding Saturday, and at other times, when petitioner and other strikers were present as pickets, and some of them hooted and called "scab" at the workmen entering complainant's plant.

The contentions of petitioner which require consideration are: That the court had no jurisdiction to issue the restraining order against picketing; and that there was no evidence in the case tending to show a violation of the restraining order by petitioner in any respect. This court has held that a circuit court, in chancery, has jurisdiction to issue an injunction restraining interference by labor organizations, and the members of the same, during a strike with the rights of an employer by picketing his premises. Beck *v.* Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13; Ideal Mfg. Co. *v.* Wayne Circuit Judge, 139 Mich. 92, 102 N. W. 372. The first contention, therefore, requires no further consideration.

From our examination of all of the evidence in the record, we are satisfied that there was evidence in the case tending to support the finding of the circuit judge. The testimony of petitioner shows that he was a person having some authority in the molders' union; that he understood that the restraining order prohibited picketing and that in his opinion the court had no authority to issue such an order; and that if anyone went there, without saying anything to the employees or making any disturbance, it would not be punishable. It is clear, from his testimony, that he went there because he thought that he could do it with more discretion than the ordinary members; that he went there willfully and in defiance of the order, under the impression that a silent picketing was not unlawful. It appears from the evidence that he had been active and present on former occasions when there was open interference with the employees. It is urged that because petitioner stationed himself at this place and said nothing and did no overt act of interference that his acts, if found to be picketing, were lawful. Such a contention is supported by many authorities. The later and more reasonable rule, however, holds that all picketing is illegal.

"The doctrine that there may be a moral intimidation which is illegal, announced by the Supreme Court of Massachusetts, was among the first real steps taken in this country toward overturning the rule permitting peaceable picketing * * * and was a forerunner of the later rule that there can be no such thing as peaceable picketing and consequently that all picketing is illegal." 24 Cyc. 836, citing Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077; Franklin Union *v.* People, 220 Ill. 355, 77 N. E. 176; Atchison, etc., R. Co. *v.* Gee, 139 Fed. 582; Beck *v.* Teamsters' Protective Union, supra.

The proceedings are affirmed.

The dissenting decision, written by Judge Kuhn, is for the most part as follows:

After a careful reading of the record in this case, I am not convinced that the petitioner should have been found guilty of contempt.

In the case of Beck *v.* Teamsters' Protective Union, 118 Mich. 497, 520, 77 N. W. 13, 22, in defining a picket, this court said: "As applied to cases of this character, the lexicographers thus define the word 'picket': 'A body of men belonging to a trades-union sent to

watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress." Cent. Dict.; Webst. Dict. The word originally had no such meaning. This definition is the result of what has been done under it and the common application that has been made of it.

It has also been defined as "relays of guards in front of a factory or the place of business of the employer for the purpose of watching who should enter or leave the same." Cumberland Glass Mfg. Co. *v.* Glass Blowers' Assn., 59 N. J. Eq. 49, 46 Atl. 208. Also "as the establishment and maintenance of an organized espionage upon the works and upon those going to and from them." Otis Steel Co. *v.* Local Union, 110 Fed. 698. Under these definitions, it is necessary, in order to have picketing, to have a deliberate, organized action on the part of at least more than one person. No organized action is shown by this record. This petitioner went on the street of his own motion. He was not a part of a body of men sent to watch and annoy, within the definition in the Beck case. He was only in the immediate vicinity of the plant for a few minutes. He interfered with no one; made no threats. I find nothing in the record to warrant the finding that he annoyed the workmen; in fact, the workmen who were sworn testified that he did not talk to them nor interfere with them in any way.

The order of the circuit judge finding the prisoner guilty of criminal contempt should be vacated and set aside, and the petitioner discharged.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJURY TO BUSINESS—DAMAGES—*Berry Foundry Co. v. International Molders' Union, Kansas City Court of Appeals (Jan. 19, 1914), 164 Southwestern Reporter, page 245.*—The original proceeding in this case was the filing by the company named of a bill for an injunction against the union and other defendants and for damages for unlawful acts charged in the petition. The circuit court of Buchanan County issued a temporary injunction which was afterwards made perpetual, and gave the plaintiff damages in the sum of $2,000. An appeal was taken to the supreme court, but on account of the insufficiency of the sum involved it was transferred to the court of appeals.

The company conducted a foundry in the city of St. Joseph, Mo., its employees formerly belonging to an organization known as union labor. Following a decision to pay their workmen by the piece instead of by the day, the managing officer of the union conferred with the chief officer of the company, and on their failing to agree a strike was threatened, which began on the following Monday, the men quitting work and a portion of them engaging in picket duty. In response to advertisements, other workmen came to take the vacated places, some being turned back by the strikers, while others took employment in spite of the opposition. The testimony was in absolute conflict as to the nature of the picketing engaged in and the con-

duct of the strikers and of the employees of the plaintiff company. On this point Judge Ellison, who delivered the opinion of the court, said:

Whichever of the parties is right in this radical difference of fact is entitled to prevail; for it has been determined by the supreme court of the State that laboring men have a legal right to strike and quit work in a body, and that they have a right to post men near by to quietly and peaceably persuade other workmen not to take their places. City of St. Louis *v.* Gloner, 210 Mo. 502, 109 S. W. 30 [Bul. No. 78, p. 601]; Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106 [Bul. No. 4, p. 440]. But they have no right to break the law by using force, intimidation, or threats. Nor have they any right to conspire to break up their late employer's business. Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997 [Bul. No. 81, p. 434].

The evidence was then discussed, the contradictory charges and the obvious falsity of some of the testimony introduced by the defendant union being set forth. The conclusions derivable from this testimony, and the decision of the court as to damages, appear in the concluding portion of Judge Ellison's opinion, which is as follows:

Amid all the contradiction of witnesses and the exaggeration of statement, the indisputable fact stands out that defendant's manager, Wilkerson, in resentment over plaintiff's changing the plan of work and payment of wages, determined to ruin plaintiff's business and ordered a strike. The testimony showed that such, in effect, was his threat, and he sat by in court and did not deny it. And in carrying out the strike, instead of mild, peaceful, and merely persuasive means, defendants terrorized those who were willing to work, so that they were compelled to stay inside the foundry premises and eat and sleep there, and, if they went abroad, were frequently compelled to have the protection of officers. In our opinion the trial court came to the only conclusion justified by a proper consideration of the evidence.

We think the trial court properly allowed damages as prayed in defendant's bill. We think they are not justly liable to be called speculative, or remote. With what was shown to have been done by defendants, serious and substantial damages must necessarily have followed. And they were in such conservative amount (being put at $2,000 by the trial court) that we think there would be no justification for us to reserve the judgment on account of some supposed error in ascertaining them, when the whole record plainly shows a greater sum than the judgment. It appears that on account of the assaults, threats, and intimidations of defendants, plaintiff was compelled to provide for new employees inside the buildings; beds were put up, and a restaurant established.

We do not think there was any error in allowing loss of profits as a part of the damage. If one loses profits by the wrongful act of another, there is no more reason why he should not be reimbursed for such loss than if it had been of some other nature. The only difficulty concerning such character of damage (it being in some degree intangible) is that it is frequently impossible to show it with that degree of certainty the law requires, and it becomes so much a mat-

ter of guess and speculation that it is disallowed. But in this case, it seems to us to have been demonstrated by the records of the company's business, expenses, income, numbers employed and mode of operation, immediately preceding defendant's unlawful interference and immediately afterwards.

The conclusion of the trial court was manifestly right, and the judgment will be affirmed. All concur.

RELIEF ASSOCIATIONS—RAILROADS—APPLICATION FOR MEMBERSHIP—FRAUDULENT REPRESENTATIONS—*Daughtridge v. Atlantic Coast Line R. Co., Supreme Court of North Carolina (Mar. 11, 1914), 80 Southeastern Reporter, page 1080.*—Charles Daughtridge sued the railroad company to recover for sick benefits claimed to be due him from its relief department, of which he was a member. The company contended that the claim was invalid on the ground that Daughtridge had certified in his application for membership that he was correct and temperate in his habits, and so far as he was aware, in good health and had no injury or disease, constitutional or otherwise, when in fact he was afflicted with syphilis. The employee recovered a judgment in his favor in the superior court of Edgecombe County, North Carolina, and this judgment was affirmed by the State supreme court. The following language from the opinion of Judge Hoke shows the position taken by the court:

In reference to regular contracts of insurance, section 4808 of Revisal makes provision as follows: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

In Alexander's Case (150 N. C. 536), Associate Justice Brown, delivering the opinion, said: "'The company was imposed upon (whether fraudulently or not is immaterial) by such representations, and induced to enter into the contract. In such case it has been said by the highest court that, 'Assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned.'" (Citing Insurance Co. *v.* Fletcher, 117 U. S. 519, 6 Sup. Ct. 837.)

While, therefore, it is the fully established position as to ordinary contracts of insurance, coming within the statutory provision, there are so many conditions distinguishing this from such a contract that we think his honor was clearly correct in his view that the contract of membership in the relief department is unaffected by the statute, and, * * * that, in order to sever the plaintiff's membership and deprive him of its benefits, it was necessary to show that the vitiating statements were knowingly false, or made with a fraudulent purpose to mislead the defendant. From a perusal of plaintiff's evidence, uncontradicted in these respects, so far as the record shows, it appears that plaintiff was required by the company to join the relief department; that he was examined by the physician of the

company, who himself seems to have written out the answers in the application; that every mark or indication of syphilis, now relied upon by defendant to defeat recovery, was existent and observable at the time of examination made, and, further, that for the six months that plaintiff was employed, and until he was paralyzed, after 48 hours of continuous and very heavy work "taking only time to eat," there had been deducted from his pay roll 75 cents, the monthly charge for membership, and that there is no offer to return any part of this amount. While these considerations might not, of themselves, avail to change the terms of a contract otherwise plain of meaning, they, or some of them, are relevant where interpretation is permitted, and were no doubt given consideration by the company in framing their printed form of application for membership. For it will be observed that, in this form signed by the plaintiff, the representations are not positive in terms, as in usual and voluntary applications, for insurance, but, as heretofore noted from the evidence, they are prefaced and affected by the statement: "I certify that I am correct and temperate in my habits, that, so far as I am aware, I am now in good health and have no injury or disease, constitutional or otherwise, except as shown in the accompanying statement made by me to the medical examiner which statement shall constitute a part of this application." From the language of the stipulation with the relevant facts and circumstances attending its execution, we concur, as stated, with the court below, in holding good faith on the part of the applicant is all that the company have required, or should reasonably require, and that the cause in this respect has been properly submitted to the jury.

STRIKES—MARTIAL LAW—INSURRECTION—POWER TO HOLD AND TO TRY OFFENDERS—*Ex parte McDonald et al., Supreme Court of Montana (Oct. 8, 1914), 143 Pacific Reporter, page 947.*—This was a habeas corpus proceeding in which Mitchell McDonald and others were petitioners, and a separate proceeding by Dan Gillis. Following disturbances of the peace in connection with local industrial disputes, Governor Stewart, on September 1, 1914, issued a proclamation declaring the county of Silver Bow to be in a state of insurrection, proclaiming martial law in it, and ordering military forces there under the command of Major Donohue. The forces went into the county and took military possession of it, which continued at the time of the decision of this case. On September 12, McDonald and five others filed in the supreme court petitions for writs of habeas corpus, alleging that they were being unlawfully detained by the governor and Major Donohue and other military officers, who were named as respondents, in that they had been arrested without warrant and were being held without bail, to be tried, without a jury, before an alleged court or tribunal set up by the military authorities, upon charges to them unknown, and this notwithstanding they had infringed no law. The respondents made return, setting forth their official character, the

proclamation of the governor and one made by Major Donohue upon his arrival in the county; and that the county was still in a state of insurrection, and the detention of the men, alleged to be leaders of the insurrection, was necessary for the purpose of the military occupation. This answer also stated that it was the purpose to surrender them to the civil authorities as soon as it could safely be done with reference to the suppression of the present state of insurrection. Upon the return and the evidence taken at the hearing, the court made an order denying the release of the petitioners, with leave to re-petition after 30 days, if at that time they had not been delivered to the civil authorities and the courts were then open and able to execute their process.

On September 24, 1914, Dan Gillis filed a petition for a writ of habeas corpus, alleging unlawful detention by the same respondents, and also that he had been restrained by virtue of a commitment issued on September 21 by Jesse B. Roote as major and judge of a certain summary court set up by the military authorities upon a charge of assaulting and resisting an officer, in which proceeding said Roote had assumed to adjudge the petitioner guilty and to sentence him to be imprisoned in the county jail for the term of 11 months and to pay a fine of $500. The petition alleged that the courts of the county were open for the trial of causes.

The return to this petition made by the military officers as respondents admitted the detention and defended on the ground of the authority of the summary court, and of the lack of jurisdiction of the supreme court to discharge the petitioner.

The supreme court held first that the governor had the constitutional right to detail the militia to a portion of the State where a state of insurrection existed, and that his determination that such a state existed and continued to exist was conclusive upon the court.

Discussing further the cases of the five petitioners who had been simply arrested and held, Judge Sanner, who delivered the opinion, said:

> It was distinctly asserted in the returns, and established to our satisfaction by the evidence taken upon the hearing, that McDonald and his copetitioners had not been arrested and were not being held for trial before any court-martial or other military tribunal, but that they had been arrested as leaders and inciters of the insurrection, and were being held as necessary measures for its suppression, to be turned over to the civil authorities for trial as soon as that could safely be done. After a consideration of all that was said in argument and of practically all the accessible literature on the subject, we are convinced that the theory which accords the least power to the governor and to the militia in cases of insurrection is that he acts as a civil officer of the State, and that the military forces under him operate as a sort of major police for the restoration of public order; and we confidently assert that under this theory the arrest

and detention, under the circumstances stated, can be justified and must be upheld. The release of McDonald and his copetitioners was therefore denied; but since the justification is necessity, and since it can not obtain beyond the period of such necessity, we granted leave to reapply, having in mind that the course of events might or might not demonstrate the detention of these petitioners beyond the time indicated to be unnecessary.

Taking up the case of Gillis, Judge Sanner discussed the question of the jurisdiction of the court, taking the view that the martial law which could lawfully be proclaimed by the governor was not sufficiently inclusive to suspend the writ of habeas corpus or the conviction of a civilian for crime, without trial by jury.

With regard to another contention of the military authorities, Judge Sanner said in part:

It is insisted, however, that under all the decisions the executive can establish martial law in time of war when the ordinary tribunals are not open, that an insurrection is war, and that the proof at bar shows the civil tribunals of Silver Bow County to have been closed. When in domestic territory the laws of the land have become suspended, not by executive proclamation, but by the existence of war, the executive may supply the deficiency by such form of martial law as the situation requires, but we deny that insurrection and war are convertible terms.

Judge Sanner said that the court was not influenced by the argument that in case of prolonged insurrection, the summary trial of offenders would be preferable to detention; also that the statutory provisions for change of venue take care of the possibility that a trial by jury, fair to the State, could not be had in the courts of Silver Bow County on account of the state of public feeling, and continued:

Martial law, however, is of all gradations, and although the governor can not, by proclamation or otherwise, establish martial law of the character above discussed, he is not barred from declaring it in any form. We must therefore assume that, in using that phrase in his proclamation, he meant only such degree or form of martial law as he was constitutionally authorized to impose. As we have seen above, he was authorized to detail the militia to suppress the insurrection and to direct their movements, without regard to the civil authorities, and they could in the performance of their work take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law, for delivery to the civil authorities; but neither he nor the military under him can lawfully punish for insurrection or for other violations of the law. The courts can not be ousted by the agencies detailed to aid them; nor can their functions be transferred to tribunals unknown to the constitution.

The conclusion as to Gillis's case was as follows:

The trial and commitment of petitioner Gillis were void, and his detention thereunder can not be upheld. But he is not entitled to

his release. The record discloses an abortive attempt to try and punish him for an alleged violation of the laws of the State. He must, therefore, be remanded to the custody of respondents, to be dealt with according to law.

STRIKES—USE OF HOUSE AS PART OF EMPLOYEE'S COMPENSATION—DAMAGES FOR EJECTION—*Lane v. Au Sable Electric Co., Supreme Court of Michigan (June 1, 1914), 147 Northwestern Reporter, page 546.*—William Lane was chief operator at the substation of the defendant company at Muskegon Heights. As a part of his compensation he had the use of a dwelling house. After a strike by other employees of the company he also left his employment. The company gave him notice to vacate the house, and then evicted him. He testified that the furniture was damaged to the extent of $14.50, which the company conceded, and judgment was entered for this amount in the circuit court of Muskegon County on a directed verdict. The plaintiff carried the case up by writ of error, claiming that it should have been given to the jury on the question of whether excessive force was used, and also upon the question of damages because of mortification, humiliation, and injured feeling, caused by having his household effects put into the street in the presence of onlookers. The court affirmed the judgment of the court below, Judge Moore, who delivered the opinion, saying:

The record is barren of proof of forcible entry or of the exercise of excessive force. It also shows that most of the onlookers were strikers or sympathizers with the strikers and the plaintiff.

The relation of landlord and tenant between the parties did not exist. It was the relation of employer and employed; the plaintiff being in possession of property belonging to the employer by virtue of his employment. When the plaintiff voluntarily severed the relationship which entitled him to the use of the property, that moment he ended his right to its use. Suppose a maid servant was employed at a monthly wage of $20 and the use of a furnished room in the house of her employer, and should then go on a strike and refuse to do any work, could she still insist upon the right to use the furnished room? A statement of the proposition shows its unreasonableness, and yet it is like the instant case in principle.

WAGES—COLLECTION—IDENTIFICATION CARD—*Roumelitis v. Missouri Pacific Railway Co., St. Louis Court of Appeals (April 7, 1914), 165 Southwestern Reporter, page 818.*—John Roumelitis was a Greek employed as a laborer by the railroad company named. On quitting his employment he left without securing from the section foreman the usual identification card, intended to show that the holder was entitled to the sum represented by a certain item on the pay roll. Later a friend wrote for the employee a letter requesting the foreman to send

the card to a certain address. This was done, but some other Greek secured the card and collected the money, the paymaster supposing him to be Roumelitis. The court, in reversing a judgment for the plaintiff and determining that the company was not liable to him, spoke by Judge Reynolds, as follows:

This identification card is in no sense commercial or negotiable paper. It is not even an order for the payment of money. Its use is solely for the purpose of identifying the bearer of it, as one entitled to receive pay as his name appeared on the pay rolls of the company. It was in such form as to warn the person in whose favor it was issued that the holder of it was the man who was entitled to be paid as his named amount appeared on the pay roll. When the plaintiff here, presumed to know this, directed that it be sent to a given address by mail, he took the risk of its falling into wrong hands, for he must be held to have known that it would serve the purpose of identifying whoever had possession of it as the man entitled to receive the money. Hence it was at his risk and his risk alone and on his express direction that the appellant transmitted this identification card by mail, addressed to respondent at a designated number in the city of St. Louis. That it arrived there is not questioned. That some one other than the plaintiff obtained possession of it and used it for identification and so obtained the pay check is clear. But surely appellant is not at fault for that and can not be charged with negligence. This on the familiar maxim that "where one of two innocent parties must suffer, he through whose agency the loss occurred must sustain it."

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