U. S. DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
ROYAL MEEKER, Commissioner

BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS ... WHOLE NUMBER 189

LABOR LAWS OF THE UNITED STATES SERIES: No. 8

DECISIONS OF COURTS AFFECTING LABOR : 1915

MAY, 1916

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

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

WHOLE NO. 189. WASHINGTON. MAY, 1916.

DECISIONS OF COURTS AFFECTING LABOR, 1915.

INTRODUCTION.

This is the fourth bulletin in the series presenting court decisions, the preceding numbers being 112, 152, and 169. Prior to the year 1912 decisions were noted in practically every issue of the bimonthly bulletins, ending with No. 100, since which date the publications of decisions have been annual. The decisions reproduced are mainly those rendered by the Federal courts or by the State courts of last resort, though in some States the opinions of subordinate courts of appellate jurisdiction have been used, notably for the State of New York; the opinions reported in the New York Supplement of the National Reporter System are this year, for the first time, made use of. No effort has been made to reproduce all cases appearing in the sources used, representative types being usually sought after, though a more general inclusiveness was practiced in connection with cases affecting the constitutionality and construction of workmen's compensation laws and those affecting the status and activities of labor organizations; considerable attention has also been paid to the decisions construing the Federal Employers' Liability Act. As was the case last year, no opinion of the Attorney General of the United States construing Federal labor legislation has appeared.

As heretofore, the opinions have been abridged, the facts usually being stated in brief, and quotations made setting forth the conclusions reached and the grounds therefor, though in a number of cases findings of the court have been stated in the editor's own words without direct quotation. The same sources have been used as in the past, i. e., the National Reporter System, published by the West Publishing Co., and the Washington Law Reporter for the District of Columbia. With one or two exceptions the cases appearing are those which were published during the calendar year 1915, the volumes covered being as follows:

Supreme Court Reporter, volume 35, page 26, to volume 36, page 93.

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Federal Reporter, volume 217, page 689, to volume 227, page 336.
Northeastern Reporter, volume 106, page 1088, to volume 110, page 544.
Atlantic Reporter, volume 92, page 513, to volume 95, page 920.
Southeastern Reporter, volume 83, page 673, to volume 87, page 96.
Southern Reporter, volume 66, page 457, to volume 70, page 112.
Southwestern Reporter, volume 171, page 1, to volume 180, page 464.
Northwestern Reporter, volume 149, page 721, to volume 155, page 144.
Pacific Reporter, volume 144, page 577, to volume 153, page 96.
New York Supplement, volume 150, page 433, to volume 155, page 1151.
Opinions of Attorney General, volume 30, pages 289 to 336.
Washington Law Reporter, volume 43.

As already indicated, the largest single group of cases is that relating to the subject of workmen's compensation, since, though simple and summary methods of procedure are contemplated by the acts establishing this system, many questions remain unsolved as yet, for the determination of which reference must be had to the courts. Other decisions of interest relate to the employment of aliens, a restrictive statute of Arizona on this subject having been held unconstitutional by the Supreme Court. A contract-labor law of Alabama was likewise declared unconstitutional; while interesting decisions as to the rights of members of labor organizations and employers' associations and as to the effect of collective agreements appear. Of special interest among the workmen's compensation decisions are those discussing the extraterritorial effect of the statutes and their relation to the Federal law relative to interstate commerce.

MINIMUM WAGE.

The constitutionality of the Oregon minimum-wage law was argued before the Supreme Court of the United States, but the opinion had not been rendered at the time of the publication of this bulletin.

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REVIEW OF DECISIONS.

The court decisions are divided into two groups, statutory and common law, though in the following review cases are grouped according to the subject matter considered without making this distinction.

CONTRACT OF EMPLOYMENT.

ENFORCEMENT.

Cases coming up under statutes are two, under the laws of Alabama and Georgia, respectively, in which workmen were convicted of fraudulent contracts, procuring advances and failing to carry out the terms of the contract. In Thomas *v.* State (p. 58) the constitutionality of a penal statute on the subject of fraudulent contract was upheld by the Court of Appeals of Alabama, and it was declared applicable to the case of a minor, who though not capable of making a binding contract was nevertheless declared possessed of the requisite guilty knowledge of wrong to authorize his conviction of crime. In Paschal *v.* State (p. 59), a conviction was reversed on the ground that a general tender of the amount advanced had been made, though another defense, i. e., that there was a conflicting existing contract, was held not to be valid. A statute of Alabama authorizing the payment of fines of misdemeanants by one subsequently accepting the service of the convicted person under contract to work out fines and costs was held in United States *v.* Reynolds (p. 177) to be unconstitutional, the Supreme Court of the United States finding that in practical effect, if not in original intent, it was in conflict with the Federal statutes abolishing peonage.

BREACH.

Questions of breach of contract were passed upon in several cases. In Koch *v.* Siff (p. 296), the plaintiff endeavored to recover unearned wages after leaving service by mutual consent on account of his fear of injury from strikers; the court disallowed recovery, but it also rejected the employer's contention that he should be allowed to retain a deposit for faithful performance. In Silbert *v.* Katz (p. 296) an employee was held not to be entitled to a return of his deposit on a showing that he had refused to render the services contracted for, to the employer's injury.

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Breach by the employer was held to afford ground for a recovery in Gabriel *v.* Opoznauer (p. 299), under a written contract, further supported by remarks of the employer; much the same conditions and results appear in Halpern *v.* Langrock Bros. (p. 300). Where hiring was for an indefinite term, and workmen refused to continue labor after having worked continuously for a day and part of the night and were discharged, it was held (The *J. P. Schuh*, p. 303) that the men were entitled to all wages earned. The general principles on which recovery may be had for discharge and the remedies available are announced in Continental Aid Association *v.* Lee (p. 297 Where there is an implied renewal of contract after the expiration of a fixed term, discharge may not be justified on grounds known to the employer at the time of the implied renewal (Akron Milling Co. *v.* Leiter, p. 297). In case of a contract for life employment given in consideration of a release of a claim for damages, it was held a written contract could be added to by oral agreement made at the same time (Swanson *v.* Union Pacific Railroad Co., p. 298).

RESTRICTIONS ON DISCHARGE.

A statute requiring statement of cause of discharge had been in effect in Texas for some years, but was declared unconstitutional in St. Louis Southwestern Railway Co. *v.* Griffin (p. 61), as violating the right of silence, the correlative of the liberty of speech. Where a certificate of discharge has been given which is injurious and defamatory, proof must be complete as to damages resulting from the unlawful act interfering with employment; this rule, however, does not make it impossible that a suit for libel can be maintained (Dick *v.* Northern Pacific Railway Co., p. 64). The question of the right of an employee to demand a hearing where he is threatened with discharge by reason of information given concerning him was before the Massachusetts Legislature, which requested an opinion of the supreme judicial court as to the constitutionality of the proposed measure, the decision of the court being adverse thereto (In re Opinions of the Justices, p. 60).

EMPLOYMENT STATUS.

The status of a man boarding a train used exclusively to carry workmen, himself not an employee but seeking employment, was held in Schifalaqua *v.* Atlantic City Railroad Co. (p. 303) to be that of neither employee nor passenger, so that no damages could be recovered for injuries incurred in the act.

Another case involving the status of employer and employee, though of a very different nature, is that of Pennsylvania Mining Co. *v.* Jarnigan (p. 293), in which it was held that the company was

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liable for the acts of armed guards hired by it, the superintendent of the company having ratified and apparently instigated assaults by the guards employed. A similar question arose as to the status of armed guards appointed under a statute of Pennsylvania (Ruffner *v.* Jamison Coal & Coke Co., p. 57). No public funds were available for the wages of these appointees, and they were paid by the company; they were held, however, not to be employees of the company, but to act in a public capacity, so that the company was not liable for injurious acts done beyond the proper scope of their authority.

INTERFERENCE WITH EMPLOYMENT—BLACKLISTS.

A statute of Alabama penalizes interference with employment by hiring away the workman of another under contract with him for service. The conditions under which the law applies are set forth in Lambert *v.* State (p. 155). In Scott *v.* Prudential Outfitting Co. (p. 322) and Kennedy *v.* Hub Manufacturing Co. (p. 323) courts of New York and Massachusetts respectively sustained judgment in favor of employees whose discharge was procured by false or unauthorized statements as to assignments of wages by them. A party placed on a blacklist by associated business men on the ground that his dealings are inconsistent with just and equitable principles of trade can not claim damages as for wrongful or malicious interference where nothing more is done than to give information in accordance with a mutual agreement without coercion (McCarter *v.* Baltimore Chamber of Commerce, p. 317). In a Massachusetts case also, Cornellier *v.* Haverhill Shoe Manufacturers Association (p. 318), a striker who had indulged in unlawful acts was held not to have "clean hands" so as to secure redress in a court of equity, where employment had been lost because of his being placed on a blacklist. A third case that may be considered in this group is that of a physician against whom notice had been given that he should not be called "in any case" of accident to railroad employees in the locality; it was decided in this case (Peek *v.* Northern Pacific Railway Co., p. 294), that there was a technical liability for damages against some of the parties defendant by reason of their action.

WAGES.

MODE AND TIME OF PAYMENT.

A law of California fixing periods of wage payment was declared unconstitutional (Ex parte Crane, p. 174), on the ground that its enforcement might lead to imprisonment for debt, this being a possibility under the penal procedure of the State. In People *v.* Interborough Rapid Transit Co. (p. 196) a New York statute prescribing

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the weekly payment of wages was construed, the question involved being as to whether various employees of the company were within the definition fixing the application of the act. A law penalizing the nonpayment of wages due on the discharge of a workman was considered in Trammell *v.* Victor Manufacturing Co. (p. 175), and was held to apply to a case where a company has fixed regular pay days. Another phase of the wages question was involved in Atkins *v.* Grey Eagle Co. (p. 176), in which a law of West Virginia requiring redemption in cash at full value of scrip or money orders was affirmed, the orders in this case being payable in merchandise.

PREFERENCE.

The preference of wage debts was discussed in two cases, in one of which, Central Trust Co. *v.* George Lueders & Co. (p. 191), the Kentucky insolvency law was attacked as unconstitutional and in conflict with the Federal statute; this and other questions were decided adversely to the contestant, and the law upheld. In the second case, Blessing *v.* Blanchard (p. 193), the Federal statute was construed, and distinctions made as to the persons included thereunder as "wage earners." Appropriate for mention here, though resting on a different basis, is the case of Farnum *v.* Harrison (p. 191), in which a bookkeeper was held to be within the preferred classes of employees for the wage debts of whom stockholders of insolvent corporations are liable.

The mechanic's lien law of Minnesota was construed in Lyons *v.* Jarnberg (p. 170), the superiority of liens over a mortgage being affirmed, ordinary lighting fixtures being held not to give a lien, not being part of the structure, and the padding of one item being held to invalidate the whole of the party's claim.

A statute of the same State providing for the exemption of wages from execution was passed upon in Bofferding *v.* Mengelkoch (p. 127), and a section making certain exceptions declared unconstitutional.

BASIS.

The Ohio statute prohibiting the screening of coal before weighing where wages are paid according to the weight of coal mined was declared constitutional in the case of Rail & River Coal Co. *v.* Yaple (p. 194), the decision being by the Supreme Court of the United States.

HOURS OF LABOR.

GENERAL LAWS.

The decisions under this head are unusually numerous this year, as well as of unusual importance, involving both general employment and special classes of employees. In the first group is the case,

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Saville *v.* Corless (p. 128), in which a novel statute of Utah fixing a 6 o'clock closing hour for mercantile establishments with certain exceptions was held unconstitutional. A similar fate befell a Louisiana statute fixing at eight per day, in cities having a population of 50,000 or more, the hours of labor of stationary firemen (State *v.* Legendre, p. 130). The Oregon statute prescribing a general 10-hour day in factories, etc., was considered in State *v.* Young (p. 131), ordinary repair work not being classed as of the type of "necessary repairs" which are made an exception under the act.

RAILROADS.

A number of cases construe the Federal statute fixing the hours of service of railroad employees. In United States *v.* Great Northern Railway Co. (p. 144) carefully drawn definitions are given of certain terms used in the proviso as to exceptions, and a judgment relieving the company from liability was reversed. In United States *v.* Denver & Rio Grande Railroad Co. (p. 146), the discharge of an insubordinate and defiant employee, whose place could not be filled immediately, was held to constitute an emergency justifying overtime work. A similar conclusion was reached in case of the illness of an operator in San Pedro, etc., Railroad Co. *v.* United States (p. 147), as was true of an operator detained by the wreck of a train; another violation charged in the same case was held culpable, where a change of crew might have been made during a run prolonged by heavy rains, but was not.

The engineer of a work train operating entirely intrastate was held not to be one of the employees engaged in the transportation of passengers or property by railroad from one State to another within the scope of the Hours-of-Service Act (United States *v.* Chicago, Milwaukee & Puget Sound Railway Co., p. 148). Questions of classification also arose in United States *v.* Florida East Coast Railway Co. (p. 152), in which it was held that a train conductor who at certain stations used the telephone to receive orders relative to the movement of trains was not an "operator" limited to 13 hours' employment; and in Chicago, Rock Island & Pacific Railway Co. *v.* United States (p. 153), in which it was held that switchmen who were regularly required to telephone to a towerman as to the arrival or position of certain trains were sufficiently identified with the group of employees classed as operators, etc., to require the limitation of their service to nine hours as a maximum at a point where service was continuous. In Delano *v.* United States (p. 153), the question arose as to whether a train dispatcher having completed his term of service might subsequently serve as ticket seller or in other capacities for which the hours of service are not restricted; the determination of the court was adverse to such supplementary employment.

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That the enforcement of the observance of the Hours-of-Service Act is an absolute duty is held in United States *v.* Oregon-Washington Railroad & Navigation Co. (p. 148), where a penalty was enforced against the company in a case where the operator remained on duty in violation of instructions and without the knowledge of any officer or agent of the company other than himself. The question of whether certain offices were operated continuously night and day arose in the case, United States *v.* Grand Rapids & Indiana Railway Co. (p. 150), the office being closed at intervals in addition to longer periods of seven and seven and one-half hours respectively late at night. In another case, United States *v.* Chicago & Northwestern Railway Co. (p. 151), it was the practice to allow regular hours off for dinner and for supper, though it appeared that the operators were on call during such times; overtime was found to be worked under such circumstances, and the offered defense of emergency in a specific instance was rejected as being nothing more than an ordinary accident.

The question of reporting overtime work was considered in United States *v.* Baltimore & Ohio Railroad Co. (p. 154), in which the court insisted that all overtime should be reported, even though worked under emergency conditions which would justify the act. The inadvertent omission of reports of overtime work, however, was held in Oregon-Washington Railroad & Navigation Co. *v.* United States (p. 154) not to subject the company to penalties.

A State statute which undertook to regulate the hours of service of certain employees of railroads to nine per day was held in Commonwealth *v.* Boston & Maine Railroad (p. 149) to be unconstitutional; it applied to baggagemen, laborers, crossing tenders, and the like, the court regarding these classes of workmen as not engaged in an occupation calling for special legislative protection.

WOMEN.

The remainder of the cases to be considered under this head relate to the hours of labor of women. In Miller *v.* Wilson (p. 133), the Supreme Court of the United States sustained as constitutional the eight-hour law of California for women, the case in hand being that of a chambermaid employed in a hotel. In Bosley *v.* McLaughlin (p. 136), the same court upheld the same law as amended to extend to hospitals. A very similar statute affecting the District of Columbia, but limiting labor to six days in the week, was sustained as constitutional in Earnshaw *v.* Newman (p. 138); while in Hotchkiss *v.* District of Columbia (p. 140), this law was held to include a dressmaking establishment, against the defendant's claim that she was not conducting a manufacturing establishment. The Massachusetts law fixing an eight-hour day for women "employed in labor" was held to apply to a cashier in a grocery store, who also gave out trad-

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ing stamps and did a little bookkeeping (Commonwealth *v.* J. T. Connor Co. [p. 140]). The question of the constitutionality of a New York Statute forbidding nightwork for women was before the court in People *v.* Charles Schweinler Press (p. 141), the law being upheld. An Arizona statute prescribing an eight-hour day for women, and making certain apportionments of time, different for different classes of employment, was upheld as constitutional in State *v.* Dominion Hotel (p. 132).

SUNDAY LABOR.

The constitutionality of a statute of Oregon restricting Sunday labor was passed upon in State *v.* Nicholls (p. 190), the contention being that the law was unconstitutional as discriminatory between classes of business permitted and those forbidden; the classification was held to be reasonable, however, and the law sustained. Similar contentions were involved in the case People *v.* C. Klinck Packing Co. (p. 197), in which the weekly day of rest law of New York was sustained as constitutional in its general scope, the classifications contained therein being held reasonable; a delegation of authority to the commissioner of labor to make certain exemptions in his discretion was held not to be valid, but this fact did not affect the validity of the remainder of the law. The construction of the Indiana statute was passed upon in Stellhorn *v.* Board of Commissioners (p. 189), the work of an assessor of property in checking up lists, etc., on Sunday being held not to be a labor of necessity, so that no payment could be collected for services rendered on Sunday.

FACTORY REGULATIONS.

The cases noted under this head all involve the question of the employer's liability for injuries alleged to be due to his negligence in failing to comply with the requirements of the law as to safety.

FIRE ESCAPES.

In Goetz *v.* Duffy (p. 71), the court determined the liability of owner, lessee, and sublessee for failure to maintain suitable fire escapes in an unobstructed condition as required by the laws of New York. This statute was also considered in Amberg *v.* Kinley (p. 73), where the employer's liability for death by burning was affirmed on the ground that the employer's negligence in failing to provide fire escapes constituted liability per se.

GUARDS.

The guarding of dangerous machinery and its practicability were before the Minnesota court in Puls *v.* Chicago, Burlington & Quincy

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Railroad Co. (p. 74), construing a Wisconsin statute and orders of the industrial commission of that State, and a judgment based on violations was affirmed; so also in the case, Ronca *v.* Wendall & Evans Co. (p. 75), involving the guarding of a steam mangle.

INSPECTION—SUITABLE EQUIPMENT.

In Burk *v.* Hobart Mill & Elevator Co. (p. 70), the Supreme Court of Oklahoma held that it was proper to admit evidence, as a defense for the company, that its mill had been inspected by a State factory inspector as relieving the company from the charge of negligence in the matter of equipment. Under this head may be noted the case Wiley *v.* Solway Process Co. (p. 67), in which the failure of the employer to furnish a punch for punching holes in barrel hoops before driving nails was made a basis of liability on the ground that it was a defect in the ways, works, machinery, and plant of the employer.

RAILROADS.

SAFETY APPLIANCES.

Under the safety appliance acts of the United States a case of considerable interest was passed upon by the Supreme Court of the United States (United States *v.* Erie Railroad Co., p. 187), in which a protracted dispute as to the definition of a railroad yard was decided adversely to the company, and a new trial ordered in accordance with the ruling that a single yard could not be construed to extend over a territory 2 or 3 miles in length, embracing separate important points and covering a part of the through trackage of the company. Quite a similar question was passed upon by the same court in United States *v.* Chicago, Burlington & Quincy Railroad Co. (p. 183), in which it was held that transfer trains crossing the Missouri River at Kansas City must be equipped under the safety law as trains in commerce. The law in question requires a sufficient supply of automatic brakes to control the train without the use of hand brakes; in Virginian Railway Co. *v.* United States (p. 184) the inability of the company to control certain heavy trains without the use of hand brakes was held not to excuse infractions of the law, the conditions being those of the company's own making, and capable of such modification as to permit compliance with the law. Necessary movements for repairs are permitted by the law, and the decision in United States *v.* Atchison, Topeka & Santa Fe Railway Co. (p. 185), turned upon the interpretation of the word "necessary" as used in the statute, the court holding that it could not be held to be the mere equivalent of "convenient" or other qualifying expression. In Southern Railway Co. *v.* Railroad Commission of Indiana (p. 186),

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the Supreme Court of the United States held invalid State safety regulations supplementing the Federal statute, holding that there could be neither added requirements as to equipment nor modifications of penalties.

FULL CREWS.

Another statute affecting railroads is one of Arkansas prescribing "full crews," making exceptions for railroads of a length of less than 50 miles. In Kansas City Southern Railway Co. *v.* State (p. 180), the contention of the railroad that since, though it was more than 50 miles in length, it had less than 50 miles within the State, it was exempt, was rejected by the court.

MINES.

WASH ROOMS.

Statutes of Indiana and Kansas requiring the establishment of wash rooms for the use of mine employees under certain conditions were passed upon in Booth *v.* Indiana (p. 171) and State *v.* Reaser (p. 173). In both cases the constitutionality of the act in question was challenged, and in both cases it was upheld; in one instance by the Supreme Court of the United States, and in the other by the Supreme Court of the State of Kansas.

RESTRICTION OF EMPLOYMENT.

EXAMINATION AND LICENSING.

Provisions of the charter of New York require persons engaged in the business of plumbing to be licensed, and in Gottesman *v.* Barer (p. 126) it was held that a person not so licensed could not recover for services rendered.

ALIENS.

Other cases that may be mentioned here involve attempts of State legislatures to limit the employment of aliens. A statute of New York forbade the employment of aliens on public works, and this was upheld as constitutional by the court of appeals of that State in People *v.* Crane (p. 52), and on appeal, by the Supreme Court of the United States (Heim *v.* McCall, p. 50). A statute of Arizona extending to private employment, and tending to debar from means of livelihood persons legally within the United States, was held unconstitutional by the Supreme Court of the United States in Truax *v.* Raich (p. 53).

LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

As indicated in the introduction, the most important cases to be considered here are those involving the application of the Federal liability law. Other cases of interest, however, have been selected,

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both under common and statute law, in order to present briefly the scope and effect of the other statutes and of the unmodified common law.

WAIVERS.

Contracts procured by employers to prevent the operation of liability statutes are forbidden by the Federal statute and by a number of State laws (see Relief associations). That Pullman employees may make valid contracts under the Federal law was held in Robinson *v.* Baltimore & Ohio Railroad Co. (p. 87), on the ground that they are not employees of railroads engaged in interstate commerce within the scope of the Federal statute. A contract of waiver was held void, however, in Chicago, Rock Island & Pacific Railway Co. *v.* Pearce (p. 118), where the plaintiff, defendant on appeal, had signed a contract which he alleged in this action to be invalid as in conflict with the Federal law. In Illinois Central Railroad Co. *v.* Harris (p. 67), the contract of waiver was held invalid, not as being forbidden by the State law, but because if valid and binding, it would "have the effect of repealing some of the statutes of the State," which could not be permitted.

CONTRACTS OF SETTLEMENT, ETC.

Of a different purpose are contracts remaining to be noted, arising under the common law. Thus in Kelly *v.* Burnham, Williams & Co. (p. 307), the wife of an injured workman was held to have a good cause of action on a contract made by her with the employing company to receive payments on account of her forbearance to sue for injuries which resulted in the insanity of her husband. In Tylee *v.* Illinois Central Railroad Co. (p. 311), a contract by the employer to pay the regular salary during the time of the injured workman's disability was enforced, the evidence being held sufficient to support an oral promise not embodied in the written release. A contract of insurance entered into by a railway company with its employees was held to obligate the company itself, and not an insurance company with which it appeared to have had a general contract; the suggestion that the claim was barred on account of a recovery in damages was not accepted by the court (McAdow *v.* Kansas City Western Railroad Co., p. 311). Quite similar was the conclusion reached in Liliopoulos *v.* Oregon-Washington Railroad & Navigation Co. (p. 308), in which it was held that a company deducting for a hospital fund could not claim restricted uses for that fund as against a general arrangement understood by the workman. Liability for failure to render service was affirmed.

FEDERAL STATUTE.

General scope and construction.—Besides the extended discussion as to what is interstate commerce to which the Federal statute is

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applicable, various other points arose for discussion under the Federal law governing railroad service, while the liability due to violations of safety appliance laws was considered in several cases. In McGovern *v.* Philadelphia & Reading Railway Co. (p. 115), the Supreme Court of the United States held the Federal statute available for the benefit of nonresident alien beneficiaries of fatally injured workmen. The same court in St. Louis, Iron Mountain & Southern Railway Co. *v.* Craft (p. 78) affirmed a judgment under this statute in which recovery was awarded for the pain and suffering of a deceased employee, the right of action therefor being held to survive under the amendment of 1910. The Supreme Court of Tennessee sustained the right of appointment of an administratrix, if for no other purpose than to maintain an action under the Federal statute (Howard *v.* Nashville, Chattanooga & St. Louis Railway Co. (p. 82). In Fish *v.* Chicago, Rock Island & Pacific Railway Co. (p. 84), the question of assumption of risks was considered, the Supreme Court of Missouri holding that the common-law rule valid in that State was applicable in the trial of local cases in spite of its being different from the one adopted by the Federal courts. In Central Vermont Railway Co. *v.* White (p. 85), however, the Supreme Court of the United States insisted upon the application of the Federal rule as to the burden of proof of contributory negligence, as against the enforcement of the rule of the State of Vermont, in one of whose courts the case was tried. The question of assumption of risks arose also in Davis *v.* Chesapeake & Ohio Railway Co. (p. 86), the injury arising from a defect not covered by the Federal law. The court held that the employee, knowing the conditions, assumed the risks, and recovery was barred.

The measure of damages as interpreted by a trial court was made the ground for a reversal of a judgment in Norfolk & Western Railway Co. *v.* Holbrook (p. 88), the Supreme Court of the United States ruling that it was improper to introduce indefinitely speculative elements. In Brabham *v.* Baltimore & Ohio Railroad Co. (p. 88), evidence as to the payment of life insurance to a dependent claimant was held improperly admitted, and the judgment reversed on an appeal based on the alleged inadequacy of the amount of the damages awarded. The fact that a public authority has approved the height and condition of an equipment was held not to be in itself a full defense against charges of negligence in Portland Terminal Co. *v.* Jarvis (p. 83), where a workman was injured by reason of the use, without notice, of an unusually high car. A question as to appliances and equipment was passed upon also in Gekas *v.* Oregon-Washington Railroad & Navigation Co. (p. 81), in which the Federal statute was held to apply to any part of the equipment, whether simple or complex, so that a defective adz was held to be within the act.

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Where a suit should have been brought under the Federal statute, but was tried under a State law and judgment reversed because of improper choice of remedies, it was held in St. Louis, San Francisco & Texas Railway Co. *v.* Smith (p. 81) that the statute of limitations would not operate to bar an action brought by a petition amended to conform with the rulings of the higher courts. In Corbett *v.* Boston & Maine Railroad (p. 77), the question of election of remedies, i. e., whether under Federal or State statutes, was up for consideration. It was held that the plaintiff was not called upon to determine under which law the action should be brought, since the facts and not the pleadings determine how recovery may be had. In Cincinnati, New Orleans & Texas Pacific Railway Co. *v.* Wilson's Administrator (p. 80), the company was held liable for the negligent act of a subforeman, held under the circumstances to be in course of employment.

Incidental absence from work for personal reasons, not going beyond reasonable bounds, was held not to take the plaintiff out from under the act in Graber *v.* Duluth, South Shore & Atlantic Railway Co. (p. 100). A section foreman was held in Texas & Pacific Ry. Co. *v.* White (p. 106) to assume the risks from an insufficient crew and a hand car too heavy to handle, though the work in which he was engaged was within the scope of the act. The effect of the Federal safety appliance act was involved in the case St. Louis & San Francisco Railroad Co. *v.* Conarty (p. 117), in which the Supreme Court of the United States held that an injury resulting from the absence of prescribed equipment was not chargeable to the negligence of the company failing to supply the same where the employee was not of the class or was not engaged in the work for the benefit of which the safety appliance act was enacted. In Texas & Pacific Railway Co. *v.* Rigsby (p. 119) it was held that the interstate use of a defective car was not necessary to bring it within the prohibition of the safety appliance act in so far as civil liability was concerned, and that even though no criminal liability attached, its use to the injury of an employee constituted actionable negligence.

Interstate commerce.—The decisions as to what constitute interstate commerce continue to be in a measure conflicting, though certain decisions of the Supreme Court have gone far to clarify the situation. Building an addition to a repair shop, the original building being an instrumentality used in interstate commerce, was held to be within the act in Thompson *v.* Cincinnati, New Orleans & Texas Pacific Railway Co. (p. 93); it may be noted also that in this case the appellate court held that it was proper to require the plaintiff to choose whether he would proceed under a State or Federal law, in contrast with the Corbett case above. In Thomas *v.* Boston & Maine Railroad (p. 103) also, an employee injured while removing a burned

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portion of a roundhouse was held to be within the act; while in Shanks *v.* Delaware, Lackawanna & Western Railroad Co. (p. 91), a workman adjusting machinery in a locomotive repair shop was held not to have any right to action. A brakeman injured while getting a tin cup for the use of the train crew was held within the protection of the act (Baltimore & Ohio Railroad Co. *v.* Whitacre, p. 91), as was a laborer cleaning an ash pit in which ashes were dumped by engines engaged both in interstate and intrastate commerce (Grybowski *v.* Erie Railroad Co., p. 94); while a workman injured in cleaning stencils used to mark cars used in interstate commerce was held not to be within the act (Illinois Central Railroad Co. *v.* Rogers, p. 95). A workman injured while clearing a wreck (Southern Railway Co. *v.* Puckett, p. 95), one engaged in the construction of a temporary bridge following a freshet (Columbia & Puget Sound Railroad Co. *v.* Sauter, p. 96), a trainmaster hauling gravel for ballasting a new sidetrack which had been used in interstate commerce (Clark *v.* Chicago Great Western Railroad Co., p. 105), and a yard clerk engaged in general duties which took him about the yards (Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. *v.* Farmers' Trust & Savings Co., p. 115), were held to be within the act. In the last-named case it was said that evidence that duties of the injured man related daily to interstate cars was a sufficient basis for the conclusion without the necessity of proving what he was doing at the particular moment. In Pecos & Northern Texas Railway Co. *v.* Rosenbloom (p. 114), on the other hand, it was held that in the absence of evidence as to what a yard clerk was doing at the particular time when he was injured while walking through the yards, the Federal statute would not be held to apply. A watchman at a crossing whose duties related more to the public than to any control of the movements of trains or other connection with their operation, was held not to be within the act in Louisville & Nashville Railroad Co. *v.* Barrett (p. 113).

A brakeman uncoupling cars on a "pick-up" freight train running locally, but handling in part interstate freight, was held by the Supreme Court of the United States to be within the act in New York Central & Hudson River Railroad Co. *v.* Carr (p. 92); while in Atchison, Topeka & Santa Fe Railway Co. *v.* Pitts (p. 97), the Supreme Court of Oklahoma ruled outside of the act a workman injured while coupling an engine tender and a baggage car intended to be connected with a train carrying in part interstate commerce. A New Jersey court affirmed a judgment in favor of a fireman of a locomotive which he was preparing to attach to an interstate train (Tonsellito *v.* New York Central & Hudson River Railroad Co., p. 98).

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A watchman injured while pursuing trespassers on an interstate train was held to be governed solely by the Federal statutes, as an employee in interstate commerce, in Smith *v.* Industrial Accident Commission of California (p. 98). Whether the shifting of cars and engines not in immediate use constituted interstate commerce was passed upon in Pennsylvania Railroad Co. *v.* Knox (p. 99), a workman fatally injured while assisting in the moving of trains being moved intrastate without evidence of destination being held to be outside the act. An opposite conclusion was reached in the case of a fireman on an engine drawing only empty cars in Thompson *v.* Wabash Railroad Co. (p. 100); in this case, however, the cars were moving interstate. In Moyer *v.* Pennsylvania Railroad Co. (p. 107), it was held that the nonuse of a car for two or three days for any form of transportation did not destroy its interstate character when its last use was in interstate traffic and the next subsequent use was of the same nature. Hardly reconcilable with this were the conclusions in McAuliffe *v.* New York Central & Hudson River Railroad Co. (p. 111), in which a freight conductor whose train consisted at the time of an engine and caboose only was injured by collision with an interstate train; his movement was interstate, and he had just previously been engaged in interstate transportation, but it was held that he was not at this time engaged in commerce, and was therefore not protected by the act. A member of a switching crew injured while the switch engine was hauling no cars but was passing to another track in order to continue switching in which both interstate and intrastate cars were being handled was held to be within the act in Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. *v.* Glinn (p. 110).

A yard conductor moving cars of coal from without the State to a dealer's private track was held to be within the act in Pennsylvania Co. *v.* Donat (p. 105). In Harrington *v.* Chicago, Burlington & Quincy Railroad Co. (p. 108) a switchman was injured while running cars of coal to a storage track for the use of railroad locomotives engaged in both interstate and intrastate commerce. The Federal act was held not to apply on the ground that the coal had not yet taken on any definite interstate character. An opposite conclusion was reached in circumstances quite similar in Barlow *v.* Lehigh Valley Railroad Co. (p. 110), though in the latter case it was set forth that the coal had some days previously come from outside the State in which the injury occurred. This accords also with the decision in Kamboris *v.* Oregon-Washington Railroad & Navigation Co. (p. 109), in which a workman engaged in shoveling coal into pockets or chutes from which tenders of engines engaged in both interstate and intrastate traffic would be supplied was injured. A judgment in favor of a miner mining coal for the use of a railroad company's engines was

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reversed by the United States Circuit Court of Appeals in Delaware, Lackawanna & Western Railroad Co. *v.* Yurkonis (p. 102), on the ground that merely mining coal is not interstate commerce, regardless of the fact that the company on whose engines it would be used was itself engaged in interstate commerce.

A mechanic repairing in a roundhouse an engine used largely in switching interstate cars was held to be within the Federal statute in Southern Pacific Co. *v.* Pillsbury (p. 106). A similar conclusion was reached as to a section foreman engaged in loading old rails on a flat car, where such rails had been replaced by new ones on a track used in interstate commerce (Cherpeski *v.* Great Northern Railway Co., p. 112). An incidental feature of interest that came up in this case was as to the question of the privilege of physicians who have examined employees in connection with a system of medical inspection adopted by their employers; it was held that they might be examined as to the facts discovered by them, since there was no intention that the persons examined by them should be regarded as patients.

EFFECT OF COMPENSATION LAWS.

A few cases decided under the liability laws were found to be closely related to cases under the compensation statutes of the States. In Behringer *v.* Inspiration Copper Co. (p. 120), the court below had regarded the complaint as insufficient because it did not state that the employer and employee had disaffirmed the provisions of the compensation act of Arizona. The supreme court of the State, however, held that this was matter of defense only, and pointed out that the constitution required the retention of the privilege of choice with the injured employee to settle under the compensation law or by liability proceedings, so that any attempt of the legislature to limit recovery to compensation would be ineffective. In Karny *v.* Northwestern Malleable Iron Co. (p. 68), it was pointed out that the failure of an employee to accept the compensation act which his employer had elected to adopt as provided under the Wisconsin statute left the employer with the common-law defenses available, and a judgment below in the plaintiff's favor was reversed. In Shinnick *v.* Clover Farms Co. (p. 69), it was held that since the New York statute made no provision for disfiguring injuries not producing disability, an action for damages would lie in such a case.

MISCELLANEOUS.

The rights of a seaman to suitable medical treatment were considered in North Alaska Salmon Co. *v.* Larsen (p. 119), in which recovery was allowed for the failure of the company either to properly treat the injury by its own physician or to send the seaman ashore for the treatment. The status of an employee of an alleged con-

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tractor was passed upon in Lehigh Valley Coal Co. *v.* Yensavage (p. 69), the court holding that where miners were employed by the piece and hired their assistants, all were employees, and the rule of independent contractors did not apply. Violation of a statute in running a train above a prescribed speed through towns was held to be negligence in Illinois Central Railroad Co. *v.* Ford (p. 71), the court holding that the statute was available for the benefit of employees of railroad companies as well as for the public under the liability statute of Mississippi.

The liability of the mine foreman appointed under the statutes of West Virginia for defective electrical appliances was passed upon in Crockett *v.* Black Wolf Coal & Coke Co. (p. 76); the court held the employer liable, stating certain limitations as to the exclusive liability of the foreman for defective conditions.

As setting forth in brief a statement of the common-law defenses of fellow service and assumed risks, a statement of a Georgia court is reproduced in Kligo *v.* Rome Soil Pipe Manufacturing Co. (p. 306). Refusal to permit a sick employee to leave the store till the close of the day, thus aggravating her illness, was held to constitute actionable negligence in Keefe *v.* Straus (p. 310).

WORKMEN'S COMPENSATION.

CONSTITUTIONALITY OF STATUTE.

The question of constitutionality arose in a number of cases, in some as the main issue, and in others in a more incidental form. In Wheeler *v.* Contoocook Mills Corporation (p. 200) objections were raised to the law of New Hampshire on the ground that the taking away of the common-law defenses and the methods of classification used in the act were violations of constitutional principles, so that the act was void; these objections were overruled, and the statute distinguished from that of the State of New York declared unconstitutional in the Ives case; incidentally the court passed upon the question of continuity of employment, holding that it was continuous during the interval between the completion of one task and the entering upon another to which the employee was assigned. The constitutionality of the Texas statute was considered in two cases before the court of civil appeals of that State, the court in Memphis Cotton Oil Co. *v.* Tolbert (p. 217) upholding the law as to all points raised in the case; in Middleton *v.* Texas Power & Light Co. (p. 219), however, that provision of the act which bars employees from any right of action for damages when the employer has accepted the law was held to be void. Much the same question as that considered in the latter instance arose in a Michigan case, Mackin *v.* Detroit-Timkin Axle Co. (p. 233), in which the employee claimed damages

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from an employer who had accepted the act, but had given no notice of the fact to the employee; various points of unconstitutionality were charged, among others the abolition of the common-law defenses; this was held to be within the power of the legislature, and the fact that the employee was presumed to know the law and to have constructive notice of the conditions of his employment, and had not given notice of his rejection of the act, was held to create a situation in which the law could apply without conflict with the principles of the constitution. More specific was the objection raised against the Ohio statute in Porter *v.* Hopkins (p. 206), the question involving the power of the legislature to make the law applicable to municipalities and to divert taxes to new purposes in calling for the payment of premiums therefrom; the contention that this could not be done was, however, overruled.

The constitutionality of the New York law was before the court of appeals of that State in Jensen *v.* Southern Pacific Co. (p. 221), the particular contention being that it takes property without due process of law, relying largely on the Ives case, in which an earlier statute was declared unconstitutional; reference was made to the fact that the constitution of the State had been amended (Nov. 4, 1913) since that decision was rendered, and that as to questions affecting the Federal Constitution the decision of the Supreme Court of the United States would control, in the light of which the act was upheld. The Iowa statute was sustained in Hunter *v.* Colfax Consolidated Coal Co. (p. 225), against contentions that it interfered with the right of contract generally, and denied due process of law, etc. The present law of California is quite different from the original act, and its constitutionality was challenged in Western Indemnity Co. *v.* Pillsbury (p. 229); in this State also a constitutional amendment had been adopted (Oct. 10, 1911), and the court upheld the statute on much the same grounds taken in the New York case, though indicating some additional grounds.

APPLICABILITY OF STATUTE.

The status of an employee unacquainted with the fact that his employer had elected to accept the compensation act of another State into which the workman had gone to perform service was considered in Johnson *v.* Nelson (p. 236), the Supreme Court of Minnesota holding that the Wisconsin statute declaring a presumption of acceptance in the absence of notice governed the case, precluding an action for damages. Under the Massachusetts statute an employee injured by the negligence of a third person has an option to proceed in damages against the negligent party or to claim compensation from the employer, with the right of recovery remaining against the third person for the benefit of the insurer; these provisions were

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construed in Turnquist *v.* Hannon (p. 236), and the status of the parties defined.

The question of the exclusiveness of the compensation law of Washington as a remedy for injury to an employee, even where that injury is due to the negligence of third parties, is affirmed by the Supreme Court of the United States in Northern Pacific Railway Co. *v.* Meese (p. 246), the court also ruling that such a construction of the act did not bring it in conflict with the provisions of the Federal Constitution.

The question of the application of the act of Connecticut to employers of less than five persons was discussed in Bayon *v.* Buckley (p. 205), and it was held that they were not excluded, even if put on a somewhat different footing from other employers; the failure of the employer to comply with the provisions as to security of payment was held not to relieve him from responsibility. The New York statute was held to apply to a workman doing a specified piece of work for a lump sum, the court refusing to hold him as an independent contractor (In re Rheinwald, p. 237). The same conclusion was reached in another case (In re Powley, p. 238), the workman in this case being the owner of a dredge which was operating under contract, but the injury being received while in service for the employer otherwise. Under the Minnesota law also a workman getting out ties, poles, and posts at piece rates was held to be under such supervision as to prevent his being classed as an independent contractor (State ex rel. Virginia & Rainy Lake Co. *v.* District Court, p. 239). The fact of the unlawful employment in a hazardous occupation of a minor of lawful working age was held not to take him out from under the compensation act of Wisconsin in Foth *v.* Macomber & Whyte Rope Co. (p. 239). Under the Michigan statute it was held that police officers are not employees, but officers of the city in which they serve, and therefore not included under the law (Blynn *v.* City of Pontiac, p. 240). In Rongo *v.* R. Waddington & Sons (p. 241), the status of a teamster driving a team hired by his employer to another person was considered, and the original employer held responsible for compensation under the act. The fact that an employee had made false statements as to his marital condition and previous employment was held not to bar the right of his widow to recover compensation under the New York statute in Kenny *v.* Union Railway Co. (p. 241), the false representations having in no way been related to the cause of death.

RELATION OF STATE TO FEDERAL LAWS.

In a number of cases the question arose as to the relation between the State compensation laws and Federal statutes, some of them involving questions of admiralty, while in others the relation to the Federal Interstate Commerce Act was considered. In a New York

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case (In re Walker, p. 249), it was held that an injured person formerly entitled to proceed at his option either in admiralty or under the common law might make a claim under the compensation law, which was a substitute for the common-law remedy. In Washington, however, the supreme court of that State held in State ex rel. Jarvis *v.* Daggett (p. 250), that since the State has no power to modify the admiralty law or the rights of workmen under it, it would not be presumed that the legislature had intended to grant compensation in cases involving questions of admiralty, under the law enacted by it. A decision by the Supreme Court of Errors of Connecticut (Kennerson *v.* Thames Towboat Co., p. 251) accords with the decision in the New York case noted above.

On the question of interstate employees injured without negligence of the employer, and therefore not entitled to sue under the Federal railroad law, diverse decisions appear. Thus in Staley *v.* Illinois Central Railroad Co. (p. 253), the Supreme Court of Illinois held the Federal statute exclusive as to the entire field of the employees' recovery; while the Supreme Court of New Jersey (Rounsaville *v.* Central Railroad Co., p. 258) and the Supreme Court of New York, Appellate Division (Winfield *v.* New York Central & Hudson River Railroad Co., p. 256), took the opposite position, ruling that as the Federal statute was restricted to cases of negligence of the employer, injuries not due to such negligence were left free for State action. The Federal statute was held not to apply to the operation of a canal in the hands of an interstate railroad, and an award was made of benefits under the compensation act of New Jersey, in Hammill *v.* Pennsylvania Railroad Co. (p. 260). Another decision in which the Federal statute was held not to apply was that of the New York Court of Appeals in Jensen *v.* Southern Pacific Co. (p. 221), in which a longshoreman unloading a steamship was held to be within the benefit of the act of the State, though the vessel was owned by a railroad company. In Okrzsezs *v.* Lehigh Valley Railroad Co. (p. 284), a provision of the New York statute that an employee will be presumed to be within its provisions, in the absence of substantial evidence to the contrary, was held to sustain an award in favor of an employee injured while repairing a car that had been used in both interstate and intrastate commerce. Another case under this act (Fairchild *v.* Pennsylvania Railroad Co., p. 284) was affirmed under circumstances where an intrastate train had just been relieved of interstate baggage and a workman was killed while uncoupling the empty cars.

EXTRATERRITORIALITY OF STATUTE.

The question of the relation of the laws of various States to each other arises when workmen in the performance of their duties go outside the State in which the contract of hiring was made.

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This was one of a number of points involved in the case, West Jersey Trust Co. *v.* Philadelphia & Reading Railway Co. (p. 285), in which the Supreme Court of New Jersey made an award in behalf of a claimant killed while engaged in interstate commerce, perhaps himself willfully negligent, the injury occurring in another jurisdiction than that of the place of contract. An additional factor in this case was a release by the injured workman prior to his death and a further release by his widow on the receipt of a death benefit from a relief association. The employee's release had no effect on her claims, and it was held that her own release was made as widow and not as personal representative, in which status she sued in the present instance. The most recent case in this group is that of Post *v.* Burger & Gohlke (p. 247), in which it was held by the Court of Appeals of New York that the law of that State governed in a case in which the injury occurred in the State of New Jersey. A similar conclusion was reached by the Supreme Court of Errors of Connecticut in Kennerson *v.* Thames Towboat Co. (p. 251), and by the Supreme Court of New Jersey in Rounsaville *v.* Central Railroad Co. (p. 258). It may be noted in passing that a contrary opinion was rendered on this point by the Supreme Judicial Court of Massachusetts in a case, In re American Mutual Liability Insurance Co., presented in Bulletin No. 152, p. 209.

HAZARDOUS EMPLOYMENTS.

Under specific phrases or provisions of the act it may be observed that the New York law is by its terms restricted to "hazardous employments"—a term which involves necessarily, when considering occupations other than those specifically named in the act, the determination of the question of hazard. The following were held to be included in hazardous employments: The work of an employee in an establishment in which plate glass was cut and beveled (McQueeney *v.* Sutphen & Hyer, p. 264); the operation of an elevator (Wilson *v.* C. Dorflinger & Sons, p. 265), the elevator car being construed as a vehicle otherwise than on tracks; the duties of an employee working as general utility man in a wholesale drug establishment, where drugs were manufactured and medicines prepared (Larsen *v.* Paine Drug Co., p. 261); and those of an employee of a retail butcher, who was injured while grinding meat in an electric meat chopper (Kohler *v.* Frohmann, p. 262). The following cases were held to be excluded: A laborer harvesting ice for an employer whose business was the preparation of foods (Aylesworth *v.* Phoenix Cheese Co., p. 261); a janitor putting out a flag on top of a building (Gleisener *v.* Gross & Herbener, p. 262); an assistant in a hotel injured while boning a leg of mutton (De la Gardelle *v.* Hampton Co., p. 263); and a shipper in a wholesale produce establishment injured

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in the warehouse of his employer (Mihm *v.* Hussey, p. 265). In connection with the decision in the Wilson case, above, may be noted that of the Supreme Court of Washington construing a law of that State as not applicable to an elevator in a mercantile establishment, the word "elevator" as used in the law being construed to relate only to grain elevators or warehouses (Guerrieri *v.* Industrial Insurance Commission, p. 242).

PROXIMATE CAUSE.

The connection between the accident and the alleged result was considered in a Massachusetts case, In re Sponatski (p. 201), connection being affirmed where a man injured by a splash of molten lead into his eye became insane and threw himself from a window, with fatal results, about one month later. In Poccardi *v.* Public Service Commission (p. 203), the West Virginia court approved a claim for the death of a man whose injury was a hernia requiring operation, the immediate cause of death being heart trouble. Death from typhoid fever resulting from the use of impure water furnished by the employer was held to be a death by accident within the law of Wisconsin (Vennen *v.* New Dells Lumber Co., p. 204). Ivy poisoning of a railway section man, followed by blood poisoning, bronchitis, congestion of the lungs, and death was held to warrant compensation under the New York law in Plass *v.* Central New England Railway Co. (p. 203). In Milwaukee Coke & Gas Co. *v.* Industrial Commission (p. 202), the Supreme Court of Wisconsin affirmed an award for the death of a man occurring some nine months after an injury causing brief temporary disability, the court holding that there was evidence to sustain the theory of a connection between the accident and the death; another point involved in this case was the effect of a release made by the injured workman on the claim of his widow for benefits, the court holding that the two rights were independent and that the employee was not able to affect the status of his wife's claim, which would arise in the event of his death. In Great Western Power Co. *v.* Pillsbury et al. (p. 266), a slight abrasion was held to be the cause of conditions resulting in blood-poisoning, entitling to benefit payments for a period of several months; while in Kill *v.* Industrial Commission (p. 266), the Wisconsin court disallowed a claim where a workman lost bones of the hand and wrist from blood-poisoning, the immediate exciting cause being the workman's engaging in a boxing bout before complete recovery from an industrial accident.

EVIDENCE.

The evidence required to sustain an award was considered in Englebretson *v.* Industrial Accident Commission (p. 243), in which the Supreme Court of California disallowed a claim where there

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was no competent evidence to support it, hearsay evidence being rejected as inadmissible. Contrasted with this finding is that of the Appellate Division of the Supreme Court of New York in Carroll *v.* Knickerbocker Ice Co. (p. 244), in which "slight evidence" and "slender items of evidence" involving "hearsay upon hearsay" were held to warrant a finding in favor of the claimant. The Supreme Court of Wisconsin in Milwaukee Western Fuel Co. *v.* Industrial Commission (p. 244) held that the presumption was against suicide and in favor of accidental death, so that evidence to overcome that presumption must be supplied by any person contesting it. The Supreme Judicial Court of Massachusetts held that it was not enough "to show a state of facts which is equally consistent with no right of compensation as it is with such right," the burden of proof being on the claimant to show facts definitely sustaining the claim (In re Savage, p. 269).

COURSE OF EMPLOYMENT.

No question involves more constant consideration than that of whether the injury arose out of and in the course of employment. The affirmative was held in Dragovich *v.* Iroquois Iron Co. (p. 267), where a workman suffered fatal injuries in an attempt at rescue; in Kingsley *v.* Donovan (p. 269), in which a workman was allowed compensation for injuries received while cleaning, during work time, his motorcycle used more or less in the business of the employer; in State ex rel. People's Coal & Ice Co. *v.* District Court (p. 270), in which the driver of an ice wagon was killed by lightning striking a tree under which he took shelter from a storm; in a case of death from valvular heart trouble following unusual exertion (In re Fisher, p. 271); in a case of injury due to an attempt to make a key from an unexploded dynamite cap, under an implied authority to do certain work in which the key would be of service (State ex rel. Duluth Brewing & Malting Co. *v.* District Court, p. 272); in the case of a workman falling with fatal results in an effort to compel boys to get off a wagon on which the workman was helping in the hauling of goods (Hendricks *v.* Seeman Bros., p. 273); in a case of death from heart failure where a cook on a lighter overexerted himself in an attempt to rescue personal possessions from a sinking vessel (In re Brightman, p. 274); in a case of death from shooting by an intruder whom a superintendent had ordered from the premises of his employer (In re Reithel, p. 274); and in the case of a foreman injured by the assault of a workman whom he was attempting to compel to obey orders (Western Indemnity Co. *v.* Pillsbury, p. 229).

Rulings adverse to claimants were made in De Voe *v.* New York State Railways (p. 268), where a motorman was killed by an automobile after working time while going from the car barn to take a

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car to go and have his watch tested, in accordance with a requirement of the company that the watch should be regularly tested; in Smith *v.* Corson (p. 271), in which a workman of limited physical capacity undertook work that he had been forbidden to do, with fatal injury resulting; and in Spooner *v.* Detroit Saturday Night Co. (p. 275), where an engineer of a company from whom power was being obtained under contract volunteered to operate an elevator as an accommodation to employees of the leasing company.

In contrast with the opinion in the case, People's Coal & Ice Co. *v.* District Court, noted above, and decided by the Supreme Court of Minnesota, is that of Klawinski *v.* Lake Shore & Michigan Southern Railway C. (p. 270), in which the Supreme Court of Michigan held that a railroad section man killed by lightning in a barn in which he had taken refuge from a storm was not exposed to injuries arising out of and in course of employment, so that no claim could be allowed. Similar to the latter ruling is the position taken by the Supreme Court of Wisconsin in Hoenig *v.* Industrial Commission (p. 276), work on a dam being held not to constitute an exposure substantially different from that of ordinary outdoor work. The same court ruled in Northwestern Iron Co. *v.* Industrial Commission (p. 277) that a workman warming himself between cars of heated briquettes and suffering injuries from being run into might claim compensation as for an injury arising out of employment.

An award as for an injury arising out of employment was made in a case, City of Milwaukee *v.* Industrial Commission (p. 280), in which the principal of a school was struck in the head by a basketball which ruptured a blood vessel with fatal results; death occurred some seven months after the injury, and the injured man was suffering from arteriosclerosis, but the injury was held to be the proximate cause of the death. That the course of employment continued during an interval in work due to a violent rainstorm was held in Moore *v.* Lehigh Valley Railroad Co. (p. 282), in which a telegraph lineman of the company who had sought refuge under a train of cars standing near was injured by the unexpected movement of the cars. A wagon driver and general assistant in a packing house making a retail delivery on foot at the expiration of his day's work, and falling over an obstruction in the building in which he was making the delivery, was held not to have suffered an injury arising out of his employment, as anyone walking in the same way would have been similarly exposed; it was also held that he was not at the time engaged in a hazardous employment such as his regular duties might have been considered (Newman *v.* Newman, p. 278). A teamster putting up his horse at the close of his day's work was held to be within the act of the same State (New York) in Smith *v.* Price (p. 282); so also was the superintendent of an amusement resort who

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assisted in an attempt to extinguish a fire a short distance from the buildings of his employer, the exposure resulting in pneumonia and death (In re McPhee, p. 281).

Playful assaults or "horseplay" were passed upon in two cases. In De Filippis *v.* Falkenburg (p. 278) the Appellate Division of the Supreme Court of New York held that the loss of an eye from contact with a pair of scissors thrust through a crack in the partition between toilet rooms was not an injury reasonably incidental to the service; while the Supreme Court of New Jersey affirmed an award in favor of a claimant where a workman slipped and fell while dodging a playful attempt to knock off his hat, the fall resulting fatally, but this was reversed on appeal (Hulley *v.* Moosbrugger, p. 279), the court of errors and appeals ruling that the employer was not responsible in such cases.

BENEFITS.

The question of benefits was considered in cases involving both amounts and methods of payment. In McCracken *v.* Missouri Valley Bridge & Iron Co. (p. 208), a lump-sum award to the mother of a deceased employee was contested unsuccessfully before the Supreme Court of Kansas, the court stating vigorously its ground for affirming such an award in the instant case; the method of computing an amount due, and the construction of the act on this point were also discussed. Another case involving the determination of a wage basis is that of Smolenski *v.* Eastern Coal Dock Co. (p. 217), where a man irregularly employed at various rates of wages was held entitled to compensation at the rate at which he was employed at the time of the injury. In Fredenburg *v.* Empire United Railways Co. (p. 210), concurrent awards for multiple injuries were reversed, and the proper method of disposing of such a case indicated. In State ex rel. Kennedy *v.* District Court (p. 212), the Supreme Court of Minnesota reversed an award for separate injuries which made in the aggregate an amount nearly equal to the amount for the total loss of the injured member. An award for impairment of function not measured by impairment of earning capacity was reversed by the Supreme Court of Wisconsin in Northwestern Fuel Co. *v.* Leipus (p. 211). The Supreme Court of Michigan restricted to the period of total disability an award for injury of an eye which diminished the vision between one-third and one-half, there being no loss in wages after return to work following nine weeks' disability (Hirschkorn *v.* Fiege Desk Co., p. 214). Where an injury amounts to the loss of a finger, it should be so compensated, and not disposed of under a general clause permitting a larger award than for the complete loss by amputation, was the finding of the Supreme Court of New York, Appellate Division, in Fineman *v.* Albert Manufacturing

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Co. (p. 212). The Supreme Court of New Jersey held in Feldman *v.* Braunstein (p. 210) that an award must be made on the basis of apparent existing conditions without presuming as to the possible effects of an operation, though if the operation should take place and the condition of the injured person changed, the decree might be modified. In the case Floccher *v.* Fidelity & Deposit Co. of Maryland (p. 214), paralysis resulting from injury so as to render the hand practically useless was held to sustain an award for the loss of a hand, evidence that an operation might improve conditions being so slight as not to make it obligatory on the workman to undergo it. The claim that an award should be limited to the aggregate of individual awards for injuries to fingers was rejected in Rockwell *v.* Lewis (p. 213), where it appeared that the sum of the injuries amounted practically to the loss of the use of the hand, so that the award should be for that loss rather than the smaller total of minor disabilities. The minimum award permissible under the California statute was considered in Massachusetts Bonding & Insurance Co. *v.* Pillsbury (p. 213), the lowest rate mentioned in the statute being 10 per cent, but allowances "intermediate to those fixed" being authorized; an award for 2¾ per cent of total disability was approved in this case; another point involved was the right of the employee to go to his family physician when he objected to the company physician and found another, to whom he was sent, out of town.

In Wood *v.* Camden Iron Works (p. 284), a receiver was held authorized to continue to make payments from the funds for operative and administrative expenses to discharge a claim for compensation existing against the corporation.

DISABILITY.

The New Jersey Court of Errors and Appeals affirmed an award in Maziarski *v.* George A. Ohl & Co. (p. 215), allowing benefits for temporary and permanent disability, computing items of injury to the fingers separately, and increasing the actual amount reached by computation, $1.875, to $5 a week for 30 weeks by reason of a provision of the act fixing the latter sum as a minimum compensation. The distinction between temporary and permanent disability was discussed by the supreme court of the same State in Vishny *v.* Empire Steel & Iron Co. (p. 215), and the proper method of computing benefits for serious injuries to both eyes was indicated. That the findings of a board as to the continuance of disability will not be disturbed even though there was evidence supporting different conclusions as to the termination of disability was held in Spooner *v.* Estate of P. D. Beckwith (p. 286).

Questions of total and partial disability were considered by the Supreme Judicial Court of Massachusetts in a case in which a man

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had returned to work after a period of total disability from injury for which compensation was awarded, and had also received an award for a period of partial incapacity; he was subsequently unable to obtain work on account of his maimed condition, and was held to be entitled to benefits for an indefinite period as for total incapacity, subject to a subsequent right of review (In re Stickley, p. 287). Inability to find work was a factor in another case before the same court (In re Septimo, p. 290), in which, as above, the workman had been employed for a time after his injury; the court ruled that such employment was evidence that the employee was not wholly incapacitated, but was not conclusive, and as he was not able to secure employment, compensation was allowed as for total disability.

An injury destroying the hand of a man who had previously lost one hand was held by the Supreme Court of New York, Appellate Division, to entitle the injured man to an award for permanent total disability in Schwab *v.* Emporium Forestry Co. (p. 288). In State ex rel. Garwin *v.* District Court (p. 289), the Supreme Court of Minnesota held that under the law in that State the loss of the second eye, while producing permanent total disability, should be compensated only as for partial disability; the Michigan law was construed in the same way by the supreme court of that State in Weaver *v.* Maxwell Motor Co. (p. 289).

DEPENDENCY.

The question of dependency was considered in Petrozino *v.* American Mutual Liability Co. (p. 235), the nonresident alien beneficiaries of a workman being held wholly dependent where they were unable to earn their own livelihood, and contributions from other sources were slight and uncertain. In Pinel *v.* Rapid Railway System (p. 235), it was held that a mother to whom no contributions had been made by the deceased employee, and whom he was under no obligation to support until proceedings were brought, was not a dependent under the Michigan statute. In Hammill *v.* Pennsylvania Railroad Co. (p. 260) the sister of a deceased workman was held to be a dependent on a showing that it was his custom to spend from Saturday night until Monday morning at her home, paying her $5 per week.

WILLFUL MISCONDUCT.

Willful misconduct was passed upon by the courts of three States under the laws of which such conduct is a bar to compensation. In Gignac *v.* Studebaker Corporation (p. 291), carelessness in crossing a railway track resulting in injury was characterized as gross negligence, but not constituting willful misconduct under the laws of that State. A similar conclusion was reached in a New Jersey case, Taylor *v.* Seabrook (p. 292), where an employee digging in a cellar

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was injured by falling material. A California court held in Great Western Power Co. *v.* Pillsbury (p. 292) that failure to wear rubber gloves, in disobedience of personal directions repeatedly given, was such "serious and willful misconduct" as to bar a claim for compensation.

PROCEDURE.

In the last-named case above it was held also that the court had power to set aside awards which had been made without warrant in the evidence. An employer was denied the right to appeal in Crockett *v.* State Insurance Fund (p. 286), since the New York law gives the employer no right to appeal when insurance is placed with the State fund, thus furnishing him absolute protection.

EMPLOYERS' LIABILITY INSURANCE.

In Frankfort Marine Accident & Plate Glass Insurance Co. *v.* California Artistic Metal & Wire Co. (p. 312), the right of the insurance company to inspect the books of the metal company in order to ascertain the amount of a sum claimed to be due for additional premiums was upheld on the ground of the existence of a fiduciary relation between the parties, giving grounds for an action in equity. It was held in Little Cahaba Coal Co. *v.* Aetna Life Insurance Co. (p. 313) that an insurance company whose contract limited recovery on a single judgment to $5,000 could not be made to pay additional costs in excess of that sum occasioned by an appeal for which the action of the insurance company was responsible.

The insurance contract usually excludes liabilities for employees employed unlawfully. The statute of Michigan forbids the employment of a female under the age of 21 in an occupation dangerous to life or limb. It was held in Great Lakes Laundry Co. *v.* Aetna Life Insurance Co. (p. 122) that a machine in the use of which no accident had occurred for 10 years was not a dangerous machine within the meaning of the act, so that the insurance company was liable for the loss. In Oxford Coal Co. *v.* Fidelity & Casualty Co. of New York (p. 121), the insuring company was successful in resisting a demand for payment on a policy where the insured person was a minor under 18 years employed as engineer on a private coal road, the court holding that this was a railroad within the meaning of the act forbidding employment of persons under 18 in such work.

RELIEF ASSOCIATIONS.

Two cases were passed upon by the Supreme Court of Indiana in which the status of railway relief departments was considered. In Baltimore & Ohio Railroad Co. *v.* Miller (p. 181), payments to a member of a relief department were refused because he had recovered

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in a suit for damages, whereupon he sued for further benefits in accordance with the contract with the department; it was held that the Federal liability statute had invalidated the contract, so that it was void in all respects. In the other case a contributor to a relief fund which had been maintained in violation of a State statute was permitted to recover from that fund the amounts of his contributions thereto, he having left the employment of the company (Baltimore & Ohio Southwestern Railroad Co. *v.* Hagan, p. 182).

EMPLOYMENT OFFICES.

An unusual provision is contained in an initiative measure adopted by the voters of the State of Washington in November, 1914, in that the taking of fees by employment agencies from persons seeking employment is forbidden; this act was held constitutional as a matter of public policy in Wiseman *v.* Tanner (p. 125). The Supreme Court of Michigan upheld the law of that State providing graduated license fees according to the population of the cities, and authorizing the commissioner of labor to revoke licenses for violations of law (People *v.* Brazee, p. 123). The Washington statute above noted was held in Huntworth *v.* Tanner (p. 123) not to apply to teachers' agencies.

LABOR ORGANIZATIONS.

MEMBERSHIP.

Associations of employers and of employees are on the same footing as voluntary associations seeking to secure by cooperation such conditions as the members may agree upon. That membership in such an employers' association is of value was held in Grassi Bros. *v.* O'Rourke (p. 304). This value the courts will recognize, and in the case in hand it was held that the expulsion was illegal, and restoration to membership was directed, damages to be determined by an agreed method. In Schouten *v.* Alpine (p. 323), the Court of Appeals of New York recognized the principle indicated above, but reversed a verdict and judgment awarding restoration of membership and damages on account of errors in the procedure, and lack of evidence to sustain the liability of certain of the parties charged. In People ex rel. Solomon *v.* Brotherhood of Painters, etc. (p. 169), restitution of membership was granted and damages allowed for the illegal expulsion of a workman from an association incorporated outside the State, the court holding that this fact did not place it outside the powers of the State courts.

Efforts of State legislatures to secure employees in their rights to membership in labor organizations by forbidding their discharge for being or becoming members were declared unavailing as uncon-

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stitutional in Jackson *v.* Berger (p. 169) and Bemis *v.* State (p. 168), in which the courts of Ohio and Oklahoma, respectively, accepted the decision of the Supreme Court of the United States in the Coppage case as controlling.

LIABILITY OF MEMBERS, ETC.

An echo of the noted Danbury Hatters' case is found in Loewe *v.* Union Savings Bank of Danbury (p. 167), in which proceedings for the recovery of judgment against members of labor organizations were being considered, the present case involving the protection of the rights of the banks in which members of unions had made deposits. The liability of members for torts of other members was passed upon in Hill *v.* Eagle Glass & Manufacturing Co. (p. 334), the court holding that in the instant case there was no such authorization to commit the alleged illegal acts as would create any common liability. In Tinkler *v.* Powell (p. 336), the liability of the treasurer of a union was discussed, and the evidence in the case found not sufficient to support an action against him.

COLLECTIVE AND CLOSED-SHOP AGREEMENTS.

The matter of collective agreements was under consideration in two cases. In Powers *v.* Journeymen Bricklayers' Union (p. 325), the Supreme Court of Tennessee affirmed the validity of such an agreement and held a union obligated to reimburse an employer with whom it had entered into such an agreement and had failed to notify him of a reduction in the union rate of wages that he must pay. In Underwood *v.* Texas & Pacific Ry. Co. (p. 156), a rival union unsuccessfully attacked an agreement between the company named and another union, the contract being upheld as not a monopoly and not otherwise against public policy. In this connection may be noted the case Marinelli *v.* United Booking Offices of America (p. 56), in which the plaintiff, who conducted an employment office for theatrical performers, alleged an unlawful combination under the Sherman Antitrust Act by a number of theater owners; a blacklist of performers and of theaters that did not conform to certain prescribed regulations of the combination was a part of the scheme, the facts being found to bring the situation within the scope of the Sherman Act. That a closed-shop agreement leading to the discharge of a workman not a member of the union did not make the union liable in damages to a discharged workman was held in Cusumano *v.* Schlessinger (p. 333). The situation in which an employer found himself as party to a closed-shop agreement after having canceled a contract with certain members of a union is discussed in Rhodes Bros. Co. *v.* Musicians' Protective Union (p. 328); other members of

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the union were forbidden to serve, and the employer sought an injunction to prevent interference with efforts to secure other members, the injunctive order granted by a lower court being reversed by the Supreme Court of Rhode Island.

STRIKES AND PICKETING.

The legality of strikes and the bounds of union activities in connection therewith are discussed in Hardie-Tynes Manufacturing Co. *v.* Cruse (p. 158), in which the Supreme Court of Alabama construed and applied a State law forbidding picketing, and sustained an order enjoining against interference with the company's business by striking employees. The question of picketing was also involved in the case of Stoner *v.* Robert (p. 331), in which the Supreme Court of the District of Columbia refused to grant an injunction against peaceful picketing of saloons which continued to sell beer manufactured by breweries against which a strike and boycott had been declared.

Growing out of a strike, and involving an offense by persons not immediately engaged therein, was the situation in State *v.* Payne (p. 188), in which a miner from another State who had engaged in strike activities was kidnaped and deported without legal authority, the Supreme Court of Minnesota affirming a judgment of conviction against the guilty parties.

INJUNCTIONS.

The cessation of objectionable acts was held in Commercial Binding & Printing Co. *v.* Tacoma Typographical Union (p. 332) to be sufficient reason for declining to issue an injunction against strikers who had previously been guilty of threats and assaults.

The Court of Chancery of New Jersey granted an injunction to prevent the consummation of a boycott against a company whose employees had struck, their places however having been filled and the business continued, the view being taken that there was a malicious conspiracy to do injury, and not for the benefit of the unions or their policies (A. Fink & Son *v.* Butchers' Union, p. 336). In Auburn Draying Co. *v.* Wardell (p. 161), the Supreme Court of New York took similar action in a case in which secondary boycotts were attempted, in an undertaking to compel an employer to coerce his workmen into joining a union. A similar conclusion is reached in Garside *v.* Hollywood (p. 166), the statutes of New York on the subject being referred to in this case as in the last preceding case. A temporary injunction was continued by final judgment in Bossert *v.* Dhuy (p. 337), where a union strike against a certain class of products was directed against an individual firm with the idea of a piecemeal achievement of the purpose of the strike.

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CONTEMPTS.

The United States Circuit Court of Appeals had before it two cases of contempt arising out of conflicts between labor and the mine operators of West Virginia. In Oates *v.* United States (p. 314) the judgment of contempt was reversed, and a new trial ordered on account of errors in procedure and in the admission of certain evidence in the court below; while in Schwartz *v.* United States (p. 315), the judgment was affirmed, though it was admitted that the injunctive order would have been modified if it had been properly before the court for that purpose.

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TEXT, ETC., OF DECISIONS OF COURTS AFFECTING LABOR.

DECISIONS UNDER STATUTE LAW.

ALIENS—PROHIBITION OF EMPLOYMENT ON PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—*Heim et al. v. McCall et al., Supreme Court of the United States (Nov. 29, 1915), 36 Supreme Court Reporter, page 78.*—A bill in equity was brought to secure an injunction restraining the Public Service Commission of the State of New York from declaring certain contracts for the construction of portions of the subway system of New York City void and forfeited for violation of provisions inserted in the contracts in pursuance of chapter 31, section 14 of the Consolidated Laws of the State, which has since been amended so as to make the employment of citizens only a preference, and to allow the employment of aliens when citizens are not available. The law as involved in the present case was prohibitory as to the employment of aliens. The injunction was sought on the ground that the statute was unconstitutional, but the law was held to be constitutional by the trial court; its judgment was reversed by the appellate division of the Supreme Court of New York, and the latter decision reversed by the court of appeals. The result of the last decision was to sustain the constitutionality of the law, and the judgment was affirmed by the Supreme Court of the United States. Mr. Justice McKenna delivered the opinion of this court, and said in part:

The basic principle of the decision of the court of appeals was that the State is a recognized unit, and those who are not citizens of it are not members of it. Thus recognized it is a body corporate, and, "like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through the agencies of government. These agencies, when contracting for the State, or expending the State's moneys, are trustees for the people of the State. (Illinois *v.* Illinois Central Railroad Co., 146 U. S. 387, 13 Sup. Ct. 110.) It is the people, i. e., the members of the State, who are contracting or expending their own moneys through agencies of their own creation." (People *v.* Crane, 214 N. Y. 160, 108 N. E. 427.) [See p. 52.] And it was hence decided that in the control of such agencies and the expenditure of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the National or the State Constitution. "The statute is nothing more," said Chief Judge Bartlett, concurring with the judgment of the court, "in effect than a resolve by an employer as to the character of his employees."

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Notwithstanding the simplicity of the determining principle pronounced by the court of appeals, its decision is attacked in many and voluminous briefs.

The fundamental proposition of plaintiff in error Heim is that, assuming that section 14 applies to the subway construction contracts in question, it (the law) contravenes the provisions of the Constitution of the United States (*a*) in that it violates the corporate rights of the city and the rights of its residents and taxpayers, (*b*) the rights of the various subway contractors with the city, (*c*) the rights of aliens and citizens of other States resident in New York, and (*d*) it is in violation of treaty rights.

Plaintiffs in error Cranford Co. and Flinn-O'Rourke Co. urged the single ground of the unconstitutionality of the law and its violation of treaties.

To sustain the charge of unconstitutionality the fourteenth amendment is adduced and the specification is that the law abridges the privileges and immunities of the contractors and those of their alien employees in depriving them of the right of contracting for labor, and that the State of New York, by enacting and enforcing the law, deprives employers and employees of liberty and property without due process of law, and denies to both the equal protection of the law.

The treaty that it is urged to be violated is that with Italy, which, it is contended, "put aliens within the State of New York upon an equality with the citizens of the State with respect to the right to labor upon public works"; and that Congress has fortified the treaty by section 1977 of the Revised Statutes (Comp. Stat. 1913, sec. 3925)—a part of the civil-rights legislation.

The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them were at one time formidable in discussion and decision. We can now answer them by authority. They were considered in Atkin *v.* Kansas (191 U. S. 207, 24 Sup. Ct. 124 [Bul. No. 50, p. 177]). It was there declared, and it was the principle of decision, 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." And it was said: "No court has authority to review its action in this respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

This was the principle declared and applied by the court of appeals in the decision of the present case. Does the instance of the case justify the application of the principle? In all particulars except one the case was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases—the right of the individual employer and employee to contract as they shall see fit; the relation of the State to the matter regulated; that is, the public character of the work.

The power of regulation was decided to exist whether a State undertook a public work itself or whether it "invested one of its

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governmental agencies with power to care" for the work, which, it was said, "whether done by the State directly or by one of its instrumentalities," was "of a public, not private, character." (See also Ellis *v.* United States, 206 U. S. 246, 27 Sup. Ct. 600 [Bul. No. 71, p. 361].) The contentions of plaintiffs in error, therefore, which are based on the fourteenth amendment, can not be sustained.

Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with Italy is the one especially applicable, for the aliens employed are subjects of the King of Italy. By that treaty (1871) it is provided:

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established. The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Construing the provision of 1871, the court of appeals decided that it "does not limit the power of the State, as a proprietor, to control the construction of its own works and the distribution of its own moneys." The conclusion is inevitable, we think, from the principles we have announced.

From these premises we conclude that the labor law of New York and its threatened enforcement do not violate the fourteenth amendment or the rights of the plaintiffs in error thereunder, nor under the provisions of the treaty with Italy.

ALIENS—PROHIBITION OF EMPLOYMENT ON PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—*People v. Crane, Court of Appeals of New York (Feb. 25, 1915), 108 Northeastern Reporter, page 427.*—This case involves the validity of the same statute discussed in the foregoing case. Crane had been convicted of employing aliens in work on a catch basin connected with the sewer system of the Borough of Manhattan, which conviction had been reversed by the appellate division of the supreme court on the ground that the law in question was unconstitutional, but the court of appeals reversed this decision, which view was also taken by the Supreme Court of the United States. (This case, 36 Sup. Ct. 85, and Heim *v.* McCall, above.)

The principal arguments in favor of the law are stated in the opinion of the Supreme Court, but incidental ones, noted by the New York Court of Appeals, speaking by Judge Cardozo, may be briefly quoted from:

The power of a State to discriminate between citizens and aliens in the distribution of its own resources is sanctioned alike by decisions of the courts and by long-continued practice. Neither aliens

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nor the citizens of other States are invested by the constitution with any interest in the common property of the people of this State. It has been held, therefore, that a State may deny to aliens, and even to citizens of another State, the right to plant oysters or to fish in public waters. [Cases cited.] It may restrict to its own citizens the enjoyment of its game. [Cases cited.] It may discriminate between citizens and aliens in its charitable institutions, or in other measures for the relief of paupers. It may make the same discrimination in the distribution of its public lands; its mines; its forests; or other natural resources. It may deny to aliens the right to hold or inherit real estate, except where the right has been secured by treaty. The principle that justifies these discriminations is that the common property of the State belongs to the people of the State, and hence that, in any distribution of that property, the citizen may be preferred.

To defeat this law it must, therefore, be held that the constitution gives to the State a narrower liberty of choice in the expenditure of its own moneys than in the use or distribution of its other resources. I can find no justification for the supposed distinction. The construction of public works involves the expenditure of public moneys. To better the condition of its own citizens, and, it may be, to prevent pauperism among them, the legislature has declared that the moneys of the State shall go to the people of the State. The equal protection of the laws is due to aliens as to citizens. [Cases cited.] But equal protection does not mean that those who have no interest in the common property of the State must share in that property on the same terms as those who have an interest.

The legislature is now empowered by the constitution to fix the wages and salaries of all employees upon the public works. The authority embraces the direct increase of expense by increasing salaries beyond the minimum fixed by competition. It must also embrace the indirect increase of expense by regulations of employment tending to diminish competition.

This statute must be obeyed unless it is in conflict with some command of the Constitution, either of the State or of the Nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature. Our duty is done when we ascertain that it has kept within its power.

If doubt exists whether there is a conflict between the statute and the constitution, the statute must prevail. Mischief and hardship, it is said, will follow the enforcement of this law. If that is so, we can not help it. To correct these evils, if they shall develop, will be the province of legislation. The statute does not withhold from the alien the rights secured to him by the constitution; and we must enforce it as the law.

The judgment of the appellate division should be reversed, and the judgment of conviction affirmed.

ALIENS—RESTRICTIONS ON EMPLOYMENT—CONSTITUTIONALITY OF STATUTE—*Truax v. Raich, Supreme Court of the United States (Nov. 1, 1915), 36 Supreme Court Reporter, page 7.*—Mike Raich

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had procured in the District Court of the United States for the District of Arizona an injunction to prevent the enforcement of the anti-alien law of Arizona. This was an initiated act, forbidding any employer of more than five workers to employ less than 80 per cent qualified electors or native-born citizens of the United States. From the order of the court below (219 Fed. 273), this appeal was taken, with the result that the act was held unconstitutional, and the order affirmed.

Raich was an unnaturalized alien, employed by Truax with eight others, seven of whom were neither native born nor naturalized. Threatened with loss of employment if the law in question was enforced, and averring that there was no adequate remedy at law, Raich began equity proceedings, with the results indicated.

The allegations of the bill were not controverted. The defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties, and the plaintiff was not entitled to sue for the relief asked.

The opinion of the Supreme Court first removed the first objection to the bill, citing numerous cases. It is also held that a court of equity may restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is necessary to safeguard rights of property; that the right of employment is such a right; and that neither the fact that the employment is at will, nor that the employee rather than the employer is the complainant, is material. Coming to the question of the constitutionality of the act, and affirming the order granting an injunction, Mr. Justice Hughes, who delivered the opinion of the court, said:

The question, then, is whether the act assailed is repugnant to the fourteenth amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. Being lawfully an inhabitant of Arizona, the complainant is entitled under the fourteenth amendment to the equal protection of its laws. The description, "any person within its jurisdiction," as it has frequently been held, includes aliens. "These provisions," said the court in Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064 (referring to the due process and equal protection clauses of the amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." [Other cases cited.] The discrimination defined by the act does not pertain to the regulation or distribution of the

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public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The purpose of an act must be found in its natural operation and effect, and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as "an act to protect the citizens of the United States in their employment against noncitizens of the United States, in Arizona."

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. [Cases cited.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they can not live where they can not work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labor;" that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employees. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it can not be denied that the authority exists to make its measures to that end effective. [Cases cited.] The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law.

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ANTITRUST ACT — MONOPOLIES — RESTRAINT OF TRADE — BLACKLIST—THEATRICAL PERFORMERS—*Marinelli v. United Booking Offices of America et al., United States District Court, Southern District, New York (July 31, 1914), 227 Federal Reporter, page 165.*—H. B. Marinelli (Ltd.) brought action at law for damages against the company named and a number of other defendants. The latter were alleged to have destroyed the plaintiff's business by illegal combination in violation of the Sherman Antitrust Act. The individual defendants were owners of many vaudeville theaters in the United States, roughly arranged in two circuits, an eastern circuit, which, together with other theaters, is known as the Keith circuit; and a western circuit, which together with theaters owned by other parties comprises what is known as the Orpheum circuit. The performers in these theaters remain in a theater not more than one week, and are usually booked under a contract which requires them to pass from one theater and from one State to another, taking with them paraphernalia and stage properties. The two corporations named as defendants were booking agents for the two circuits, securing performers to travel about the whole or part of each circuit, and, in general, acting as agents for the managers or owners.

The plaintiff, which maintained offices in London, Paris, and Berlin, as well as in New York, acted as a sort of clearing house between performers and managers and as agents for the former in securing contracts and in arranging for their entrance into the country, the transportation of their apparatus, etc.

It was alleged that the defendants entered into a combination or conspiracy in restraint of their own business. The eastern theater owners were not to employ anyone not booked through the eastern booking corporation, which was not to act for any theater which employed another booking agent. They were to procure the assent of the other theaters in the Keith circuit to the plan. All were to blacklist performers who played outside the two circuits, and also blacklist theaters that disregarded the blacklist of players. No one was to be employed who had as a representative any person who obtained employment for a performer outside the circuits, and theaters who employed such performers were put under the ban. Such representatives also were blacklisted. Similar allegations were made as to the western circuit, and it was further alleged that the defendants blacklisted the plaintiff, sent out notices to that effect, and destroyed his business.

The court went at length into the question whether the interstate commerce features of the defendants' business were sufficiently prominent, and the results of their acts affected that commerce to such a degree as to bring the matter within the scope of the Sherman Act; the decision was that the act applied.

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The court also held that the combination was one in restraint of trade, overruled a demurrer to the complaint, and required that an answer be filed.

ARMED GUARDS—STATUS—LIABILITY OF EMPLOYERS FOR ACTS—*Ruffner v. Jamison Coal & Coke Co., Supreme Court of Pennsylvania (Jan. 2, 1915), Atlantic Reporter, page 1075.*—The plaintiff in this case alleged that assault and battery had been committed upon him on May 9, 1911, by certain policemen or peace officers employed by the company named. These officers were appointed by the court of quarter sessions on petition of 25 citizens, under chapter 156 of the Public Laws of 1889, but, there being no provision for their pay in the act, they were paid by the coal company. The plaintiff therefore claimed that the wrongful acts of which he complained were done by the policemen not in their public capacity, but as employees of the company, and that it was liable for such acts. Judge Moschzisker, in delivering the opinion of the supreme court, adopted the views of the court of common pleas of Westmoreland County, rejecting the contentions of the plaintiff, and quoted largely from the opinion of Judge McConnell of that court. The following is a part of this quotation:

The testimony of G. U. Shaw, relied on to show that the deputies were not such officers, but were the mere servants of the defendant, does not sustain that contention; but is to the effect that what was done was done in their capacity as officers, and not otherwise. * * * Of course, the defendant company would be interested in the movements of the officers, and the superintendent of the company would frequently talk to Shaw and to the other officers, about conditions in the trouble zone; but, according to Shaw, no attempt was made by the superintendent to control the officers in the discharge of what they conceived to be official duties. * * * The "deputies" * * * were not performing services or supposed services on the private property of the defendant, but on the public highway, where the authority of policemen is usually exercised, and where private interests yield the fullest submission to public control. It may be that they mistakenly believed they as policemen were required to prevent marches of a kind forbidden by some injunction (not put in evidence), or it may be that they thought (mistakenly, also) that, in the interest of peace and good order, they as policemen should warn persons about to conduct marches * * * and apprise them of the terms of the injunction, in order that it be not violated. Their mistaken ideas about what they should do in furtherance of supposed official obligations would not make their acts to be acts of (private) servants. * * * Their acts are not to be considered the acts of officers as long as they keep within the law, and become the acts of (private) servants whenever they transcend those limits. The acts done are referable to one of these relations—and not to the other—and undoubtedly, taking all the evidence just as it

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was given, they supposed (in apprising marchers of the injunction) they were at the time exercising official functions. That being the case, their conduct (in that respect) is to be measured by the standards of official duty. * * * There exists no occasion or warrant for deducing from the facts the implication of a contract (of private employment), especially when to do so is to negative the official capacity so clearly and circumstantially proven. * * *

Judge Moschzisker then concludes:

In substance, the foregoing presents a correct view of all the material matters before us for consideration; and we are not convinced of reversible error in the disposition made of the case by the learned court below. Of course, one in the position of a public police officer might at the same time act as a private servant, and, if a wrong be committed while acting in the latter capacity, the principle of respondeat superior applies; further, when there is a fair dispute on the facts, the question of the exact capacity occupied by the offender, at the time of the injury, is for the jury. But, after going over the proofs and considering all the authorities cited, we can not say the trial judge erred in holding the evidence at bar insufficient in law to sustain a finding that the deputy constables in the present case were acting as the private servants of the defendant company at the time of the alleged torts here complained of.

CONTRACT OF EMPLOYMENT—FRAUDULENT BREACH—CONSTITUTIONALITY OF STATUTE—*Thomas v. State, Court of Appeals of Alabama (Oct. 4, 1915), 69 Southern Reporter, page 908.*—James Thomas was convicted of entering, with intent to defraud his employer, into a written contract for the performance of services, in violation of an Alabama statute of 1911. It was alleged that he obtained $60 from the employer in money, and failed to perform his part of the agreement. As to the constitutionality of the act, which was brought in question, Judge Pelham, who delivered the opinion, said:

The object and purpose of the act, and the essence of its provisions, is to punish those who obtain money, or property, by fraudulent misrepresentation or false pretense, and is not similar, and has not the corresponding vice of section 6846 of the Code of 1907, of permitting involuntary servitude in violation of the Federal Constitution and statutes prohibiting peonage, held to be invalid by the United States Supreme Court. (U. S. *v.* Reynolds, 235 U. S. 133, 35 Sup. Ct. 86 [see p. 177].)

It was held that although the respondent was a minor, and not capable of making a binding contract, he was nevertheless guilty of the crime charged, and the judgment was affirmed, the following being a quotation from the opinion on this point:

The question is not one of being of the legal age to enter into a contract, but of possessing the requisite guilty knowledge of the wrongfulness of the act charged to authorize a conviction of crime,

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and every person over 14 years of age charged with crime in this State is presumed to be responsible for his acts.

CONTRACT OF EMPLOYMENT—FRAUDULENT BREACH—DEFENSES—EVIDENCE—*Paschal v. State, Court of Appeals of Georgia (May 17, 1915), 85 Southeastern Reporter, page 358.*—Harvey Paschal was convicted in the superior court of Lincoln County of violation of the Georgia labor contract act, in receiving an advance from one Walton on account of labor to be performed, and failing to perform the services contracted for. It was shown that at the time of the advance from Walton, Harvey was under contract to one Butler to labor for the same period for which he made the new contract, and the trial judge was requested, and refused, to instruct that this was an excuse for the failure to perform the contract with Walton. The court of appeals held that such instruction had been properly refused, Judge Russell, who delivered the opinion, saying on this point:

The fact that one is already under contract to perform services for another will not negative the presumption of fraudulent intent in case he obtains advances from a third person upon a promise to perform services for the latter for a period of time wholly or partially concurrent with that embraced in the contract previously entered into by him, nor afford such an excuse, within the contemplation of section 716 of the Penal Code, as would relieve one accused of a violation of section 715 from performing the second contract. So far from excusing one who is already under contract to perform services for another from the imputation of a criminal fraudulent intent, the making of a second contract would tend to magnify and impress the presumption that he intended to defraud; and the gist of the offense penalized by the labor contract act is the intent to defraud.

The judgment of conviction was reversed, however, because of two other matters. The statute provides that a return of the money advanced, with interest, at the time the labor is to be performed, is an excuse. The court held that this special provision is not subject to the general rule of law as to tenders, which requires an offer of the exact amount due; and as it was in evidence that the accused had made a tender of a general amount, "what he owed him," to Walton, there was a ground for reversal. The other had to do with an instruction to the jury in the trial court, which was calculated to give the impression that "satisfactory proof of the contract made by the accused, the procuring thereon of money or other thing of value, the failure to perform the services agreed to be performed, or failure to return the money with interest, without good and sufficient cause, resulting in loss and damage to the hirer," made it absolutely necessary to convict the accused; whereas the statute provides only that such proof "constitutes presumptive evidence" of the intent to defraud which is essential to conviction.

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EMPLOYER AND EMPLOYEE—RIGHT TO DISCHARGE WITHOUT HEARING—CONSTITUTIONALITY OF STATUTE—*In re Opinion of the Justices, Supreme Judicial Court of Massachusetts (May 3, 1915), 108 Northeastern Reporter, page 807.*—The Senate of Massachusetts requested the opinion of the justices of the supreme judicial court of that Commonwealth as to the constitutionality of a proposed law providing that no railroad employee should be disciplined or discharged without opportunity for a hearing in the presence of the person giving information concerning the conduct of such employee.

An answer signed by five justices holding the proposed statute unconstitutional, is, omitting their statement of the substance of the proposed statute, as follows:

As a corporation can have no first-hand observation and can acquire information as to incompetency, inefficiency or wrongful conduct of its employees only through some person, the proposed statute means that such a corporation never can discipline or discharge any of its employees for misconduct, no matter how flagrant, except on his own confession, without giving him a hearing in the presence of the person affording the information, regardless of the fact whether that person be an employee or an entire stranger. Although the title of the bill refers to the "use of detectives," there is no such limitation in the body of the bill. It applies broadly to all persons who may furnish information, whether pure volunteers or others, even though it be wholly beyond the power of the railroad to produce the person furnishing the information, and even though that person may be a stranger to the railroad and decline for any reason, or be unable to confront the employee. The questions have been considered, however, upon the broad principles involved in the proposed bill, and not upon its details.

The fourteenth amendment to the Federal Constitution prohibits the several States from depriving "any person of life, liberty or property, without due process of law." The Supreme Court of the United States is the final authority upon the scope and meaning of these words. That court has said that:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the Federal Constitution. * * * The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." (Lochner *v.* New York, 198 U. S. 45, 53, 25 Sup. Ct. 539 [Bul. No. 59, p. 340].)

Citations were also made from Adair *v.* United States, 208 U. S. 161, 28 Sup. Ct. 277 (Bul. No. 75, p. 634) and Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (Bul. No. 169, p. 147) to the effect that the liberty of making and terminating contracts by either party thereto can not be interfered with.

Continuing, the court said:

It seems to us impossible to say that the right of an employer to discharge an employee because of information affecting his conduct

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in respect of efficiency, honesty, capacity, or in any other particular touching his general usefulness, without first providing a hearing, stands on a different footing or is less under the shield of the Constitution than the right held to be secured in the Adair and Coppage cases. Our own constitution contains in several clauses similar guaranties of the right to acquire, possess and protect property, which doubtless have substantially the same meaning in this respect as has the fourteenth amendment to the Federal Constitution. It has been held that the right to acquire, possess and protect property secured by our constitution "includes the right to make reasonable contracts, which shall be under the protection of the law. (Commonwealth *v.* Perry, 155 Mass. 117, 28 N. E. 1126.) In the absence of a contract, conspiracy, or other unlawful act, the right of the individual employee to leave the service of a railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employee for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employee, as this statute in substance does, and to require him also as a prerequisite to the exercise of his right, to enable the employee to make a statement in the presence of someone else—a thing which may be beyond the power of the employer. His freedom of contract would be impaired to an unwarrantable degree by the enactment of the proposed statute.

The proposed bill has no reference to the safety of the traveling public. It applies only to one kind of common carrier and not to others. It imposes a burden upon railroads from which all other common carriers and employers of labor are free. It singles out employees of railroads and confers upon them immunities and advantages enjoyed by no others who work for individuals and corporations, in a particular which has no relation to the kind of employment engaged in by them. In both respects it tends to destroy equality. It creates of railroad employees a specially privileged class, and subjects railroads, as to a matter having no special relation to their business as distinguished from other kinds of business, to obstacles and burdens from which other employers are free. There is strong ground for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter of having no particular relation to the management of railroads would be arbitrary and hence unwarrantable under the Constitution.

The proposed enactment was therefore held unconstitutional—a conclusion in which the two remaining justices concurred, without expressing an opinion on other portions of the argument, which they held to be not necessary to consider in arriving at the conclusions reached.

EMPLOYER AND EMPLOYEE—STATEMENT OF CAUSE OF DISCHARGE—BLACKLISTING—CONSTITUTIONALITY OF STATUTE—*St. Louis Southwestern Railway Co. v. Griffin, Supreme Court of Texas (Dec. 16, 1914), 171 Southwestern Reporter, page 703.*—Action was brought

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by Thomas A. Griffin against the company named for refusal to furnish a true statement of the cause of his discharge from its employment, as required by chapter 89, Acts of 1909. Griffin was successful in the district court of Dallas County, and the judgment was affirmed in the court of civil appeals (154 S. W. 583, see Bul. No. 152, p. 37). On the present appeal by the company, the judgment of the courts below was reversed, the statute being declared unconstitutional.

Judge Brown, who delivered the opinion of the court, after stating the facts, said:

There is no conflict in the evidence to the fact of the employment and discharge of Griffin. The question presented to this court is the validity of a statute enacted by the legislature, as stated above.

Judge Brown then quoted from the act, and continuing said:

The act gives no right of action to the employee for failure to furnish "the true statement," but provides that the State may sue for and recover a penalty of $1,000 for each failure to comply with the law.

The citizen has the liberty of contract as a natural right which is beyond the power of the Government to take from him. The liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed. When Griffin entered the service of the railroad company for an indefinite time, the law reserved to him the right to quit the service at any time without cause or notice to the employer. The railroad company had the corresponding right to discharge him at any time without cause or notice. The rights of the parties were mutual.

If the servant could quit without notice and the master could discharge him at will without notice, the effect of the statute in question would be to preserve the servant's unqualified right to leave the service without cause or notice, but to deny to the corporation the corresponding right to discharge without cause or notice.

The requirement that the corporation give to the discharged employee, on his demand, a statement of the "true cause" for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else, how could the "true cause" be given. The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of its liberty of contract and a denial of the equal protection of the law, in violation of the provision of the fourteenth amendment to the Constitution of the United States:

"Nor shall the State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

But the statute did not stop at the destruction of the corporation's right to discharge the employee without cause, but provided that in case the statement of cause should be refused, or if the cause stated was not the "true cause," the State might recover from the corporation a penalty of $1,000.

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But the legislature did not stop with that provision, for under the construction placed on the law by the court of civil appeals the discharged employee could recover damages by proving that the cause stated was not true. The proof in this case was that the person who discharged Griffin acted upon the report of another who had oversight of Griffin's work, and there was no controversy that he acted upon that report, but Griffin was permitted to prove that he was capable and did good work, which denied to the employer the right to determine the efficiency of the servant.

In St. Louis Southwestern Railway Co. of Texas *v.* Hixon (104 Tex. 267, 137 S. W. 343 [Bul. No. 96, p. 779]) this court held that the law required a true statement of the fact which operated upon the mind of the officer or agent who discharged the employee, but did not require that the fact stated must have been true. Under this most favorable construction, the law is no less in violation of the constitutional right of equal protection of the law as secured by the fourteenth amendment to the Constitution of the United States.

The eighth section of article 1 of the constitution of this State is in this comprehensive and clear language:

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

The liberty to write or speak includes the corresponding right to be silent, and also the liberty to decline to write. (Railway Co. *v.* Brown, 80 Kans. 312, 102 Pac. 459 [Bul. No. 84, p. 416]; Wallace *v.* Railway Co., 94 Ga. 732, 22 S. E. 579 [Bul. No. 2, p. 201]). To say that one can be compelled at the instance of another party to do what he has the constitutional liberty to do or not is a contradiction that is not susceptible of reconciliation. In Wallace *v.* Railway Co., cited above, the Georgia court tersely and clearly covers the entire ground thus:

"A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this State by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important or less sacred."

We find no authority to the contrary, and argument could not add force to the reasoning of those courts. The cases cited are sufficient to require this court to declare the law in question void, but we believe that we should point out other grounds which demand the judgment of this court in support of our conclusion.

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Various points of objection were then enumerated, and were disposed of as follows:

The second, third, fourth, and fifth grounds of liability under the statute, each is in violation of the natural right to speak or be silent, or the liberty of contract secured by the constitution of this State and of the United States. Of the great number of cases which have settled these questions adversely to the provisions of the act of the Texas Legislature, we have cited sufficiently, because there is no conflict on the question.

The second and fourth grounds, as above stated, are most remarkable, for they invest the discharged employee with inquisitorial authority as has not been intrusted to any officer, and would not be enforced if granted to any officer, except it be in a legal proceeding.

There being no suit pending in court, a private person in his own interest is empowered to demand, of a corporation which has discharged him, to disclose to him that corporation's private correspondence, even the conversation which may have occurred between its agents and officers and other people. Originality in devising these provisions surely must be accorded to the Legislature of Texas. We have found nothing like them elsewhere. In the conflict between labor and capital, the legislature has the limitation of its authority in the Constitution of the United States and of the State, and the courts have no authority, save to keep both parties within the limits of their constitutional rights.

Beyond controversy, the act of the legislature is void, unless it can be sustained as an exercise of the police power.

This phase of the question is then discussed, and the opinion concludes:

There can be no pretense that the act under examination deals with "the real needs of the people in their health, safety, comfort, or convenience."

To add cases as authority would be useless, for this is a fundamental principle of free government and gains no force by the repetition of it by different courts. The subject of legislation in this statute and its various provisions, as stated above, are purely personal as between the employee and the corporation, and do not directly affect the public, in health, safety, comfort, convenience, or otherwise.

The act is in violation of the constitution of this State and of the United States, and is void.

It is ordered that the judgment of the district court and of the court of civil appeals be, and the same are, reversed; and it is ordered that judgment be entered for the plaintiff in error.

EMPLOYER AND EMPLOYEE—STATEMENT OF CAUSE OF DISCHARGE—BLACKLIST—LIBEL—*Dick v. Northern Pacific Railway Co., Supreme Court of Washington (June 30, 1915), 150 Pacific Reporter, page 8.*—J. R. Dick brought action against the company named for damages by reason of alleged unlawful publication by the company of an

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untruthful statement of the cause of the plaintiff's discharge from employment as engineer which prevented the plaintiff from pursuing his chosen occupation. The first and second paragraphs of the complaint, after amendment, allege the corporate capacity of the defendant and the fact that the plaintiff was, on October 10, 1907, a capable locomotive engineer of good standing and reputation in the defendant's employ. The third paragraph alleges that on the said day the defendant railway company, through its officers and agents, with intent to injure the plaintiff and for the purpose of preventing him from seeking or securing other employment and of ruining him in his profession as locomotive engineer, caused to be printed and published the following, which they are continuing to publish and circulate, and which is false, fraudulent, and defamatory:

LIVINGSTON, MONT., *October 10, 1907.*

Discharged Engineer Dick, Mr. J. R. Dick, Eng'r, Livingston.

DEAR SIR: This is to advise you that you are hereby discharged from company's service for intimidating company's employees at Whitehall on the 8th instant while in the performance of their duties.

Yours truly,

[Signed] ——— NELSON,
Master Mechanic.

The fourth paragraph refers to the custom of railroad companies in the United States and Canada to require references from former employees before giving exployment, and states that for that reason a person once discharged, for no matter what reason, from the employment of one company can not secure work with any other. The fifth and last paragraph states that the plaintiff has continuously since his discharge attempted unsuccessfully to procure employment as an engineer, and that consequently he has been obliged to give up his chosen occupation; and alleges damages in the sum of $50,000.

A demurrer to this complaint on the grounds that it failed to state sufficient facts, and that the action was not commenced within the time limited by law, was sustained, and the action dismissed, whereupon the plaintiff appealed. The supreme court reversed the decision, and remanded the case for further proceedings. Judge Ellis wrote the opinion, which declared that if the complaint could be sustained as stating any cause of action it must be either "(1) An action on the case for a wrongful interference with the plaintiff's pursuit of an occupation or vocation, in which case specific damages as resulting from the defendant's conduct must be alleged; or (2) an action for libel in which it must appear that the letter which it is alleged was published by the defendant contained language actionable per se, in which case no special damages as resulting therefrom need be alleged."

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Under (1) the court held that no facts were stated in the third and fourth paragraphs sufficient to show special damages resulting from any unlawful act of the defendant. Quotations from the opinion relating to the fifth paragraph are given to show the reasoning of the court in regard to it:

Passing to the fifth paragraph, we find the allegations that the plaintiff ever since his discharge has been seeking but has been unable to secure employment, and that the defendant has and is continuing to "blacklist" and "boycott" the plaintiff with all railroad companies in the United States and Canada, and "has at times and still does refuse to furnish the plaintiff with such a clearance as will enable him to secure other employment," and by reason thereof the plaintiff has been compelled to abandon his chosen profession, etc. This is the only allegation in the whole complaint charging the defendant with any conduct which has resulted in damage to the plaintiff. This charge makes no reference to any of the acts set forth in the two preceding paragraphs as a ground of damage. The only direct charge of conduct on the defendant's part resulting in damage is found in the averment that the defendant refuses to furnish the plaintiff with such a clearance as will enable him to secure other employment.

In the absence of a statute imposing it, there is no legal duty on the part of an employer to furnish a servant discharged or leaving his service with any certificate of character. At common law whatever moral obligation rests on a master to give to a servant a character belongs to the imperfect class not enforceable by law. In the absence of contract, or of custom implying a contract, or a statute so requiring, the same rule prevails in the United States. In this State there is no such statute. It may be assumed that if there were any specific contract to that effect, or if there existed a uniform custom on the part of all railroad companies to give a character to their servants on the termination of the service, or, as it is termed in the complaint, a "clearance," the custom would enter into every contract of employment, and the refusal to give some form of clearance would constitute an actionable breach of duty, but even in such a case the custom must be uniform and must be alleged and proved. In the complaint before us no such custom is alleged; no such contract is set out. There being no statement of any fact raising the legal duty to furnish such a clearance as that described, it follows that the defendant has committed no actionable wrong in failing to furnish it.

Under this first phase of the case it only remains to inquire whether the use of the words "blacklist" and "boycott," in the fifth paragraph of the complaint, are sufficient, in the connection in which they are used, to charge any definite actionable wrong.

The court then considered definitions of these terms, and concluded that there were no allegations bringing the case within these definitions, the charges being mere conclusions and not issuable facts, and continued:

We are constrained to hold that the complaint states no cause of action on the case for damages for interference with or preventing the plaintiff from pursuing his occupation or vocation.

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Looking at the matter from the standpoint of libel, however, the court found that a cause of action was stated sufficient to require an answer, also that it appeared from the allegations that the statute of limitations was not operative, and the judgment of the court below in favor of the defendant company was reversed and the case remanded for further proceedings.

EMPLOYERS' LIABILITY — CONTRACT WAIVING LIABILITY — *Illinois Central Railroad Co. et al. v. Harris, Supreme Court of Mississippi (Dec. 14, 1915), 67 Southern Reporter, page 54.*—G. L. Harris brought action against the railroad company named for damages for personal injuries alleged to have been caused by the negligence of his fellow servants. His foot was crushed, and a verdict was given him in the sum of $5,000 in the circuit court of Madison County. The statute law of the State provides that the company shall be liable for negligence of its employees, and that contributory negligence on the part of the injured person shall be a defense only in diminution of the damages. One defense set up by the company was an agreement to assume all risks of the service, which the plaintiff, in common with all other employees, had signed as a condition of obtaining employment. This was held invalid, as appears from the following portion of the opinion, delivered by Judge Cook, dealing with this phase of the case:

If this contract is valid and binding on the employees of railroads, it will have the effect of repealing some of the statutes of this State. It will nullify the so-called comparative negligence section of our code, so far as railroad employees are concerned. The contract invoked in this case, if valid, releases the company from every conceivable act of negligence of any employee of the company no matter how gross. We believe the policy of the State, reflected in its laws, can not be bargained away in this manner. There has been a practical abolishment of the common-law fellow-servant doctrine in this State, so far as it may affect the servants of a railroad company of the class to which plaintiff belonged. This was done for broad reasons of public policy, and we do not believe that the policy can be nullified by contracts like the one here discussed.

EMPLOYERS' LIABILITY—DEFECT IN PLANT—FAILURE TO SUPPLY SUITABLE TOOLS—*Wiley v. Solway Process Co., Court of Appeals of New York (July 13, 1915), 109 Northeastern Reporter, page 606.*—Bert Wiley brought action against the company named for damages for personal injury resulting in the loss of sight of an eye. He was employed in heading up barrels after they had been filled with baking soda, and had to drive nails through the iron hoops and into the staves. In doing this the nails would sometimes bend and fly with considerable force, and the employee had asked the foreman

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to provide him with a punch, so that he could make the holes in the hoops before driving the nails. This request was refused. Suit was brought under the employers' liability act of the State of New York, it being alleged that a punch as described is a part of the ways, works, machinery and plant of the employer, and the failure to furnish it is a defect in the same. The judgment of the lower court in favor of the plaintiff was affirmed, the following being a brief quotation from the opinion of Judge Chase on the point referred to:

If the punch which the plaintiff wanted and solicited from the foreman was a tool proper and requisite and reasonably necessary for his use under all the circumstances, it was not the duty of the plaintiff to furnish it, but the failure to provide it was the fault and neglect of the defendant. A plant without tools and appliances would be useless as such. A plant is defective when any part of it is not in a proper condition for the purpose for which it was intended, and it is also defective when it is so incomplete that the use of the plant is dangerous by reason of the failure to furnish reasonably necessary parts for the purpose for which it is used.

EMPLOYERS' LIABILITY—EFFECT OF WORKMEN'S COMPENSATION ACT—ELECTION BY EMPLOYER AND FAILURE TO ELECT BY EMPLOYEE—*Karny v. Northwestern Malleable Iron Co., Supreme Court of Wisconsin (Mar. 23, 1915), 151 Northwestern Reporter, page 786.*—The employee Karny was injured on June 5, 1913, while in the employ of the company named. This company had more than five employees, and less than 30 days before the accident had accepted the provisions of the compensation act. The employee had failed to indicate whether he elected to be subject thereto. After the injury he applied for compensation, but the employer objected, and the commission decided in its favor. The liability action was then commenced, and at the close of the trial the defendant requested a directed verdict on the grounds of failure to show actionable negligence, and of assumed risk. This motion was denied, the case submitted to the jury and a verdict of $3,000 rendered. On appeal, this judgment was reversed.

The court stated that, the employer having elected to accept the compensation act and the employee having failed to do so, by the plain terms of the act the employer was entitled to the benefit of the defenses of assumption of risk, fellow service and contributory negligence.

Referring to the circumstances of the injury, which was the result of the plaintiff's fellow employees letting go prematurely while they, seven in all, were lifting a heavy piece of machinery into place in an excavation, the court held that no negligence on the part of the employer was shown, and that the plaintiff assumed the risk of such an occurrence.

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EMPLOYERS' LIABILITY—EFFECT OF WORKMEN'S COMPENSATION ACT—INJURY NOT CAUSING DISABILITY—*Shinnick v. Clover Farms Co., Supreme Court of New York, Appellate Division, First Department (July 9, 1915), 154 New York Supplement, page 423.*—Thomas Shinnick, while in the employ of the company named, lost a part of an ear by a bite of a horse owned by it which was alleged to be vicious, and brought action against the company under the employers' liability act. The company demurred to the complaint on the ground that his remedy, if any, was under the workmen's compensation act. It was not alleged that the employer had not provided compensation "according to the provisions of this article." Where that has not been done the compensation act allows an election between procedure for compensation and a suit for damages. The demurrer was overruled by the trial court, and this decision was affirmed, the court holding that such cases, not being within the scope of the compensation schedules, permit action as if the compensation act were not in existence. Judge Scott, who delivered the opinion, said in part:

If the schedules do not cover the injury suffered by an employee, he does not fall within the purview of the act and can not claim compensation under it, for the act provides no scale or gauge by which to determine what compensation should be provided. As to such an injury, therefore, the right to recover remains as it was before the act was passed.

We do not consider that such an injury to the ear as the plaintiff complains of is of the same class of disability as those specified in the schedules. The latter are all disabilities tending to impair the efficiency of the injured person in the occupation in which he was engaged, such as the loss of a hand or a finger, a foot or a toe. A bitten or even a partially amputated ear would not have such a tendency. Furthermore, the plaintiff's right to recover upon the facts stated in his complaint will not depend upon his employment by defendant, for anyone not so employed, if injured by a vicious animal, known to its owner to be vicious, would have an action for damages. Our conclusion, therefore, is that the injury for which plaintiff seeks to recover is not covered by the workmen's compensation act, and that the complaint states a good cause of action.

EMPLOYERS' LIABILITY—EMPLOYEES—*Lehigh Valley Coal Co. v. Yensavage, United States Circuit Court of Appeals, Second Circuit (Nov. 30, 1914), 218 Federal Reporter, page 547.*—The employee in this case sued the company named for damages for personal injuries suffered in its coal mine, for which he secured a verdict of $25,000 in the District Court of the United States for the Eastern District of New York. Yensavage was a miner's helper. The company contended that under the system of work by which a miner is paid by the piece and hires one or more assistants, the miner is an inde-

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pendent contractor, and the assistants are not employees of the company. This contention was rejected, and the court affirmed the judgment of the court below in favor of the plaintiff. Judge Hand, who delivered the opinion of the majority of the court, said in part as to this point:

In the case at bar the necessary conclusion of the defendant's theory is that Terowsky, as well as the plaintiff, was not an employee of the company, and that they owed him none of the duties of a master to the servant. The company is therefore not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors, to whom they owe as little duty as to those firms which set up the pumps in their mines. Thus what is confessedly only a means of speeding up the miners and their helpers becomes conveniently an incidental means of stripping from them the protection of the statute. The laborers, under this contention, are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital; the miner is to take his chances in the mine without the right to a safe place to work, or any other protection except as an invited person. This misses the whole purpose of such statutes, which are meant to protect those who are at economic disadvantage.

EMPLOYERS' LIABILITY—EVIDENCE—INSPECTION BY STATE FACTORY INSPECTOR—*Burk v. Hobart Mill & Elevator Co., Supreme Court of Oklahoma (June 29, 1915), 150 Pacific Reporter, page 458.*—J. L. Burk was injured by machinery while attempting to clean an oil cup and put oil into it, and sued the company named, his employer, for damages for the injuries sustained. Judgment in the district court of Kiowa County was for the company, and the employee brought error. The principal questions at issue on the appeal related to the admission of certain evidence. The court held that, the machinery about which the employee was working being complicated and not easily understood, the testimony of an expert explaining the operation of the machinery and how the same could have been safely oiled had been properly admitted. It also held that evidence to the effect that the State factory inspector had inspected the mill was properly admitted, and finding no error in the record, affirmed the judgment for the defendant company. On the question of the admission of testimony as to inspection Judge Brewer, who delivered the opinion, said:

This mill, it seems, is such a manufacturing establishment as is contemplated by and comes under the provisions of what is generally known, in popular parlance, as the factory act, as found in article 4, chapter 42, Revised Laws 1910. The particular evidence objected to was that the defendant was permitted to ask a witness whether or not the State factory inspector had inspected the mill; such witness answering that it had been inspected at different times, previous

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to the accident, and while the witness was the head man employed there. We think this evidence was admissible. It was not hearsay. It was the mere statement of a fact that an officer of this State, charged with the official duty of inspecting mills of this character, had been at the place and had inspected the same. We think that evidence of such an official inspection of the appliance causing the injury is competent as showing an exercise of some degree of care by the employer. The fact of inspection would not, of itself, have absolved defendant from liability, or the duty of furnishing his servant with reasonably safe machinery, appliances, etc., with which and about which to work; but, as has been said, we think the fact of an official inspection was a circumstance to go, with the other circumstances and evidence in the case, to the jury for whatever it might be thought to be worth.

In the case of Pardridge *v.* Gilbride (98 Ill. App. 134), which was a suit brought against an employer by a servant for injury sustained while operating an elevator, it was held that evidence offered by defendant to show an inspection of the elevator by an official city inspector was competent to show the exercise of some degree of care on the part of defendant, but that proof of such inspection was not conclusive evidence that ordinary care had been exercised.

EMPLOYERS' LIABILITY—EXCESSIVE SPEED OF TRAIN IN VIOLATION OF STATUTE—*Illinois Central Railroad Co. v. Ford et al., Supreme Court of Mississippi (Feb. 1, 1915), 67 Southern Reporter, page 145.*—Dave Ford, one of a section crew of the company named, was killed in the town of Batesville, when a locomotive collided with a hand car which he was assisting to remove from the track. The engine was running at a speed, far in excess of 6 miles an hour, which the engineer testified was 45 miles an hour. The plaintiffs, suing for Ford's death, received judgment for $3,000 in the circuit court of Panola County, and this was affirmed on appeal. The defense was that the statute forbidding the running of trains through cities, towns and villages at a rate of more than 6 miles per hour was not applicable to a case where the party injured was an employee. The court pointed out that by chapter 194 of the Laws of 1908, every employee of railroad corporations was given the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or of its employees, as are allowed by law to other persons not employed. It held that the intention of the legislature to make a change in the fellow-servant rule is very clear in this statute, and that the 6-mile statute was applicable in the case.

EMPLOYERS' LIABILITY—FIRE ESCAPES—OBSTRUCTION OF ACCESS—LIABILITY OF OWNER, LESSEE, AND SUBLEASING EMPLOYER—*Goetz v. Duffy et al., Court of Appeals of New York (May 26, 1915), 109*

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Northeastern Reporter, page 113.—This was an action by the administratrix of one Goetz who met his death by fire in a tenant factory, the liability being due to the alleged negligence of the owner and others in failing to provide fire escapes and keep them in available condition. The trial court, in a decision affirmed by the appellate division, dismissed the complaint as to both the owner, Duffy, and her lessee, the Keep Shirt Co. This the court of appeals reversed in part, and held that the responsibility of the owner, as well as that of the sublessee, the Hetzel Co., who was the employer of the deceased workman, should be submitted to the jury. The Keep concern was lessee of an entire floor, the sixth and topmost of the building, and subleased a corner of the floor to the Hetzel Co. In the front corner of the Hetzel factory next to the hall was an office separated from the workroom by a partition, and the only way out of the workroom into the hall was through a door leading from the workroom into the office and another leading from the office into the hall. At the rear of the hall was a fire escape, while at the rear of the workroom was a little window through the partition separating the Hetzel and Keep premises.

On the 11th day of November, 1909, a fire suddenly broke out in the Hetzel factory, in which celluloid combs were made, and of the seven persons in the workroom at the time but two escaped death. Goetz attempted to pass through the door leading into the office, but it was a self-locking door, shut at the time, and he was unable to open it, and he was burned to death.

Having stated the foregoing facts, Judge Bartlett, who delivered the opinion of the court, said in part:

I think the case presented a question for the jury, certainly as against the owner. The question as to the liability of the tenants of the H. V. Keep Co. is more doubtful. The liability of the owner is predicated upon sections 82 and 94 of the Labor Law (Cons. Laws, ch. 31) as in force at the time of the fire. By chapter 461 of the Laws of 1913 the labor law was extensively amended in relation to fire escapes and exits in existing factories, the future construction of factory buildings, and the limitation of the number of occupants in factories.

The building in which the fire occurred was a tenant factory within the meaning of the statute. Construed together, the effect of sections 82 and 94 of the labor law was to require the maintenance of a fire escape on the floor on which the Hetzel establishment was located "connected with the interior by easily accessible and unobstructed openings"; and this irrespective of any demand by the commissioner of labor or the superintendent of buildings, performing like functions in the city of New York. [Cases cited.]

The obligation thus to maintain an accessible and unobstructed fire escape was imposed upon the owner, and he could not avoid liability by delegating the performance of the duty to others. A fire escape was in fact provided; but there was evidence which should

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have taken the case to the jury to the effect that access thereto was so obstructed as to render it of little or no avail in such an emergency as arose when the fire suddenly broke out in the Hetzel factory. It needs no argument to show that a fire escape is useless if the way to it is impassable.

It would seem that the immediate tenant who cooperated with the sublessee to obstruct free access to the fire escape ought to be as responsible as the owner of the building; but the language of the statute appears to have been designed to relieve him from liability, when it says that the owner "instead of the respective lessees or tenants" shall be responsible. Unlike the defendant Hetzel Co. the defendant H. V. Keep Co. owed no common-law duty to the plaintiff's intestate. If liable at all it must be by virtue of some statute; and the statutory provision relied upon to charge the owner of the building imports in pretty clear language an intent to absolve the tenant as such. The word "instead" as used in the sentence quoted conveys the idea that while the owner is to be held responsible, the tenant is not.

For these reasons, I favor a reversal of the judgment as to the owner but an affirmance as to the respondents Keep.

EMPLOYERS' LIABILITY—FIRE ESCAPES—VIOLATION OF STATUTE—*Amberg v. Kinley, Court of Appeals of New York (Apr. 13, 1915), 108 Northeastern Reporter, page 830.*—Anna L. Amberg, as administratrix of W. Amberg, deceased, brought action against Charles H. Kinley for damages for the death of Amberg through the employer's alleged negligence. The deceased was in the defendant's employ in a tannery, one of the buildings of which was a drying loft. This was a wooden building 123 by 43 feet, and 3 stories high, this last fact, however, being questioned by the defense. The ground formed the floor of the first story, while the others had board floors. It was about 16 feet from tan bark banked around the building to the top story. On the second and third floors there were ventilators in each of the seven bents of the building, the ventilator openings being 8 feet wide and 3 feet high, on the level of the floor, and each covered by a pair of shutters, which were fastened at the top, and could be easily swung outward at the bottom.

On the day Amberg lost his life he and one Mott were at work in the loft, taking from the first floor hides soaked with oil, loading them on a truck, and conveying them to the third floor, where they hung them on sticks over the beams of the ceiling to dry. At about 3 o'clock they took a truck loaded with hides and placed it in the elevator. Then Mott went out into the yard for some purpose and did not return for about 10 minutes, when he found the loft in flames. It burned very rapidly, and was entirely consumed, Amberg's body being afterwards found on the ground under the place where they had been hanging the hides, with the truck not far from it.

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The principal ground on which the claim as to the employer's negligence was based was the failure to equip this building with fire escapes, and questions arose as to whether these were required by law on a building of this kind, and as to whether the failure to provide them was the cause of the employee's death. The appellate division affirmed a judgment for the plaintiff.

At the time of the death of this employee, the provision of section 82 of the labor laws with regard to fire escapes on factories was as follows:

Such fire escapes as may be deemed necessary by the commissioner of labor shall be provided on the outside of every factory in this State consisting of three or more stories in height.

Judge Cuddeback, who delivered the opinion of the court, stated that it had been held in the case of Arnold *v.* National Starch Co., 194 N. Y. 42, 86 N. E. 815, that the statute is mandatory, and that the owner may not delay action until the directions of the commissioner of labor are given; also that there were no fire escapes on the building in which the employee was burned. It was further held that an instruction in the trial court was correct to the effect that the building was in law a factory, that there was an absolute duty to provide it with a fire escape, and that the only questions for the jury were whether the failure was the cause of the accident, and that of contributory negligence, citing Willy *v.* Mulledy, 78 N. Y. 310; also that the plaintiff need not prove negligence, because the failure to observe the statute constituted a liability per se, this being considered as an action to recover damages for the breach of a statutory duty, and not one based solely on negligence, where the violation of a statute or ordinance is simply evidence of negligence. This last point Judge Cuddeback discussed at some length, and cited many authorities.

The court finally held that there was sufficient evidence to warrant a finding by the jury that the failure to provide fire escapes was the cause of the death, and ruled in the plaintiff's favor on a technical point as to notice. The judgment in favor of the plaintiff was accordingly again affirmed, five judges concurring in this decision, while two dissented, one expressing his views in a dissenting opinion.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—PRACTICABILITY OF GUARDING—ORDER OF INDUSTRIAL COMMISSION—*Puls v. Chicago, Burlington & Quincy Railroad Co., Supreme Court of Minnesota (Dec. 18, 1914), 150 Northwestern Reporter, page 175.*—W. W. Puls brought action for personal injury received while working for the company on a hand jointer. The negligence al-

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leged consisted in the knives of the jointer being dull and nicked, and in a failure to guard the knives. Judge Dibell, who delivered the opinion, said in part:

There is evidence that the knives were dull and nicked and that their condition in this respect tended to throw or kick back the boards. If they were kicked back there was a likelihood that the operator's hands would come in contact with the knives. The evidence was such as to make a question for the jury upon the negligence charged.

Under authority of the statutes of Wisconsin the industrial commission made the following order assumed to be of statutory effect:

"All hand jointers must be equipped with safety cylinder heads and a guard must be placed over the knives to protect the hands of the operator."

It defined "guarded" as follows:

"The term 'guarded' when used in these orders shall mean so covered, fenced or inclosed that a person in the course of his employment is not liable to come in contact with the point of danger and be injured."

The defendant complied so far as to use safety cylinder heads. It did not place a guard over the knives. There is evidence that it is practicable to do so. There is evidence that a guard of some kind had at one time been over the knives. There was evidence that it was impracticable. There was testimony on the part of the defendant that guards could not be placed over the knives without destroying the character of the machine as a jointer. The court submitted the case to the jury substantially upon the theory that the defendant was liable only in the event that it was practicable to place a guard over the knives; and that it negligently failed so to place guards. Upon the theory upon which the case was submitted the questions of practicability and negligence were for the jury.

It was also held that a certain witness testifying as an expert was competent to so testify, and that the question of assumption of risk had been settled by the verdict of the jury in favor of the plaintiff. It was also held that a verdict for $2,000 was not excessive in the case of a left-handed carpenter who lost a part of the little and third finger of his left hand. The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—STEAM MANGLE—*Ronca v. Wendall & Evans Co., Supreme Court of New York, Appellate Division, Second Department (Jan. 15, 1915), 151 New York Supplement, page 257.*—Fannie Ronca brought action against the company named for damages for the loss of her left hand through an injury received while in the employ of the company. She was placing a napkin in a steam mangle, the article being first placed upon a convex brass table and pushed under a felt-covered roller 2 inches in diameter, whence it emerged to be taken up by

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the ironing rollers. The felt roller revolved in a suitable direction to carry the napkin forward between the ironing rollers. There was evidence that the small roller would give a warning pinch to fingers which got under it and be thrown out of gear. The general manager and the foreman of the company testified that the purpose of the small roller was that of a guard, to prevent the operator's hands becoming caught and injured, but one of the company's witnesses referred to it as a "guide roller." On this point the court held that the jury in the trial term in Kings County, which had rendered a verdict for the plaintiff, was justified in believing that the roller was only incidentally, if at all, intended as a guard, and that it was not a proper guard under the statute.

There was testimony that a guard directly in front of the rollers was not practicable, but none that no other kind of a guard, nor any additional guard, was possible. The court affirmed the judgment of the court below, but reduced the verdict. The girl was shown to be 15 years of age and earning $4.50 per week. The court decided that $12,000 was an excessive amount of damages, and reduced it to $9,000, ordering a new trial if this reduction was not accepted.

EMPLOYERS' LIABILITY—MINE FOREMEN—ELECTRICAL APPLIANCES—*Crockett v. Black Wolf Coal & Coke Co., Supreme Court of Appeals of West Virginia (Dec. 15, 1914), 83 Southeastern Reporter, page 987.*—J. M. Crockett, administrator of a deceased workman, brought suit against the company named for his death by its alleged negligence. Judgment was in his favor in the circuit court of McDowell County. The workman while operating an electrically driven coal car reached a point where the trolley wire had become detached and had been improperly attached by a fellow servant. This condition had existed for 16 or 18 hours without attention from the mine foreman. The wire fell and struck the motor operator, and death resulted from the ensuing shock. The principal question was whether the mine foreman alone was liable under the State statute exempting owners and operators in certain cases. The court held that the company was liable, Judge Poffenbarger, who delivered the opinion, saying on this point:

In Humphreys *v.* Raleigh C. & C. Co. (80 S. E. 803, [Bul. No. 169, p. 70]) the following proposition was declared as the limitation upon the statutory duties and responsibilities of the mine foreman:

"The mine foreman statute of the State does not absolve the mine owner or operator from his common-law duty to exercise reasonable care to provide reasonably safe machinery, tools, and appliances for use in the mine, and make the mine a reasonably safe place for work, except in so far as the duty is devolved upon the mine foreman, nor from liability for injury resulting to a servant in the mine from his

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failure to make such provision, or his provision of defective or unsafe appliances, or his failure of duty as to the safety of the mine as a place of work in those instances in which such duty is not cast upon the mine foreman."

This view of the statute harmonizes with observations found in all the leading cases in which the master has been accorded immunity by virtue of the statute. Nearly all of them contain expressions of limitation of the mine foreman's duties to those things in respect of which he is charged with duty by some terms found in the statute. [Cases cited.] A consideration almost conclusively establishing the soundness of this construction is this: The statute transfers liability which the common law would impose upon the master to the shoulders of the mine foreman and abrogates the common-law right of action of the injured servant against the master. The imposition of liability upon the mine foreman is in derogation of the common-law right of service without it, and the abrogation of the injured servant's right of action against the master is in derogation of his common-law right as a citizen and employee. Hence the statute ought not to, and can not, consistently with the rules of construction, have effect beyond that clearly indicated by its terms.

The declaration had failed to allege the appointment and qualification of the plaintiff as administrator, so that the judgment could not be affirmed without an amendment. The case was remanded to the lower court, however, with instructions to allow amendment and render judgment for the plaintiff if the necessary allegation and proof of these facts should be made.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—TRIAL—ELECTION OF REMEDIES—*Corbett v. Boston & Maine Railroad, Supreme Judicial Court of Massachusetts (Nov. 24, 1914), 107 Northeastern Reporter, page 60.*—The husband of Mary E. Corbett, the plaintiff, died on July 8, 1912, from injuries received while working for the railroad named. She first brought action in her own name to recover damages under the Massachusetts employers' liability act, which gives a right of action to the widow. Later she brought action as administratrix under the Federal Employers' Liability Act, alleging that the deceased was engaged in interstate commerce at the time of his death. When the two actions came on for trial in the superior court of Essex County the judge ruled that the bringing of the action under the Federal act had the effect of superseding the other action, and of depriving the court of jurisdiction to hear that action during the pendency of the other. In the action under the State statute he ordered judgment for the defendant, and reported this action to the supreme judicial court for determination as to its correctness. The several points involved, while largely on matters of procedure, are important, and the opinion delivered by Judge Rugg, holding that the judgment in the action

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under the State statute adverse to the plaintiff should be set aside and both cases remanded to the superior court for trial, is quoted from as follows:

Even if the presiding judge was right in his ruling, judgment ought not to have been rendered in favor of the defendant in the action under the State statute. A court without jurisdiction over a cause can not enter judgment in favor of either party. It can only order that the cause be dismissed for want of jurisdiction.

But we are of the opinion that the ruling was wrong. The Federal act in the field covered by it supersedes all State statutes. As to matters within the scope of the Federal power, legislation by Congress is supreme. [Cases cited.]

The State law is as supreme and exclusive in its application to intrastate commerce as is the Federal law to interstate commerce. If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law. (Wabash Railroad *v.* Hayes, 234 U. S. 86, 34 Sup. Ct., 729 [Bul. No. 169, p. 77].) The facts and not the pleadings determine whether the wrong done in any given case gives a right to recover under the Federal or the State statute.

The defendant has contended that the plaintiff at least ought now to be compelled to elect which action she will rely upon. But the argument is not convincing. The plaintiff in each of the present cases happens to be the same individual. But that is an accident. Under the State statute she is given a right of action because she is the widow. She prosecutes that action in her own name and in her own interest. The action under the Federal statute can be prosecuted only by the personal representative of the deceased for the benefit of the persons therein named, among whom may be included others than the widow. [Cases cited.] The plaintiffs in two such cases as these well might be different persons. In any event, they sue in different capacities. Under these circumstances it would be difficult to require an election. The reasoning upon the main point of this opinion leads to the conclusion that election ought not to be required at this stage. It is not necessary to decide whether an instance might arise where a plaintiff could be compelled to elect before the evidence is closed, nor whether at the close of the evidence an election could or ought to be required by the trial court.

In accordance with the terms of the report, the judgment for the defendant in the action of Corbett *v.* Boston & Maine Railroad is set aside, and both actions are remanded to the superior court for further proceedings there.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ACTIONS—DAMAGES FOR CONSCIOUS SUFFERING—*St. Louis, Iron Mountain & Southern Railway Co. v. Craft, United States Supreme Court (June 1, 1915), 35 Supreme Court Reporter, page 704.*—This case was an appeal by the railroad company named from a judgment of the Supreme Court of the State of Arkansas in favor of the

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administrator of a deceased employee. The verdict and judgment of the circuit court of Jackson County was for $1,000 for the pecuniary loss of the father of the employee, and $11,000 for the pain and suffering of the employee. The State supreme court reduced the latter sum to $5,000 and then affirmed the judgment, which proceeding the Supreme Court also affirmed.

The company made two objections to the judgment, first, that there was not evidence of conscious suffering, and, second, that the statute requires that the recovery be limited to either the loss of the surviving relative, or the pain and suffering of the employee. The court reviewed the evidence, which showed that the employee survived for 30 minutes after a car ran partly over his body, and showed consciousness by groans and movements, and held that this was sufficient to sustain the verdict.

Taking up the original employers' liability act, the court showed that it gave a right of action to the injured person for damages for his personal loss and suffering where the injuries were not immediately fatal, and that, where the injuries proved fatal at any time, it gave a right of action to the personal representative for damages, for the benefit of designated relatives, for the pecuniary loss incurred by such relatives. The right of the injured person, however, died with him, there being no provision for its survival.

By the amendment of 1910 section 9 was added, providing that any right of action given to a person suffering injury should survive. The section concludes, "but in such cases there shall be only one recovery for the same injury." In holding that both causes of action are maintainable, Mr. Justice Van Devanter, who delivered the opinion, said in part:

> No change was made in section 1. (Taylor *v.* Taylor, 232 U. S. 363, 34 Sup. Ct. 350 [Bul. No. 169, p. 79].) It continues, as before, to provide for two distinct rights of action—one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person "shall survive" to his personal representatives "for the benefit of" the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. And when this provision and section 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived.

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Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ACTS IN COURSE OF EMPLOYMENT—*Cincinnati, New Orleans & Texas Pacific Railway Co. v. Wilson's Administrator, Court of Appeals of Kentucky (Dec. 15, 1914), 171 Southwestern Reporter, page 430.*—This action was brought against the railway company named by the administrator of John Wilson, who had been a section hand of the railway company, and was killed on April 25, 1911. The foreman of the section crew to which he belonged was Gran Ramsey. Ramsey and his crew, also Nate Sumner and Joe Spradlin, two other section foremen, with their crews, were ordered to board a work train loaded at Oakdale, Tenn., with ballast material, to proceed to Flat Rock, Ky. They reached Flat Rock and backed onto a "passing track" to allow a regular train behind it to pass on the north main track, and an extra freight train to pass on the south main track.

When the extra south-bound train was found to be approaching, Foreman Sumner, under the mistaken impression that the switch was open onto the passing track and that the approaching train would go upon it and strike their train, shouted to his men and others who were sitting on a car of ballast material to get off. Foremen Sumner and Ramsey and others of the crews jumped, and ran across the south track. Wilson attempted to do so and while crossing the track was struck and killed by the engine.

In the McCreary County circuit court judgment was rendered in favor of the plaintiff for $6,000, and the company appealed. The question of law involved was whether the negligent act of Sumner which caused the injury was in the course of employment. The court of appeals held that it was, and affirmed the judgment for the plaintiff. Judge Hannah, who delivered the opinion, said in part:

In this case Nate Sumner was a section foreman there in charge of his crew. True, Ramsey was the senior or superior foreman in charge of the work, and Wilson was one of Ramsey's men; but Sumner was nevertheless a foreman, and section hands had a right to believe that there was imposed upon him, by virtue of his position, at least a secondary responsibility—a greater responsibility than a mere section hand—for their safety, and some measure of duty in their behalf. He was discharging that obligation when he shouted. Had he been acting for Nate Sumner alone, he would have jumped and ran, but remained silent; but, in his mistaken belief as to the position of peril in which the section hands on the work train were placed, he undertook to do that which every master expects those servants to do whom he places in authority over other servants—that is, to prevent injury to all persons, be they servants of the master or

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strangers. His act was such an act as a personal master there present, and laboring under the same mistaken belief as Nate Sumner, would have performed. And, because of that quality, his act was fairly imputable to the master, imposing legal liability therefor.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—AMENDMENT OF PETITION—LIMITATION—*St. Louis, San Francisco & Texas Railway Co. v. Smith, Court of Civil Appeals of Texas (Dec. 19, 1914), 171 Southwestern Reporter, page 512.*—The decision of the Supreme Court of the United States, that the facts of this case prevented recovery by the widow under the State statute, is reported under the title St. Louis, San Francisco & Texas Railway Co. *v.* Seale, in 229 U. S. 156, 33 Sup. Ct. 651, and noted in Bul. No. 152, page 87. The court there reversed and remanded the case without prejudice to the rights of the personal representative.

The company made a motion in the court of civil appeals to order judgment in its behalf on the ground that the two years' limitation fixed by the statute for bringing the suit had expired, but this was refused (160 S. W. 317). The widow in the meantime had been appointed administratrix, and had also married one Smith. She filed a motion in the district court of Grayson County for permission to amend her petition, and this having been granted filed an amended petition prosecuting her suit as personal representative. On trial of the suit she recovered a verdict for $7,500, and the company carried the case up for review. The judgment was affirmed, the court holding that the limitation fixed by the act did not prevent the amendment of the petition after its expiration, saying, on this point, through Judge Rainey:

> The substitution of the personal representative of a deceased party is not the beginning of a new cause of action, but it relates back to the filing of the original petition. We think the case of Railway Co. *v.* Wulf (226 U. S. 570, 33 Sup. Ct. 135 [Bul. No. 152, p. 93]), is decisive of this proposition. The holding of our supreme court is to the same effect. [Cases cited.]
>
> The amendment setting up no new cause of action, the statute of limitation did not apply, and there was no error in the overruling of the exception.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—APPLIANCES AND EQUIPMENT—SIMPLE TOOLS—*Gekas v. Oregon-Washington Railroad & Navigation Co., Supreme Court of Oregon (Mar. 9, 1915), 146 Pacific Reporter, page 970.*—Thomas K. Gekas brought action under the Federal Employers' Liability Act for negligence of the company named causing personal injury. In the circuit court of Multnomah County a judgment was rendered in his favor

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for $2,500. The injury was the loss of sight of one eye, caused by a flying piece from an adz with which the employee was cutting a bush along the right of way. At the trial the defendant made a motion for a nonsuit, and later for a directed verdict, both of which were refused, and the refusals were assigned as error on appeal. The adz showed that there had been a flaw at the place of the break. The company contended, however, that there was not sufficient evidence to be submitted to the jury that this tool had been repaired or reconstructed at its shops as claimed, or that the defect should have been discovered by the repairer when this was done, but the court decided these questions adversely to it.

The principal question was whether the Employers' Liability Act, giving a right of action for injury or death resulting, among other things, from any defect or insufficiency, due to the carriers' negligence, in its appliances, machinery, or other equipment, makes the company liable for defects in simple tools. The company argued that no care was required of it in this respect. The court, however, speaking by Judge Bean, after discussing the general law as to simple and complex tools, said in part as to the Employers' Liability Act:

> The defects and insufficiencies due to the negligence of the common carrier referred to in the act are not confined to complex appliances. The terms of the act in this respect are broad, and appear to apply to any part of the equipment, whether simple or complex.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—APPOINTMENT OF ADMINISTRATOR—*Howard v. Nashville, Chattanooga & St. Louis Railway Co., Supreme Court of Tennessee (Oct. 19, 1915), 179 Southwestern Reporter, page 380.*—The husband of Mrs. Mollie Howard was killed in the early part of 1915, while in the service of the railway company named. The injury was received on its line in Alabama, through which State the line runs for a short distance, and the man was at once removed to Chattanooga, Tenn., where he died eight hours later. The main part of the line, and the company's offices, are in Tennessee. Shortly after her husband's death the widow secured letters of administration in Hamilton County, Tenn., and brought action against the company, declaring under both the Federal Employers' Liability Act and the Alabama statute. The company made a motion to compel election, but before this was acted upon filed a petition in the county court, praying that the letters of administration be recalled, on the ground that the decedent left no property or estate in Tennessee that could furnish a basis for the appointment. There was a question as to the existence of certain small items of property, which the court decided was im-

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material. The county court decided that if there were no assets liable for the payment of debts there was no basis for administration, and entered judgment recalling the administration granted. This was affirmed by the circuit court, but reversed by the court of civil appeals. The supreme court affirmed the last judgment, thus leaving the administratrix qualified as such. It calls attention to the case of Sharp *v.* Railway Co., 179 S. W. 375, just described by it, in which it was held that an administrator could be appointed for a nonresident killed in the State, who left no property therein except the right of action for his death.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—APPROVAL BY INSPECTOR—HIGH CAR IN TRAIN—*Portland Terminal Co. v. Jarvis, United States Circuit Court of Appeals, First Circuit (Sept. 29, 1915), 227 Federal Reporter, page 8.*—Frank R. Jarvis brought action under the Federal Employers' Liability Act against the Terminal Co. for personal injuries sustained on April 13, 1913, and recovered judgment in the district court. He was in the employ of the company as yard conductor, and was engaged in moving a train of freight cars from one point to another in the yard, during a foggy, rainy evening. He was sitting on the top of the last car when he felt a "telltale" strike him, and threw himself flat on his back, but even then the bridge struck him and threw him to the ground. The bridge had been approved as to height above the track, etc., by the State railroad commission. As to the effect of this Judge Dodge, who delivered the opinion, said:

We are unable to hold, as the defendant contends, that because the height and condition of the bridge had been thus established, independently of it, by a public authority in 1909, no fault can thereafter be attributed to it for want of sufficient height above the tracks, or for anything else appertaining to said bridge. If passage beneath the bridge was not reasonably safe, under all the circumstances, for employees engaged in moving such a train or such a car as here in question, the defendant might still be negligent in permitting such passage. (Boston & Maine Railroad *v.* Brown, 218 Fed. 625.)

The rear car on which Jarvis was stationed was 2 feet higher than the average freight car, and 2½ feet higher than the car next ahead of it in the train. Its height was such that under a rule of the company inspectors should have reported it, that it might be set aside and not permitted to attempt to run under the bridges. Considering all the circumstances, including the fact that the position on the rear car was one which the conductor would most naturally occupy, and that on account of the darkness he did not have a good opportunity to observe the height of this car, the court held that it could

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not say that the evidence did not disclose negligence on the part of the company, nor that the employee assumed the risk as a matter of law. The judgment in his favor was therefore affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISKS—*Fish v. Chicago, Rock Island & Pacific Railway Co., Supreme Court of Missouri (Dec. 31, 1914), 172 Southwestern Reporter, page 340.*—Norman G. Fish was a head brakeman employed by the company named, who was killed on January 15, 1909. He was on the side of a car in the performance of his duties at night, and was knocked off and under the wheels of the train by contact with a water crane or standpipe. His widow and administratrix, Millie Fish, brought action against the company, charging negligence on its part in locating the standpipe so near the tracks. It was shown that one of the rules of the company contained a caution in regard to the danger of riding on the side of cars because of the possible proximity of such structures, and that the contract of employment which the plaintiff had signed a little more than a year before contained an agreement that he would assume such risks. The company claimed that the trial court should, on this ground, have taken the case from the jury and decided it in its favor, while the actual result was a verdict in favor of the plaintiff. The court however held otherwise, and affirmed the judgment below. The Missouri common-law rule was held applicable in cases tried by the courts of that State, in spite of its being different from the one adopted by the Federal courts. A part of the discussion on this point by Judge Bond in the opinion written by him is quoted:

The only question presenting any difficulty in this case is the question of the defense arising upon the theory that the deceased assumed the risk of being struck by this water crane when he entered into the service of the defendant. In this connection it must be borne in mind that section 4 of the Federal Employers' Liability Act provides in terms that the doctrine of assumption of risk shall not be available in any case where the master or employer has violated any Federal statute in reference to providing safety appliances or proper equipments on its trains. The thought in the mind of Congress evidently was that the doctrine of assumption of risk should not obtain where the negligence of the master had supervened, and that provision of the act is in strict consonance with the law as established in this State.

This exclusion of the defense of the assumption of risk in cases of Federal statutory negligence on the part of the master leaves that defense available in other cases. And in applying it in accordance with that limitation it has been recently held by the Supreme Court of the United States, in a case appealed from the Supreme Court of North Carolina, and which involved the construction of the Federal Employers' Liability Act on the point under review, that in other than

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the instances excepted in the statutes the test would be whether or not there was an assumption of risk on the part of the plaintiff or his representative according to the common-law rule. In that case the question was whether failure of the master to comply with a State statute excluded the defense of assumption of risk. The court held that it did not. (Seaboard *v.* Horton, 233 U. S. loc. cit. 507, 34 Sup. Ct. 635 [Bul. No. 169, p. 80].)

The effect of that decision and of the act construed therein, and of the previous decision of the Supreme Court devolving concurrent jurisdiction upon the courts of the several States to enforce the provisions of said act, is to require them, in passing on the defense of assumption of risk, to apply as a standard the common-law rule on that subject. This points a plain pathway—that of the common law as adopted, interpreted, expounded, and enforced in the respective States.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISKS—BURDEN OF PROOF—*Central Vermont Railway Co. v. White, Supreme Court of the United States (June 21, 1915), 35 Supreme Court Reporter, page 865.*—Mary Theresa White brought action as administratrix, for the benefit of herself and minor children, for the death of her husband, Enoch L. White, who was killed, while employed as a brakeman by the company named, in a rear-end collision. Judgment on a verdict in her favor for $7,168 was affirmed by the supreme court of Vermont. The case being taken to the United States Supreme Court on a writ of error, the judgment was affirmed, Mr. Justice Lamar delivering the opinion. The contention that the evidence failed to show facts constituting actionable negligence under the Federal Employers' Liability Act, under which the suit was tried, was held untenable by the court, which states the substance of the evidence and its decision on this point as follows:

The evidence showed that on the night of January 1, 1912, Enoch L. White was employed by the Central Vermont Railway Co. as brakeman on extra freight train No. 401. It had passed several miles north of Bethel, Vt., and was proceeding upgrade at a low rate of speed. White and the other employees thereon had no notice that it was followed by a faster freight train (No. 708), which, at Bethel, had received a "clearance card" indicating that the track ahead was clear and that it might proceed. The engine, pulling train No. 708, had a leaking cylinder, from which steam escaped in such quantities as to make it impossible for the engineer to see the tail lights of the train on which White was employed. The result was that the faster train (708) ran into the slower train (401) and in the collision White was killed. The evidence was amply sufficient to sustain a finding that the death of White was due to the fault of the agents of the railway company.

It was held that the trial court did not err in failing to instruct the jury as to assumption of risks, since there was no evidence that White knew of the negligence of the company's agents.

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The company further contended that the burden of proving that the deceased was not guilty of contributory negligence should have been placed upon the plaintiff, his representative, since that is the rule in the State of Vermont, in one of whose courts the case was tried. As to this Justice Lamar said in part:

It is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. [Cases cited.] Congress, in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line Railway Co. *v.* Moore (228 U. S. 434, 33 Sup. Ct. 580). There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISKS—DEFECTIVE APPLIANCES—*Davis v. Chesapeake & Ohio Railway Co., Court of Appeals of Kentucky (Oct. 29, 1915), 179 Southwestern Reporter, page 422.*—J. F. Davis, while repairing a water column belonging to the company named at South Portsmouth, Ky., fell from it and suffered injury. The work was done at night, and while engaged in it, or while descending after its completion, he slipped upon a pipe which was covered with water from a leaky valve, and fell. He alleged failure to furnish a ladder and allowing the wet and slippery condition to exist, as negligence on the part of the company. The circuit court of Greenup County directed a verdict in favor of the company, and the judgment entered thereon was affirmed, the court holding that the defect causing the condition complained of was a temporary one and was not of the nature of a defective appliance as contemplated by the Employers' Liability Act, which provides that where such defects contribute to the injury the defense of assumption of risks is abrogated. It was considered that in the present case the employee, being fully acquainted with the work and its conditions, assumed the risk.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—CONTRACTS OF EXEMPTION FROM LIABILITY—PULLMAN PORTERS—*Robinson v. Baltimore & Ohio Railroad Co., Supreme Court of the United States (April 5, 1915), 35 Supreme Court Reporter, page 492.*—The plaintiff was porter on a Pullman car, and was injured, while the car on which he was employed was being conveyed over the defendant company's road, by a collision alleged to have been caused by the company's negligence. The company introduced in evidence the plaintiff's contract of employment with the Pullman Co., by which he released all railroad corporations over whose lines the cars of that company might be operated while he was traveling in its service "from all claims for liability of any nature or character whatsoever on account of any personal injury or death." The trial court directed a verdict in favor of the company, and judgment was rendered in its favor, which was affirmed by the Court of Appeals of the District of Columbia (40 App. D. C. 169, 41 W. L. R. 194, Bul. No. 152, p. 95), and again by the Supreme Court. The opinion was delivered by Mr. Justice Hughes, who after stating the facts said in part:

The substantial question is whether the contract of release was invalid under section 5 of the Employers' Liability Act, which provides that "any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." The application of this provision depends upon the plaintiff's employment. For the "liability created" by the act is a liability to the "employees" of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was "employed" by the railroad company within the meaning of the act.

We think it to be clear that in employing its servants the Pullman Co. did not act as the agent of the railroad company. The service provided by the Pullman Co. was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Co. were bound by the rules and regulations of the railroad company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation.

With this limitation, the Pullman Co. supplied its own facilities, and for this purpose organized and controlled its own service, including the service of porters; it selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure. [Cases cited.]

We conclude that the plaintiff in error was not an employee of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—DAMAGES—LIFE INSURANCE PAID TO DEPENDENT—*Brabham v. Baltimore & Ohio Railway Co., United States Circuit Court of Appeals, Fourth Circuit (Nov. 5, 1914), 220 Federal Reporter, page 35.*—Raymond H. Brabham, an unmarried man not quite 22 years old, a fireman, was killed in a collision December 27, 1910. His father sued as administrator, under the Federal Employers' Liability Act, for damages for the benefit of the father and mother, and on the trial in the Circuit Court of the United States for the Northern District of West Virginia it was stipulated that the Federal law applied, the parties being engaged in interstate commerce at the time of the injury; and that the fireman met instant death in a collision due to the negligence of other employees, and while himself in the exercise of due care. A verdict was rendered for $2,500, the jury computing the damages at $500 to the father and $2,000 to the mother. From this judgment the plaintiff appealed on the ground that the damages were inadequate.

The proofs showed that the young man was large, strong and healthy; that the father was a laborer, who did not earn enough to support the family; and that the young man had earned nearly $100 a month, and turned the greater part of this over to his mother for the family use. In the trial court evidence was admitted that the mother had drawn $2,500 as the proceeds of an insurance policy on the life of her son. The circuit court of appeals held that this testimony should not have been admitted, and that it was harmful to the plaintiff as naturally tending to cause the jury to reduce the amount assessed as damages. Because of the erroneous admission of this evidence, the court reversed the judgment and granted the plaintiff a new trial.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—DEPENDENTS—MEASURE OF DAMAGES—*Norfolk & Western Railway Co. v. Holbrook, Supreme Court of the United States (Jan. 5, 1915), 35 Supreme Court Reporter, page 143.*—W. T. Holbrook, a bridge carpenter employed by the company named at $2.75 per day, was killed by a passing train while at work on January 4, 1913. He left a widow, 32 years old, and five children of 1, 4, 7, 11 and 14 years. The widow brought action as administratrix, under the Employers' Liability Act, in behalf of herself and children, in the United States District Court, Western District of West Virginia. She charged that the accident resulted from negligence of employees of the railway company, and introduced evidence tending to establish this. The verdict was in her favor in the sum of $25,000, and judgment thereon was affirmed by the circuit court of appeals (215 Fed. 687).

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The case was taken to the Supreme Court on a writ of error. The majority of that court held that the judgment should be reversed on account of a part of the instructions of the trial judge relative to the amount of damages, Mr. Justice McReynolds, who delivered the opinion, speaking as follows:

The only assignment of error now relied upon goes to a single sentence in instruction No. 5, wherein comparison is made between the pecuniary injuries of a widow and infant children and those of adults or mere next of kin. At the instance of the administratrix, the court told the jury (instruction No. 4) that if Holbrook's own negligence contributed proximately to his death, only proportionate damages could be recovered, and then gave instruction No. 5, in the following words:

"The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

"However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding $40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

"(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed, and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

"(2) The jury will also take into consideration the care, attention, instruction, training, advice, and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their

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minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

The railway company duly excepted because "the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related." The exception was overruled, and this action is now relied on as material error requiring a reversal.

Under the Employers' Liability Act, where death is instantaneous, the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same. The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from those demanding examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented. [Cases cited.]

In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show the hypothetic injury which might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts.

Considering the whole record we feel obliged to conclude that the probable result of the indicated language in instruction No. 5 was materially to prejudice the rights of the railway company. The judgment of the circuit court of appeals is accordingly reversed and the cause remanded to the District Court for the Western District of West Virginia for further proceedings in conformity with this opinion.

Mr. Justice McKenna delivered a dissenting opinion, which was concurred in by Justices Day and Hughes. They expressed the opinion that the instructions, taken as a whole, gave the jury the proper basis upon which to assess damages.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ADJUSTING MACHINERY IN LOCOMOTIVE REPAIR SHOP—*Shanks v. Delaware, Lackawanna & Western Railroad Co., Court of Appeals of New York (Mar. 26, 1915), 108 Northeastern Reporter, page 644.*—Bruce Shanks brought action under the Federal Employers' Liability Act for damages for personal injuries. Judgment was in his favor in the trial court, but the appellate division reversed this and directed judgment dismissing his complaint, on the ground that the employment was not within the scope of the Employers' Liability Act. The decision was affirmed by the court of appeals, two judges dissenting.

The railroad company is engaged in both interstate and intrastate commerce. The plaintiff was employed in its locomotive repair shop at Hoboken, N. J., and his principal employment was running a shaping machine, in which parts of locomotives, usually those engaged in interstate commerce, were repaired. At the time of the accident he was, on a Sunday morning, engaged with a helper in moving a countershaft and pulley through which the power for the shaping machine was secured, and while making new holes in a girder from which the countershaft was suspended, his hands were cut off by the movement of a traveling crane which ran upon the top of the girder.

Judge Chase, in delivering the majority opinion, said in part:

The defendant is not liable under the act unless the plaintiff suffered injury while he was employed by the defendant as a common carrier in interstate commerce. (Illinois Central Railroad Co. *v.* Behrens, 233 U. S. 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91].)

The plaintiff, in moving the countershaft, was doing millwright work that in itself had no immediate or direct connection with commerce. He was not engaged in repairing or moving the shaping machine. If the plaintiff, while engaged in millwright work, as appears in this case, can be said to have been engaged in interstate commerce, all work in the repair of the shop and shop machinery where interstate locomotives are repaired may in some remote degree be said to constitute commerce. It was, of course, necessary in running the shaping machine to obtain power, and to obtain power it was necessary to burn coal and to obtain coal it was necessary to perform other acts far removed from the purposes of the statute in question, but these several steps surely do not constitute interstate commerce by a carrier, or commerce of any kind.

The remedy of the unfortunate plaintiff is by the compensation act of the State of New Jersey, in which State the accident occurred.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—BRAKEMAN GETTING CUP FOR TRAIN—*Baltimore & Ohio Railroad Co. v. Whitacre, Court of Appeals of Maryland (Jan. 6, 1915), 92 Atlantic Reporter, page 1060.*—Harvey W. C.

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Whitacre brought action against the company named under the Federal Employers' Liability Act for damages for personal injuries suffered in its employ as a brakeman. His run was from Cumberland, Md., into West Virginia. At 1 o'clock in the morning of June 23, 1913, he was called for his train, which was due to leave at 2 o'clock. He went to the engine, and was told by the fireman that it would not go at once to be coupled to the train, and was requested to hunt up the tool boy, who had failed to provide as usual a tin cup for the use of the train crew, and get such a cup from him. In following a moving light which he supposed to be a lantern in the hands of the boy, he stepped around an obstruction and fell into a cinder pit, receiving injuries which resulted in rupture, spinal trouble, etc.

The circuit court of Washington County rendered a judgment for the plaintiff, and this was affirmed by the court of appeals. Judge Stockbridge delivered the opinion, and in determining that the employment of the plaintiff at the time of the injury was an essential part of interstate commerce, he said in part:

That the plaintiff must be regarded as being engaged in interstate commerce at the time of the happening of the accident seems conclusively settled by two cases. In P. W. & B. R. R. Co. *v.* Tucker (35 App. D. C. 123), subsequently affirmed per curiam by the Supreme Court, Tucker was killed by being struck by an engine when he was on the premises of the defendant, in response to its call to assume the duties he had been engaged by the defendant to assume for their mutual interest and advantage; and it was there laid down that the obligation of the master commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. In North Carolina Railroad *v.* Zachary (232 U. S. 248, 34 Sup. Ct. 305 [Bul. No. 169, p. 83]), it was held that the acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE — INTERSTATE COMMERCE — BRAKEMAN UNCOUPLING CARS — *New York Central & Hudson River Railroad Co. v. Carr, Supreme Court of the United States (June 14, 1915), 35 Supreme Court Reporter, page 780.*—Bernard J. Carr recovered a judgment for damages for personal injury against his employer, the company named, which was affirmed by the Supreme Court of New York. The company appealed on the ground that the employment was not in interstate commerce, and that the suit should therefore be governed by the State law, under which, since Carr was injured by the negligence of a fellow servant, he could not recover. Both the facts and the rea-

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sons for affirming the judgment are given in the opinion, which was delivered by Mr. Justice Lamar, and which is as follows:

Carr was a brakeman on a "pick-up" freight train running from Rochester to Lockport over the lines of the New York Central. On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely intrastate business were the two cars, at the head of the train and next to the engine, which were to be left at North Tonawanda, N. Y. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then backed into a siding. It was the duty of one brakeman (O'Brien) to uncouple the air hose from the engine, and for the other (Carr) to set the hand brakes in order to prevent the two cars from rolling down upon the main track. O'Brien, having failed to open the gauge to the stopcock, suddenly and negligently "broke" the air hose. The result was that the sudden escape of air—applied only in cases of emergency—violently turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground, and for the injuries thus suffered he brought suit in a State court.

The railroad company insists that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal Employers' Liability Act.

The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing, and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employees, on its interstate journey.

Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—BUILDING ADDITION TO REPAIR SHOP—*Thompson v. Cincinnati, New Orleans & Texas Pacific Railway Co. et al., Court of Appeals of Kentucky (June 4, 1915), 176 Southwestern Reporter, page 1006.*—James Thompson brought action against the company named for damages for serious injuries received by him while working as a carpenter in the erection of an extension to the company's engine repair shop at Ferguson, Ky., on

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May 7, 1914. He was crushed by a section of the gable end of the extension, which was being hoisted and pried into place. He sued both the company and two fellow employees whose negligence he claimed caused the injury, and declared under both the State and the Federal act; but on being required to make election, he elected to proceed under the Federal Employers' Liability Act and against the company. The trial court directed a verdict for the company, and the employee appealed, securing a reversal of judgment, and directions for a new trial. The grounds for the appeal are stated as follows in the opinion by Judge Turner:

Three grounds for reversal are urged: (1) That the court erred in requiring appellant to elect whether he would prosecute his action under the State law or the Federal act; (2) that the court erred in dismissing the plaintiff's petition as against the individual appellees; (3) that the court erred in directing a verdict for the defendant company.

The court held that the trial court acted properly in the matters mentioned under (1) and (2). Judgment had been directed for the defendant company because it was not considered that the employment at the time of the injury was in interstate commerce. The court of appeals, however, held to the contrary, as appears from the following paragraph quoted from the opinion:

We can not escape the conclusion that appellant was at the time of his injury engaged in aid of interstate commerce; (1) because the extension was already in use as a storehouse in connection with the original building which was confessedly being used as an instrumentality of interstate commerce, and (2) because the extension from the very beginning of its erection must be deemed and treated as a part of the original shops.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CLEANING ASH PIT—*Grybowski v. Erie Railroad Co., Supreme Court of New Jersey (Nov. 5, 1915), 95 Atlantic Reporter, page 764.*—Constantine Grybowski sued as administrator for damages for the death of an employee of the railroad company named. The latter was run over and killed by a locomotive as he was leaving an ash pit in the yard of the company in Jersey City. Engines engaged in interstate and intrastate commerce dumped ashes into this pit, and the employee had been cleaning it out. The court held that the same principle would apply as in the repairing of tracks, bridges, etc., used indiscriminately in both kinds of commerce, and that the case was covered by the Employers' Liability Act. Other points being also decided in the plaintiff's favor, a judgment for him rendered in the circuit court of Hudson County was affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CLEANING STENCILS—*Illinois Central Railroad Co. v. Rogers, United States Circuit Court of Appeals, Fifth Circuit (Apr. 5, 1915), 221 Federal Reporter, page 52.*—Wallace Rogers brought action under the Employers' Liability Act for damages for personal injuries. Judgment was in his favor in the trial court, but on the company's appeal the judgment was reversed, the court holding the act not applicable to the facts proved. The employee had been struck and injured while cleaning stencils used to mark cars in interstate commerce. After considering the principles set forth by the Supreme Court of the United States, as to the conditions which must exist in order to make the liability act applicable, in the Pedersen case (33 Sup. Ct. 649, Bul. No. 152, p. 85) and the Behrens case (34 Sup. Ct. 646, Bul. No. 169, p. 91) Judge Maxey, who delivered the opinion, said in part:

Was such cleaning of stencils a part of interstate commerce? It seems to us that to so hold would be an unwarranted expansion of the doctrine announced by the Supreme Court, and we do not think that the principle is susceptible of such indefinite extension.

Nor do we think the mere allegation that the railroad company was engaged in interstate commerce is sufficient to authorize the holding that, at the time the defendant in error was injured, the offending engine was engaged in such commerce. To justify the application of the act, the pleadings should affirmatively show, as we have intimated, that both the defendant in error and the engine were so engaged when the injury was inflicted.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CLEARING WRECK—*Southern Railway Co. v. Puckett, Court of Appeals of Georgia (July 3, 1915), 85 Southeastern Reporter, page 809.*—H. E. Puckett brought action against the company named for damages for injuries suffered in its employ, and one of the important questions was whether he was engaged in interstate commerce at the time of the injury, it being admitted that the campany was so engaged. The accident occurred at night in August, 1911. Puckett was a car inspector, and had been engaged in inspecting cars in an interstate train which was being made up. He had inspected 23 or 25 cars in this train, and was waiting for 12 or 14 more to be brought up and placed in it, in the meantime making entries in his inspection book, when a collision between other cars occurred in the yard near by. In accordance with a rule of the company he went to give what assistance he could, and was directed by a superior to get material to jack up the car to release an employee, O'Berry, who was pinned beneath the car and engine, which action would serve also to begin the clearing of the tracks. The track from

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which the cars to be placed in the train which Puckett was checking were to be taken was one of those blocked. He was carrying blocks to be used in jacking up the wrecked car and replacing it on the track, when he stumbled over three large clinkers. This started him falling and about 5 feet farther on he struck his foot against two old ties overgrown with grass, completing the fall, in which be received permanent injuries. The court, considering the evidence, decided that there was sufficient to warrant its going to the jury on the question of the company's negligence, and also decided that the employee was engaged in interstate commerce. It affirmed the judgment which had been rendered for the plaintiff in the city court of Atlanta. Judge Broyles, who delivered the opinion, said in part on the question of interstate commerce:

It is insisted that the intention of the plaintiff, at the time of his injury, in "jacking up" the wrecked car, was to release O'Berry from his perilous position, and not to free the tracks from the obstruction so that the remaining cars to be placed in train No. 75 could be transported over the obstructed tracks. We think it immaterial that the primary object of the plaintiff may have been the rescue of his fellow employee, O'Berry. If the plaintiff helped to "jack up" the wrecked car and engine, though primarily done for the purpose of releasing O'Berry, it was nevertheless the first step to be taken in clearing the obstruction from the tracks so that over these tracks could be transported the remaining cars to be placed in train No. 75. In our opinion, his work facilitated the interstate commerce of the railroad, and, consequently, he was engaged in interstate commerce when injured.

In railroad yards both "lead" and "switch" tracks are indispensable to interstate commerce. Such tracks are just as important to carry on the business of the railroad as are the main tracks, or tracks outside of the yard. These yard tracks are necessary in making up trains and in switching, and in classifying and distributing the different cars that make up the completed interstate or intrastate train.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CONSTRUCTION OF TEMPORARY BRIDGE—*Columbia & Puget Sound Railroad Co. v. Sauter, United States Circuit Court of Appeals, Ninth Circuit (May 26, 1915), 223 Federal Reporter, page 604.*—Walter G. Thompson was killed while in the employ of the company named, and his representative brought action under the Employers' Liability Act. A bridge of the company had been undermined by a freshet, and had partly toppled over, while logs and rubbish had accumulated against the piers. In order to build a structure which would serve as a temporary bridge over which interstate trains could pass, and also as false work for the permanent structure, it was necessary to remove the material from about the piers, and the employee was attaching cables to the logs

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so that they might be pulled out into the stream, when the bridge fell and caused his death. Judgment was for the plaintiff, and on appeal the company contended that the employment was not in interstate commerce, a contention which the court of appeals rejected. In discusing the facts Judge Wolverton, who delivered the opinion, said:

While it is denied that the defendant company was at the time engaged in any way in constructing the new bridge, it clearly appears from the testimony that it had the new bridge in view at the time, and that the trestle was to serve, not only for a temporary structure for passing engines and trains over in interstate traffic, but also as false works for rebuilding the old bridge.

On this basis the court held that the employee was engaged in interstate commerce, within the decision in the Pedersen case (33 Sup. Ct. 649 [Bul. No. 152, p. 85]).

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—COUPLING ENGINE TENDER AND BAGGAGE CAR—*Atchison, Topeka & Santa Fe Railway Co. v. Pitts, Supreme Court of Oklahoma (Jan. 19, 1915), 145 Pacific Reporter, page 1148.*—W. N. Pitts brought action against the railway company named for damages for personal injuries suffered by being crushed while coupling an engine tender and a baggage car. In the district court of Kay County he recovered a verdict for $5,000. On appeal, the question of the interstate commerce character of the business in which the employee was engaged was decided adversely to him, as is shown in the following paragraph of the syllabus prepared by the court:

A common carrier by railroad engaged in interstate commerce is only liable to its employees for damages for negligence resulting in personal injuries suffered while both such carrier and such employee are engaged in that particular service under the [Federal Employers' Liability Act], and such carrier, when engaged in both interstate and intrastate commerce, is not liable under this act for injuries suffered by one of its employees while effecting a coupling betwen its engine tender and its baggage car (not appearing to be then in the service of other than intrastate commerce) in making up a train, notwithstanding it was the defendant's intent to immediately thereupon incorporate in said train a number of freight cars, including three then in the service of interstate commerce.

The court further held that, the evidence being undisputed, the court should not have left to the jury the question as to whether the Federal or the State law applied. The judgment of the court below was reversed, and the case remanded for a new trial.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—DRIVING TRESPASSERS FROM INTERSTATE TRAIN—ATTEMPT TO SECURE COMPENSATION—*Smith v. Industrial Accident Commission of California, District Court of Appeals of California (Feb. 16, 1915), 147 Pacific Reporter, page 600.*—George W. Smith applied for compensation under the act of California, and the commission entered an order dismissing the application, for the reason that the employee at the time of the injury was engaged in interstate commerce, and therefore the workmen's compensation act had no application to his case. The injury took place in the railroad yards at Colton, Cal., on the night of January 13, 1914. The employee, who was a special officer or watchman, boarded the tender of a locomotive attached to a through passenger train from New Orleans to San Francisco as it got under way to leave the yards, for the purpose of preventing trespassers from getting on the cars. Three men attempted to get on the car next the engine, but jumped off when he shouted to them. He also left the engine and started to pursue the men to drive them from the company's property. His revolver fell from its holster and a cartridge exploded, the bullet entering his thigh and inflicting a wound, which was the injury for which he sought compensation.

The court affirmed the order of the commission, holding that the employment was in interstate commerce, and therefore the Federal Employers' Liability Act was exclusively applicable. It held that the contention that the interstate character of the employment ceased when the officer stepped off the train and began pursuing the men could not be supported, the line of distinction being too fine to be seriously considered, and that the act of the watchman should be looked upon as a continuous one without a break or stop.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FIRING LOCOMOTIVE—RIGHTS OF PARENT OF MINOR—*Tonsellito v. New York Central & Hudson River Railroad Co., Court of Errors and Appeals of New Jersey (June 14, 1915), 94 Atlantic Reporter, page 804.*—Michael Tonsellito, a minor, brought action under the Federal Employers' Liability Act against the company named for injuries sustained in its employ, and his father, James Tonsellito, also brought an action under the common law. The employee was engaged on the day of the accident in firing locomotives. The one on which he was working was about to be attached to an interstate train. It became necessary to take on board a barrel of oil from a near-by storehouse, and as the engineer had not arrived, the employee started to drive the engine to the storehouse. He left

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it to adjust a switch and while attempting to board it again the engine was started and he was thrown under the wheels, receiving the injuries complained of.

The court affirmed the judgment of the Supreme Court in favor of the employee, holding, under the authority of the Pedersen case, that he was engaged in interstate commerce, and that the Federal act was applicable. A judgment in his father's favor was also affirmed, Judge Minturn for the court saying with reference to the relation of the act to this action:

We do not construe the Federal act as repealing either expressly or impliedly the father's right of action as it existed at common law. It purports to deal only with cases involving the death of the employee, and, in the absence of an intent clearly expressed or necessarily implied that Congress intended to take away by this corrective or remedial act the legal status of third parties as fixed by the immemorial rules of the common law, we must assume that such legal rights still subsist unimpaired.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—HAULING EMPTY CARS—BRAKEMAN—*Pennsylvania Railroad Co. v. Knox, United States Circuit Court of Appeals, Third Circuit (Jan. 4, 1915), 218 Federal Reporter, page 748.*—This suit was brought by the administrator of the estate of James Campbell who was killed while in the employ of the company named as a freight brakeman. His death was caused by the twisting off of a brake rod. There was no evidence of the interstate character of the cars composing the train, except that relating to eight empty cars, the relation of which to such commerce constituted one of the important questions in the case. They had been delivered to the Pennsylvania system in New York, and had been transferred to the nearest distributing point for freight cars in Pennsylvania, without any billing or other evidence of destination. There being no use for them there, they were placed in another train and carried to another point in the same way, and this occurred three or four times up to the time of the injury to the employee. The court held that the interstate movement ceased when they reached the first distributing point in the State.

The other question in the case, whether there was evidence of the company's negligence in failing to make suitable inspection of the brake rod which broke, the court also decided adversely to the plaintiff, and the judgment of the district court, which was in his favor, was reversed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—HAULING EMPTY CARS—FIREMAN—*Thompson v. Wabash Railway Co., Supreme Court of Missouri (Dec. 2, 1914), 171 Southwestern Reporter, page 364.*—R. W. Thompson was killed in a collision while employed as fireman on an engine on his regular route from Moberly, Mo., to Moulton, Iowa. At the particular time, the engine was drawing only empty cars. Suit was brought against the employer, the company named, by Ethel Thompson, widow of the deceased employee, under a Missouri statute, and she recovered a judgment for $10,000 in the circuit court of Randolph County. The supreme court reversed this judgment, holding that the employee was engaged in interstate commerce, and that the case was therefore governed by the Federal Employers' Liability Act, so that suit could properly be brought only under that act. The case of Norfolk, etc., Railway Co. *v.* Commonwealth of Virginia, 93 Va. 749, 24 S. E. 837, cited by Mrs. Thompson's counsel was recognized as opposed to this view, but the court held that it could not follow that case on account of the later decisions of the Supreme Court of the United States to the contrary, including Michigan Central Railroad Co. *v.* Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, Bul. No. 152, p. 88), and the Second Employers' Liability Cases, 223 U. S. 1, Bul. No. 98, p. 470). Quite extensive quotations were given from these cases and from cases in various States as supporting the court's view that the work which the fireman was doing, as described, was interstate commerce. The judgment was therefore reversed and the case remanded to the circuit court with instructions to dismiss the plaintiff's petition.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INCIDENTAL ABSENCE FROM WORK—*Graber v. Duluth, South Shore & Atlantic Railway Co., Supreme Court of Wisconsin (Jan. 12, 1915), 150 Northwestern Reporter, page 489.*—The plaintiff, Graber, a brakeman in the employment of the company named, was injured in the early part of the evening of January 24, 1912, his injury consisting of the crushing of one foot so that it was necessary to amputate the leg between the ankle and knee. He recovered in an action for damages in the circuit court of Douglas County, and the company appealed. The principal part of the employee's duties was to run as brakeman between Soo Junction and Marquette, both in the State of Michigan. Soo Junction was a terminal transfer point where cars were brought from within and without the State and made up into trains for completion of transit. On the day of the accident Graber had made a trip out from Soo Junction, and returned with several interstate cars.

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The remaining duty for the day was to sidetrack the cars, put away the engine in the roundhouse, locate and properly close the caboose and do work in the yard, if time should permit, and such were the orders from the conductor. After doing such work, Graber proceeded to a near-by saloon, off the right of way, to get a drink. The saloon was so located that a through train which was standing on the track obstructed the way therefrom to the depot. After getting the drink Graber started for the depot, for the purpose of obtaining final instruction from his superior and then going to supper at a place on the right of way, on the depot side of the standing train. As Graber reached the train and was in the act of climbing through between two gondola cars, without any signal being given, it was suddenly started. There was evidence to prove that trains often stood as in the particular case for as long as half an hour to an hour and a half, leaving no way of getting from the side of the track where Graber was before endeavoring to pass between the cars, other than by executing some such movement as he attempted or going around the end of the train, and that trainmen commonly took the short cut and depended for warning of danger upon a signal by ringing of the engine bell, which commonly occurred before moving a train.

The complaint of the company on appeal was to the submission of the case to the jury on the question of whether respondent, at the time he was injured, was engaged in interstate commerce, and within the scope of the Federal Employers' Liability Act. Judge Marshall, who delivered the opinion of the court affirming the judgment of the court below in Graber's favor, stated the respective functions of the court and jury, cited a number of cases defining the application of the law in question, and continued:

In the cases cited, the Federal Supreme Court explained that the law does not permit of splitting up a service, which is in its nature an entirety, into its various steps or elements. All work, so closely related to interstate commerce business as to be practically inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former.

A further detail of the Federal act, as it has been authoritatively construed, is important in this case. Any brief incidental absence from the scene of work or instrumentality used therein, which is not inconsistent with the employee's duty to his employer, does not, necessarily, preclude his efficiently claiming to be still on duty and engaged in interstate commerce. (North Carolina Railroad Co. *v.* Zachary, 232 U. S. 248, 34 Sup. Ct. 305 [Bul. No. 169, p. 83].) Neither the period or nature of continuity of service is changed by such a brief stepping aside from or cessation of activity as that of customarily visiting a wayside place for a lunch or other legitimate and common means of refreshment, or waiting after one task shall have been done for orders as to the next movement, the employee all the time being

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within customary reach for continuance of the day's service and holding himself in readiness to immediately respond. (Missouri, Kansas & Texas Railway Co. *v.* United States, 231 U. S. 112; United States *v.* Chicago, etc., Railroad Co., 197 Fed. 624; United States *v.* Denver & Rio Grande Railroad Co., Id. 629.)

Applying the foregoing to the undisputed facts detailed in this case, it is considered that, if the trial court committed any error in leaving the question of whether respondent was engaged in interstate business at the time he was injured, to the jury, it was not in his favor; but rather was in favor of appellant. Work in the transfer yard was indispensable to the interstate business. Respondent had not been relieved for the day. His service from the time he started out in the morning until the instant of his injury and the work he then thought might be required of him, were inseparably connected with interstate business and, so, were a part thereof. The court under the circumstances, would not have made any mistake by so deciding, as matter of law.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—MINING COAL—EVIDENCE—*Delaware, Lackawanna & Western Railroad Co. v. Yurkonis, United States Circuit Court of Appeals, Second Circuit (Jan. 12, 1915), 220 Federal Reporter, page 429.*—The employee, Yurkonis, brought action against the railroad company named for damages for personal injuries suffered by him on July 6, 1911, while employed in a coal mine of the company. In the District Court of the United States for the Eastern District of New York he recovered a verdict of $50,000, and this being reduced by the plaintiff's consent to $36,000, judgment was entered for this amount. The plaintiff claimed, as the negligence of the company, failure properly to ventilate the working place in accordance with the Pennsylvania mining law. The original complaint set forth the provisions of this law and also of the Pennsylvania Employers' Liability Act, and later an amendment was made alleging that the company was engaged in interstate commerce. This was admitted by the defense. At the close of the evidence the defendant made a motion that a verdict be directed for it, because the Federal act was exclusive, and the cause of action was at this time barred under it. The court denied this motion on the ground that the plaintiff could recover either at common law, under the State liability act or the Federal statute. The circuit court of appeals held that this was a right decision based on a wrong reason; that if the Federal law ever applied it was exclusive, but it never applied in this case, because merely mining coal is not interstate commerce. Coming to the merits of the evidence as proper to come before the jury and sufficient to sustain its verdict, Judge Ward, who spoke for the court, said:

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The plaintiff was the only witness as to the circumstances immediately preceding the accident, and he testified that he was allowed to go into the chamber with an open lamp; that, having examined for gas with his safety lamp, he discovered none; that he thereupon lighted the squib placed to fire the blast, picked up his hat, in which was an open mining lamp, and started to walk out. As he raised his head he was knocked down by an explosion of gas, got up and was knocked down again, and before he could get away the blast was exploded by the gas. He also testified that he had informed the mining foreman on the morning of the day of the accident that the brattice was not long enough to properly ventilate his working place, and that the foreman promised to have it corrected, which he did not do. The defendant sought to prove that this account of the explosion was impossible, and that the blast must have gone off through the plaintiff's own negligence. These were questions which we think were properly submitted to the jury. The plaintiff's account does not appear to us so incredible, or the cause of the explosion so disconnected with failure to furnish the ventilation required by the Pennsylvania mining law, as to justify the direction of a verdict for the defendant.

This case later came before the Supreme Court of the United States on a writ of error, and was dismissed for want of jurisdiction (35 Sup. Ct. 902), the court holding that the employment was not in interstate commerce, and that the jurisdiction of the circuit court of appeals, having been based wholly on diversity of citizenship, was final. The following is a quotation from the opinion delivered by Mr. Justice Day:

In the course of the trial, during examination of a witness, while evidence was being offered to show the disposition of the coal mined, counsel for defendant stated that it used the coal mined in its locomotives in interstate commerce. He said that as a matter of fact and as a matter of law coal which plaintiff mined was used in that way, and that "we are engaged in interstate commerce."

The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce—facts essential to recovery under the Employers' Liability Act.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING BURNED PORTION OF ROUNDHOUSE—*Thomas v. Boston & Maine Railroad, United States Circuit Court of Appeals, First Circuit (Jan. 15, 1915), 219 Federal Reporter, page 180.*—Gordon Thomas brought action against the rail-

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road company named, under the Federal Employers' Liability Act, for damages for personal injuries, and in the District Court for the District of New Hampshire an objection to the plaintiff's declaration was sustained and judgment given for the defendant, that court holding that the employee was not engaged in interstate commerce at the time of the injury. The court of appeals reversed this decision and remanded the case for a new trial, holding that the declaration sufficiently alleged employment in interstate commerce, as is shown by the following quotation from the opinion of Judge Dodge:

The district court understood the declaration as follows:

"According to the declaration, the plaintiff was engaged in tearing down a roundhouse, or that part of it, which had been rendered useless by the fire, and was injured, not by an instrumentality being actively used in interstate commerce, but by a falling timber.

"The active function of the roundhouse as an instrumentality in interstate business had ceased to exist, and the employment, therefore, was in connection with the removal of a useless structure, to the end that a new one might be created for railroad purposes, and very likely for uses in connection with interstate commerce."

The plaintiff denies that his allegations warrant the statement that the roundhouse had ceased to exist as an instrumentality in interstate business, or the statement that his employment was in removing a useless structure to the end that it might be replaced by a new one.

The allegations here in question are as follows:

"That [on the alleged day of the injury] said roundhouse was partially damaged by fire, in consequence whereof it became necessary for said defendant for the conduct of its interstate commerce to tear down so much thereof as was damaged by fire and to rebuild the same, and that said defendant * * * was undertaking to tear down and rebuild said roundhouse, with the intent and for the purpose of again using the same in such interstate commerce; that said plaintiff was then and there employed * * * on said work."

While this is not wholly consistent, we do not think it must necessarily be understood in the sense attributed to it by the district court. We think it may fairly be taken as alleging that the damage which the plaintiff was repairing was partial damage to the structure, temporarily suspending its former regular use, instead of damage requiring its complete removal, in order to permit the construction of a wholly new structure to begin.

So construed, we think the declaration states a case within the act. One engaged in repairing an instrumentality of interstate commerce may be engaged in such commerce. (Pedersen *v.* Delaware, etc., Co., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85].) In Law *v.* Illinois Central, etc., Co. (208 Fed. 869 [Bul. No. 169, p. 94]), the plaintiff was repairing an engine, regularly used for interstate transportation, but at the time, and for 21 days before his injury, dismantled and in the repair shop where his injury was sustained. Two days later, its former use was resumed. The Court of Appeals for the Sixth Circuit held that the suit was maintainable under the act.

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The judgment of the district court is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING CARS FROM SWITCH TRACK—*Pennsylvania Co. v. Donat, Supreme Court of the United States (Nov. 1, 1915), 36 Supreme Court Reporter, page 4.*—In affirming a judgment in favor of the plaintiff in this case Mr. Justice McReynolds said:

Basing his claim upon the Employers' Liability Act of 1908, Marion Donat began the original action in the United States District Court for Indiana against the Pennsylvania Co., a carrier by railroad, to recover damages for personal injuries alleged to have been suffered by him while employed as a yard conductor. The trial court refused a request to charge that he was not engaged in interstate commerce when the accident occurred, and therefore could not recover. This refusal is the sole ground upon which error is now asserted.

Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Ind. They were destined to Olds' private switch track connecting with the yard; and, acting under instructions, Donat commenced the switching movement requisite to place them thereon. There was evidence tending to show that, in order to complete this movement, it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged about the removal, defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. 1021) the circuit court of appeals was clearly right. (New York Central & Hudson River Railroad Co. *v.* Carr, 238 U. S. 260, 35 Sup. Ct. 78 [see p. 92].)

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING SIDETRACK—*Clark v. Chicago Great Western Railroad Co., Supreme Court of Iowa (May 18, 1915), 152 Northwestern Reporter, page 635.*—Clark, the plaintiff, recovered a verdict in the district court of Dubuque County for injuries received by him while in the employ of the company named. The employee was a trainmaster, and was injured by being thrown from and struck by a gravel train on which he had been standing, by the sudden stopping of the train. The gravel was being placed upon a new sidetrack, which had not been opened for traffic generally, but which had on two occasions been used by interstate trains, they having tied up on it to afford the rest legally required for the crews. The court decided that under the circumstances the work being done would be of the nature of repair of a track used in interstate commerce rather than of new construction, so that the plaintiff had

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properly proceeded under the Federal Employers' Liability Act. The judgment was reversed, however, on the ground of the signing of a release by the plaintiff.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING SWITCH ENGINE TEMPORARILY WITHDRAWN FROM SERVICE—*Southern Pacific Co. v. Pillsbury et al., Supreme Court of California (Aug. 7, 1915), 151 Pacific Reporter, page 277.*—The Industrial Accident Commission of California awarded compensation for the death of an employee of the company named, the fatal injury having been received while the employee was repairing in a roundhouse an engine used largely in switching interstate cars. The company made application for a writ to review the action of the members of the commission, on the ground that the employee was engaged in interstate commerce, and therefore his remedy was under the Federal Employers' Liability Act. The court upheld the company's contention as to this, and annulled the award of the commission.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SECTION FOREMAN—ASSUMPTION OF RISKS—*Texas & Pacific Ry. Co. v. White, Court of Civil Appeals of Texas (June 19, 1915), 177 Southwestern Reporter, page 1185.*—J. P. White brought action for damages for injuries sustained by him while in the employ of the railroad company named as section foreman. He, with a crew of five men, went out to repair a broken rail joint, riding upon a hand car. The work was finished and the return trip begun, when a freight train was seen approaching, and they proceeded to lift the car from the track. One of the men in doing this staggered and let go his hold because of the weight of the car, throwing an extra burden upon White, who severely wrenched his back in the effort resulting. Negligence of the company was charged in furnishing a car too heavy for use by the number of men available, and in refusing the foreman's previous requests for a lighter car or a larger number of hands, and on these grounds he brought suit, and secured a verdict amounting to $1,000 in the district court of Taylor County. As to the question whether he was engaged in interstate commerce the court relied upon the Pedersen case, holding that, the work of repairing the interstate track being such, the return trip was equally so. Judge Dunklin concludes the portion of the opinion dealing with this subject as follows:

We are of the opinion, further, that the act of removing the hand car from the track out of the way of the coming train, being in the

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aid of the movement of interstate traffic, was sufficient of itself to bring the accident within the operation of the Federal Employers' Liability Act; in other words, that White, in removing the hand car for the purpose of giving a clear track to the train loaded in part with interstate freight, was engaged in interstate commerce within the meaning of the act.

The case was reversed on the ground of assumption of risks, the court holding, on a point on which there is not entire agreement among the different courts, that the State rule has no bearing on the question, the opinion saying:

The evidence shows without controversy that, if the car was too heavy to be handled by White and the men working under him, White knew of that fact and of the risk incident to handling the same before he undertook the performance of his service by using said hand car; in fact, counsel for appellee admit that, if the doctrine of assumed risk is applicable, then that defense was sustained by proof. Under the statutes of the State of Texas the defense of assumed risk in a suit by an employee of a railway company against such company does not obtain; the statutes making the facts which would otherwise sustain such a defense admissible upon the issue of whether or not the employee was guilty of contributory negligence. But under the Federal statute, the Employers' Liability Act, the defense of assumed risk is available between such parties.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CAR REMAINING IN YARDS BETWEEN INTERSTATE TRIPS—*Moyer v. Pennsylvania Railroad Co., Supreme Court of Pennsylvania (Jan. 2, 1915), 93 Atlantic Reporter, page 282.*—Oscar G. Moyer brought action against the company named for damages for personal injuries, which were found by the jury to have been the result of the car which he was engaged in shifting not being equipped with a coupler coupling automatically by impact, as required by the safety appliance act for cars in interstate traffic. The facts as to the use of the car, which belonged to another company, previous to and following the accident were not in dispute, it being shown that it came loaded from Logansport, Ind., to Donora, Pa., arriving on December 18, and being unloaded there. It was sent to one yard of the company in Pittsburgh on the 21st, and the next day shifted to the Thirtieth Street yard. Within a short time it went to Louisville, Ky., loaded with glass, and there was nothing to show that it was employed in any way in the meantime. The plaintiff was injured while it was being shifted to the Thirtieth Street yard. The court held that the brief period of nonuse did not interrupt its status as employed in interstate commerce, and affirmed

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a judgment rendered for the plaintiff under the Federal Employers' Liability Act. Judge Stuart, who delivered the opinion, said in part:

Can it be said that, because it had discharged its freight and was not actually employed in transportation for two or three days following, it had ceased to be a car "used in moving interstate traffic"? The last actual use it had been put to was that of moving interstate commerce. The next use it was put to was the same. It had not been employed while remaining in charge of the defendant company in any other. It was detained in the defendant company's yards, so far as appears, only to await the company's convenience in returning it to where it belonged. With these facts established, the question, we think, admits of but one answer—the car at the time of the accident was a car used in moving interstate traffic. The facts being as stated above, the learned trial judge committed no error in ruling as he did.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CARS OF COAL FOR INDISCRIMINATE RAILROAD USE—*Harrington v. Chicago, Burlington & Quincy Railroad Co., Kansas City Court of Appeals, Missouri (Nov. 22, 1915), 180 Southwestern Reporter, page 443.*—Margaret Harrington brought action under the statute of the State of Missouri for damages for the death of her husband, which occurred while he was employed as a switchman in the yards of the company named in Kansas City. He was running cars of coal onto a storage track, where the coal would be placed in bins and used on locomotives in both interstate and intrastate commerce. The company defended on the ground that the employment was in interstate commerce, and that therefore the suit under the State law could not be maintained. Judgment was in the plaintiff's favor in the circuit court of Jackson County, and this was affirmed by the court of appeals. Judge Johnson, who delivered the opinion, discussed the Pedersen and Behrens cases as authorities, and held that the Federal law did not apply, saying in part:

The most difficult task confronting us is the solution of the question whether or not the coal being transported had become impressed with the character of an instrumentality of interstate commerce, for the reason that an indefinite and indistinguished part of it certainly would be used as fuel for locomotives engaged in interstate traffic, though the remainder just as certainly would be supplied to locomotives engaged only in intrastate traffic. There would be no separation of the fuel, and no application of any portion to the use of either class of traffic, before such portion passed from the bin or chute at which the engine happened to stop into the tender of the engine, and it is manifest that the act of filling the tender of an intrastate engine could not be classified as an act of interstate transportation; nor could the coal thus used, which, as stated, would be drawn from the carrier's general store, be regarded as ever having been an

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instrumentality of interstate commerce. And if it had not been thus characterized, how may it be said that the general supply, of which it had been a component, but indistinguished part, had taken on the character of an instrumentality of interstate commerce?

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE—INTERSTATE COMMERCE—SHOVELING COAL INTO POCKETS FOR TRAINS—*Kamboris v. Oregon-Washington Railroad & Navigation Co., Supreme Court of Oregon (Mar. 23, 1915), 146 Pacific Reporter, page 1097.*—This action was brought by Pete Kamboris, administrator of Saranti Tsepelia, under section 380, Lord's Oregon Laws, to recover damages for the death of Tsepelia. The latter was an employee of the company named, and was engaged in shoveling coal into its pockets at Umatilla, Oreg. The cars were run into the chute by an inclined trestle, and the employee was standing at the top of the incline, waiting for cars to be switched in, and with instructions to block their wheels, when he was struck and killed by a derailed coal car, whose derailment was due to a broken and defective rail, which the evidence tended to show was due to the negligence of the company. While a judgment in favor of the plaintiff was rendered in the circuit court of Multnomah County, the company objected to this recovery under the State law on the ground that the employment was interstate commerce, and the Federal Employers' Liability Act controlled. This contention was sustained by the court, and the judgment reversed and the case remanded for further trial. Judge Bean, in delivering the opinion, spoke in part as follows:

In the case at bar we can not see why the act of furnishing the coal for fuel, and placing the same in the pockets of the chute to be used partly in the engines engaged in interstate traffic, was not just as essential in the matter of running interstate trains as the act of taking the same out of said chute or pockets and placing it upon the tenders of the engines, or any other act of the employees in running the engines and trains transporting such commodities. If it were impossible to fill the position of the deceased, and the coal was not furnished, interstate commerce would stop or be retarded to that extent, and it clearly seems to us that the general duties of the decedent, as well as the act he was performing at the particular time of the injury, had a very substantial bearing upon and relation to interstate commerce. It can not be said consistently that the decedent was not engaged in his duty because he was waiting for the cars to approach the proper place in order to block the wheels. It might as well be said that a switchman was not engaged in his duty while waiting for a train to pass a switch in order to turn the same. The act of placing the cars of coal in the chute was similar to decedent's general duties of shoveling coal, and was a necessary service in preparing the fuel for the engines hauling the interstate trains. From the practically admitted facts in the case at bar we conclude the de-

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fendant was engaged in interstate commerce at the time of the injury, and that the decedent was employed by the defendant in such commerce, and was within the protection of the act in question.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHING CARS WITH COAL FOR ENGINES—*Barlow v. Lehigh Valley Railroad Co., Court of Appeals of New York (Feb. 5, 1915), 107 Northeastern Reporter, page 814.*—James H. Barlow brought action against the company named for damages for personal injuries, and recovered a judgment, which was affirmed by the appellate division. The only question on appeal was as to the propriety of the submission of the case to the jury under the Federal Employers' Liability Act, as was done in the trial court.

Barlow was employed by the company named as an engineer on a switching engine in the yards at Cortland, N. Y. His crew was engaged in placing three cars of coal upon a trestle, to be dumped into pockets, thence to be used upon engines for interstate and intrastate commerce. The cars had come from another State, and had been on the siding in the yard for a few days. While Barlow was reaching under the engine to make an examination, the fireman backed it up, either for the purpose of uncoupling from the cars or of backing down the incline just after uncoupling, and caused the injury. The following is quoted from the opinion of the court, speaking by Judge Miller, and affirming the judgment below:

The plaintiff's right to recover under the Federal act is maintained on two grounds: (1) That the transportation of the coal from Sayre, Pa., though for the defendant's own use, was interstate commerce, and was not completed until the cars were actually placed on the trestle to be unloaded; (2) that the act of placing the cars on the trestle, so that the coal could be dumped into pockets from which it could be transferred to the tenders of engines engaged in interstate commerce was so closely connected with and related to interstate commerce as to be a part of it. We think the action may be sustained upon both theories.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHMAN—BURDEN OF PROOF—*Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Glinn, United States Circuit Court of Appeals, Sixth Circuit (Jan. 5, 1915), 219 Federal Reporter, page 148.*—This action was brought by Annie B. Glinn, administratrix of the estate of her son, Hugh A. Morford, who had been killed while employed as a brakeman of the company named, in switching operations. The crew to which Morford belonged had been switching both interstate and intrastate cars during the night in which the accident occurred, and at the time the engine was

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not hauling any cars, but was passing onto another track in order to conduct more switching. The court held that under these circumstances the judgment which the district court had rendered in favor of the plaintiff was justified, Judge Denison, who delivered the opinion, saying, in part:

The circumstances here are not, in all respects, the same as those found controlling in the Pedersen case (229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85]), or the Seale case (229 U. S. 156, 33 Sup. Ct. 651 [Bul. No. 152, p. 87]). They may also be distinguished, though we think not effectively, from the facts in the Zachary case (232 U. S. 248, 34 Sup. Ct. 305 [Bul. No. 169, p. 83]); because, in the latter case, it definitely appeared that the engine was about to be used, or was being prepared for use, in distinctively interstate commerce. The same difference and possible distinction exists with reference to Law *v.* Illinois Central (208 Fed. 869 [Bul. No. 169, p. 84]). However, we can draw no inference from these and other familiar decisions of the Supreme Court (including the Behrens case, 233 U. S. 473, 477, 34 Sup. Ct. 646 [Bul. No. 169, p. 91]), and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a general, indiscriminate character, not segregated and tied to shipments within the State (as in the Behrens case, supra) but applicable at least as well to the interstate commerce which the carrier is conducting. While it may not be easy in some cases to draw the line between the results of this view and a breadth of construction which would make the statute invalid under the [first] Employers' Liability Cases (207 U. S. 463, 28 Sup. Ct. 141 [Bul. No. 74, p. 216]), yet cases like the present are fairly within the line of validity. They hardly go beyond fixing the burden of proof and declaring that, where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary.

It follows that the jury in this case had a right to find, as it did, that at the time of his death Morford was employed in interstate commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TAKING "DEAD ENGINE" FROM ONE STATE TO ANOTHER—BURDEN OF PROOF—*McAuliffe v. New York Central & Hudson River Railroad Co., Supreme Court of New York, Appellate Division, Second Department (Dec. 11, 1914), 150 New York Supplement, page 512.*—Timothy McAuliffe was injured while in the employment of the company named, and brought suit against it for damages under the Federal Employers' Liability Act. He was a freight conductor, and was injured by collision of his train, which at the time consisted of an engine and a caboose only, with an interstate train. The employee had taken a train from New Jersey into New York the second day before the accident, and the next day was employed in carrying freight between points in New York. On the day of the accident he was returning from New York to the southern

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terminal of the road in New Jersey with a "dead engine." On reaching the terminal he would have laid off for eight hours, and it was not shown in what kind of transportation he would be next engaged. The court decided that under the facts stated the employee was not engaged in interstate commerce. Judge Thomas, who delivered the opinion, said:

In North Carolina Railroad Co. *v.* Zachary (232 U. S. 248, 259, 34 Sup Ct. 305, 309 [Bul. No. 169, p. 83]), it was said that:

"The hauling of empty cars from one State to another is, in our opinion, interstate commerce within the meaning of the act."

The defendant says that this utterance was dictum. However, I accept it as authority; but it does not apply to the present case. The locomotive and caboose and crew were not hauling empty cars from one State to another, nor were they returning from a trip after hauling empty or loaded cars between States, because after the outward trip was ended they were diverted to intrastate operation, and after such intervention were going back without transporting any objects of commerce from one State to another. They were carrying instrumentalities which had been and probably would be used in the future for interstate and intrastate transportation combined, or only for intrastate purposes, or perchance for interstate commerce only. I can not find that it has been decided that such act constitutes interstate commerce, but it has been decided in principle that it does not.

The opinion then quotes from the case of Illinois Central Railroad Co. *v.* Behrens, 233 U. S. 473, 34 Sup. Ct. 646 (Bul. No. 169, p. 91), in which it was decided that a member of a switching crew which handled interstate and intrastate cars indiscriminately, who was at the time of injury hauling only intrastate cars, was not within the provisions of the act. Continuing Judge Thomas said:

The language is explicit; it isolates completely the service at the time of the injury, and ascertains whether then and there the plaintiff was employed in interstate commerce; it ignores past service; it puts from view further service, and asks what was the nature of the carrier service at the period of accident. What was done in that case is not what was done in this instance; but the rule for testing the application of the statute is made very clear.

The opinion then takes up the limitations of State and Federal powers, and holds that the burden is upon a person asserting that the Federal act applies, and that the plaintiff has failed to sustain this burden. The judgment in favor of the plaintiff was reversed and a new trial granted. Two of the judges dissented from the decision.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TAKING OUT OLD RAILS AND LOADING ON CARS—STATUS OF MEDICAL EXAMINERS FOR EMPLOYEES—*Cherpeski v. Great Northern Railway Co., Supreme Court of Minnesota*

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(*Feb. 5, 1915*), *150 Northwestern Reporter, page 1091.*—Anton Cherpeski brought action under the Federal Employers' Liability Act for damages for personal injuries alleged to have been suffered by him because of the negligence of his fellow servants in the employment of the company named. He was a section foreman, and with his crew was engaged in taking up old rails from the main line of track and replacing them, the old rails being loaded on a flat car, and presumably hauled away. He was engaged in so loading a car when injured. The main track and the track on which the flat car was standing were used both in interstate and intrastate commerce. The verdict in the district court of Lyon County was for the plaintiff. On the authority of the Pedersen case (229 U. S. 146, 33 Sup. Ct. 648, Bul. No. 152, p. 85), and other cases, the court held that it was at least a question for the jury whether the work was in interstate commerce, and that the trial court properly submitted this question, as it did also the question of the negligence of a fellow servant in throwing one end of a rail into the car without the usual warning.

The judgment was reversed, however, because the trial court excluded as privileged the testimony of physicians as to examinations of the plaintiff, one for the purpose of determining whether he was in suitable physical condition to become an employee of the railway, and the other to determine his fitness to continue such employment. The court held that since there was no intention that these physicians should apply curative treatment, the testimony was not privileged, and was improperly excluded.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WATCHMAN AT CROSSING—PRESUMPTIONS—*Louisville & Nashville Railroad Co. et al. v. Barrett, Supreme Court of Georgia (July 21, 1915), 85 Southeastern Reporter, page 923.*—Mattie Lou Barrett brought action as administratrix against the company named, under the State law, for damages on account of the death of her husband while in the company's employ. He was a watchman at the crossing, whose duty it was to warn travelers on the highway of approaching trains. When a freight train was approaching the crossing he was engaged in so warning certain travelers, and was struck by a passenger train on another track and killed. Judgment was in the plantiff's favor in the superior court of Cobb County. The company claimed on appeal that the employee was engaged in interstate commerce. It appeared that both termini of the route of the passenger train were within the State of Georgia, while the freight train went from Atlanta to a point in Tennessee, but there was no evidence that that particular train had freight for points out-

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side the State of Georgia. The court held that he was not within the scope of the Employers' Liability Act, Judge Atkinson, who delivered the opinion, saying in part on this point, after a discussion of the precedents:

To make a similar ruling in the case now under consideration would require an extension of the rulings in the cases cited. In the first place the duties of the watchman, under his employment, were primarily for the safety of the public, and do not appear to have extended to any control of the movements of the train, or to have extended to repairs or physical maintenance of any of the defendant's indispensable instrumentalities of commerce, such as a railroad bridge, tracks, or the like. In the second place it does not appear that the freight train, on account of the approach of which the watchman was warning pedestrians not to come upon the tracks, was engaged in carrying freight to points beyond the limits of this State, or that the passenger train which inflicted the injury was engaged in interstate commerce. On these facts the case is not controlled by the ruling in the cases cited, and the doctrine of those cases will not be extended.

The judgment was reversed, and a new trial granted to the company, however, on the ground of an erroneous instruction to the jury. This was to the effect that a statute creating a presumption, in cases of damage to persons and property by the running of trains, that the company is negligent applied to the case. This act was held by the court not to apply in cases of actions for injury to or death of employees of railroad companies.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—YARD CLERK—EVIDENCE—*Pecos & Northern Texas Railway Co. v. Rosenbloom, Supreme Court of Texas (June 26, 1915), 177 Southwestern Reporter, page 952.*—Action was brought in this case by the widow of a deceased employee and others under the State laws and the successive judgments were in their favor. On a petition for rehearing the company insisted that suit could not be maintained by the plaintiffs in the character in which they sued, because the employee was engaged in interstate commerce, and recovery should be had, if at all, under the Federal Employers' Liability Act.

Rosenbloom was a yard clerk whose duty it was to check up cars and trains, take their numbers, and report in regard to them. Just before his death he was walking between two tracks, on one of which was a moving train which was leaving the yard and which contained cars which had come in from New Mexico, and most of which were destined for points outside of Texas. There was no evidence as to the purpose of the employee in walking through the yards at that time. The court held that he was not engaged in interstate com-

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merce, Judge Phillips, who delivered the opinion refusing the company's motion for a rehearing, saying in part:

It was not shown here that Rosenbloom had been engaged in any service connected with the interstate freight train, and in the state of the evidence his walking through the yard can not be said to have had any association with a duty in respect to it. The finding of the court of civil appeals is definite to the effect that the evidence did not disclose for what purpose he was walking through the yard, or what character of work he had been engaged in just before his injury.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—YARD CLERK—EVIDENCE—*Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Farmers' Trust & Savings Co., Supreme Court of Indiana (Mar. 10, 1915), 108 Northeastern Reporter, page 108.*—The trust company named brought action as administrator against the railway company named for the death of William Morrow on December 14, 1910. Morrow was a yard clerk of the company, and it was his duty to direct the setting and movement of freight trains in the yard, and make a record of all cars passing in and out. He was killed by an engine which came upon him while in the performance of these duties, which necessarily took him about the yards. The court held, following the Seale case (33 Sup. Ct. 651, Bul. No. 152, p. 87), that evidence that these duties related daily to interstate cars as well as others was sufficient, without the necessity of proof that the particular work which he was doing at the moment of the injury had to do with interstate commerce, and regardless of the status of the engine which ran him down as engaged in interstate or intrastate traffic. The circuit court of Howard County had rendered a judgment in favor of the plaintiff for $5,000, and this was affirmed by the supreme court.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NONRESIDENT ALIEN BENEFICIARIES—*McGovern v. Philadelphia & Reading Railway Co., Supreme Court of the United States (Dec. 14, 1914), 35 Supreme Court Reporter, page 127.*—This action was brought against the railway company named for damages for its alleged negligence in causing the death of Peter McGovern, an employee, by his administratrix on behalf of his surviving parents, citizens of Great Britain and Ireland. The action was brought under the Federal Employers' Liability Act of 1908. Mr. Justice McKenna delivered the opinion of the court, and the following is the greater part of his opinion, stating the history of the case and the

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reasoning of the Supreme Court, which reversed the previous judgment in favor of the company:

There were two trials of the action. At the first trial the plaintiff obtained a verdict. On motion of the railway company, the court, being of opinion that the action could not be maintained for the benefit of nonresident aliens, granted a new trial. (209 Fed. 975.) On the second trial the railway company submitted to the court for its affirmance the following propositions, among others: (1) The parents of McGovern, being nonresident aliens, have no right under the act of Congress for which the action might be maintained, and therefore a verdict should be directed in favor of the company. (2) Under all of the evidence in the case a verdict should be for the company. The court affirmed the propositions and directed a verdict for the company. The jury returned a verdict accordingly, and judgment was duly entered for the railway company. This writ of error was then sued out.

In ruling upon the statute the district court considered that the reasoning in Deni *v.* Pennsylvania Railroad Co., 181 Pa. 525, 37 Atl. 558; and in Maiorano *v.* Baltimore & Ohio Railroad Co., 213 U. S. 268, 29 Sup. Ct. 424, applied. In the Deni case the Supreme Court of Pennsylvania, passing upon a statute of the State which permitted certain named relatives to recover damages for death occurring through negligence, held that the statute had no extraterritorial force, and that the plaintiff in the action was not within its purview, though its language possibly admitted of the inclusion of nonresident aliens. The Maiorano case came to this court on writ of error to the Supreme Court of Pennsylvania, where the doctrine of the Deni case was repeated and applied. This ruling was simply accepted by this court as the construction of the State statute by the highest court of the State.

We concede some strength of persuasion to the Pennsylvania decision, but to it may be opposed the ruling in other jurisdictions. (Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386 [Bul. No. 32, p. 153]; Kellyville Coal Co. *v.* Petraytis, 195 Ill. 217, 63 N. E. 94; Atchison, Topeka & Santa Fe Railroad Co. *v.* Fajardo, 74 Kans. 314, 86 Pac. 301.) In the latter case and in Mulhall *v.* Fallon many other cases are reviewed, including English and Canadian cases, and it was concluded that the weight of authority in this country and in England was that alienage is not a condition affecting a recovery under acts such as that involved in the case at bar.

We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that the policy of the Employers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies. Even if that were its only object, we might accept the distinction expressed in Mulhall *v.* Fallon, supra, between the duties imposed by a statute upon persons in another State and benefits conferred upon them. Extraterritorial application would naturally not be given to the first, "but rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered."

The rights and remedies of the statute are the means of executing its policy. If this "puts burdens on our own citizens for the benefit

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of nonresident aliens," as said by the district court, quoting the Deni case, supra, it is a burden imposed for wrongdoing that has caused the destruction of life. It is to the prevention of this that the statute is directed. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be wife, children, or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SAFETY APPLIANCES—DRAWBARS AND COUPLERS—*St. Louis & San Francisco Railroad Co. v. Conarty, Supreme Court of the United States (June 14, 1915), 35 Supreme Court Reporter, page 785.*—Fannie M. Conarty brought action as administratrix against the railroad company named for damages for personal injuries resulting in death. The injuries were received in a collision between a switch engine on which the employee was riding and a loaded freight car. The car was about to be placed on an isolated track for repair, and was left near the switch leading to that track while other cars were being moved out of the way, a matter of about five minutes. During that time the switch engine came down the track and the collision occurred. Darkness and a headlight on another locomotive tended to obscure the car. The deceased and two others were standing on the footboard at the front of the switch engine. The others stepped off, while he remained on the footboard and was caught between the engine and the body of the car. The drawbar and coupler were missing from that end of the car, and the negligence of the company in violating the Federal safety appliance act by using a car thus defective was the fault complained of as the basis of the action. There was evidence that if the missing parts had been present they would have kept the engine and car a sufficient distance apart so that the employee would not have been crushed. The three men were on their way to a point farther on, and did not intend to perform any duty regarding this particular car by coupling it or otherwise. The car was loaded with interstate freight, and the employee was engaged in interstate commerce. He died from the injuries six days later, leaving a widow and three minor children. Judgment for $10,000 in favor of the administratrix was affirmed by the Supreme Court of Arkansas. The United States Supreme Court reversed this decision, as will appear from the following quotation from the opinion delivered by Mr. Justice Van Devanter:

The principal question in the case is whether, at the time he was injured, the deceased was in the class of persons for whose benefit the safety appliance acts required that the car be equipped with

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automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed.

The safety appliance acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled "without the necessity of men going between the ends of the cars," or that is not equipped with drawbars of standard height, the height of the drawbar having, as explained in Southern Railroad Co. *v.* Crockett, 234 U. S. 725, 34 Sup. Ct. 897, an important bearing on the safety of the processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are directed are those which attended the old-fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars, when coupled into a train, sometimes separated by reason of the insecurity of the coupling. Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate "the necessity for men going between the ends of the cars."

We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the supreme court of the State erred in concluding that the safety appliance acts required it to hold otherwise.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SPECIAL CONTRACTS—NOTICE—*Chicago, Rock Island & Pacific Railway Co. v. Pearce, Supreme Court of Arkansas (Mar. 29, 1915), 175 Southwestern Reporter, page 1160.*—R. Edgar Pearce brought action against the company named for damages for personal injuries suffered while in its employment in interstate commerce, and recovered a small verdict in the circuit court of Perry County. The company appealed from the judgment in his favor, claiming that he was not entitled to recover, under the terms of a contract entered into at the beginning of the employment. In this he agreed to give notice within 30 days of an injury, stating the time, place, manner and circumstances of the injury, and attempted to waive, on behalf of himself and his representatives, all claim for damages in case of failure to give such notice. On this appeal he contended that the contract was in conflict with the Federal Employers' Liability Act under which he sought damages, and the court upheld this view and affirmed the judgment below. It cited the case of El Paso & Northeastern Railway *v.* Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21 (Bul. No. 86, p. 316). In that case a statute of New Mexico, then a Territory, requiring no-

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tice, was held unconstitutional. Judge McCulloch, who delivered the opinion, spoke in part as follows:

Now, the point of that decision, so far as it applies here, is that, if the first employers' liability act superseded Territorial statutes on this subject, the last employers' liability act, which applies to all persons working in the service of railroads in interstate commerce, likewise supersedes any State legislation on the subject, and it necessarily follows that if other legislation is thus superseded and set at naught, contracts between the parties are also without force. We think that conclusion is correct upon principle.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—VIOLATION OF SAFETY APPLIANCE ACT—INTRASTATE MOVEMENT OF DEFECTIVE CAR—*Texas & Pacific Railway Co. v. Rigsby, United States Circuit Court of Appeals, Fifth Circuit (Apr. 29, 1915), 222 Federal Reporter, page 221.*—This was an action for injuries received by one Rigsby, the company being charged with negligence in moving a car which was defective, in violation of the safety appliance acts of the United States. Judgment had been in Rigsby's favor in the trial court, and was affirmed on appeal, the court ruling that civil liability attaches even where criminal liability does not, and that interstate use is not necessary to bring the movement of such a car within the prohibition of the act, saying that "In this respect there is a marked difference between the safety appliance acts and the Employers' Liability Act."

The opinion was delivered by Judge Walker, the concluding portion being as follows:

The evidence in this case was without conflict to the effect that the injury to the defendant in error, a switchman employed by the plaintiff in error, a common carrier engaged in interstate commerce by railroad, was due to the defective condition of one of the rungs or grab irons constituting the ladder to the top of a box car which at the time was standing on the plaintiff in error's main line at Marshall, Tex., while switching was going on which was required to complete a movement previously started of that with other cars from another track in the yard to the plaintiff in error's repair shop at that place. There was an absence of evidence tending to prove that the defect which caused the injury could not as well have been repaired or removed without making the movement of the car which had been partially executed when the injury occurred. We are of opinion that the evidence showed a right of recovery in the defendant in error.

EMPLOYERS' LIABILITY—SEAMEN—MEDICAL TREATMENT—*North Alaska Salmon Co. v. Larsen, United States Circuit Court of Appeals, Ninth Circuit (Feb. 1, 1915), 220 Federal Reporter, page 93.*—Peder Larsen shipped on the *Olympic* for a voyage from San Fran-

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cisco to the salmon cannery of the company named at Locanock, Alaska, and return. On July 12, 1912, while loading fish into a bucket to be hoisted to the wharf, he sustained an injury to his knee. He alleged that the company failed to provide him with proper medical care after this injury, and compelled him to work, and that he should have been sent to a point on shore where he could have received proper medical attention. The jury in the trial court awarded him a verdict of $506, and the company appealed.

The company's first contention was that the case was not within the admiralty jurisdiction of the court. Larsen's contract was for service as a seaman, fisherman, beachman, trapman, "and such other services as might be required." The court held that this was a maritime contract, citing cases in support of this view.

The next contention for the defense was that the finding that the company did not furnish the employee with proper care and attendance was not supported by the evidence, and the company showed that it had in its employment at Locanock a regularly licensed physician. There was, however, evidence that the physician persistently minimized the injury and refused to treat it, and that the superintendent refused to send the employee ashore to other physicians.

The last point of interest was whether recovery could be had for loss of time after the conclusion of the contract of employment with the company. The court held that such recovery could be had, at least in a case like this where there was negligence on the part of the employer, citing cases to that effect. The judgment for the plaintiff was affirmed.

EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION—ELECTION BY INJURED EMPLOYEE AND BY PERSONAL REPRESENTATIVE—*Behringer v. Inspiration Copper Co., Supreme Court of Arizona (July 7, 1915), 149 Pacific Reporter, page 1065.*—Belle Behringer, administratrix of Fred A. Behringer, deceased, brought action against the company named for the death of Behringer, who was its employee. Her suit was brought under the statute providing for the survival of actions in cases of fatal injury, and the question arose whether she could sue in this manner, or should proceed under the compensation act. An objection to the complaint as insufficient had been sustained in the superior court of Gila County, and judgment entered dismissing the complaint. The complaint did not state that the employer and employee had disaffirmed the provisions of the compensation act. The court held, however, that this was matter of defense, and had been waived by the defendant in setting up a demurrer.

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Taking up the question of the power of the administratrix to employ the different methods for recovery, Judge Ross, who delivered the opinion, called attention to the provision of the constitution giving the legislature power to pass the compulsory compensation act, and quotes that amendment, which concludes as follows:

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.

The court held that this limited the legislature, that the option provided for was personal to the employee, that the attempt of the legislature in the law as passed to give an election to the personal representative, in case the employee did not make such election between the accident and his death, was void, and that in such case of failure on the part of the employee to elect, the representative's rights were limited to a suit under the act governing fatal injuries or under the employers' liability act of the State. The following quotation is from the concluding portion of the opinion:

The attempt of the legislature to enlarge the scope of the constitutional mandate so as to afford the remedy therein mentioned to the personal representative or heirs or dependents of the deceased workman in the absence of an election by the workman to accept compensation, is beyond the power and authority of the legislature, and of no avail.

We conclude that the workmen's compulsory compensation act has no application to the state of facts before us as presented by the complaint and demurrer; that if, as a matter of fact, the deceased after the injury, and before his death, elected to accept compensation under that act, it is matter of defense to be raised by plea or answer, and that the remedy is personal to the workman, he only having the right to elect so as to make such election binding on him and his personal representative.

EMPLOYERS' LIABILITY INSURANCE—EMPLOYMENT OF MINOR CONTRARY TO LAW—"RAILROADS"—*Oxford Coal Co. v. Fidelity & Casualty Co. of New York, Supreme Court of Pennsylvania (Mar. 1, 1915), 93 Atlantic Reporter, page 1072.*—The coal company named brought action against the insurance company for the amount paid by the former as damages to an injured employee. The insurer made answer that the injury was caused by a minor under 18, employed contrary to the statute which forbids the employment of such minors at switch tending, etc., and as brakemen, firemen, engineers, motormen, conductors upon railroads, and the liability was therefore not covered by the policy. The minor, Conway, had been employed as a switch tender, but at the time of the accident in question was acting as engineer, upon a private narrow-gauge railroad three-fourths of a

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mile long, operated by the coal company in its coal washery. The coal company contended that the term "railroads" as used in the statute referred only to railroads which were common carriers. The court, however, after a discussion of the rules for interpretation of statutes, held that the word here should be understood in its broadest sense, Judge Mestrezat, who delivered the opinion, using the language here quoted, and upholding the decision of the court of common pleas in favor of the insuring company.

The mischief intended to be remedied and the undoubted purpose of the act clearly indicate that the word "railroads" was used in its broadest sense and applies wherever the road or way may be so designated. It was not for the protection of the public, but specifically to provide for the health and safety of minors within the designated age, and the danger to them is as great on a private railroad at an industrial plant as on a commercial railroad or one used as a common carrier. In fact, there are reasons which suggest themselves why switch tending and running an engine over a short industrial road would be more dangerous than on a railroad used as a common carrier. A private railroad at an industrial plant is used for the transportation of freight. It is not built for passenger traffic, and is therefore not constructed with a view to the safety of such traffic. The legislative thought was to protect minors, under 18 years of age, against dangers incident to switch tending and operating locomotive engines on railroads, and it being apparent that the danger is as great on a private as a public railroad, on a railroad at an industrial plant as on a railroad operated as a common carrier, it is manifest that the word as used in the statute applies to the plaintiff's railroad.

EMPLOYERS' LIABILITY INSURANCE—EMPLOYMENT OF MINOR—DANGEROUS MACHINERY—*Great Lakes Laundry Co. v. Aetna Life Insurance Co., Supreme Court of Michigan (Mar. 17, 1915), 151 Northwestern Reporter, page 744.*—The laundry company named employed Bertha Roddy, a girl 16½ years of age, and in July, 1911, her hand was injured by being burned by contact with the hot roller of a mangle into which she was feeding goods. As the company was indemnified by the insurance company against liability losses, it notified the latter company, but the insurance company denied liability, on the ground that the laundry company had unlawfully employed a female under the age of 21 years in an occupation dangerous to life and limb. A settlement having been made with the employee for the sum of $1,623, the laundry company sued the insurance company for this amount.

On the trial in the circuit court of Chippewa County it was shown that the machinery had been in use for 10 years and no accident had previously occurred, and that it was equipped with an automatic feeder, and with a guard roll to warn the operator if the hand was

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allowed to follow the goods too near the hot roll. Witnesses testified that they did not consider the machinery dangerous, and the court held that the question was one for the jury. The verdict and judgment were for the plaintiff for the amount claimed. The supreme court affirmed this judgment, saying, "We are not of the opinion that this machinery was so obviously dangerous to life and limb that we should declare it so, as a matter of law." It also held that the reports of the inspections of the laundry made by the insurance company after it assumed the risk, stating that there was no specially dangerous work connected with the business nor dangerous points about the machinery unprotected, and evidence that the laws respecting the employment of minors were observed, had been properly admitted by the trial court.

EMPLOYMENT OFFICES—CONSTRUCTION OF STATUTE—TEACHERS' AGENCY—*Huntworth v. Tanner, Attorney General, et al., Supreme Court of Washington (Nov. 6, 1915), 152 Pacific Reporter, page 523.*—F. W. Huntworth, doing business as the Pacific Teachers' Agency, brought suit against the attorney general of the State to restrain a threatened arrest and prosecution for violation of the law relating to employment agencies.

The court held that the plaintiff could properly sue for an injunction where it appeared that an arrest would greatly injure his business, and was not bound to wait until the prosecution had been actually commenced against him.

The definition of the words "worker" and "workman" were carefully considered, and it was held that school-teachers do not come within their meaning. It was also remarked that the purpose of the act is to protect workmen, while teachers are usually in a position to guard their own interests, and receive a contract for a definite term, usually one year, before paying any fee except a small preliminary fee. A judgment in favor of the defendants was therefore reversed, with instructions to enter a perpetual injunction against the defendants, to prevent their enforcement of the law in the case of the proprietor of the teachers' agency.

EMPLOYMENT OFFICES—LICENSING AND REGULATION—POWERS OF COMMISSIONER OF LABOR—CONSTITUTIONALITY OF STATUTE—*People v. Brazee, Supreme Court of Michigan (Dec. 18, 1914), 149 Northwestern Reporter, page 1053.*—Le Roy Brazee was convicted of a violation of Public Acts, 1913, No. 301, providing for the licensing and regulation of private employment agencies, and attacked the

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constitutionality of the act. The act provides a different fee for the license of agencies in cities of 200,000 and over from that for smaller cities, and that licenses may be revoked by the commissioner of labor for violations of the law.

Judge Brooke, who delivered the opinion of the court, first summarized the provisions of the act, and continuing said:

Respondent avers that said act is unconstitutional and void, for many reasons which we find it unnecessary to enumerate at large in this opinion. It may be said, generally, that the claim of the respondent is: (1) That the title of the act is insufficient. (2) That the fee charged is a tax and as such lacks the equality or uniformity demanded by the constitution. (3) That it is unreasonable, oppressive, prohibitory, and not regulative. (4) That it vests arbitrary, executive, legislative, and judicial power in the State labor commissioner to say whether any man may engage in this lawful business. (5) That it is discriminatory class legislation. Other reasons are urged, which we believe may fairly be considered as covered by those above set forth.

With reference to the first contention, we think it is sufficient to say that in our opinion the title is sufficient and does not offend section 21 of article 5 of the constitution.

The opinion cites and examines a number of decisions of the Michigan court and those of other States defining the police power and upholding it in similar cases, among others Williams *v.* Fears, 179 U. S. 270, 21 Sup. Ct. 128 (Bul. No. 36, p. 976), an extract being given from the opinion of Chief Justice Fuller. The concluding paragraph of this part of Judge Brooke's opinion reads:

From a careful consideration of all the authorities, we have reached the conclusion that the business is one properly subject to police regulation and control. The character of those with whom the business is likely to be conducted, in point of capacity for self-protection from fraudulent practices, is such that the legislature might very properly determine that a license system should be adopted, to the end that dishonest and disreputable persons might, in a measure, be excluded from a right to engage in the business and means afforded for the detection of fraud and the redress of wrongs. It seems clear that the character of the business is such as to facilitate the practice of fraud upon the ignorant and credulous.

The court also held that the license fee is not excessive, and that the requirement of a larger fee in cities of over 200,000, of which there is but one at the present time, did not invalidate the act as being local legislation in the guise of general. As to the powers of the commissioner of labor Judge Brooke said:

There remains for consideration only the question whether the act confers upon the commissioner of labor arbitrary powers judicial in their character.

The legislature frequently delegates to boards or commissions the right and power to determine certain facts upon which action is

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based, and this power has frequently been challenged in our own and other courts.

At this point cases are considered upholding the delegation of such duties to saloon licensing boards and to the State board of registration with reference to revocation of the certificates of physicians. A case involving the railroad commission is referred to as follows:

In the late case of Michigan Central Railroad Co. *v.* Michigan Railroad Commission, 160 Mich. 355, 125 N. W. 549, the legislation was attacked upon the ground that legislative power was conferred upon the commission. We there said, speaking through Justice Stone:

"It is held that the functions and duties of such commissions are administrative or ministerial, and neither legislative, executive, or judicial."

The opinion concludes as follows:

We are of opinion that the act in question is a valid exercise of the police power of the State, and that the judgment must be affirmed.

EMPLOYMENT OFFICES—PROHIBITION OF RECEIPT OF FEES FROM PERSONS SEEKING EMPLOYMENT—CONSTITUTIONALITY OF STATUTE—*Wiseman et al. v. Tanner et al., United States District Court, Western District of Washington, Northern Division (Dec. 24, 1914), 221 Federal Reporter, page 694.*—R. B. Wiseman and others filed a bill in equity against the attorney general of the State of Washington and the prosecuting attorney of King County, for an injunction against the enforcement of the provisions of initiative measure No. 8, adopted by the voters of the State in November, 1914. This measure prohibits the taking of fees by employment agents from persons seeking employment. The complainants alleged that their manner of conducting the business was honest and that their charges for securing positions, ranging from 75 cents to $9, were reasonable, and that the enforcement of the act would destroy their business, which was of value. Affidavits from officials of a labor organization, of the State, and of the city of Seattle were filed by the defense, to the effect that there had been constant complaints of fraud and extortion in the employment agency system as it had been carried on.

The court, in an opinion by Judge Neterer, from which Judge Cushman dissented, denied the injunction and dismissed the bill. It pointed out that the police power may be exercised by a State whenever necessary to protect its citizens from fraud or extortion, and that the necessity is a matter for legislative determination, and not subject to review by the courts. Numerous decisions, including some

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of the United States Supreme Court, are cited and quoted in support of this view.

In the concluding portion of the opinion Judge Neterer said:

It is clearly apparent that what the regulation shall be and how to be administered are matters for the State, and a strong preponderant opinion being prevalent among the electors of the State, they having expressed at a general election that the public welfare required regulation as set forth in the act, and having declared that the evil existed and shall be met by prohibiting the collection of fees from a class of persons, the court can not interfere, unless it appears that the act has no real or substantial relation to the evil sought to be remedied, which does not appear in this case. The court can not say that the electors of the State, in adopting the act which declared that the welfare of the State required the prohibition of the collection of fees from the sources designated, did not exercise a reasonable discretion in declaring a public policy as in the act set forth.

The large number of decisions cited by complainants do not militate against or take from the quotations of the cases herein referred to. The public welfare is the determining factor, and the expressed conclusion of the electors of the State is that the interest of the public generally requires the regulation provided by the act, and this is conclusive upon the court.

The fact that complainants may have conducted their business honestly, and in such a way that no complaint could be rightfully lodged against them, would not prevent the State from adopting the measure, if necessary to reach persons who have not so conducted their business, but, as stated before the bar, in such a way as to have three men for one job—one upon the job, one going to the job, and one coming from the job—and receiving compensation from all. The honest must suffer with the others in regulating the business of the general class. The act is within the police power of the State and does not infringe complainant's rights.

EXAMINATION AND LICENSING OF PLUMBERS—RECOVERY FOR SERVICES BY UNLICENSED WORKMEN—*Gottesman v. Barer et al., Supreme Court of New York, Appellate Term, First Department (Mar. 18, 1915), 152 New York Supplement, page 128.*—Morris Gottesman brought action for his services as a master plumber, and secured judgment in the municipal court of the Borough of Manhattan. The defendants appealed on the ground that, not having been licensed in accordance with the provisions of sections 415 and 416 of the Greater New York charter, added by chapter 754 of the Laws of 1913, he could not legally recover for such services. This view the supreme court adopted, reversing the judgment and dismissing the complaint, citing Milton Schnaier & Co. *v.* Grigsby, 199 N. Y. 577, 93 N. E. 1125.

Judge Guy, who delivered the opinion, said in part:

When the plaintiff's evidence showed that he had made a contract as a master plumber, and that the work under such contract, for

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which he sought a recovery, was performed by him in the Borough of Brooklyn, it was incumbent upon him to go further and prove registration in pursuance of the statute.

By reason of the plaintiff's failure to make such proof, no cause of action was established, and the complaint should have been dismissed.

The plaintiff's testimony shows, however, that in June, 1912, he received a license from the examining board of plumbers; that on May 9, 1913, the board revoked his license for fraud in passing the examination upon which the certificate was issued and for making false statements in his application; that in July, 1913, upon the plaintiff's application, the board declined to issue a certificate to him because of his fraud in the examination, but that on April 22, 1914, several months after the performance of the work in question, the board, as shown by the minutes of its meeting on that day, took the following action:

"The following-named persons having submitted to a new examination in March, and the board having gone over their examination papers and having found them to be qualified to engage in business as master plumbers, it hereby authorizes the issuance of their certificates and rescinds its prior action in refusing to issue the same: Morris Gottesman, 117 Columbia Street, Manhattan," etc.

Not only, therefore, did the plaintiff fail to prove the essential element of registration in his effort to establish a cause of action, but his own testimony showed affirmatively that between May 13, 1913, and April, 1914, he had no plumber's license, so that he had no license at the time he made the contract and did the work in question.

It is clear that the so-called rescission of the action of the board, mentioned in the minutes of its meeting of April 22, 1914, when read in connection with the context, was really no rescission; it was merely a change of action by the board, based on the fact that since the prior refusal in July, 1913, to reissue a certificate, the plaintiff had passed a new examination.

EXEMPTION OF WAGES FROM ATTACHMENT—DEBTS FOR NECESSARIES—CONSTITUTIONALITY OF STATUTE—*Bofferding v. Mengelkoch et al., Supreme Court of Minnesota (Mar. 19, 1915), 152 Northwestern Reporter, page 135.*—William Bofferding brought action against Alex Mengelkoch and others, on a judgment obtained by the plaintiff against the defendant, and garnisheed the wages of the defendant. On disclosure it appeared that $25 was due the defendant from the garnishee for wages earned during the previous 30 days, and that the garnishee had paid defendant $35 for wages earned during that period. The trial court therefore gave judgment for the plaintiff against the garnishee for the sum of $25, giving effect to Laws, 1913, chapter 375, subdivision 16, which exempts from seizure and sale:

The wages of any person, not exceeding thirty-five dollars, due for any services rendered by him for another during thirty days preceding any attachment, garnishment or the levy of any execution against him: *Provided, however,* That if the action, in which such attach-

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ment, garnishment, or levy of execution is made, is brought to recover the purchase price of necessaries for the use of the debtor or his family dependent upon him, and any such debtor shall have been paid wages amounting to thirty-five dollars or more earned during such thirty-day period, then in any such case, such debtor shall not be entitled to any exemption under this subdivision in wages earned during said thirty-day period, except the thirty-five dollars theretofore paid.

Judge Schaller, who delivered the opinion of the court, quoted the amendment made to the constitution in 1888, providing that all property, even though otherwise exempted, should be liable to seizure for debts for work and material furnished in the construction, repair and improvement of the same; and real property, for debts for labor and service performed. It was stated that prior to this amendment decisions were rendered to the effect that the legislature had no power to discriminate in favor of a certain class of debts by making the legal exemptions inapplicable to them, and that the exceptions contained in the amendment were made soon after the announcement of these decisions. Continuing, the opinion reads, in part:

The settled law of this State from the very beginning, under constitution, article 1, section 12, has been that, unless specifically authorized by the constitution, there can be no discrimination in favor of any debt or class of debts, excepting, of course, such as the property is specifically subject to when acquired by the debtor. [Cases cited.] We are therefore constrained to hold that the proviso to Laws, 1913, chapter 375, above quoted, is unconstitutional and void.

It does not follow, however, that the main portion of this act is invalid. The act in question is certainly not fatally emasculated by cutting out the proviso, nor are we convinced that the latter was an indispensable inducement to the amendment of Revised Laws, 1905, section 4317, subdivision 16, by increasing the amount of the wage exemption from $25 to $35, which, with the exception of the proviso, was the only change made by the act of 1913 here involved. While it may serve no purpose to inquire into the motives which actuated the legislature in making this increase, one reason which readily suggests itself is the gradual and universal rise in the prices of nearly all the necessaries of life during the last few years.

We hold that so much of Laws, 1913, chapter 375 (G. S. 1913, sec. 7951), subdivision 16, as is contained in the proviso thereto, is obnoxious to article 1, section 12, of our constitution, but that the remainder of the act is not thereby invalidated.

HOURS OF LABOR—CLOSING HOURS OF MERCANTILE ESTABLISHMENTS—CONSTITUTIONALITY OF STATUTE—*Saville v. Corless, Supreme Court of Utah (July 20, 1915), 151 Pacific Reporter, page 51.*—Chapter 23 of the Laws of Utah, 1915, requires mercantile establishments, with certain exceptions, in cities of 10,000 or more population in the State, to close at 6 o'clock p. m. every business day in the year, except

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the six days immediately preceding Christmas. The plaintiffs were arrested and confined for violation of this act, and sued out a writ of habeas corpus against the sheriff in whose custody they were, contesting the validity of the law as in conflict with the Federal and State statutes. The court held the act invalid, and ordered the plaintiffs released. The facts involved, and the reasons for declaring the act unconstitutional, were shown in the opinion by Judge Straup as follows:

The constitution provides that the subject of acts shall be clearly expressed in the title. There is a subject expressed in this title. It is "An act to regulate the working hours of all employees of mercantile establishments." The act itself provides, section 1:

"That all mercantile and commercial houses, either wholesale or retail, or both, in the cities of ten thousand population and over, shall close at six o'clock in the evening of every business day of the year, except for the period of six business days immediately preceding December 25 of each year."

Section 2:

"This act exempts all commercial and mercantile houses that deal exclusively in, or whose major portion of stock consists of foodstuffs, meats, and other provisions of a perishable nature; which are regarded as, and are, public necessities."

Section 3:

"That this act also exempts drug stores, which are regarded as, and are public necessities."

It is thus seen that the title of the act is to regulate the working hours of employees of mercantile establishments; but when we look to the body of the act, we find nothing concerning such a subject, but find one wholly different, a subject fixing a closing hour for mercantile and commercial houses. The act itself forbids them to be open after 6 o'clock, regardless of the subject of employees or of their working hours. It just as much forbids one who has no employees from conducting his business, or keeping it open, after 6 o'clock, as one who has or conducts his business with employees. It makes the business itself unlawful after 6 o'clock. No such subject is expressed in the title.

The act is defended on the ground that it is a police measure, and that as such it was competent for the legislature to fix and regulate working hours of employees of mercantile and commercial houses and establishments. As has been seen, the act itself in no manner relates to such a subject. If, however, that be the intent, then does the act contravene the fourteenth amendment to the Constitution of the United States. That very clearly is shown by the case of Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539 [Bul. No. 59, p. 340]. There, the State of New York forbade the employment of bakers longer than 10 hours per day. The Supreme Court of the United States held the act bad, because it abridged the right to contract. The act there, as here, was defended as a police measure; but the court held that it in no manner related to public health, morals, safety, or general welfare, nor to the health, morals, or safety of those engaged in the business. One of the plaintiffs is a merchant engaged in selling men's clothing,

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furnishing goods, boots, shoes, jewelry, etc., in Salt Lake City. He conducted his business without help. The other plaintiff is engaged in selling cigars at retail in Salt Lake City. Both of them sold goods after 6 o'clock p. m. That, and that only, constitutes the alleged violation. It also is averred and admitted that commercial houses, or establishments in Salt Lake City, and other cities of 10,000 or more population, and exempt under the act, deal in and sell, after 6 o'clock, the same kind of goods dealt in and sold by the plaintiffs after that hour. Whether the act be viewed as expressed in the title, or as indicated in the body of the act, we do not see how it can be defended as a police measure. The business conducted by the plaintiffs does not affect the health or safety of those engaged in it. Nor is the act directed to enterprises affecting health, morals, safety, or general welfare. It strikes at all commercial houses and establishments, not within the exemptions, and forbids them to be open after 6 o'clock, regardless of the character of the business carried on, and regardless of whether it does, or does not, affect health, or morals, or safety. It, therefore, can not be upheld as a police measure.

The act was also found unconstitutional as special legislation, both on account of its applying only to cities of 10,000 population or over, and because it exempted drug stores, and commercial houses dealing exclusively or mainly in foodstuffs, meats, and provisions of a perishable nature, such places being permitted by the act to remain open and sell anything after 6 o'clock.

HOURS OF LABOR—EIGHT-HOUR DAY—STATIONARY FIREMEN—CONSTITUTIONALITY OF STATUTE—*State v. Legendre, Supreme Court of Louisiana (Nov. 2, 1915), 70 Southern Reporter, page 70.*—James Legendre was indicted for violation of a Louisiana statute, Act No. 201 of 1914, making it a misdemeanor to compel a stationary fireman to work longer than eight consecutive hours in one day, in a city having a population of 50,000 or more. He filed a demurrer to the indictment, which was sustained by the trial court, whereupon the State appealed. The allegations of the demurrer were as follows:

(1) That the statute violates the Constitution of the United States, especially the fourteenth amendment, and violates articles 1 and 2 of the constitution of Louisiana, in that it seeks to deprive the defendant of his liberty and property without due process of law, and to deny him the equal protection of the laws; (2) that the statute also violates both constitutions by attempting to make arbitrary, unequal, and discriminating classifications, and by attempting to discriminate improperly as to the persons on whom the penalty is sought to be imposed; (3) that the statute, if enforced, would destroy the right of freedom of contract; and (4) that there is a confusion as to the penalty sought to be imposed by the statute.

In affirming the judgment below, and holding the act unconstitutional, Judge O'Niell, who delivered the opinion, said in part:

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A statute very similar to the one under consideration was enacted in 1912 (Act No. 245 of 1912) and was pronounced unconstitutional and invalid. (See State *v.* Barba, 132 La. 768, 61 South. 784 [Bul. No. 152, p. 124].)

It is obvious, from the restriction of this statute to the very limited class of "persons engaged in the generation of steam in stationary boilers in which coal is used as fuel" in a city having 50,000 inhabitants or more, that this legislation has no relation to the health or morals or safety of the public, or to the health, morals or safety of the class of persons to whom the statute is confined in its operation.

A fireman employed at a stationary boiler in which coal is used as fuel, in a city having a population of 50,000 or more, is not a ward of the State. He does not need the protecting arm of the legislature, nor deserve its interference with his freedom of contract or independence of judgment, any more than a fireman employed at a portable boiler, or firing wood or coke or fuel oil, or firing coal under a stationary boiler in a city of less than 50,000 inhabitants.

The freedom of the right of citizens to make contracts is subject to such restrictions as the legislature may impose, in good faith and with a reasonable and appropriate regard for the welfare of the citizens, in the exercise of the police power of the State. (Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. 383 [Bul. No. 17, p. 625].) But a statute containing a mere pretense of promoting or protecting public health or public safety, and having no real or reasonable relation to its pretended object, is an abuse of the police power of the State, and, in so far as it invades the fundamental rights of her citizens, it is the province and duty of the courts to adjudge such a subterfuge invalid, and to uphold the constitution. [Cases cited.]

Our conclusion is that Act No. 201 of 1914 is an arbitrary and unreasonable discrimination against the employers and employees embraced within its provisions; that it invades the fundamental right of freedom of contract; that it has no real or reasonable relation to public health, public morals, or public safety, and is therefore beyond the police power of the State.

HOURS OF LABOR—NECESSARY REPAIRS—CONSTRUCTION OF STATUTE—*State v. Young, Supreme Court of Oregon (Jan. 19, 1915), 145 Pacific Reporter, page 647.*—James Young was convicted in the circuit court of Lake County of violation of the provisions of chapter 102, General Laws of Oregon, 1913, by employing William Harvey for more than 10 hours in one day, and appealed. Section 2 of the chapter mentioned provides:

No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger: *Provided, however,* Employees may 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.

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The lower court found as facts that Harvey had been employed for 11 hours on the day in question and had not been paid time and a half for the excess; that the repairs on which he was engaged were those ordinarily, regularly, and continuously required in all mills and factories, and were in that sense necessary repairs, but were not necessary in the sense that a failure to make them involved immediate or imminent danger to life or property, and that there was no emergency under the statute. It found the defendant guilty and imposed a fine of $50. The supreme court reversed the judgment. Discussing the respective effect of the exception and the proviso, it held that, while the interpretation that all employees, including the excepted classes of watchmen and repairers, were to be paid at the higher rate for their overtime would entirely destroy any effect of the exception, both would be given effect by holding that the watchmen and repairers need be paid only at the regular rate. An important point was the interpretation of the word "necessary" in the statute, and as to this Judge Bean, who delivered the opinion, said in part:

> Needful repairs are indispensable to the proper operation of the manufacturing establishment. They are also indispensable to the immediate and continued successful operation of such industrial plant, and urgent in order to lessen the danger of accident to life and limb, and as we view it, in order to carry out one of the important purposes of the act. To encourage the delay of making repairs until "they were necessary in the sense that a failure to make them would involve immediate or imminent danger to life or property" would be an effort to adopt the rule of "locking the stable after the horse is stolen," and we do not think that such was the intention of the lawmakers, as disclosed by the plain provisions of the statute.
>
> To require a mill or factory to shut down and the majority of the force of operatives to remain idle while the ordinary and usual repairs are being made by those upon whom that duty devolves would tend to work a hardship upon all concerned. Such is not in accordance with the plain requirements of the statute, which appears to contemplate, to express it in common parlance, the running of such manufacturing establishment for 10 hours per day without penalty or extra compensation, at such remuneration to those employed as may be agreed upon by the parties. The position that one in making necessary repairs would be excluded from the provisions of the act only in case of emergency, is no more tenable than that a watchman would be excluded from such provisions only under the same circumstances.

HOURS OF LABOR OF WOMEN—EIGHT-HOUR DAY—APPORTIONMENT OF TIME—CONSTITUTIONALITY OF STATUTE—*State v. Dominion Hotel (Inc.), Supreme Court of Arizona (Sept. 18, 1915), 151 Pacific Reporter, page 958.*—The hotel company named was charged with violation of the eight-hour law, and demurred on the ground that the statute was unconstitutional. In the superior court of Gila County

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its demurrer to the complaint was sustained, and the State appealed. In the supreme court, however, the decision was unfavorable to the company, and the judgment was reversed and the case remanded.

The statute provides that women in occupations named shall not be employed more than eight hours daily; that at least one hour shall be allowed for meals during the working periods; that the working period shall be included within a total period of 12 hours, except in the case of railroad restaurants; that each establishment employing women shall post the working hours; and that the permitting of a woman to work at any time not included in the hours posted shall be a violation of the act, for which a penalty is provided.

It appeared that Ada Tessner, with whose employment at a time not within the posted hours the hotel was charged, worked in the dining room. The point on which the case turned was the alleged unconstitutionality of the act in discriminating in favor of railroad restaurants. The court held that this did not bring the act in conflict with constitutional provisions, as claimed. Judge Cunningham, who delivered the opinion, called attention to the fact that the amount of actual working time allowed was the same in all cases, and continuing said:

The offense created by the statute is permitting the female employee to work at times not designated as a part of the working period. The fact that respondent and employers of like occupations are not permitted to apportion more than 12 hours of the day to the performance by female employees of 8 hours' work deprives them of no right of contract protected by the fourteenth amendment to the Constitution of the United States and section 4 of article 2 of the State constitution. The statute in the particular mentioned is a reasonable regulation restricting the employer in apportioning the hours of rest, and not of labor. He has no property right in the hours of rest of his said employees, and to grant to one employer the right to apportion the hours of labor during the 24 hours of the day so that, in effect, the employer is able to apportion the hours of rest as well as the hours of labor, is the grant of no privilege or immunity to one employer that, withheld from another, deprives the other employer of equal protection when such other is permitted to apportion only 12 hours of the day for his employee. In either case no more than 8 daily working hours may be apportioned of one day, and the employers, without exception, have equal rights in making the apportionment. The contention made is without merit.

HOURS OF LABOR OF WOMEN—EIGHT-HOUR DAY—CONSTITUTIONALITY OF STATUTE—CLASSIFICATION—*Miller v. Wilson, Supreme Court of the United States (Feb. 23, 1915), 35 Supreme Court Reporter, page 342.*—F. A. Miller, the proprietor of the Glenwood Hotel in Riverside, Cal., was arrested by F. P. Wilson, sheriff of Riverside

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County, upon the charge of employing and requiring a woman to work as a chambermaid in the hotel for the period of nine hours in a day, contrary to the California statute (Acts of 1911, p. 437) which forbade such employment for more than 8 hours a day or 48 hours a week. Miller obtained a writ of habeas corpus from the supreme court of the State, urging that the act was in violation of the State constitution and also that it was repugnant to the fourteenth amendment, as an arbitrary invasion of liberty of contract, and as discriminatory. That court, characterizing the statute as one "intended for a police regulation to preserve, protect, or promote the general health and welfare," upheld its validity and remanded Miller to custody. (162 Cal. 687, 124 Pac. 427, Bul. No. 112, p. 108.) The case was taken to the United States Supreme Court on a writ of error. Mr. Justice Hughes, who delivered the opinion affirming the judgment of the State court, said in part:

As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose. [Cases cited.] Upon this point, the recent decisions of this court upholding other statutes limiting the hours of labor of women must be regarded as decisive. In Muller *v.* Oregon, 208 U. S. 412, 28 Sup. Ct. 324 [Bul. No. 75, p. 631], the statute of that State, providing that "no female shall be employed in any mechanical establishment or factory or laundry" for "more than 10 hours during any one day" was sustained as applied to the work of an adult woman in a laundry. The decision was based upon considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigor of the race.

The opinion was then quoted from, and reference was made to the cases of Riley *v.* Massachusetts, 232 U. S. 671, 34 Sup. Ct. 469 (Bul. No. 169, p. 121), and Hawley *v.* Walker, 232 U. S. 718, 34 Sup. Ct. 479, in which the constitutionality of statutes of Massachusetts and Ohio, respectively, of similar nature, was upheld by the Supreme Court.

Continuing, the court said:

It is manifestly impossible to say that the mere fact that the statute of California provides for an 8-hour day, or a maximum of 48 hours a week, instead of 10 hours a day, or 54 hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped. Nor, with respect to liberty of contract, are we able to perceive any reason upon which the State's power thus to limit hours may be upheld with respect to women in a millinery establishment, and denied as to a chambermaid in a hotel.

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We are thus brought to the objections to the act which are urged upon the ground of unreasonable discrimination. These are (1) the exception of women employed in "harvesting, curing, canning, or drying of any variety of perishable fruit or vegetable"; (2) the omission of those employed in boarding houses, lodging houses, etc.; (3) the omission of several classes of women employees, as, for example, stenographers, clerks, and assistants employed by the professional classes, and domestic servants; and (4) that the classification is based on the nature of the employer's business, and not upon the character of the employee's work.

With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences, and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will, as a whole, fairly represent a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based upon the nature of the business is not an unreasonable one, considered in its general application, the classification is not to be condemned. (See Louisville & Nashville Railroad Co. *v.* Melton, 218 U. S. 36, 30 Sup. Ct. 676 [Bul. No. 90, p. 848].) Hotels, as a class, are distinct establishments not only in their relative size, but in the fact that they maintain a special organization to supply a distinct and exacting service. They are adapted to the needs of strangers and travelers who are served indiscriminately. As the State court pointed out, the women employees in hotels are, for the most part, chambermaids and waitresses; and it can not be said that the conditions of work are identical with those which obtain in establishments of a different character, or that it was beyond the legislative power to recognize the differences that exist.

If the conclusion be reached, as we think it must be, that the legislature could properly include hotels in its classification, the question whether the act must be deemed to be invalid because of its omission of women employed in certain other lines of business is substantially the same as that presented in Hawley *v.* Walker, supra. There the statute excepted "canneries or establishments engaged in preparing for use perishable goods"; and it was asked in that case, on behalf of the owner of a millinery establishment, why the act should omit mercantile establishments and hotels. The contention as to various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulations, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. It is free to recognize degrees of harm, and it may confine its restrictions to

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those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business" it is not necessary that the prohibition "should be couched in all-embracing terms." If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. (Keokee Consol. Coke Co. *v.* Taylor, 234 U. S. 224, 34 Sup. Ct. 856 [Bul. No. 169, p. 190].) Upon this principle, which has had abundant illustration in the decisions cited below, it can not be concluded that the failure to extend the act to other and distinct lines of business having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels. [Cases cited.]

For these reasons the judgment must be affirmed.

HOURS OF LABOR OF WOMEN—EIGHT-HOUR DAY—CONSTITUTIONALITY OF STATUTE—CLASSIFICATION—HOSPITALS—*Bosley et al. v. McLaughlin et al., Supreme Court of the United States (Feb. 23, 1915), 35 Supreme Court Reporter, page 345.*—William B. Bosley and the two other trustees of the Samuel Merritt Hospital in Alameda, Cal., and one of their employees, Ethel E. Nelson, brought suit in the District Court of the United States for the Northern District of California to secure an injunction restraining John P. McLaughlin, labor commissioner of California, and others from enforcing the eight-hour law for women of that State. The act is the same as is upheld in Miller *v.* Wilson, 35 Sup. Ct. 324 (see p. 133). The act, however prior to the institution of the present action, had been amended by Acts of 1913, page 713, which amendment had extended the statute to public lodging houses, apartment houses, hospitals, and places of amusement. The proviso was also amended so as to make the statute inapplicable to "graduate nurses in hospitals." Mr. Justice Hughes, who delivered the opinion of the Supreme Court affirming the decree of the district court refusing to grant the injunction, states the nature of the pleadings thus:

Their bill set forth that there were employed in this hospital approximately 80 women and 18 men; that of these women 10 were what is known as "graduate nurses." By reason of their qualifications they were paid "a compensation greatly in excess of that paid to female pupils engaged in nursing in hospitals while students of the training school."

It was further averred that, in addition to these 10 graduate nurses certain other women were employed in the hospital, one as bookkeeper, two as office assistants, one as seamstress, one as matron or housekeeper, five who were engaged in ordinary household duties, and one—the complainant, Ethel E. Nelson—as pharmacist. It was stated that this complainant was a graduate pharmacist, licensed by the State board; that she also acted as storekeeper, but that her chief

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duty was to mix and compound drugs for use in the treatment of the hospital patients. The general allegation was made that these last-mentioned 11 employees performed work that was in no manner different from that done by "persons engaged in similar employments or occupations and not employed in hospitals." The apprehended injury to the complainant Nelson by reason of the interference of the statute with her freedom to contract was specially alleged.

The enforcement of the act with respect to these student nurses, it was stated, would require the hospital either to cease the operation of the school, or largely to increase the number in attendance in order that an equal return in service could be obtained; and such increase would involve a greatly enlarged expense.

The complainants attacked the act on the grounds that it interfered with their liberty of contract, and denied to them the equal protection of the laws, contrary to the fourteenth amendment. And in support, it was asserted in substance, that labor in hospitals did not afford, in itself, a basis for classification; that there was no difference between such labor and the "same kind of labor" performed elsewhere; that a hospital is not an unhealthful or unsanitary place; and, generally, that the statute and its distinctions were arbitrary.

Upon the bill, an application was made for an injunction pending the suit. It was heard by three judges and was denied. The appeal in No. 362 [two appeals were decided together] is from the order thereupon entered.

Coming to the decision of the legal questions involved Justice Hughes said:

As to liberty of contract—the gravamen of the bill is with respect to the complainant Nelson, a graduate pharmacist, and the student nurses. As to the former—it appears that a statute of California limits the hours of labor of pharmacists to 10 hours a day and 60 hours a week. (Stat. 1905, p. 28.) In view of the nature of their work, and the extreme importance to the public that it should not be performed by those who are suffering from overfatigue, there can be no doubt as to the legislative power reasonably to limit the hours of labor in that occupation. This, the appellants expressly concede. But this being admitted to be obviously within the authority of the legislature, there is no ground for asserting that the right to contractual freedom precludes the legislature from prohibiting women pharmacists from working for more than 8 hours a day in hospitals. The mere question whether in such case a practical exigency exists, that is, whether such a requirement is expedient, must be regarded as a matter for legislative, not judicial, consideration.

The appellants, in argument, suggest a doubt whether the statute is applicable to the student nurses, but the bill clearly raises the question of its validity as thus applied, and urges the serious injury which its enforcement would entail upon the hospital. Assuming that these nurses are included, the case presented would seem to be decisive in favor of the law. For it appears that these persons, upon whom rests the burden of immediate attendance upon, and nursing of, the patients in the hospital, are also pupils engaged in a course of study, and the propriety of legislative protection of women

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undergoing such a discipline is not open to question. Considerations which, it may be assumed, moved the legislature to action, have been the subject of general discussion, as is shown by the bulletin issued by the United States Bureau of Education on the "Educational Status of Nursing" (Bulletin, 1912, No. 7). With respect to the "hours of duty" for student nurses, it is there said: [The quotation calls attention to the fact that such students are often engaged in exacting and responsible work for 10 or more hours a day in addition to their studies, classes, etc.; advocates an 8-hour working-day, and shows that a majority of hospital superintendents appeared to favor such limitation.]

Whatever contest there may be as to any of the points of view thus suggested, there is plainly no ground for saying that a restriction of the hours of labor of student nurses is palpably arbitrary.

As to certain other women (10 in number) employed in the hospital, such as the matron, seamstress, bookkeeper, 2 office assistants, and 5 persons engaged in so-called household work, the bill contains merely this general description, without further specifications; and from any point of view it is clear, that, with respect to the question of freedom of contract, no facts are alleged which are sufficient to take the case out of the rulings in Muller *v.* Oregon, 208 U. S. 412, 28 Sup. Ct. 324 [Bul. No. 75, p. 631]; Riley *v.* Massachusetts, 232 U. S. 671, 34 Sup. Ct. 469 [Bul. No. 169, p. 121]; Hawley *v.* Walker, 232 U. S. 718, 34 Sup. Ct. 479; and Miller *v.* Wilson, 35 Sup. Ct. 342 [see p. 133].

The distinction between graduate nurses and the other professional employees is discussed and held to be a valid one, and the opinion concludes:

As to the 10 other women employees, the validity of the distinction made in the case of graduate nurses is obvious. It should further be said, aside from the propriety of classification of women in hospitals with respect to the general conditions there obtaining (Louisville & Nashville Railroad Co. *v.* Melton, 218 U. S. 36, 30 Sup. Ct. 676 [Bul. No. 90, p. 848]), that the bill wholly fails to show as to the employment of any of these persons any such injury—actual or threatened—as would warrant resort to a court of equity to enjoin the enforcement of the law.

And the objection based upon the failure of the legislature to extend the prohibition of the statute to persons employed in other establishments is not to be distinguished in principle from that which was considered in Miller *v.* Wilson, supra, and cases there cited.

HOURS OF LABOR OF WOMEN—EIGHT-HOUR DAY—CONSTITUTIONALITY OF STATUTE—LIMITATION TO SIX DAYS PER WEEK—*Earnshaw v. Newman et al., Supreme Court of the District of Columbia (Mar. 12, 1915), 43 Washington Law Reporter, page 198.*—The plaintiff, a stockholder in a corporation, brought suit in equity for an injunction to restrain the corporation from compliance with the act regulating the hours of employment of females in the District of Columbia,

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and the Commissioners of the District from enforcing the provisions of the act. Judge McCoy, in delivering the opinion of the court, said:

The first section of the act reads:

"That no female shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in the District of Columbia more than eight hours in any one day or more than six days or more than forty-eight hours in any one week."

Were it not for the words "or more than six days in any one week," this act would be identical with the statute of California, the constitutionality of which was upheld by the Supreme Court of the United States in a recent decision.

Therefore, if it is to be held unconstitutional it will be on the ground that it may be interpreted as limiting the number of days to six.

In Miller *v.* Wilson, 35 Sup. Ct. 342 [see p. 133], the Supreme Court upheld the California statute above referred to, both as to its classification of employment, which is identical with that in the act here in question, and as to the right to legislate especially for women. Mr. Justice Hughes, writing for a unanimous court, says:

"It is manifestly impossible to say that the mere fact that the statute of California provides for an 8-hour day, or a maximum of 48 hours a week, instead of 10 hours a day or 54 hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped. Nor, with respect to liberty of contract, are we able to perceive any reason upon which the State's power thus to limit hours may be upheld with respect to women in a millinery establishment and denied as to a chambermaid in a hotel."

So it can not be said that an act of Congress is taken "out of the domain of legislative discretion" because it limits to six the number of days in a week during which women may be employed in the occupations mentioned, as "there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped." The Court of Appeals of the State of New York, in a recent decision (People *v.* Klinck Packing Co., 108 N. E. 278 [see p. 197]) sustained the "one day of rest in seven" law, requiring that every person, with a few exceptions, employed in any factory or mercantile establishment shall be allowed "at least 24 consecutive hours of rest in every 7 consecutive days."

Judge McCoy then quoted from the opinion referred to certain extracts from opinions of the Supreme Court in Gundling *v.* Chicago, 177 U. S. 183, 188, and Hennington *v.* Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, and concluded:

The act of Congress must be upheld, even though it does limit employment to six days in the week.

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HOURS OF LABOR OF WOMEN—EIGHT-HOUR DAY—"EMPLOYED IN LABORING"—*Commonwealth v. John T. Connor Co., Supreme Judicial Court of Massachusetts (Nov. 30, 1915), 110 Northeastern Reporter, page 301.*—The company named was convicted of violating the Statutes of 1913, chapter 758, which provides as follows:

No woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company, more than ten hours in any one day; and in no case shall the hours of labor exceed fifty-four in a week.

It was shown by evidence that Elsie Finn was employed by the company in a grocery store, admittedly a mercantile establishment, for more than 10 hours in one day. Her duties were those of a cashier, and she also gave out trading stamps to customers and did a little bookkeeping. The question arose whether she was "engaged in laboring" under the act. Judge Rugg delivered the opinion of the court, and sustained the conviction. He reviewed the reasons for the enactment of laws limiting the hours of labor of women, and said that the earlier history of the law would seem to give strength to the contention of the company. He then called attention to the changes by which the statute was extended to include women employed in telegraph and telephone offices and by express and transportation companies, and pointed out that the duties of the woman whose employment was involved in the present case could as well be characterized as "laboring" as those of telephone and telegraph operators. In conclusion Judge Rugg said:

We reach this conclusion for the reasons stated, notwithstanding the numerous statutes of other States, where generally the prohibition is against the employment of women under the forbidden conditions without limiting words resembling "in laboring" found in our statute.

It is not necessary to define explicitly the words of our statute or to determine whether they can be stretched to include bookkeepers, stenographers and those engaged in kindred service, or to say that the statute means the same as if the words "in laboring" had been omitted. As to those engaged in these and similar pursuits, the statute is not plain and difficulties may arise in its further application. But we are of opinion that the case at bar rightly was submitted to the jury.

HOURS OF LABOR OF WOMEN—EIGHT-HOUR DAY—MANUFACTURING ESTABLISHMENT—DRESSMAKER—*Hotchkiss v. District of Columbia, Court of Appeals of the District of Columbia (Nov. 1, 1915), 41 Washington Law Reporter, page 706.*—Susan H. Hotchkiss was convicted of a violation of the eight-hour law for females in the District of Columbia, by employing women more than eight hours daily, and

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by failure to post notices and comply with other requirements of the law. On appeal she claimed that she was not engaged in conducting a manufacturing establishment. It was shown that her business was conducted on the second floor of her residence, where she had five sewing machines and employed from 5 to 10 girls, and that she kept on hand goods and materials to be made into dresses for customers, though the customers sometimes supplied their own materials. There was no dispute that the hours worked were more than eight per day. In affirming the conviction, Justice Van Orsdel spoke for the court, saying in part:

The only error assigned worthy of consideration relates to the question whether or not the place thus conducted by plaintiff in error was a mercantile or manufacturing establishment. We think the evidence shows that she conducted a manufacturing establishment. It is not easy to define just what constitutes manufacture. It may, however, be defined to consist, not alone of converting raw material into the manufactured article, but of converting a manufactured article into a different product.

In the present case, in order to constitute plaintiff in error a manufacturer of dresses, it is not necessary that she should weave the cloth that enters into the finished article. The material entering into the finished product may pass through many stages of manufacture before the completed article is produced. These various steps employed in making the cloth and other articles entering into a dress constitute manufacture, just as the conversion of the cloth and trimmings into a dress likewise constitutes manufacture.

But it is not to be understood that everyone who may be employed to make a dress within the District of Columbia comes within the limitations of the statute. The act applies only to manufacturing establishments. The word "establishment" in this connection has a well-defined meaning. It is a place devoted, as in the present case, to dressmaking—a place where the public is invited to come and have its work done—a fixed place where plaintiff in error conducted her business—as distinguished from a mere itinerant dressmaker who maintains no fixed place in which to conduct her business.

HOURS OF LABOR OF WOMEN—NIGHTWORK—CONSTITUTIONALITY OF STATUTE—*People v. Charles Schweinler Press, Court of Appeals of New York (Mar. 26, 1915), 108 Northeastern Reporter, page 639.*—The concern named, a corporation, was convicted of violating section 93b of the labor law, as added by Laws of 1913, chapter 83. There were appeals and motions, the final result being that the court of appeals in effect affirmed the judgment of the court below, and upheld the constitutionality of the statute, which was contested. The following is the text of the statute in question:

SEC. 93b. In order to protect the health and morals of females employed in factories by providing an adequate period of rest at night

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no woman shall be employed or permitted to work in any factory in this State before six o'clock in the morning or after ten o'clock in the evening of any day.

Judge Hiscock, in delivering the opinion of the court, said in part:

It is undisputed that the appellant caused or permitted a married woman to work in a factory operated by it between the hours of 10 o'clock in the evening and 6 o'clock in the morning, and thereby violated the provisions of the act above quoted, and became subject to the punishment duly prescribed for such violation. It challenges, however, the legality of its conviction for the reason, as claimed, that said act unduly and unjustifiably interferes with the right of an adult woman to contract for her own labor, and thus violates various provisions of the constitution both of the State and of the United States which in effect provide that no one shall be deprived of life, liberty, or property, except by due process of law, and that no unjust discrimination shall be made between different classes of citizens by denial of the equal protection of law.

The answer to this challenge is that nightwork in factories, as contrasted with day labor, substantially affects and impairs the physical condition of women and prevents them from discharging in a healthful and satisfactory manner the peculiar functions which have been imposed upon them by nature, and that therefore it was within the power of the legislature to enact the statute as a police regulation tending to protect the well-being of a large class of citizens and promote the public welfare.

We are therefore presented with the issue whether it can be said that nightwork by women in factories is so generally and substantially injurious to their health that the legislature was justified by public considerations in preventing the evil by forbidding the cause.

Protection of the health of women is a subject of special concern to the State. However confident a great number of people may be that in many spheres of activity, including that of the administration of government, woman is the full equal of man, no one doubts that, as regards bodily strength and endurance, she is inferior, and that her health in the field of physical labor must be specially guarded by the State if it is to be preserved, and if she is to continue successfully and healthfully to discharge those peculiar duties which nature has imposed upon her. This proposition is fully recognized and stated in Muller *v.* Oregon, 208 U. S. 412, 421, 28 Sup. Ct. 324, 326 [Bul. No. 75, p. 631].

Evidence of the truth of the proposition would be found in many statutes which have been adopted in this State without question of their constitutionality particularly designed to protect and preserve the health of women when engaged in various kinds of physical labor.

Moved in part it may be by such general and underlying considerations as these, under and in accordance with two statutes adopted by our legislature in 1911 and 1912, there was appointed in the latter year a factory investigating commission. This commission considered this subject of nightwork by women in factories and in 1913 made a report to the legislature, recommending that there be passed the law now before us prohibiting it. It reported that such prohibition was essential to protect and preserve the health and to some extent the morals of women.

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Thus, at the time when this statute was adopted, there was before the legislature the report of a commission created by it to consider and report on this subject, based on natural laws and on actual investigation, a large volume of expert and medical opinion, and a large number of statutes adopted in various jurisdictions, all of which tended to show a careful and long-continued study and examination of the subject of nightwork by women, and as a result of such study and examination a widespread belief that such work was so injurious to their health that it ought to be prohibited both for their own sakes and for the sake of the offspring whom they might bear.

We then come to the query whether such facts, evidence, and information furnished a sufficient reason for action by the legislature and justified the statute which was adopted; and I think the answer must be in the affirmative.

The legislature was justified in preventing any such evils as those which were outlined, both real and fairly to be anticipated, by any legislation which reasonably tended to prevent them, and it had a wide discretion in formulating the means which it would adopt to this end. [Cases cited.] It was a sufficient basis in that respect for action if only there were reasonable grounds for belief that such labor was thus injurious, even though there was an "earnest conflict of serious opinion" on the subject. [Cases cited.]

The only question then left is the one whether the legislature was justified in going so far as to prohibit night labor in factories between the hours named by it as a means of promoting the public welfare by averting the actual or apprehended misfortune of broken health of working women.

It is not a basis for a constitutional objection to a statute like this, generally prohibiting the labor of women between certain hours, that in exceptional cases it may prevent employment of some women for a short time between those hours under such conditions as would be productive of no substantial harm. A legislature must legislate in general terms, and its mandates are not constitutionally vulnerable because, having power to act concerning a certain subject and to legislate in terms reasonably calculated to accomplish the general purpose within the scope of its authority, it covers and prohibits some isolated transaction which by itself would be harmless and unobjectionable. [Cases cited.]

Neither is it an effective objection to a statute if some of those who will be protected by its provisions oppose such protection, for the State has such an interest in the welfare of its citizens that it may, if necessary, protect them against even their own indifference, error, or recklessness. [Cases cited.] Nor if some cases which might have been included are omitted, for police legislation may rest on narrow distinctions. [Cases cited.]

Tested and fortified by these rules, we cannot and ought not to say that the legislature did not act within the wide powers of discretion and judgment possessed by it in adopting the prohibition which it did as a means of preventing the evils with which it was justified in believing the State to be threatened as the result of such nightwork by women.

Lastly, it is urged that whatever might be our original views concerning this statute, our decision in People *v.* Williams, 189 N. Y. 131, 81 N. E. 778 [Bul. No. 72, p. 611], is an adjudication which

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ought to bind us to the conclusion that it is unconstitutional. While it may be that this argument is not without an apparent and superficial foundation and ought to be fairly met, I think that a full consideration of the Williams case and of the present one will show that they may be really and substantially differentiated, and that we should not be and are not committed by what was said and decided in the former to the view that the legislature had no power to adopt the present statute.

That statute [considered in the Williams case] bore on its face no clear evidence that it was passed for the purpose of protecting the health and welfare of women working in factories; and while, of course, the presence or absence of such a label would not be controlling in determining the purposes and validity of the statute it still was in that case an incident of some importance as leading to the conclusions finally expressed by Judge Gray and adopted by the court.

Especially and necessarily was there lacking evidence of the extent to which, during the intervening years, the opinion and belief have spread and strengthened that such nightwork is injurious to women; of the laws, as indicating such belief, since adopted by several of our own States and by large European countries, and the report made to the legislature by its own agency, the factory investigating commission, based on investigation of actual conditions and study of scientific and medical opinion that nightwork by women in factories is generally injurious and ought to be prohibited.

So, as it seems to me, in view of the incomplete manner in which the important question underlying this statute—the danger to women of nightwork in factories—was presented to us in the Williams case, we ought not to regard its decision as any bar to a consideration of the present statute in the light of all the facts and arguments now presented to us and many of which are in addition to those formerly presented, not only as a matter of mere presentation, but because they have been developed by study and investigation during the years which have intervened since the Williams decision was made. There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission.

HOURS OF SERVICE—RAILROADS—CASUALTIES—*United States v. Great Northern Railway Co., United States Circuit Court of Appeals, Seventh Circuit (Jan. 5, 1915), 220 Federal Reporter, page 630.*—The Government prosecuted the railway company named for alleged violation of the Hours of Service Act, involving two train crews. The company has a line from iron ore mines near Kelly Lake, Minn., to docks near Superior, Wis., a distance of 100 miles. The equipment

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is all of the heaviest type, and the grade from the mines to docks slightly downhill. One hundred and twenty to one hundred and twenty-five loads are brought down in a single train, on one track, and the empties returned over the other, trains following each other less than an hour apart, day and night, making an average speed of a little more than 6 miles an hour, and usually consuming nearly the whole of the 16 hours permitted by the act in making the run. On June 18, 1912, the crew of train 1981 continued on duty for more than 20 consecutive hours, beginning at 7.45 a. m. The delay was caused by the pulling out of drawbars and breaking into five pieces of the seventh train ahead, and there being insufficient sidings or other opportunity for all the trains to be set off and the crews relieved. In the case of the other violation charged the delay was due to the bursting of air hose.

The lower court had found in favor of the defendant company, which judgment was reversed by the circuit court of appeals. Certain instructions given to the jury in the court below, and others requested but refused, involving the meaning of the terms used in the statute, were excepted to by the prosecution; and in delivering the opinion of the court of appeals, Judge Baker took the ground that the trial court had erred in the matter of these instructions. speaking in part as follows:

If the view that was acted upon by the court throughout the trial is correct, namely, that "casualty" means any occurrence or happening, whether unavoidable or avoidable by the exercise of due care on the part of the railroad, and therefore excuses all delays except those knowingly and willfully caused by the railroad, then it seems clear to us that Congress stands convicted of having followed up "casualty" with a series of meaningless and purposeless expressions. But, if the result can fairly be reached, courts must ascribe a meaning and a purpose to every part of a statute. Looking at the proviso as a whole, and with the intent of leaving, if possible, vitality in all its parts, we conceive that Congress said to the railroads: You need not pay penalties for violations in the following instances: Act of God. You are excusable for delay caused by violence of nature in which no human agency participates by act or omission. For example, a washout due to an unprecedented flood that was not and could not reasonably have been anticipated. Unavoidable accident. You are excusable if, at the time and place of the accident that caused the delay, you, through your employees, were in the exercise of due care. For example, a switch tender falls dead at an open switch and a collision immediately follows without anyone's fault. Last clause of the proviso, explanatory of unavoidable accident. But you are not excusable if, at the time a train leaves a terminal, you, through your inspectors, either knew or by the exercise of due care might have foreseen a cause that would be likely to produce an accident and consequent delay. For example, incompetent trainmen or defective or inefficient drawbars or air hose, particularly if you had notice of a succession of accidents due to those causes. Casualty (which must

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differ from the other defenses and must not be so broad as to deprive them of meaning and use). You are excusable for delay from an occurrence or happening due entirely to an outside human agency. For example, your train is overturned by a train of another railroad at a crossing by reason of the other road's trainmen's disobedience of the interlock signals. And finally, if you can not establish one of these defenses by a fair preponderance of the evidence, you must pay the penalty for keeping your employees on duty an excessive time.

HOURS OF SERVICE—RAILROADS—EMERGENCY—DISMISSAL OF EMPLOYEE FOR INSUBORDINATION—*United States v. Denver & Rio Grande Railroad Co., United States Circuit Court of Appeals, Eighth Circuit (Jan. 4, 1915), 220 Federal Reporter, page 293.*—Action was brought against the company named to recover penalties for certain alleged violations of the Federal Hours of Service Act by allowing certain employees in a night-and-day office, concerned in dispatching orders for the movement of trains, to work more than nine hours in one day. The company made answer to the effect that an emergency had arisen because an employee, when questioned with regard to his manner of performing certain work, had exhibited a violent temper, and become abusive, insubordinate and defiant on the 8th day of September and had been dismissed, and it had been impossible to secure one to fill his place until the 10th day of September; and that in this emergency the company had caused other employees to work for more than nine hours on the days intervening. The Government demurred to the answer, and the trial court overruling the demurrer, judgment was entered for the defendant. This was affirmed by the circuit court of appeals, which held that the circumstances constituted an emergency, Judge Munger, who delivered the opinion, saying in part:

It is urged that no emergency is shown, because insubordination by an employee is but a violation of the rules of employment, and a railroad company may not create an emergency at will by discharging an employee for infraction of rules, and thus require remaining employees to render extra labor. But in the situation alleged in the answer the railroad company did not create the emergency, but merely acted in one. Under the allegations of the answer that the employee became of violent temper, abusive, insubordinate, and defiant, the defendant could have shown that the employee had the power, disposition, and purpose to endanger the safety of those who traveled subject to his care by acts of omission or commission. The primary purpose of the act of Congress was to provide for the safety of those intrusted to the supervision of the employees, from the dangers arising from their lack of attention and misjudgment, owing to fatigue; but the danger from such a source is not greater than arises from the disobedience, willfulness, or malice of employees.

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The facts stated in the answer allege an emergency within the definition declared by this court in United States *v.* Southern Pacific Co., 209 Fed. 562 [Bul. No. 169, p. 124], and the judgment of the lower court is affirmed.

HOURS OF SERVICE—RAILROADS—EMERGENCY—UNAVOIDABLE ACCIDENT—*San Pedro, Los Angeles & Salt Lake Railroad Co. v. United States, United States Circuit Court of Appeals, Ninth Circuit (Mar. 8, 1915), 220 Federal Reporter, page 737.*—Judgment was rendered for the United States against the company named in two cases under the Hours of Service Act. This was reversed as to the first case, and affirmed as to the second. The first related to the employment of telegraph operators engaged in dispatching trains, etc., at Kelso. This is a night-and-day office, where three operators have shifts of eight hours each. On the 16th day of January, 1911, one of these men, Starkey, was taken suddenly ill, and, no operator being available to take his place, the two others, Grandee and Dugan, were kept at work for 12 hours each, on the 17th, 18th, 19th, 20th, and 21st. On the morning of the 17th the chief dispatcher at Las Vegas, under whose supervision the Kelso office was, requested that an operator be sent from Los Angeles, which was done, and he would ordinarily have reached Kelso in time to relieve the operators there before the expiration of the three days during which operators are permitted by the act to work for not more than four additional hours daily. However, the train on which the relief operator was traveling to Kelso was wrecked, and he was ordered to establish an office at the wreck in order to facilitate the clearing away of the wreck and the running of trains around it. This necessitated a continuation of the overtime work by the two operators at Kelso. The court held that the sickness of the operator Starkey constituted an emergency justifying the additional work for the first three days, under the provisions of section 2 of the act, and that the wreck of the relief operator's train was a casualty or unavoidable accident under section 3, so that the company was not liable for penalties for this alleged violation of law.

The second case charged violation of the act in the employment of a train crew on October 3, 1912, in excess of 16 consecutive hours. The schedule time of the run from Las Vegas to Los Angeles is 13½ hours; but on the occasion in question a landslide occurred of such character and magnitude as to stop traffic over the line, and to oblige the train to make a detour over the lines of connecting companies. The rails on one road were light, requiring slow running, especially in view of the same heavy rains which caused the landslide. Owing to all these causes, 27 hours were required to complete the run. The engine crew was changed en route, but the conductor

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and brakeman continued to perform their duties until the end of the run, a period of 27 hours in all. It appeared that a change might have been made at two points, and the decisive question was whether the law required this to be done. The court held that this is the requirement, and affirmed the judgment for penalties, Judge Ross saying as to this:

As under the evidence there can be no doubt that the landslide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4, and 5 must have been based on the view that the defendant company had the opportunity to relieve the crew either at San Bernardino, or Daggett, or both, and was by the statute, properly construed, required to avail itself of it, in which view we think, for the reasons already stated, the court was right—being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act "it was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident, until the end of the run."

HOURS OF SERVICE—RAILROADS—"EMPLOYEES"—*United States v. Chicago, Milwaukee & Puget Sound Railway Co., United States District Court, District of Idaho (June 16, 1914), 218 Federal Reporter, page 701.*—The railroad company named was prosecuted for alleged violations of the Hours of Service Act. The law provides that it shall apply to any common carrier or carriers, their officers, agents and employees, engaged in the transportation of passengers or property by railroad from one State to another, and that "employees" means persons actually engaged in or connected with the movement of any train. The employee concerned was the engineer of a work train, running between points in the same State over an interstate track, and carrying materials for the repair of that track. The court held that this employee was not within the provisions of the law, and sustained a demurrer to the Government's complaint.

HOURS OF SERVICE—RAILROADS—KNOWLEDGE OF OFFICERS AND AGENTS—*United States v. Oregon-Washington Railroad & Navigation Co., United States District Court, District of Oregon (Dec. 14, 1914), 218 Federal Reporter, page 925.*—The United States brought action against the company named for permitting E. H. Heintze, a telegraph operator engaged in handling orders affecting the movement of trains, to remain on duty over 9 hours during the 24-hour

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period beginning at 9 a. m. on January 24, 1914, namely, from the hour mentioned until 1 a. m. on January 25th. The office was one operated continuously day and night. It was stipulated that the operator did this in violation of instructions and without the knowledge of any officer or agent of the company other than himself.

The court decided that the duty of the company is absolute; that the employee who works overtime is himself an agent of the company; and cited the analogy of decisions under the safety appliance act making it also an absolute duty to see that no defective apparatus is used on trains.

This decision cites and agrees with that of the judge of the District Court for the Eastern District of Washington, in another case having the same title as the present one, reported in 213 Fed. 688 and noted in Bulletin No. 169, page 129.

A verdict for the Government had been directed, and the motion of the company for a new trial was denied.

HOURS OF SERVICE—RAILROADS—NINE-HOUR DAY—STATION EMPLOYEES—CONSTITUTIONALITY OF STATUTE—*Commonwealth v. Boston & Maine Railroad, Supreme Judicial Court of Massachusetts (Nov. 23, 1915), 110 Northeastern Reporter, page 264.*—The company named was charged with violation of chapter 746 of the Acts of 1914, which provides that baggagemen, laborers, crossing tenders and the like in and about railroad stations shall not be employed more than 9 working hours in 10 hours' time. It appeared from the agreed statement of facts submitted to the court that Victor Richards was employed as a general baggageman, at Worcester, and that the baggage handled by him was largely transported into other States. Richards worked from 6 a. m. to 7 p. m. with the exception of two lay offs of one hour and one-half hour respectively; about half his work was out of doors, and the work was not arduous, as he was assisted by the man on the baggage car, and when heavy pieces of baggage were received, by a helper at the station.

The court held that the company's construction of the law, that it simply forbids employment for more than 9 hours out of any 10, but does not limit the total hours per day to 9, was not tenable, Judge Rugg, who delivered the opinion, saying:

While the act is not phrased with clearness, its meaning seems to be that the maximum number of hours permitted to the designated employees is 9 for a day. To adopt the interpretation put forward by the defendant would render the statute inoperative. It can not be presumed in the absence of unequivocal words that the legislature intended a statute to be devoid of substantial force. In effect, the statute prohibits labor by the designated employees more than 9 hours in each day.

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On the other hand, the court held that the instructions asked for by the defendant company, among others that the act was invalid, should have been given, and the exceptions of the company were therefore sustained. In declaring the act unconstitutional Judge Rugg said:

The main contention of the defendant is that the statute as thus construed is unconstitutional. The agreed facts show that there is nothing inherently unhealthy about the work which the employee did. It was half performed in the open air. It was not arduous. Under these circumstances, the case at bar is indistinguishable from and is governed by Lochner *v.* N. Y., 198 U. S. 45, 25 Sup. Ct. 539 [Bul. No. 59, p. 340]. It was there held that a statute which prohibited labor for more than 10 hours per day in an ordinarily healthy occupation was "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they think best, or which they may agree upon with other parties to such contracts," and that "under such circumstances the freedom of master and employee to contract with each other in relation to their employment, * * * can not be prohibited or interfered with, without violating the Federal Constitution." That decision is binding upon the legislature and courts of this Commonwealth. (See, also, Opinion of Justices, 208 Mass. 619, 94 N. E. 1044 [Bul. No. 96, p. 856].) The instant statute is indistinguishable in principle from the one there stricken down. That it relates in part to certain employees of railroads constitutes no ground for differentiation, for the class with which it deals, namely, "baggagemen, laborers" and "the like," groups together those whose work does not have relation to the operation of trains and the safety of passengers. It refers to those employed in different capacities in and about railroad stations, whose work does not concern the safety of the traveling public.

Statutes limiting the hours of labor of employees of the Commonwealth, counties, cities, and towns [cases cited], are upheld for quite different reasons, and without conflicting with the Lochner case.

It was held that the statute could not be sustained as an amendment to the charter of the company. The question whether it is also unconstitutional as a regulation of interstate commerce in contravention of the powers of Congress exercised in that field, was not decided, as it was deemed unnecessary.

HOURS OF SERVICE—RAILROADS—OFFICES OPERATED CONTINUOUSLY NIGHT AND DAY—*United States v. Grand Rapids & Indiana Railway Co., United States Circuit Court of Appeals, Sixth Circuit (June 30, 1915), 224 Federal Reporter, page 667.*—Penalties amounting to $60,000 were sought to be enforced against the company named for violation of the Hours of Service Act. Judgment in the district court was for the company, and the Government appealed.

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There were two operators at each of two stations involved. At Traverse City one operator was on duty a total of 10½ hours and another 9½; at Pellston, one for 10½ and the other for 10. The former office was closed from 6 a. m. to 7 a. m. and from 11 a. m. to 12 noon; with these exceptions it was open from 4.30 a. m. to 9.30 p. m., having one operator on duty a part of this time, and both at other hours. The latter office was open all the time from 6.30 a. m. to 11 p. m.; so that the length of the closing period at night was 7 hours in the former case, and 7½ in the latter.

The single question was whether these should be considered as "offices operated only during the daytime" or "offices operated continuously night and day." In the former employees are allowed by the statute to be employed 13 hours; in the latter only 9. The court discussed the subject fully, with an examination of the cases already decided, and reached the conclusion that they were to be regarded as operated continuously, so that the judgment in favor of the company was reversed, and the case remanded for further proceedings.

HOURS OF SERVICE—RAILROADS—"ON DUTY"—"EMERGENCY"—*United States v. Chicago & Northwestern Railway Co., United States District Court, Western District of Michigan, Northern Division (Oct. 30, 1914), 219 Federal Reporter, page 342.*—Action was brought against the company named for the enforcement of penalties under the Federal Hours of Service Act, and the court gave judgment for the prosecution. Twenty-four different counts alleged the keeping of telegraph operators on duty for more than 13 hours during periods of 24 hours. A part of the stipulated facts as to eight of the counts was as follows:

It is agreed that the testimony shows that the employee always has a full hour off duty for dinner and also for supper as a uniform and regular practice; that they have no definite recollection as to the particular days in question; that if during a meal hour an unexpected train should arrive at their station they would give it the necessary attention and complete their meal hour after doing so as a common practice; that they were paid for the full amount of overtime charged; and also for their regular service.

Discussing this point, Judge Sessions, who delivered the opinion, said:

From these facts, it is apparent that the operator was always subject to call whenever his services were required, both during meal hours and at other times. It is well settled that, within the meaning of the Hours of Service Act, brief periods allowed for meals and other purposes do not interrupt the continuity of service. Under the circumstances here shown, it must be held that the operator was on duty during the time he was taking his meals. (United States *v.* Chicago,

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Milwaukee & Puget Sound Railway Co., 197 Fed. 624–627 [Bul. No. 112, p. 124]; Missouri, Kansas & Texas Railway Co. *v.* United States, 231 U. S. 112–119, 34 Sup. Ct. 26 [Bul. No. 152, p. 128]; United States *v.* Northern Pacific Railway Co., 213 Fed. 539 [Bul. No. 169, p. 133].)

The defense of emergency was made to certain counts, but the court held that neither the lateness of other trains on connecting lines or the delay of the departure of a circus train due to the act of the circus company's intoxicated employees in running a wagon off a flat car, was an emergency, but that both were, on the contrary, ordinary accidents, which "furnish neither justification nor excuse for a violation of a remedial statute like the one under consideration."

HOURS OF SERVICE — RAILROADS — OPERATORS, ETC. — CONDUCTOR USING TELEPHONE—*United States v. Florida East Coast Railway Co., United States Circuit Court of Appeals, Fifth Circuit (Apr. 5, 1915), 222 Federal Reporter, page 33.*—The company named was prosecuted for alleged violation of the Hours of Service Act, by the employment for more than 13 hours out of 24 of a conductor who, at certain stations, used the telephone to receive orders relating to the movement of trains. The question involved was whether such an employee was included, by reason of his use of the telephone, in the term "other employees" in the proviso of section 2 of the act, relating to operators, train dispatchers, and the like.

The court held that the act was not intended to cover such employees under the proviso, and that the company was not guilty of its violation. Judge Maxey, in delivering the opinion, considered that the purpose of the proviso was to provide shorter hours for telegraph and telephone operators and other employees whose primary and principal duty requires them to operate telegraph instruments and telephones for transmitting, etc., orders affecting train movements generally. He also called attention to the fact that the language of the statute contemplates that the duties of employees mentioned in the proviso should be performed in a fixed place. He stated that an additional reason for such construction of the law is that when general terms are used in a statute, their meaning will be restricted to things of a like nature and description with the particulars among which they are found, and quoted as follows from the case of Missouri Pacific Railway Co. *v.* U. S., 211 Fed. 893 (Bul. No. 169, p. 129):

As the word "employee" in the proviso of section 2 includes "operator" and "train dispatcher," for the latter are both employees, the conclusion here is irresistible that Congress intended by the use of the words "other employee" to mean an employee engaged primarily in the same class of service as would be performed by an operator or train dispatcher.

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HOURS OF SERVICE—RAILROADS—OPERATORS, ETC.—SWITCH TENDERS USING TELEPHONES—ORDERS—*Chicago, Rock Island & Pacific Railway Co. v. United States, United States Circuit Court of Appeals, Seventh Circuit (Aug. 6, 1915), 226 Federal Reporter, page 27.*—The railway company named was convicted in a district court for violation of the Hours of Service Act. The questions involved were whether the employees concerned were within the classes restricted in the proviso of the act to a nine-hour working day, and whether the telephone communications made by them were orders within the meaning of the act. It appeared that the employees were switchmen, and it was their duty to throw certain switches, near Chicago, over which trains entering the city from the south or leaving it in that direction passed. Four miles distant there was a crossing with the tracks of the Baltimore & Ohio Railroad. At that point there was an interlocking arrangement by which it was impossible for trains to proceed over both tracks at the same time, so that they could not collide. The passenger trains on the Rock Island road might, however, be considerably delayed in waiting for freight trains to pass on the Baltimore & Ohio; and to obviate this difficulty it was made the duty of the switchmen in question, when a passenger train passed them, to telephone to the towerman at the crossing, so that he would hold freight trains until the passenger train had passed. The court affirmed the conviction in an opinion by Judge Mack. The company conceded that any direction which must be obeyed would be an order; but contended that only such orders as might result in some accident came within the purpose, and therefore within the scope, of the act. The court held that those accomplishing greater regularity in passenger service, as in this case, would also be included, and pointed out that delay might result in accident. It also held that the statute is not intended to apply only to those whose primary and principal duty it is to transmit orders, but to those as well who ordinarily and habitually do so, although other duties form the principal part of their employment.

HOURS OF SERVICE—RAILROADS—OPERATORS—TRAIN DISPATCHER EMPLOYED ALSO AS TICKET SELLER—*Delano et al. v. United States, United States Circuit Court of Appeals, Seventh Circuit (Jan. 5, 1915), 220 Federal Reporter, page 635.*—This case involves the question whether a railroad violates the Hours of Service Act by the employment of a person for a length of time less than nine hours as a train dispatcher, and for a further period, completing a total of more than nine hours, as a ticket seller, inspector of telegraph lines and apparatus, or the like, these latter occupations being among those

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not limited to nine hours of service by the statute. The court reviewed the purpose of the act, held that Congress expressed no intention to permit such employment of a train dispatcher, and affirmed the judgment of the court below for the United States against the defendants (appellants in the present proceedings), receivers for a railroad company.

HOURS OF SERVICE—RAILROADS—REPORTS OF OVERTIME WORK—*United States v. Baltimore & Ohio Railroad Co., United States District Court, Northern District of West Virginia (Sept. 13, 1915), 226 Federal Reporter, page 220.*—Action was brought against the railroad company named for penalties for alleged violation of the Hours of Service Act. Certain employees included in the nine-hour provisions of the act had been required, under emergency conditions, to work for periods not in excess of four hours additional per day for three days in one week, as permitted by the act under such conditions. The company contended that in these cases it was not required to report the occurrence of the overtime work, but the court held that a report should have been made. Judge Waddill, who delivered the opinion, said as to this:

> The purpose of the act in question was to limit the time of service of employees, and at the same time, in cases of emergency, to give some latitude in the enforcing of the act, looking to the practical working of the same; and the purpose, therefore, was to place some limit on the time in which additional service could be rendered in case of emergency.
>
> It was the plain purpose of the order to secure information respecting these very matters; otherwise, without just reason or cause, all employees could have been required to labor four additional hours for three days in each week, and the commission would not be advised thereof. It was not intended that this additional service should be required, save in an emergency, and it was certainly not within the spirit of the act that the employees [employers?] should be the sole judges of when the emergency existed, to warrant the extra service.

The court held on the other hand that a report was not required when an operator was employed for extra hours because at work at the place of a wreck.

HOURS OF SERVICE—RAILROADS—REPORTS OF OVERTIME WORK—INADVERTENT OMISSIONS—*Oregon-Washington Railroad & Navigation Co. v. United States, United States Circuit Court of Appeals, Ninth Circuit (May 3, 1915), 222 Federal Reporter, page 887.*—The Government brought action to recover 30 penalties, of $100 each, for violation by the company named of an order of the Interstate Commerce Commission, requiring that within 30 days after the

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end of each month all carriers shall report instances where, during the month, employees have worked for a period longer than that provided in the Hours of Service Act. It was conceded by the Government that the omissions had been inadvertently made, and the question was whether, that being true, the company was liable for penalties. The District Court for the District of Oregon held that it was so liable, but its judgment of conviction was reversed on appeal, Judge Ross, who delivered the opinion, saying in part:

In the recent case of San Pedro, Los Angeles & Salt Lake Railroad Co. *v.* United States, 220 Fed. 737 [see p. 147], in considering the Hours of Service Act, we held that the whole of it "must be taken together, and be so construed as to give effect to its humane purpose, and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent"; that the paramount purpose of the act was to prevent the overworking of the employees, to the end that their efficiency be not impaired; and that the obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse.

We think the same common sense and just construction should be placed upon the order of the Interstate Commerce Commission adopted for the purpose of giving effect to that act, and that an omission honestly and inadvertently made from a report of a carrier, filed pursuant to the order, should not be held to subject the carrier to the penalty prescribed by the act of Congress. Undoubtedly the courts should, and no doubt always will, scrutinize any and all such omissions with care (and in jury cases, as was the present, so instruct the jury), to the end that there be no evasion of the requirements; but we can not think that an honest mistake or omission fairly comes within the provision of either the statute or the order of the commission. The only reported case cited by counsel directly upon this point is that of Northern Pacific Railroad Co. *v.* United States, 213 Fed. 162, which is in accordance with these views.

INTERFERENCE WITH EMPLOYMENT—HIRING EMPLOYEE UNDER WRITTEN CONTRACT WITH ANOTHER—*Lambert v. State, Court of Appeals of Alabama (June 30, 1915), 69 Southern Reporter, page 261.*—Robert Lambert was convicted in the circuit court of Elmore County of knowingly and willfully interfering with, hiring, or enticing Henry Jones, a laborer or servant, who had contracted in writing to serve one W. R. McCarter.

In rendering an opinion affirming the conviction, Judge Thomas spoke for the court of appeals in part as follows:

Under the statute inhibiting any person from knowingly interfering with, hiring, or employing, etc., any laborer or servant who has in writing contracted to serve another, a conviction may be had on proof that such contract exists, and that such laborer or servant was found in the employ of the defendant before the expiration of the

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contract with prosecutor, and that defendant refused to release him on demand and on being given notice of such contract. Such being the tendencies of the evidence for the State in this case, the court did not err in refusing the affirmative charge requested by the defendant.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—"MONOPOLY"—VALIDITY—*Underwood et al. v. Texas & Pacific Railway Co. et al., Court of Civil Appeals of Texas (July 3, 1915), 178 Southwestern Reporter, page 38.*—J. A. Underwood and others sued for a writ of injunction against the defendants to obtain relief from the continued carrying out of a contract of agreement between the railway companies and the Brotherhood of Railway Trainmen, and for a decree declaring the agreement to be void. The plaintiffs declared that they were proficient railway switchmen, and were industrious, etc., and had been unable to secure work when they had applied because they were not members of the brotherhood. As to the reasons assigned for illegality of the contract the court's opinion, by Judge Rainey, says:

Complainants further charge that said purported contract between the Brotherhood of Railway Trainmen and the defendant railroads is illegal and void, as being without consideration, against public policy, discriminatory, preventive of competition and of the freedom of contract, creative of a monopoly of labor, destructive of the liberty and property of the complainants, and creative of a combination in the interest of monopoly to prevent the employment, as well as to compel the discharge of competent men who were willing to work, but who were not members of the Brotherhood of Railway Trainmen, that its continued enforcement by the railroads and the Brotherhood of Railway Trainmen will work irreparable injury to complainants, and that they have no adequate remedy at law.

The railway companies admitted an agreement by them with the brotherhood, which provided that they would give preference to members of the brotherhood to the extent of 85 per cent in the case of one company and 75 per cent in the other case, making no change in the men employed at the time of the contract, but accomplishing the result in the hiring of men as vacancies occurred. They denied any agreement or understanding between themselves with reference to the matter.

A part of the answer of the brotherhood giving additional allegations of fact is quoted in the opinion as follows:

It shows to the court that its membership is composed of 135,000 or more men, and that the Switchmen's Union of which it verily believes and charges is the real plaintiff herein, and encouraging and instigating the bringing of this suit by the several plaintiffs who joined in the same, is an order composed, as it is informed and believes, of some nine or ten thousand members. It verily believes, and charges the fact to be, and so states, on information and belief,

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that it, the Brotherhood of Railway Trainmen, has an excess of membership in the ratio of more than 10 to 1 over and above that of the aforesaid Switchmen's Union, and that, among those within this State who by occupation pursue the business of switchmen, nine-tenths or more are members of its (defendant's) order, and that its contracts with the several defendants herein, wherein it has sought to provide for a percentage employment basis of its members, is not only not discriminatory as to nonmembers of its order, but, on the other hand, is exceedingly fair and just, and, if there be discrimination in said percentage, it is against the defendant rather than those who are not its members.

The trial court refused to issue the injunction. The court of appeals affirmed the judgment in favor of the defendants, Judge Rainey stating the findings of fact and conclusions of law. After stating the terms of the contract, he said:

After these contracts were entered into, the railway companies required all applicants to state whether or not they were members of the Brotherhood of Railway Trainmen. The appellants each made application for employment as switchmen to one of the said companies, but, not being members of Brotherhood of Railway Trainmen, were turned down, and the reason given was that they were not members of said brotherhood, although at that time money matters were stringent, many men were out of employment, and the railroads had reduced their force and were working just as few men as practicable.

Judge Rainey then reproduced certain statements in evidence as to the number of members of the respective organizations, and the numbers employed at various points, and said:

In proportion to the membership of the appellee the Brotherhood of Railroad Trainmen, if there is any discrimination in the employment of men, it is against it. While the appellee, the Brotherhood of Railroad Trainmen has not got the percentage of men as per their agreement with the other appellees, still nothing has been done by it, or any of its members, to coerce or try and force them to give more Brotherhood of Railway Trainmen men employment even though a big percentage of its membership is out of employment and have been refused places just as Switchmen's Union men have.

The appellants present, first, that "the contract is unilateral in character, wanting in mutuality, and unenforceable at law." They are met by appellees with the counter proposition that they are strangers to the contract, and there is nothing in the pleadings nor by the evidence in the record to show that there is any privity of contract between the parties. The appellants not being privies to the contract between the railway companies and the Brotherhood of Railway Trainmen, they are in no position to complain. But they say "the contract is void, as against public policy, as preventive of competition, and creative of a monopoly of labor." We do not agree with this proposition. There is nothing to show that there was any conspiracy and combination between the appellees which contravenes any law of this State or of the United States. There is nothing in the contract which interferes with the interests of society nor in-

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terferes unlawfully with the liberty of appellants to pursue their chosen avocations consistent with the rights of others. The law gives to the railroad companies the right of contract and the same right to all other legal organizations so long as such contracts they make are not violative of law. Our statutes authorize laborers to associate themselves together, form trade-unions, etc., for their protection, in their respective callings. (Penal Code, art. 1477.) Article 1479 provides that the antitrust law shall not interfere with the terms and conditions of contracts relating to private contracts as to service of employment between employer and employee. The contract between the railway companies and the Brotherhood of Railway Trainmen was legal, it being for the benefit of the individual members of that order in securing work, and for the railways in securing skilled and efficient workmen to protect their interest.

The evidence does not show that they would have been employed by the railroads had there been no contract with the Brotherhood of Railroad Trainmen. Appellants merely show that the railways gave as an excuse for not giving them employment that they were not members of the Brotherhood of Railway Trainmen. This the railways had the right to do. They were free to employ whom they pleased, and this right can not be questioned, not being connected with any conspiracy or combination against any individual or organization to prevent employment.

The decisions of this State and the United States, we think, make clear the distinction between the two classes of contracts in regard to labor, where such are legal and those affected by conspiracy, etc. There is reason in contracting with the Brotherhood of Railway Trainmen, for its membership greatly exceeded the membership of any other particular union, which was a guaranty of keeping a full working force. But the contract is not exclusive, and provides for only a certain per cent of Brotherhood of Railway Trainmen, and the evidence shows appellees have a larger per cent of other classes employed than of the Brotherhood of Railway Trainmen in proportion to membership.

Where Congress and several of the States have enacted laws attempting to limit the power of corporations and individuals in regard to making contracts for labor as they see fit such laws have been held unconstitutional by the appellate courts. (Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240 [Bul. No. 169, p. 147; other cases cited].)

A quotation of some length is made from the Coppage case, and the opinion concludes:

The contract here is not against public policy, as it in no way affects the real needs of the people in their health, safety, comfort, or convenience.

LABOR ORGANIZATIONS — CONSPIRACY — INJUNCTIONS — STRIKES — PICKETING—*Hardie-Tynes Manufacturing Co. v. Cruse et al., Supreme Court of Alabama (Nov. 7, 1914), 66 Southern Reporter, page 657.*—The company named brought a bill to secure an injunction against W. D. Cruse and others. The bill of complaint sought re-

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lief against certain of the complainant's former employees, members of the Molders' Union, who in cooperation with the union had engaged in a general strike against their employers, including this company. It charged concerted action to coerce the employers to agree to their terms, and to prevent the employers from employing other members of the union in their places. An elaborate system of picketing and patrolling, and intimidation, threats, insults, and in some cases violence were charged. Large pecuniary damages and a probability of the continuance of the acts were alleged, and the bill prayed for an injunction covering all the practices complained of. The respondents objected to the bill on the ground that it was without equity and was multifarious. They contended further that the separate paragraphs of the bill set forth no sufficient basis of complaint. On submission for rulings on these objections it was decreed that the demurrers be separately and severally sustained. From this decree the complainant company appealed. The preliminary injunction prayed for was, however, issued by a justice of the supreme court upon application.

In delivering the opinion of the supreme court, which reversed the chancellor's decree in favor of the respondent members of the union, and overruled their objections to the bill of complaint, Judge Somerville said in part:

The English and American courts have, we believe, without exception, held that the right to conduct one's business, without the wrongful and injurious interference of others, is a valuable property right which will be protected, if necessary, by the injunctive processes of equity. (Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663 [Bul. No. 53, p. 955]; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077 [Bul. No. 9, p. 197]; Beck *v.* R. T. P. Union, 118 Mich. 497, 77 N. W. 13 [Bul. No. 22, p. 457].)

They seem to be unanimous, also, in holding that employees may rightfully organize themselves into associations for mutual protection and betterment; and that, having thus organized, they may by confederated action withdraw from, or decline to enter, the service of any particular employer. And it may be further said that there is practically no judicial dissent from the proposition that in the accomplishment of their purposes of self-protection and self-betterment employees or nonemployees have no right to use threats, intimidation, or violence against or upon employers, or upon their employees or strangers to induce them to leave or not to enter the service of the former. (24 Cyc. 830, 831.)

With respect to the "peaceful persuasion" of others not to enter an employer's service, it may, perhaps, be said that such a right is generally recognized by the courts, and injunctive relief against it is denied, though it is to be noted that interference with existing contracts of service by inducing those so contracting to violate their agreements is such a wrong as may be enjoined in equity. (24 Cyc. 838, and cases cited.)

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In regard to the practice of "picketing," as that term is commonly understood, the courts are not in harmony. The consensus of judicial opinion is admirably stated in the following excerpt from the case note to Jensen *v.* C. & W. Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302 [Bul. No. 62, p. 323]:

"The lawfulness or unlawfulness of 'picketing' in the United States—as subsequently shown, it is otherwise in England in consequence of statutory provisions—must be determined in view of the fundamental principle upon which all the courts are agreed, that the boundary between lawful and unlawful conduct in the effort to induce persons, not under contract, to leave another's employment, or not to enter such employment, is the line between peaceable persuasion and intimidation. As a practical matter, however, it is not always easy to determine exactly when peaceable persuasion ceases and intimidation commences, or so to frame an injunction that it will, in its practical operation, prevent intimidation without infringing the right of peaceable persuasion. Open threats, much less actual violence, are not an indispensable accompaniment or condition of intimidation. That which in appearance and outward form is but peaceable persuasion may, by virtue of the intent which lies behind it or the circumstances which surround it, carry a menace the practical effect of which is intimidation. Indeed, it is quite conceivable that, under the circumstances generally surrounding a strike or other labor difficulty, that which was in good faith intended as peaceable persuasion, and designed merely to influence the voluntary action of employees or persons seeking employment, may, by reason of the timidity or unprotected condition of persons upon whom it is exerted, operate practically as intimidation or coercion. Picketing a place of business where a strike is in progress, though in intent as well as in outward appearance maintained for the lawful purpose of persuading the classes of persons mentioned, has almost inevitably some tendency to intimidate individuals belonging to those classes. This tendency has induced a few courts, though they are in decided minority, to condemn picketing per se and under all circumstances as unlawful, or at least to enjoin picketing without qualification or exception by reference to intimidation, though even in cases of this kind the showing upon which injunctions have been granted has included facts indicating that the picketing had been accompanied by threats or other conduct amounting to actual intimidation."

It is obvious that upon the established principles of the common law, and without the aid of statutory provision, the bill of complaint in this case contains equity; and, indeed, this does not seem to be seriously controverted.

It is, however, urged on behalf of the respondents that the bill is demurrable in so far as it seeks to prevent peaceful picketing and the peaceful persuasion of complainant's workmen to leave their employment. Conceding, without deciding, that the demurrers raise this point, and that the weight of authority in other States sustains it, the statutes of this State do not permit us to so hold. We notice briefly these provisions:

"Any person who entices, decoys, or persuades any apprentice or servant to leave the service or employment of his master" is guilty of a misdemeanor. (Sec. 6849, Code of 1907.)

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This section was construed in Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 South. 596, as being applicable not only to menial servants, but also to the employees of a mill; and in Tarpley *v.* State, 79 Ala. 271, it was held that a similar statute was not obnoxious to the constitution of the State.

The court then quoted sections of the Code of 1907, section 6394, forbidding conspiracy to interfere with the conduct of business, section 6395, forbidding picketing, and section 6856, forbidding threats and violence; and continuing said:

The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. And while the courts do not undertake to enjoin the conspiracy itself, the execution of the conspiracy would be a criminal tort against the employer's property rights which may be prevented by injunction. Section 6395 is more specific in its inhibition of such forms of "peaceful interference," and expressly forbids picketing when it is done "for the purpose of interfering with or injuring any lawful business or enterprise." Perhaps our legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes.

It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. No intimation is offered as to what provision of the constitution is thereby offended, and we can think of none. Certain it is that a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of "life, liberty, and the pursuit of happiness." The "liberty" guaranteed by the constitution (art. 1, sec. 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other to pursue his business unmolested? It is clear that this notion of liberty utterly ignores "the other fellow," and denies to him the very freedom it is claiming for itself.

LABOR ORGANIZATIONS — INJUNCTIONS — INTERFERENCE WITH TRADE—PEACEFUL BOYCOTTS—*Auburn Draying Co. v. Wardell et al., Supreme Court of New York, Equity Term, Cayuga County (Mar. 30, 1915), 152 New York Supplement, page 475.*—This was an action

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for an injunction and damages by the company named against certain persons in their individual capacity and as officers of labor unions, to restrain them from the prosecution of a boycott against the company's business. A permanent injunction was granted by the court, which held the acts of the defendants to be violations of the Penal Law, section 580, which forbids interfering with trade by threats, etc. In the opinion delivered by Judge Sutherland the facts of the controversy between the company and the unions are given at some length. It appears that the company, at the time the trouble arose, was the leading concern engaged in the trucking business in the city of Auburn, and had a large number of well-satisfied patrons. The relations between the company and its 30 to 45 employees had been harmonious, and the employees were free to join a union or not, as they desired. Representatives of the Teamsters' Union and the Central Labor Union, outside the company's force, endeavored to persuade the employees to join the Teamsters' Union, organized in November, 1912. The men did not join voluntarily, and the union workers took offense because the company would not advise or compel the men to join, and organized the boycott complained of.

Both the unions named, as well as the meat cutters', bakers' and other local organizations took up the attempt to compel the company's customers to leave it by threatening to call strikes among their men if they did not. The organization of the unions and their connection with the Central Labor Union are shown to have been complete, the latter being nominally an advisory body, but in fact having the power to work great harm, as in this case. A contractor to build a theater was compelled to abandon a contract with the draying company for hauling materials from the station, and even to have that part already hauled carted back to the station and again to the location of its job in order to retain its employees. Other building contractors, also butchers, bakers and merchants were in like manner obliged to choose between ceasing to patronize the company and facing a strike.

No force or violence was used during the trouble, nor were misstatements of facts made unless the use of the word "unfair" was such. At the trial, it was shown that there was not in the constitution or laws of the organizations any authoritative definition of this word, and the well-informed members of the union defined it as including refusal to treat with representatives of the organizations, and to give employees the working conditions asked for by labor organizations. Continuing, Judge Sutherland said:

The plaintiff did not refuse to treat with union labor leaders, nor did it discriminate against those of its employees who did belong to that organization. Some effort was made at the trial to show that union men were discriminated against; but that claim is not justified

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by the facts. It is true Mr. Wilson, the manager of the plaintiff, stated to the union leaders who called upon him that, if his men asked his advice as to joining the union, he would tell them that he thought it would not tend to preserve the spirit of harmony which had existed between the men and their employers, but might introduce an element of discord. He stated that he would not volunteer this information, and would put no obstacle in the way of any of his men joining who desired; but it is not unlikely that his unsympathetic attitude toward the union idea was understood by his employees. Mr. Wilson testifies that Mr. Dennis, who was the official organizer of the American Federation of Labor, business agent of the Central Labor Union at Auburn, and ex officio agent of each affiliated local union, told him, if the men would not join, he (Wilson) must discharge them. This Dennis denies. But the efforts of Dennis with the men had proved unavailing, and he undoubtedly tried to get Wilson to bring pressure upon the men to join; and because Wilson did not do as he requested, and because the men continued to remain out of the union, the plaintiff was declared unfair. Some of the plaintiff's employees offered to join, but after the declaration of unfairness the union would not receive a portion of the men and permit them to work with others who did not belong to the union; the position of the union being that they would then take all of the plaintiff's men into their organization or none.

It is plain enough that, whether the words used in notifying plaintiff's customers that labor troubles would come to them if they continued to patronize plaintiff were that the union men would quit, or would be ordered to quit, the intention was disclosed to use the power of the labor organization, if necessary, to compel the members to quit; and what was feared by the customers was, not any voluntary, self-initiated movement of their own employees to quit, but that they would quit because ordered to do so by the organizations to which they belonged, which possessed disciplinary powers to enforce obedience. The temporary injunction continued until the case was tried upon the merits; and it must now be determined whether a cause of action in equity exists, and, if a permanent injunction is to issue, toward what acts it should rightfully be directed.

The law on the subject of the peaceful boycott does not seem to have been so clearly settled in this State by its court of last resort as to leave no ground for uncertainty. The familiar and frequently cited cases of Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297 [Bul. No. 11, p. 529], Nat. Protective Assn. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 [Bul. No. 42, p. 1118], and Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5 [Bul. No. 64, p. 896], if they are entirely reconcilable, do not apply so closely to the question at issue here as to dispose of it, and I think it may be regarded as still an open question as far as the court of appeals is concerned; and the reported opinions of judges of other courts of this State are not in entire harmony in all their expressions as to the legal effect of a combination or agreement of many to do that which each individual of his own accord might lawfully do as to the withholding of patronage, where no physical interference is used or threatened, and no misstatement of fact employed to arouse hostility. It has sometimes been said that if the purpose of the confederated movement is to benefit the members of the organization, and the consequent injury to a third

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party only an incident, the injury is without redress in the civil courts. (See review of New York cases in Gill Engraving Co. *v.* Doerr et al., 214 Fed. 111 [Bul. No. 169, p. 301].) Whether that be the true test is, to say the least, open to great doubt; and I venture to suggest that it will be hard to find a case in the books where a combination has been held to be illegal, and has been restrained from operating, in which the purpose of the combination was not to benefit its members. The acts done to accomplish the purposes of the organization may bring it under condemnation, and render it liable in damages to the party injured by said acts, even if the purpose for which the organization was formed is most praiseworthy. The distinction between motive and intent, between ultimate purpose and immediate purpose, must not be forgotten.

In so far as it may be thought to be material to inquire whether the movement against the plaintiff was merely incidental to a general policy adopted by the unions, irrespective of the individuals outside their organization who might happen to gain or lose by it, it is clear that the declaration of unfairness against the plaintiff was not so made. The resolution of unfairness and the propaganda which followed were rather in the nature of special legislation and special action directed particularly against the plaintiff, for the immediate purpose of destroying its business unless it would yield to the demands imposed upon it and take the necessary steps to bring its unwilling employees into the union.

The immediate purpose or intent, and not the ultimate purpose or hope, of the defendants in instituting the boycott should be considered, if the purpose of those who inaugurate a boycott bears upon its legality. While the ultimate hope of the defendants no doubt was to better the condition of the members of the union by bringing into it all the craftsmen and laborers in Auburn, so that their united efforts for higher wages, shorter hours, and better working conditions might be more persuasive and effectual, and assuming, as we readily may, that without such motive or ultimate purpose the boycott would not have been inaugurated, nevertheless the immediate business in hand, the specific and direct thing which the defendants were then and there devoting their energies to and focusing all of the disciplined power of their organization upon, by which their intent in the true legal sense is to be ascertained, was the destruction of the plaintiff's business, in order that the plaintiff, through its sufferings, might be forced to yield to the demands of the union; and by this immediate purpose and intent the legality of the boycott movement in this case should be determined. What was threatened, intended, and in part accomplished, was injury to the business and property of the plaintiff; the acts performed and results accomplished being also necessarily injurious to trade and commerce. Whether we call those acts means or ends, they are forbidden under the statutes of this State. (Penal Law, sec. 580, subds. 5, 6 [cases cited].)

The sections of the Penal Law relating to conspiracy have received much attention in the arguments and briefs of the learned counsel who have presented the case and the defense with very great ability. Section 580, as far as it relates to the subject under discussion, provides that: "If two or more persons conspire: * * *

"5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by in-

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terfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or

"6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

"Each of them is guilty of a misdemeanor."

Section 582 reads as follows:

"No conspiracy is punishable criminally unless it is one of those enumerated in the last two sections, and the orderly and peaceable assembling for cooperation of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy."

Speaking first as to the declaration in section 582 that cooperation to obtain an advance of wages, or to maintain the rate, is not a conspiracy, it is clear that that proviso is not applicable to this case, because the bone of contention here was not wages, but the open shop. The facts here are not unlike those discussed by Justice Barrett in People ex rel. Gill *v.* Smith, 5 N. Y. Cr. R. 509; and the reasoning in that case is equally persuasive to show that section 582 does not furnish immunity to these defendants for the acts complained of.

It seems to be necessary under the evidence to hold that the confederated acts of the defendants violate section 580, above quoted, as being injurious to trade and commerce, and also that the threats to call strikes on plaintiff's patrons to prevent the plaintiff from exercising its lawful trade or calling were illegal under the penal statute above quoted. As to the threats, it is argued that each member of the union has the unchallenged legal right to quit his job, and that a threat to do that which the persons making it have a perfect right to do is not the kind of a threat referred to in subdivision 5 of section 580; and I accept that contention as sound. But it seems to me clear that what one may do as an individual, and may therefore threaten to do, lawfully, with respect to withdrawal of his own patronage, can not always be done nor threatened to be done lawfully by a combination of individuals held together in a compact to act together in that respect. If the making and observance of the compact by many confederates is calculated to injure trade and commerce, it is obnoxious to the common law, and a threat to do that is a threat to do an unlawful act.

The plaintiff is entitled upon the facts established to damages and an injunction against the continuation of the injurious acts. By stipulation, the assessment of damages, if the right to damages is upheld, is to be taken up on a supplemental hearing. The form of the final injunction to be granted should not be so broad as to withhold from any individual member of any of the unions the right to quit his job at any time according to his own pleasure, and to consult with his fellow members in that regard. And when we speak of an agreement to quit work, or not to patronize, as being under some circumstances unlawful, it should be understood that by agreement we mean a compact or mutual understanding which imposes something in the nature of an obligation on the parties thereto, and not to an agreement in the sense in which that word is used to denote mere similarity or harmony of opinion or belief which may be entertained

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by a number of individuals who, as the natural result of the holding of such similar views, may find themselves moving in the same direction at the same time; each individual doing of his own volition just what others around him are doing for the same reason, without any understanding or promise that they shall act together, which state of mind and consequent simultaneous action is surely not subject to control by law, nor justly called a conspiracy. There is a very perceptible and practical difference between the latter supposititious condition and the one presented in this case; and I venture the opinion that the full liberty of every individual to act according to his own will with regard to withholding his own labor or patronage will be preserved, and the plaintiff will be also protected from unjust and unlawful injury, if what may be compulsory action on the part of the members of the union, because of the disciplinary powers possessed by the organization over its members, or because of the obligatory nature of the compact entered into by the group, is enjoined.

The injunction, broadly speaking, should prohibit the enforcement of resolutions, rules, or orders of the defendant unions requiring their members to quit the service of employers who patronize the plaintiff, and the giving of notices by or on behalf of said organizations or the officers thereof to such employers, or the public, of an intention to quit provided said employers continue to patronize the plaintiff, and any other attempt or threat to use the powers or authority of the defendant unions over their own members, for the purpose of inducing or compelling patrons of the plaintiff, or the public generally, against their will, to refrain from dealing with the plaintiff.

LABOR ORGANIZATIONS—INJUNCTIONS—STRIKES—COERCION—*Garside v. Hollywood et al., Supreme Court of New York, Special Term, Kings County (Dec. 7, 1914), 150 New York Supplement, page 647.*—This was an action by John R. Garside, as president of the Shoe Manufacturers' Association of New York, against Michael J. Hollywood, as president of the United Shoe Workers of America, Cutters' Local No. 72, and others. The application for an injunction pendente lite was granted. The facts and the court's ruling thereon are shown in the opinion delivered by Judge Benedict as follows:

This is an application for an injunction during the pendency of a suit brought by the plaintiff, a voluntary unincorporated association composed of 17 firms and corporations engaged in the manufacture and sale of shoes in the city of New York, boroughs of Brooklyn and Manhattan, and employing about 5,000 employees. The defendants are voluntary associations of the operators in the factories of the plaintiff's constituents comprising local unions, and certain individual defendants are also impleaded. The relief sought in the action is the perpetual restraint of the defendants from unlawful interference with the business of the plaintiff's constituents by means of acts of physical violence, intimidations, threats, and abuse directed against them and their employees by the defendants and their members, whereby the defendants have coerced other employees of the plaintiff's constituents, who were unwilling to join a strike called

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by the defendants, into leaving their employment, and by preventing other persons from accepting employment by the plaintiff's constituents to fill the vacancies thus created.

The plaintiff claims that the defendants have formed a combination, conspiracy, or federation, with an unlawful purpose, and are utilizing unlawful means to accomplish that purpose. The question presented to this court is whether the plaintiff association is entitled to an injunction pendente lite under the law as it is applicable and upon the facts as they are shown by the affidavits submitted.

The subject matter of equitable jurisdiction is civil property and the maintenance of civil rights. Injunctions do not issue to prevent acts merely because they are immoral, or illegal, or criminal, but only in case the complainant's civil rights are invaded. (22 Cyc. 757.)

I think it may fairly be stated that the plaintiff is entitled to maintain an action for the restraint of an unlawful interference with, or an attempted invasion of, the rights of its several constituent members, when the acts involved would affect the civil rights or property of all the members, whatever might be the rule if the alleged unlawful acts affected only one or a few of such members (see sec. 1919, Civil Code); and I think, too, that the plaintiff's papers show that this action does affect the civil rights and interests of all the members of the plaintiff's association.

The acts complained of, if they were committed, would clearly be invasions of the rights of the plaintiff's constituents under the authorities cited upon the brief of the learned counsel for the plaintiff, and even under those cited in behalf of the defendant. Admitting all the defendants' contentions as to the defendants' legal rights, the plaintiff would be entitled to an injunction restraining the unlawful acts on the part of the defendants, provided such acts are admitted or found to exist, because such acts are far in excess of the defendants' rights of striking or of peaceful picketing, or the other classes of lawful acts permitted by law, as laid down in the numerous decisions which have been made by the courts in this and other States. (See People *v.* Davis, 159 App. Div. 464, 144 N. Y. Supp. 284.) The defendants, by their answering affidavits and their verified answers, have raised an issue as to the commission of many, but not all, of the alleged unlawful acts. In my opinion, however, the papers submitted sufficiently establish, for the purpose of the present application and until the issues can be determined with more accuracy and deliberation upon the trial, the existence of an unlawful conspiracy on the part of the defendants, by proof of the adoption or ratification by them of the unlawful acts of the members of the unions.

LABOR ORGANIZATIONS—LIABILITY OF MEMBERS FOR DAMAGES—COLLECTION OF JUDGMENT—GARNISHMENT—SCIRE FACIAS—*Loewe et al. v. Union Savings Bank of Danbury, United States District Court, District of Connecticut (Aug. 12, 1915), 226 Federal Reporter, page 294.*—Decisions were noted in Bulletin No. 169, pages 137 and 140, affirming the liability of members of the United Hatters of North America for damages resulting from a conspiracy to injure the business of Loewe & Co. The present cases, proceedings by

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Loewe and others against two Danbury savings banks, were actions of scire facias in consummation of garnishments made in the original actions, in which judgment was given for the plaintiffs against the banks. The banks had defaulted, and at the next term their motions to reopen the cases were overruled, as the rule on this point in the Federal courts is strict.

The banks moved in the present, or scire facias, actions, for a hearing in damages, and also that the United Hatters, which claim to hold by assignments from the employees the moneys in the hands of the banks, be given notice of the pendency of these actions, and be required to give security to the banks to indemnify them for costs. Loewe & Co. resisted these motions on the ground that the court did not have jurisdiction to reopen the case, but the court held that judgment could not be rendered for the full amount of the judgments in the previous action regardless of the sufficiency of the funds in the hands of the garnishee, and that the only circumstances under which such a judgment can be entered are (1) a finding that the garnishee has sufficient funds in his hands; (2) a default of appearance; or (3) a refusal to disclose under oath. The court stated, and supported by citations of Connecticut statutes and decisions, three propositions upon which it based its decision that the banks were entitled to a hearing in damages and the granting of their other motions: First, a scire facias to enforce a judgment in an action begun by foreign attachment is, in the State of Connecticut, a civil action for all purposes; second, a judgment by default has no conclusive effect upon the final judgment to be rendered; third, the assessment of damages after a default is a judicial and not a ministerial act. Since this default had been entered by the clerk in a purely ministerial capacity, it was held that the amount of liability should be judicially determined, and the motions of the banks for hearing, notice, and the giving of security were allowed.

LABOR ORGANIZATIONS—PROTECTION OF EMPLOYEES AS MEMBERS—CONSTITUTIONALITY OF STATUTE—*Bemis v. State, Criminal Court of Appeals of Oklahoma (Oct. 9, 1915), 152 Pacific Reporter, page 456.*—A. J. Bemis was convicted of unlawfully coercing laborers, and sentenced to pay a fine of $200. He appealed, contending that the law was unconstitutional. The statute under which conviction was had (sec. 4041, Compiled Laws of 1909) is as follows:

Any person or corporation within the State, or agent, or officer on behalf of such person or corporation, who shall hereafter cause or compel any person to enter into an agreement either written or verbal, not to join or be a member of any labor organization as a

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condition of such person securing employment or continuing in the employment of any such person or corporation, shall be guilty of a misdemeanor. * * *

The court quoted at length from the decision of the Supreme Court of the United States upon a similar statute in Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (Bul. No. 169, p. 147), and concluded as follows:

The foregoing discussion and the conclusion therein reached by the highest of courts leaves little to be said by us. It is our plain duty—in fact, we have no alternative, except—to follow the doctrine declared therein. It follows, therefore, that the statute in question is repugnant to the "due process" clause of the fourteenth amendment to the Constitution of the United States, and is therefore void.

LABOR ORGANIZATIONS—PROTECTION OF EMPLOYEES AS MEMBERS—CONSTITUTIONALITY OF STATUTE—*Jackson, Chief of Police, et al., v. Berger, Supreme Court of Ohio (May 4, 1915), 110 Northeastern Reporter, page 732.*—In this case the court passed upon the constitutionality of an Ohio statute whose purpose was to make it a criminal offense for an employer to discharge or threaten to discharge an employee because of his connection with a labor organization. The statute was similar to that of Kansas held by the Supreme Court of the United States to be violative of the Federal Constitution in Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (Bul. No. 169, p. 147); and following the decision in that case, the Ohio court held the statute void, two of the judges expressing dissent in separate opinions.

LABOR ORGANIZATIONS—UNLAWFUL EXPULSION OF MEMBER—MANDAMUS—*People ex rel. Solomon v. Brotherhood of Painters, Decorators, and Paperhangers of America et al., Supreme Court of New York, Appellate Division, First Department (Nov. 5, 1915), 155 New York Supplement, page 438.*—This was an action of mandamus by the people, on the relation of Meyer Solomon, to compel his restoration to membership in the local union of the labor organization named. A peremptory writ in Solomon's favor was granted at the trial term, and the unions appealed. The judgment was affirmed, as is shown in the opinion by Judge Scott as follows:

The relator seeks restitution to membership in a trade organization known as the Brotherhood of Painters, Decorators, and Paperhangers of America. This is a foreign corporation operating extensively throughout the United States, acting in each State through local unions, which, in this State, are unincorporated organizations. That the relator was improperly expelled from the brotherhood, and that he has unsuccessfully pursued all the means of redress

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afforded him within the organization, is not to be questioned, and the verdict to that effect was amply warranted. The appellants, however, insist that the mandamus will not lie against the brotherhood, because it is a foreign corporation, and will not lie against the local unions, who are also made defendants, because they are unincorporated.

Neither objection is well taken. The brotherhood has assumed to come into this State to pursue the objects of its incorporation, and can not deny the jurisdiction of our courts to scrutinize its action, and to afford redress for a wrong done to a resident within the State. The fact that the brotherhood has failed to file the necessary certificate to do business within the State can not be interposed by it as a shield against proper supervision.

As for the local district unions, while mandamus might not lie against them alone, they act in this State as the agents of the brotherhood, and for that reason are properly joined as defendants in this proceeding, because it is they who will be compelled to act in order to make the writ against the brotherhood effective.

The defendant has recovered what the jury deemed to be fair damages for the injury done him by his illegal expulsion. The recovery of such damages is authorized by Code Civ. Proc., sec. 2088, and the amount does not appear to be excessive.

The proceedings leading up to the judgment appealed from were irregular, in that the justice who presided at the trial of the issues of fact himself issued the mandamus, instead of certifying the verdict of the jury back to the special term, as is the proper practice. Furthermore, no final order was made directing the issue of the writ of peremptory mandamus.

For these purely technical errors we might remit the cause for more formal proceedings, and in the past should have felt bound to do so. The power and duty of this court to disregard technical errors and defects has been much extended recently (Code Civ. Proc., sec. 1317, as amended by Laws of 1912, ch. 380), and this appears to be a proper case to exercise the power. The relator has a mandamus and a judgment, to both of which he is entitled. Thus a correct result has been obtained, and it is of no consequence that informalities can be found in the steps leading up to a proper result.

MECHANICS' LIENS—LIGHTING FIXTURES—FILING OF EXCESSIVE CLAIM—*Lyons v. Jarnberg et al., Supreme Court of Minnesota (Jan. 29, 1915), 150 Northwestern Reporter, page 1083.*—This was an action by Peter Lyons against Joel Jarnberg and others to foreclose mechanics' liens against a house and lot. The trial court having rendered judgment establishing the liens, one of the defendants, to whose mortgage the liens were adjudged superior, appealed.

The court held that the liens, as far as valid, were paramount to the mortgage, and that the verification of the bills was sufficient. It held, however, that a claim for the installation of certain lighting fixtures was not properly allowed, Judge Taylor, who delivered the opinion, saying:

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The claim of the Ireland-Simmons Co. includes the sum of $120 for electric lighting fixtures. These fixtures appear to be such as are ordinarily kept in stock for sale by dealers in such articles; it does not appear that they were designed, constructed, or prepared for this particular building. Neither is there any evidence tending to show the intent with which the parties caused them to be placed in the building. The naked fact appears that they were installed therein; nothing more. It was decided in Capehart *v.* Foster, 61 Minn. 132, 63 N. W. 257, that gas-lighting fixtures did not become a part of the realty under such circumstances, and the same rule must be applied to electric-lighting fixtures. It follows that the company are not entitled to a lien upon the realty for the value of such fixtures.

One company had refused to complete its contract when work remained undone which was admitted to be of the value of $150 or more. The company, however, filed claim for the whole amount. That this invalidated the entire claim was held by the court, as the following quotation from the opinion shows:

The statute provides:

"In no case shall a lien exist for a greater amount than the sum claimed in the lien statement, nor for any amount whatever, if it be made to appear that the claimant has knowingly demanded in such statement more than is justly due." (Sec. 7085, G. S. 1913.)

The legislature intended to prevent the padding of such claims, and this statute must be given effect according to its terms. It provides that a lien claimant, who, in his lien statement, knowingly demands more than is justly due, shall have no lien whatever. In the present case the lien statement demanded fully 20 per cent more than was justly due. The heating company knew that they were making a claim for all the material and all the labor that would be required to complete the contract in full. They also knew that they had not completed the contract, and necessarily knew that they were attempting to acquire a lien for material not furnished and for labor not performed. The admitted facts are such that the statute divests them of the right to a lien and the judgment must be modified accordingly.

Other courts apply the same rule under statutes less drastic than our own and to facts more excusable than those here presented. [Cases cited.]

In conclusion the court said:

The cause is remanded, with directions to modify the judgment to conform to the views hereinbefore expressed.

MINE REGULATIONS—WASH ROOMS—CONSTITUTIONALITY OF STATUTE—*Booth v. Indiana, United States Supreme Court (May 3, 1915), 35 Supreme Court Reporter, page 618.*—Harry C. Booth was convicted of violation of a statute of the State of Indiana requiring the owner, operator, lessee, superintendent, or person in charge of every coal mine, colliery, etc., at the written request of 20 or more em-

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ployees, or of one-third of the number of employees if there are less than 20, to provide a wash room or washhouse for the use of the employees, and prescribing what the facilities must be in such wash rooms. From the conviction Booth appealed to the supreme court of the State and finally to that of the United States, on the ground of the unconstitutionality of the statute. The decision of the Indiana Supreme Court is found in 179 Ind. 405, 100 N. E. 563. Before the United States Supreme Court, his contentions were based on the fourteenth amendment to the Constitution of the United States, the claim being that he was deprived by statute of his property without due process of law, and denied the equal protection of the law. Mr. Justice McKenna, in delivering the opinion of the court affirming the judgment of conviction, said in part:

The Supreme Court [of Indiana] rejected both contentions, deciding that the statute was a legal exercise of the police power of the State, and the specific objection that the statute was invalid because it only applies to coal mines, and not to other classes of business, the court said was disposed of by Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. 357, and Soon Hing *v.* Crowley, 113 U. S. 703, 709, 5 Sup. Ct. 730. The court quoted from the latter case as follows: "The specific regulation of one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind."

This position was approved, and, continuing, Mr. Justice McKenna said:

But a distinction is sought to be made between what a legislature may require for the safety and protection of a miner while actually in service below ground, and that which may be required when he has ceased or has not commenced his labors. Cases are cited which, upon that distinction, have decided that when a miner has ceased his work and reached the surface of the earth his situation is not different from that of many other workmen, and that, therefore, his rights are not greater than theirs, and will not justify a separate classification.

We are unable to concur in this reasoning, or to limit the power of the legislature by the distinctions expressed. Having the power in the interest of the public health, to regulate the conditions upon which coal mining may be conducted, it can not be limited by moments of time and differences of situation. The legislative judgment may be determined by all of the conditions and their influence. The conditions to which a miner passes or returns from are very different from those which an employee in work aboveground passes to or returns from, and the conditions of actual service in the cases are very different, and it can not be judicially said that a judgment which makes such differences a basis of classification is arbitrarily exercised; certainly not in view of the wide discretion this court has recognized, and necessarily has recognized, in legislation to classify its objects.

It is further said that the act "is inoperative in itself for the reason that it can only be put into operation by the will and election of a specific number of the 'class' to which it applies, and conse-

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quently it fastens a burden upon the owners and operators of coal mines, which is 'a manifest injustice by positive law.'" The purpose of the comment, other than to give accent to the contention that the act has special operation, is part of the view elsewhere urged that the provision is a delegation of legislative power. But with this objection we are not concerned. The supreme court of the State decided that the law could be called into operation by petition, and in the decision no Federal question is involved.

It is, however, further objected that the law discriminates because it may be applied to one mine, and not to another, all other conditions being the same but the desire of the miners—indeed, discriminates upon a distinction more arbitrary than that, upon the desire of 20 in one mine as against a lesser number, 19, it may be, in another. The objection is a familiar one and has an instance and answer in McLean *v.* Arkansas [211 U. S. 539, 29 Sup. Ct. 206, Bul. No. 81, p. 419]. It is the usual ground of attack upon a distinction based on degree, and seems to have a special force when the distinction depends upon a difference in numbers.

But there are many practical analogies. The jurisdiction of a court is often made to depend upon amounts arbitrarily fixed. Would not an objection have the same legal strength if the law had been made to depend upon anything less than unanimity of desire? To require that, it might well have been thought by the legislature, would render the legislation nugatory, and that a lesser number would call it into exercise and attain its object. The choice of manner was, under the circumstances, for the legislature, and its choice was legal if it had the power to enact the law at all.

There remains to be considered only the contention that the law "is, within itself, a dead letter." And it is said that "it would forever lie dormant if not called into exercise and activity by the request of private persons." Or, as plaintiff in error otherwise expresses what he thinks to be the evil of the law, "it is not enforceable by any power which the State government possesses, under its constitution, or its laws enacted thereunder, but it is enforceable only upon the demand, the whim, or the election of a limited number of employees in the coal mining business." And it is declared that "this is the exercise of an arbitrary power, for an arbitrary private right, and against a private business."

We have quoted counsel's language in order to give them the strength of their own expressions of what they consider the vice of the law; but manifestly it is but a generalization from the particular objections which we have considered, and these objections we have sufficiently discussed.

MINE REGULATIONS—WASH ROOMS—CONSTITUTIONALITY OF STATUTE—*State v. Reaser, Supreme Court of Kansas (Jan. 9, 1915), 145 Pacific Reporter, page 838.*—Phil Reaser was convicted of a misdemeanor in failing to comply with the provisions of chapter 222 of the Laws of 1911 of Kansas (later superseded by chapter 226, Laws of 1913), providing for the establishment of wash rooms near the entrance of coal mines, and for a penalty in case of failure to comply with the requirements. On appeal, the supreme court affirmed the

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conviction and sustained the law, the constitutionality of which was attacked. It ruled that it could not be held as a matter of law that the fact that the statute applied only to coal mines constituted an unreasonable discrimination. The concluding portion of that part of the opinion delivered by Judge Smith which deals with the question of constitutionality, is as follows:

It is a matter of common knowledge in Kansas that many of the coal mines therein are worked at considerable depths, and that the temperature in such mines is considerably higher than at the surface; that the atmosphere therein is damp, and that the laborers therein perspire freely; and that on coming to the surface it is a great protection to their health and well-being that a washhouse should be located as required by the act in question, in order that their bodies may be cleansed and dry clothing substituted for their laboring clothes before walking any considerable distance from the mine, especially in cool or cold weather. The health of the employee is a matter of concern not only to himself but to the employer and the public as well. The framers of the law will be presumed to have been possessed of such general knowledge and to have made such special investigations of the conditions at coal mines as to them was deemed necessary.

PAYMENT OF WAGES—CONSTITUTIONALITY OF STATUTE—IMPRISONMENT FOR DEBT—*Ex parte Crane, District Court of Appeals, First District, California (Nov. 23, 1914), 145 Pacific Reporter, page 733.*—Arthur Crane was arrested on a charge of violating "An act providing for the time of payment of wages" (Stats. 1911, pp. 1268 and 1269), which fixes the times at which payment shall be made in case of terminated or continuous employment, and provides penalties, consisting of fines, for violation. Crane petitioned for a writ of habeas corpus, and the court ordered his discharge, holding the statute unconstitutional. After stating the facts and quoting the statute, the opinion reads as follows:

It is the contention of the petitioner that the act above quoted is unconstitutional in this, that it, in effect, permits an imprisonment on mesne process for debt, and that therefore his arrest and detention by the respondent pending a hearing of the charge in the police court is illegal.

In our opinion, this contention is sound, and must be sustained. Section 15 of article 1 of our State constitution provides in part that:

"No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud * * *."

By this constitutional provision the right of a creditor to control and confine the person of his debtor by the process of arrest, which the law at one time gave the creditor for the enforcement of his debt, has been abolished, and, happily, is prohibited in this State, save and except that the body of a debtor may be seized and confined in cases where it is made to appear that the indebtedness was

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fraudulently contracted, or that there has been an attempted fraudulent disposition of the property of the debtor with the intent to delay or defeat the payment of the debt.

In the exceptional cases noted it will be observed that fraud must exist before a debtor may be subjected to arrest and imprisonment, and that in such cases the arrest and imprisonment permitted by various statutes do not fall within the inhibition of the constitution, for the obvious reason that the penalty prescribed is not for or on account of the failure to pay the creditor's demand, but solely because of the fraud alleged to have been committed in the creation of the debt or in a subsequent attempt to delay or defeat its satisfaction, by a transfer, removal, or concealment of the property of the debtor.

It will be noted that the statute in controversy does not involve the element of fraud as an essential of the offense defined therein. True, the statute does not provide imprisonment as the penalty for the failure of an employer to pay a debt due to his employee. The statute, however, is silent as to the process by which the magistrate before whom complaint is made of an alleged violation of the statute may obtain jurisdiction of the person of the offender. In the case at bar jurisdiction was attempted to be obtained by a resort to the provisions of sections 812 and 813 of the Penal Code, which authorize the issuance of a warrant of arrest when the magistrate is satisfied from the deposition presented to him that the offense complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it. By this process and under our system of procedure a defendant unable to give bail is jailed and restrained of his liberty until such time as a hearing can be conveniently had of the charge made against him. It will thus be seen that the statute in controversy was attempted to be enforced by the issuance and execution of a mesne process which, in the case at bar, resulted in the temporary imprisonment of the petitioner, and the cause of his imprisonment is to be found primarily in the fact that he is unwilling or, perchance, unable to discharge a debt which was not conceived or contracted in fraud of his creditor. To this extent the arrest of the petitioner necessarily is in conflict with the fundamental law of the State, and therefore illegal.

PAYMENT OF WAGES—FAILURE TO PAY ON DISCHARGE—CONSTRUCTION OF STATUTE—*Trammell v. Victor Manufacturing Co., Supreme Court of South Carolina (Nov. 18, 1915), 86 Southeastern Reporter, page 1057.*—F. A. Trammell brought action for a balance of wages due him, and also for a penalty for noncompliance with section 3812 of the Code of 1912, which provides penalties for failure to pay the wages of laborers whose wages are paid monthly or weekly on a fixed date, beyond the end of the month or week in which the labor is performed. The company contended that this statute did not apply in the present case, where the customary dates of payment were the 1st and 15th of each month; but the court quoted a mention of a two-week period in the opinion of Wynne *v.* Railway Co., 96 S. C. 1, 79

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S. E., 521 (Bul. No. 152, p. 170), which upheld the constitutionality of the law, and held that its terms apply to intermediate periods. Judge Hydrick, who delivered the opinion, said in conclusion:

No reason has been suggested why the legislature would have penalized the failure to pay discharged laborers whose wages are paid weekly and monthly, and not penalize the failure to pay those whose wages are paid at intermediate periods of time, while every reason which calls for the remedy in the former cases applies with equal force to the latter. Therefore the words "weekly and monthly" must be taken as used to denote the extremes—the shortest and the longest periods of time—and as standing in apposition to and modified by the words "on fixed days," etc., which immediately follow them, and therefore to include intermediate fixed days. Any other construction would be strained and unnatural, and lead to absurd consequences.

PAYMENT OF WAGES IN SCRIP—REDEMPTION IN CASH—CONSTITUTIONALITY OF STATUTE—*Atkins v. Grey Eagle Coal Co., Supreme Court of Appeals of West Virginia (Mar. 16, 1915), 84 Southeastern Reporter, page 906.*—J. Dennis Atkins brought action against the company named before a justice of the peace for the face value of certain scrip, payable in merchandise, issued by it to its employees. He recovered the full amount, $72, and judgment was again rendered for him for the same amount when the company appealed to the circuit court of Mingo County. The company then brought writ of error to the supreme court of appeals, the sole question before it being as to the validity of the State law providing that all scrip or evidence of indebtedness shall be payable at its face value in cash. The court upheld the constitutionality of the statute and affirmed the judgment below, Judge Lynch, who delivered the opinion, saying:

The objection urged to the act in question is that ordinarily interposed as to legislative enactments of a similar character; the charge being that the act is in violation of the Federal Constitution, imposes undue restrictions upon the liberty of contract, and is not a legitimate exercise of the police power of the State.

While the present statute differs in material respects from the act construed and held invalid in State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, it is the same act construed and held valid in State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, though by an equally divided court. The former act (ch. 63, Acts 1887; Code 1913, ch. 15H, secs. 75–79 [secs. 534–538]) embraced within its inhibition only persons engaged in certain specifically designated business activities; while the latter in express terms embraces all persons, firms, companies, and corporations engaged in any trade, calling, or business. The discrimination manifestly appearing from the act of 1887, though not generally recognized in criticisms directed against the decision in the Goodwill case, was the real basis of such decision, as readily appears from the first point of the syllabus. The act im-

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posed no restrictions upon employers of labor engaged in other trades or callings where the propriety or necessity therefor was equally apparent. That feature, however, was eliminated by the subsequent act, the one upheld in the Peel Splint case, and the one involved here (ch. 76, Acts 1891).

In the opinion in the last case Judge Lucas cites many instances of similar regulations by Parliament, generally known as "truck acts," and by acts of the several States, and reaches the conclusion epitomized in the syllabus prepared and adopted by the court. The argument so well sustained by him need not now be restated or amplified. The trend of it is that the freedom of individual contract must yield to due legislative restraint whenever necessary to conserve the public health, safety, and morals and to promote the general welfare and peace of the community; and ordinarily such is the basis of the decisions in other jurisdictions upon similar statutes.

The court then cited numerous decisions upholding statutes involving the same or similar principles, and concluded:

We do not think the statute challenged by defendant violates any constitutional provision, or unduly curtails the right of contract, or is an illegitimate exercise of the State's police power.

PEONAGE—INVOLUNTARY SERVITUDE—WORKING OUT FINE AND COSTS FOR SURETY—CONSTITUTIONALITY OF STATUTE—*United States v. Reynolds, Supreme Court of the United States (Nov. 30, 1914), 35 Supreme Court Reporter, page 86.*—The Supreme Court had before it two cases involving the constitutionality of an Alabama statute, United States *v.* Reynolds and United States *v.* Broughton, the defendants having been indicted for holding persons in peonage under United States Compiled Statutes, 1901, page 1266. The opinions of the United States District Court for the Southern District of Alabama, which came to the conclusion that the respective indictments did not set forth an offense against the United States, are reported in 213 Federal Reporter, pages 352 and 345, respectively. The statute in question, section 6846 of the Alabama Code of 1907, provides for the making in open court by a person convicted and fined, of a contract for labor in consideration of a person becoming surety for him, and for punishment for violation of a contract thus made. The facts in the Reynolds case are given in the Supreme Court's opinion as follows, those in the Broughton case being similar except that no second contract was made:

One Ed Rivers, having been convicted in a court of Alabama of the offense of petit larceny, was fined $15, and costs, $43.75. The defendant Reynolds appeared as surety for Rivers, and a judgment by confession was entered up against him for the amount of the fine and costs, which Reynolds afterwards paid to the State. On May 4, 1910, Rivers, the convict, entered into a written contract with Reynolds to work for him as a farm hand for the term of 9 months and

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24 days, at the rate of $6 per month (besides board, lodging, and clothing), to pay the amount of fine and costs. The indictment charges that he entered into the service of Reynolds, and under threats of arrest and imprisonment if he ceased to perform such work and labor, he worked until the 6th day of June, when he refused to labor. Thereupon he was arrested upon a warrant issued at the instance of Reynolds from the county court of Alabama, on the charge of violating the contract of service. He was convicted and fined the sum of 1 cent for violating the contract, and additional costs in the amount of $87.05, for which he again confessed judgment with G. W. Broughton as surety, and entered into a similar contract with Broughton to work for him as a farm hand at the same rate, for a term of 14 months and 15 days.

After stating the facts and giving the Alabama statute under consideration and those relating to confession of judgment, working out fines and costs directly for the State, etc., Mr. Justice Day, who delivered the opinion of the court, spoke for the most part as follows:

The thirteenth amendment to the Constitution of the United States provides:

"SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SECTION 2. Congress shall have power to enforce this article by appropriate legislation."

It was under the authority herein conferred, to enforce the provisions of this amendment by appropriate legislation, that Congress passed the sections of the Revised Statutes here under consideration. (Clyatt *v.* United States, 197 U. S. 207, 25 Sup. Ct. 429 [Bul. No. 60, p. 69]; Bailey *v.* Alabama, 219 U. S. 219, 31 Sup. Ct. 145 [Bul. No. 93, p. 634].)

By these enactments Congress undertook to strike down all laws, regulations, and usages in the States and Territories which attempted to maintain and enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or obligation. To determine whether the conduct of the defendants charged in the indictments amounted to holding the persons named in a state of peonage, it is essential to understand what Congress meant in the use of that term prohibiting and punishing those guilty of maintaining it. Extended discussion of this subject is rendered unnecessary in view of the full consideration thereof in the prior adjudications of this court. (Clyatt *v.* United States and Bailey *v.* Alabama, supra.)

The actual situation is this: The convict, instead of being committed to work and labor as the statute provides for the State, when his fine and costs are unpaid, comes into court with a surety, and confesses judgment in the amount of the fine and costs, and agrees with the surety, in consideration of the payment of that fine and costs, to perform service for the surety after he is released because of the confession of judgment.

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When thus at labor, the convict is working under a contract which he has made with his surety. He is to work until the amount which the surety has paid for him—the sum of the fine and costs—is paid. The surety has paid the State and the service is rendered to reimburse him. This is the real substance of the transaction. The terms of that contract are agreed upon by the contracting parties, as the result of their own negotiations. The statute of the State does not prescribe them. It leaves the making of contract to the parties concerned, and this fact is not changed because of the requirement that the judge shall approve of the contract. When the convict goes to work under this agreement, he is under the direction and control of the surety, and is in fact working for him. If he keeps his agreement with the surety, he is discharged from its obligations without any further action by the State. This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done. (Bailey *v.* Alabama, 219 U. S. 244, 31 Sup. Ct. 145; Ex parte Hollman, 60 S. E. 24.)

Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be again prosecuted, and the convict is thus kept chained to an ever-turning wheel of servitude to discharge the obligation which he has incurred to his surety, who had entered into an undertaking with the State, or paid money in his behalf. The rearrest of which we have spoken is not because of his failure to pay his fine and costs originally assessed against him by the State. He is arrested at the instance of the surety, and because the law punishes the violation of the contract which the convict has made with him.

Nor is the labor for the surety by any means tantamount to that which the State imposes if no such contract has been entered into, as these cases afford adequate illustration. In the case against Reynolds, Rivers was sentenced to pay $15 fine and $43.75 costs. Under the Alabama Code, he might have been sentenced to hard labor for the county for 10 days for the nonpayment of the fine, and assuming that he could be sentenced for nonpayment of costs under section 7635 of the Alabama Code, he could have worked it out at the rate of 75 cents per day, an additional 58 days might have been added, making 68 days as his maximum sentence at hard labor. Under the contract now before us, he was required to labor for 9 months and 24 days, thus being required to perform a much more onerous service than if he had been sentenced under the statute, and committed to hard labor. Failing to perform the service, he may be again rearrested, as he was in fact in this case, and another judgment confessed to pay a fine of 1 cent and $87.05 costs, for which the convict was bound to work for another surety for the term of 14 months and 17 days.

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We are cited to a series of Alabama cases, in which it is held that the confessed judgment and the contract do not satisfy the law nor pay the penalty imposed, but the hirer becomes the transferee of the right of the State to compel the payment of the fine and costs, and by this exaction of involuntary servitude the convict has only changed masters, and that under the Alabama constitution the law is constitutional, and that the convict is not being imprisoned for indebtedness.

In such cases this court must determine for itself whether a given enactment violates the Constitution of the United States or the statutes passed in pursuance thereof. The validity of this system of State law must be judged by its operation and effect upon rights secured by the Constitution of the United States and offenses punished by the Federal statutes. If such State statutes, upon their face, or in the manner of their administration, have the effect to deny rights secured by the Federal Constitution, or to nullify statutes passed in pursuance thereto, they must fail. (Bailey *v.* Alabama, supra; Henderson *v.* New York (Henderson *v.* Wickham) 92 U. S. 268.)

There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the thirteenth amendment, and such punishment expressly excepted from its terms. Of course, the State may impose fines and penalties which must be worked out for the benefit of the State, and in such manner as the State may legitimately prescribe. (See Clyatt *v.* United States, 197 U. S. 207, 25 Sup. Ct. 429, and Bailey *v.* Alabama, 219 U. S. 219, 31 Sup. Ct. 145.) But here the State has taken the obligation of another for the fine and costs, imposed upon one convicted for the violation of the laws of the State. It has accepted the obligation of the surety, and, in the present case, it is recited in the record that the money has been in fact paid by the surety. The surety and convict have made a new contract for service, in regard to the terms of which the State has not been consulted. The convict must work it out to satisfy the surety for whom he has contracted to work. This contract must be kept, under pain of rearrest, and another similar proceeding for its violation, and perhaps another and another. Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer.

In our opinion, this system is in violation of rights intended to be secured by the thirteenth amendment, as well as in violation of the statutes to which we have referred, which the Congress has enacted for the purpose of making that amendment effective.

It follows that the judgment of the district court must be reversed. Judgment accordingly.

RAILROADS—FULL-CREW LAW—CONSTRUCTION AND CONSTITUTIONALITY.—*Kansas City Southern Railway Co. v. State, Supreme Court of Arkansas (Jan. 25, 1915), 174 Southwestern Reporter, page 223.*—The company named was convicted of violation of the "full-crew law" of Arkansas, and appealed. Railroads whose lines are less than 50 miles in length are exempted from the operation of the law.

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It was alleged that a freight train of more than 25 cars was operated with less than three brakemen. The company admitted the facts as to the operation of the train, and that its total mileage was much more than 50, but contended that since the number of miles operated within the State was less than 50, the act did not apply to it; but if held to be applicable, it claimed that the act was in conflict with the commerce clause of the Constitution of the United States, and deprived the company of its property without due process of law and denied it the equal protection of the law as guaranteed by the fourteenth amendment. These contentions were disallowed and the conviction affirmed, in an opinion delivered by Judge Kirby, who said in part:

The evident purpose of the act is to require all railroads over 50 miles in length, engaged in the operation of trains and the hauling of freight, to equip the freight trains of the designated length with the full crew, including three brakemen, and this relates to all railroads operating in this State whose line or lines of road are more than 50 miles in length, whether they are 50 miles in length within the State or not. If it had been the intention to require only such roads as operated a line of 50 miles in length within the State, words clearly manifesting that intention would have been used and not the expressions that were employed, which clearly manifest the intention to make this requirement of all railroads operating in the State whose entire operative line is 50 miles or more in length.

The decision of the State court holding the full-crew statute to be not a burden upon interstate commerce nor in conflict with the Constitution, and the decision of the United States Supreme Court in affirmance of this in Chicago, Rock Island & Pacific Railway Co. *v.* State, 219 U. S. 453, 31 Sup. Ct. 275 (Bul. No. 95, p. 317), were cited as authorities upholding the present decision.

RAILROADS—RELIEF DEPARTMENTS—CONTRACTS INVALIDATED BY EMPLOYERS' LIABILITY ACT—*Baltimore & Ohio Railroad Co. v. Miller, Supreme Court of Indiana (Jan. 29, 1915), 107 Northeastern Reporter, page 545.*—In this action Charles W. Miller sued the company named for benefits alleged to be due him as a member of its relief department. Judgment being in his favor in the circuit court of Dekalb County, the company appealed. The employee, an engineer, had become a member of the relief department, and had paid his dues for a number of years. He was injured while engaged in interstate commerce, in March, 1909. His relief department membership entitled him to $2 per day for one year and $1 per day as long as the disability continued, and he received payments in accordance therewith until April, 1912, when the company refused to pay further benefits because he at that time recovered judgment for dam-

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ages for his injury in the amount of $5,000, which was paid. He brought action for the later-accruing relief benefits.

The regulations of the relief department required a release of liability as a condition precedent to payment of benefits, and provided that bringing action should work a forfeiture of all claims for benefits. The Federal Employers' Liability Act provides that any contract whose purpose is to enable any common carrier to exempt itself from liability under the act shall be void. The court held that the contract was indivisible, and that the whole was invalidated by the act, so that the appellee, Miller, was without cause of action. The judgment in his favor was therefore reversed and a new trial granted.

RAILROADS—RELIEF DEPARTMENTS—WAIVER OF RIGHT TO DAMAGES—RECOVERY OF DEDUCTIONS FROM WAGES—CONSTITUTIONALITY OF STATUTE—*Baltimore & Ohio Southwestern Railroad Co. v. Hagan, Supreme Court of Indiana (June 15, 1915), 109 Northeastern Reporter, page 194.*—Chas. B. Hagan was in the employ of the company named from August, 1909, to July, 1911, when he became disabled for service because of defective hearing. At the time of entering upon work Hagan became a member of the relief department of the road, and signed an agreement that a deduction of $4 per month should be made from his wages for this purpose, the agreement also containing a provision waiving his rights to damages in case of his death or injury from the negligence of the company, and making the bringing of suit a waiver of the right to benefits from the relief association. This waiver was in violation of the Indiana statute of 1907 forbidding the establishment by railroads of relief organizations with such requirements. The employee, after leaving, sued the company for the amount of wages deducted for the purposes of the relief society. Judgment was in his favor in the circuit court of Lawrence County, and on appeal this was affirmed, the contention that the statute mentioned was unconstitutional being disposed of by Judge Morris, who delivered the opinion, as follows:

It is earnestly contended by appellant that the act of 1907, if held applicable to interstate carriers, is invalid because of interference with interstate commerce. It is not claimed that Congress has passed any law in relation to schemes of relief for employees of interstate railroads. It is manifest that the general assembly of 1907, in enacting the measure, purported to do so in the exercise of its police power. We are of the opinion that the act is within the bounds of the lawful exercise of such power. While it may incidentally affect interstate commerce, it is clear that the object of the statute was not to regulate it, and, in the absence of congressional action, the mere

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incidental effect will not invalidate the law. (Sligh *v.* Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, and authorities cited; Vandalia Railroad Co. *v.* Railroad Com., 101 N. E. 85 [Bul. No. 152, p. 159].)

Appellant also claims that the act constitutes unconstitutional class legislation because applicable alone to railroads. We can not assent to this view. [Cases cited.]

Other contentions likewise overruled, in addition to certain technical matters, were that the statute in question had been repealed by implication by section 5 of chapter 88 of the Acts of 1911, and that the fact that other losses of the employee than those from negligent accident were insured by the association entitled it to at least a part of the premiums deducted.

RAILROADS—SAFETY APPLIANCES—AIR BRAKES—TRANSFER TRAINS—*United States v. Chicago, Burlington & Quincy Railroad Co., United States Supreme Court (May 10, 1915), 35 Supreme Court Reporter, page 634.*—This was a proceeding against the railroad company named for alleged violation of the Federal safety appliance act. The point in controversy was whether the requirement as to the connecting of a certain percentage of the air brakes of the cars of a train applied to trains of the nature of the three in question. The district court held that it did so apply, and rendered judgment for the Government, while the circuit court of appeals reversed this judgment (211 Fed. 12, Bul. No. 169, p. 179), upon which the United States carried the case to the Supreme Court by certiorari.

It appeared from the evidence that the trains concerned were transfer trains running between the company's yards at Kansas City, on opposite sides of the Missouri River, the distance between their nearest points being 2 miles. The connecting track is a main-line track, 3,000 feet being upon a single-track bridge across the river. The track intersects, at grade, 12 or 15 tracks of other companies and passes through the union depot tracks. The transfer trains pass from one yard to the other as units, and are often preceded and followed by other trains, passenger or freight. The three trains consisted of 42, 36, and 39 cars, respectively, and only 9 in one train and 10 in each of the others had the brakes connected. At the time, August 9, 1910, the requirement was that 75 per cent should be connected.

The decision of the Supreme Court was that the provisions of the safety appliance law apply in such cases as that under consideration, and it reversed the decision of the circuit court of appeals, thus giving final judgment affirming the liability of the railroad company for penalties for the violation charged. The part of the opinion

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delivered by Mr. Justice Van Devanter expressing this conclusion is as follows:

Giving effect to the views quite recently expressed in United States *v.* Erie Railroad Co., 35 Sup. Ct. 621 [see p. 187], we think these trains came within the air-brake requirement, which the amendatory act of 1903 declares "shall be held to apply to all trains * * * on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passenger and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it.

RAILROADS—SAFETY APPLIANCES—HAND AND POWER BRAKES—*Virginian Railway Co. v. United States, United States Circuit Court of Appeals, Fourth Circuit (May 4, 1915), 223 Federal Reporter, page 748.*—Judgment for the United States was rendered on the trial of an action against the company named for violation of the safety appliance act by the use of hand brakes instead of the automatic brakes required. It appeared that the principal use made of the tracks was in the transportation of coal, and that very heavy trains, consisting of 100 cars of 54 tons each, were run at a low rate of speed, and on the stretch of track in question down a heavy grade. Under these circumstances it was found that the air brakes either stopped the train entirely, or if they were released before the train came to a standstill, the result was a jerking which frequently broke the cars apart. An order was therefore given that the trains should be controlled by hand brakes except in emergencies. The court affirmed the judgment against the company. A statement of the company's position is given in the following quotation from the opinion delivered by Judge Knapp:

The object of Congress was evidently that the automatic power brakes should be used to control the speed of the train at all times when good railroad practice would require the use of such brakes,

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and to permit the use of hand brakes under such circumstances as, in the judgment of the people in charge of the operation of the trains, would promote the safety of the operation.

Continuing, Judge Knapp said:

It is obvious that such a construction would practically nullify the train brake requirement, and take all effective meaning from the provision which makes it unlawful to run "any train" unless the locomotive and cars are so equipped that the engineer can control its speed "without requiring the brakeman to use the common hand brake for that purpose." The contention must be rejected as clearly unsound.

There is no express or implied qualification, which in any way relates to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make.

The justification set up is that trains of 100 cars can not be moved on this stretch of track, at the slow speed of 10 miles an hour or less, and kept under safe control with the use only of the prescribed power brake. But those operating conditions, which occasioned the need of hand brakes, are evidently of defendant's own creation. All it has to do to comply with the law is to make up trains of such smaller number of cars as can be safely and properly handled without resorting to the use of hand brakes. In short, the mandate of the Congress is disregarded in this instance, not because compliance involves any physical difficulty which is inherent or practically serious, but merely because it involves some increase of expense. It is too plain for argument that no such reason can serve to condone disobedience to the command of the statute.

RAILROADS—SAFETY APPLIANCES—HAULING DEFECTIVE CAR FOR REPAIRS—"NECESSARY"—*United States v. Atchison, Topeka & Santa Fe Railway Co., United States District Court, Southern District of California (Jan. 14, 1915), 220 Federal Reporter, page 215.*—This action was brought to enforce a penalty under the Federal safety appliance act, it being agreed as to the facts that the company moved a car having a defective coupler from a transfer track in San Diego to a repair track 1 mile distant; also that it would have been possible to send a repair man to the transfer track with suitable materials and to make the repairs there. The case turned largely upon the interpretation of the word "necessary" as used in the statute, which allows movements of defective cars, etc., to be made to repair points if such movement is necessary. Judge Bludsoe, who delivered the opinion affirming a judgment against the company, said in part:

In order that the movement of a car, such as is involved herein, can be justified, it must be shown by the carrier that such movement was necessary, in order that the required repairs might be made, and that such repairs could not be made except at the repair point to which the car was moved. It will not suffice, in my judgment, to hold that the word "necessary" is the substantial equivalent of

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"convenient," or that it should be qualified by the phrase "practicably" or "economically"; so to hold would be to place the convenience, practicability, and economy above human life, and that this court will not do.

RAILROADS—SAFETY APPLIANCES—STATE AND FEDERAL STATUTES—*Southern Railway Co. v. Railroad Commission of Indiana, Supreme Court of the United States (Feb. 23, 1915), 35 Supreme Court Reporter, page 304.*—The Railroad Commission of Indiana brought suit against the company named to recover a penalty for alleged violation on February 24, 1910, of a State statute requiring grab irons and handholds on the sides and ends of every car. The car in question was transported from Boonville to Milltown, both in Indiana. The company filed an answer in which it denied liability under the State law inasmuch as on February 24, 1910, the Federal safety appliance act imposed penalties for failing to equip cars with handholds, and also designated the court in which they might be recovered. This contention was overruled and judgment was entered against the company. That judgment was affirmed on appeal, and the case was taken to the Supreme Court of the United States on a writ of error. The Supreme Court reversed the judgment, on the ground that the provisions of the State statute were invalidated by the Federal safety appliance act, Mr. Justice Lamar, who delivered the opinion, saying in part:

The car alleged to have been without the required equipment, though transporting freight between points wholly within the State of Indiana, was moving on a railroad engaged in interstate commerce, and the company was, therefore, subject to the provisions and penalties of the safety appliance act. (Southern Railway Co. *v.* United States, 222 U. S. 20, 32 Sup. Ct. 2 [Bul. No. 98, p. 485].)

The defendant in error insists, however, that the railroad company was also liable for the penalty imposed by the Indiana statute.

But the principle that the offender may, for one act, be prosecuted in two jurisdictions, has no application where one of the Governments has exclusive jurisdiction of the subject matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Congress, of course, could have "circumscribed its regulations" so as to occupy a limited field. [Cases cited.] But so far as it did legislate, the exclusive effect of the safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.

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RAILROADS — SAFETY APPLIANCES — SWITCHING OPERATIONS — YARDS—*United States v. Erie Railroad Co., Supreme Court of the United States (May 3, 1915), 35 Supreme Court Reporter, page 621.*—The United States brought action against the company named for penalties for violations of the safety appliance act. On the second trial a verdict was directed for the defendant. The judgment in its favor rendered thereon was affirmed by the circuit court of appeals, and the United States brought the case to the Supreme Court on a writ of error. The attitude of the court of appeals appears in the opinion in 197 Fed. 287 (Bul. No. 112, p. 128).

The company operates a railroad from New York via New Jersey to Buffalo and Chicago. It has yards on the Hudson River at Jersey City and Weehawken, and another inland at Bergen, the last named being 2 miles from the Jersey City and 3½ miles from the Weehawken yard. The yards are connected by a double track, which runs a mile through a dark tunnel. This double track is used for a number of through freight trains daily, and a train going from one yard to another passes many switches connecting with tracks used by main-line passenger trains. The cars to be transferred from one yard to another are made up into trains which remain intact during the run, and a large number of cars are thus transferred daily.

Some counts of the indictment referred to alleged hauling between the yards cars having defective couplers, etc., and others to hauling trains not having the requisite number of air brakes connected. The grounds for the decision of the circuit court of appeals were that the three yards with the connecting tracks constitute a single and extensive yard; that the movements of the transfer trains were mere switching operations, and therefore not within the air-brake provision in the statute; and that it was permissible under the statute to haul the cars with defective equipment under such circumstances.

The Supreme Court reversed the former judgment, Mr. Justice Van Devanter, who delivered the opinion, speaking in part as follows:

We can not assent to the view that the yards at Jersey City, Weehawken, and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from 2 to 3½ miles apart, are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intrayard movements, and are in actual practice treated as separate yards.

We are persuaded that the transfer trains moving from Jersey City and Weehawken to Bergen and vice versa came within the purview of the air-brake provision. They were made up in yards like other trains, and then proceeded to their destinations over main-line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching oper-

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ations, but were engaged in main-line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks, and across passenger tracks whereon trains were frequently moving. Thus it is plain that in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should "be held to apply to all trains." We therefore conclude and hold that it embraced these transfer trains.

The hauling of the cars with defective equipment was clearly in contravention of the statute. While section 4 of the act of 1910 permits such cars to be hauled, without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars "by means of chains instead of drawbars" in association with other cars in commercial use, unless the defective cars "contain live stock or perishable freight." Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained live stock or perishable freight.

It follows that the district court erred in directing a verdict for the defendant, and the circuit court of appeals erred in sustaining that ruling. The judgments of both courts must therefore be reversed and the case remanded to the district court for a new trial.

STRIKES—KIDNAPING OF MEMBER OF STRIKERS' COMMITTEE—EVIDENCE—*State v. Payne et al., Supreme Court of Minnesota (Dec. 11, 1914), 149 Northwestern Reporter, page 945.*—Peter L. Newman and one Sullivan were convicted in the district court of Crow Wing County on a charge of kidnaping, and appealed, the judgment being affirmed. The statute alleged to have been violated is General Statutes, 1913, section 8628, and reads as follows:

Every person who shall willfully seize, confine or inveigle another with intent to cause him, without authority of law, to be secretly confined or imprisoned within the State, or sent out of it, to be sold as a slave, or in any way held to service, or kept or detained against his will, * * * shall be guilty of kidnaping and punished, etc.

Four men had been tried jointly, and the other two were acquitted. Testimony of Newman at a previous trial of the case was admitted and no request was made for an instruction that this testimony should not be considered against Sullivan. It was held that this

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evidence was properly admitted against Newman, and that under the circumstances Sullivan could not complain of its admission.

The only other question was as to the sufficiency of the evidence to sustain the conviction. Judge Bunn, who delivered the opinion, reviewed the evidence and discussed its sufficiency as follows:

The indictment charged that the defendants on April 17, 1913, at the village of Crosby, in Crow Wing County, did willfully, unlawfully, and feloniously seize, confine, and inveigle one Theodore Sjogren, with intent to cause him, without authority of law, to be secretly confined within the State, and set out the acts constituting the seizure, confinement, and inveigling of Sjogren.

The evidence justified the jury in believing beyond a reasonable doubt that the following facts were true: Sjogren was a miner and had come from his home in Michigan to work in one of the mines near Crosby. The miners started a strike, and Sjogren was a member of a committee appointed to confer with the superintendent and the "captain" of the shaft. Several conferences had been held prior to the evening of April 17, 1913. On that evening Sjogren visited a pool hall in Crosby and attended a moving-picture show. After coming out from this show with two companions, and as he was passing an automobile standing near the sidewalk, revolvers were pointed at his face, and he was ordered to step into the automobile. He complied, and the automobile drove off. Defendants Newman and Sullivan were two of the men, the others being the two defendants who were acquitted and one Payne, who was indicted but not tried. All of the men had revolvers, and dark handkerchiefs over their faces. They gagged Sjogren and went through his pockets, though they took nothing from him. The machine was driven to Brainerd, with more or less of threats and shooting on the way. In Brainerd the five men conducted Sjogren to a room in a hotel, where they had refreshments. Sjogren was told that if he would not go back to the mines, but would go home to Michigan, the men would let him go, but would shoot him full of holes if he ever came back or wrote to his friends in Crosby. Sjogren promised, and his captors left him in charge of Payne, one of their number; the others going back to Crosby. Payne, with the help of a revolver, kept Sjogren in charge, saw that he bought a ticket to Duluth, and took the train with him. Payne got off at Deerwood, Sjogren continuing to Duluth.

It is manifest that this story, if believed, was sufficient to convict defendants of willfully seizing, confining, or inveigling Sjogren, with the intent to cause him, without authority of law, to be secretly confined or imprisoned within the State. There is little room to question the substantial features of Sjogren's tale, as told above, and we are obliged to hold that the conviction was justified by the evidence. We are not concerned with the motives of the men who thus attempted to get out of the way of one of the committee of strikers. It is not pretended that they acted with any legal authority.

SUNDAY LABOR—"COMMON LABOR"—"AVOCATION"—NECESSITY—ASSESSMENT OF PROPERTY—*Stellhorn v. Board of Commissioners of Allen County, Appellate Court of Indiana (Nov. 3, 1915), 110 North-*

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eastern Reporter, page 89.—August Stellhorn brought action against the county commissioners for a balance claimed to be due him for services in assessing personal property during the years 1905, 1906, 1907, and 1908. The term during which this work was done was March 1 to May 15, and the statutory rate of pay was $2 per day. The claim has been allowed each year for 65 days, but the deputy assessor claimed that he worked on Sundays checking up lists, etc., and also for a few days each year after May 15, his total additional claim being for $136. The Sunday labor law of the State prohibits common labor or engaging in one's usual avocation, works of necessity and charity being excepted. It was held that the work done came within the meaning of both common labor and usual avocation, the word "avocation" being used in the sense of vocation or occupation. The circumstances were examined and it was held that there was no necessity within the meaning of the period, there being a provision for the appointment of additional deputy assessors if needed. The judgment for the defendants rendered in the trial court was affirmed.

SUNDAY LABOR—CONSTITUTIONALITY OF STATUTE—*State v. Nicholls, Supreme Court of Oregon (Sept. 14, 1915), 151 Pacific Reporter, page 473.*—Leigh E. Nicholls was convicted in a justice court of violating the Sunday law, but on his appeal to the circuit court his objection to the complaint as insufficient was sustained, from which decision the State appealed. The charge was of keeping open a cigar store and selling cigars, tobacco and candy. The law, besides providing that circumstances of necessity and mercy may be pleaded in defense, exempts from its provisions theaters, keepers of drug stores, doctor shops, undertakers, livery-stable keepers, butchers and bakers. The respondent claimed that the law granted to the classes named privileges and immunities not equally belonging to all citizens upon the same terms, and was therefore in violation of the State constitution; also that it was in conflict with the fourteenth amendment to the Constitution of the United States. The court held that the classification was reasonable and the law valid, and therefore reversed the judgment of the circuit court and remanded the case for further proceedings. Judge Burnett, who delivered the opinion, after defining the police power and stating the respondent's contention, said in part:

The general rule laid down by the enactment forbids keeping open any store, shop, grocery, bowling alley, billiard room, or tippling house for the purpose of labor or traffic. An exception is found in the proviso excluding the occupations already named. A good reason for this may be found in the fact that drug stores, doctor shops, undertakers, butchers, bakers, and livery-stable keepers minister to

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wants that are more imperative as a rule than those supplied by the general run of business in the occupations named, while theaters afford mental diversion conducive to rest and relaxation. The emergency involved gives color and sanction to the exception. The law applies to all persons coming within the class described and limited in the statute. Many situations are pointed out in the argument of the defendant illustrating possible absurdities. For instance, a carpenter shop may be closed, but the carpenters themselves might be working on the outside, or the store of the defendant, where cigars and candy are sold, might be closed, yet the same articles might be purchased in a drug store. These contentions are properly addressed to the legislative branch of the Government. We are concerned only with the authority, and not with the wisdom, of the lawmakers. The question of whether an institution which vends both drugs and candy is a drug store or a candy shop is not before us. We are convinced that the classification set out in the statute is reasonable, and that the legislation is a proper exercise of the police power.

WAGE DEBTS—LIABILITY OF STOCKHOLDER OF CORPORATION—BOOKKEEPER AS EMPLOYEE—*Farnum v. Harrison, Supreme Court of New York, Appellate Division, First Department (Apr. 16, 1915), 152 New York Supplement, page 835.*—William Farnum brought action against William H. Harrison, one of the stockholders of the Wishart-Dayton Auto Truck Co., and recovered a judgment against him in the city court, for unpaid salary as bookkeeper of the company. Farnum first sued the company and recovered judgment, and when his execution was returned wholly unsatisfied, brought this action pursuant to section 57 of chapter 59 of the Consolidated Laws. The question to be decided was whether the plaintiff, a bookkeeper with a salary of $50 per week, was included within the meaning of the terms "laborers, servants or employees" in the statute referred to. The court reviewed the decisions relating to similar classifications, and held that the plaintiff was a servant or employee of the company, and therefore entitled to maintain the action. The judgment in his favor was accordingly affirmed.

WAGES AS PREFERRED CLAIMS IN BANKRUPTCY—CONSTITUTIONALITY OF STATUTE—*Central Trust Co. v. George Lueders & Co. et al., United States Circuit Court of Appeals, Sixth Circuit (Mar. 2, 1915), 221 Federal Reporter, page 829.*—In the Matter of J. Rheinstrom & Sons Co., Bankrupt, the district court issued an order allowing the claims of Lueders & Co. and other creditors, under the terms of a Kentucky statute which provides that employees and persons furnishing materials and supplies for the carrying on of a manufacturing business shall have a preference in case the manufacturers

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become insolvent. The trust company appealed from this order. The questions at issue are thus stated by Judge Knappen, who delivered the opinion of the circuit court of appeals:

The grounds of attack upon the order are (1) that the statute invoked is unconstitutional and in conflict with the [Federal] Bankruptcy Act; (2) that the statute does not relate to manufacturing establishments other than those similar to rolling mills and foundries; and (3) that the bankrupt did not own or operate a manufacturing establishment.

It was held that the statute is not unconstitutional as discriminatory, as is shown by the following language used in the opinion:

The asserted ground of unconstitutionality is that the statute unreasonably discriminates in favor of those who furnish materials and supplies to manufacturing establishments, as against those furnishing money or machinery to the same establishments, as well as those furnishing materials and supplies to establishments not engaged in manufacturing, and discriminates against manufacturing establishments in favor of other establishments. We think this contention without merit.

The rule is well settled that the equal protection clause of the fourteenth amendment does not take from the States the power to classify the subjects of legislation, but leaves to the legislatures a wide field of discretion in that regard, avoiding such classification only when unreasonable and arbitrary, and that a legislative classification is presumed to be reasonable unless it is apparent that there was and could be no reasonable basis therefor. (Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, and cases there cited; Jeffrey Manufacturing Co. *v.* Blagg, 235 U. S. 571, 577, 35 Sup. Ct. 167 [Bul. No. 169, p. 203].) We see nothing arbitrary or unreasonable in preferring materialmen, whose supplies enter into the marketed product, over sellers of machinery, upon which liens for the purchase price may well be reserved, or over those loaning money, who not infrequently are in position to exact personal security or indorsement, nor in either of the other respects complained of. We cite in the margin several decisions of the Supreme Court which we think amply sustain the validity of this statute against the criticisms urged. The statute in no way conflicts with the Bankruptcy Act. Section 64b of the act provides that—

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: * * * (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

It was expressly held by this court in the Bennett Case that this section of the Bankruptcy Act adopts the Kentucky statute in question, and makes it the applicable Federal law in determining priorities. (153 Fed. 674.)

The court held that decisions already rendered debarred the contention that only manufacturing establishments similar to rolling mills and foundries were included under the act; and, as to the

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third point, showing at some length that the processes of making so-called Maraschino cherries changed them into an entirely different product from the cherries as originally imported, it held that the plant was a manufacturing establishment within the meaning of the law. The order of the district court was therefore affirmed, granting the preferences to the employees and those furnishing materials.

WAGES AS PREFERRED CLAIMS IN BANKRUPTCY—"WAGE EARNER"—"SERVANT"—*Blessing v. Blanchard et al., United States Circuit Court of Appeals, Ninth Circuit (May 10, 1915), 223 Federal Reporter, page 35.*—The district court allowed priority to the claims of two employees of the Pacific Car Motor Co., bankrupt, named Blanchard and Winn, for the sums due them on their salaries earned within three months prior to the filing of the bankruptcy petition. The company was engaged in buying, selling and repairing automobiles. Blanchard was general manager, and Winn superintendent of the shop.

The company claimed that neither man was entitled to priority, and pointed out that section 1, subdivision 27, of the Bankruptcy Act defines a "wage earner" as one working at a rate of less than $1,500 per year. The court held, however, that this definition does not affect the construction of section 64b (4), relating to priorities.

The act provides for priority of wages due workmen, clerks, and servants, and also, by amendment, salesmen. The court discussed the meaning of the word "servants," and concluded that the general manager should not be included in this designation. The following is quoted from the opinion delivered by Judge Gilbert:

> We think the word "servant" should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. We do not think it includes the manager of a business, notwithstanding that he may also have rendered services as a salesman.
>
> Priority of payment was intended for the benefit only of those who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection. It evidently was not thought that the general manager of the business would require special protection. Such seems to have been the opinion of the courts of bankruptcy. [Cases cited.]

On the other hand, it was held that Winn, who, although superintending other men, was engaged personally in the work of repairing, etc., should receive the protection of the act. The judgment of the court below giving priority to the claims of both was therefore reversed as to Blanchard, and affirmed as to Winn.

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WAGES—MINES—WEIGHING COAL BEFORE SCREENING—CONSTITUTIONALITY OF STATUTE—*Rail & River Coal Co. v. Yaple et al., Supreme Court of the United States (Feb. 23, 1915), 35 Supreme Court Reporter, page 359.*—The company named applied to the United States District Court for the Northern District of Ohio to enjoin the members of the Industrial Commission of Ohio from enforcing the law of that State (104 Ohio Laws, p. 181) requiring payment of coal miners, when made by weight of coal mined, to be made on the basis of weight before the screening of the coal. The injunction was refused (see 214 Fed. 273, Bul. No. 169, p. 171), and the company appealed. The Supreme Court affirmed the order of the court below in an opinion delivered by Mr. Justice Day, who summarized the allegations of the company's bill, which stated the conditions of coal mining and alleged that the provisions of the act "are unreasonable and arbitrary and impracticable in operation, and that the act is unconstitutional, as in violation of the fourteenth amendment to the Constitution of the United States, and in violation of the constitution of the State of Ohio, and that it delegates legislative authority to the industrial commission of the State and although the bill was filed before the act went into effect, it was alleged that the industrial commission, in putting the same into effect, would work an irreparable injury to the plaintiff."

Before enacting the legislation under consideration, the question had been referred to a coal-mining commission, which, after full investigation, made a report in which the arguments for and against the measure were discussed, and a bill was recommended in the form in which it was passed, becoming the law in issue. In its first section, the act proposes to establish a system by which the miner shall be paid according to the total weight of all the coal contained in the car in which it was removed from the mine; providing, however, that no greater percentage of slate, sulphur, rock, dirt, or other impurity shall be contained in such contents than the amount fixed by the industrial commission of the State. By the second section, the industrial commission is required to ascertain and determine the percentage of impurities unavoidably present in the cars when proper mining and loading are done.

The seventh section provides penalties for infractions of the act, including improper mining and loading, so as to produce amounts of impurities in excess of that allowed by the commission. A proviso is made in this section to the effect that the miner and the operator may agree upon deductions by a method of docking fixed upon by themselves, which agreement may be substituted for the ascertainment of the commission. Indeed, section 3 of the act makes it the duty of the miner and the employer to agree upon the percentage of fine coal, commonly known as nut, pea, dust, and slack, to be allowed

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in the output of the mine, and in case they do not, the commission may fix a percentage which shall be in effect until otherwise agreed upon by the miner and the employer, unless the commission finds that the amount originally fixed is not correct, when it may itself fix another rate, as provided in a later section.

Having stated the foregoing, Mr. Justice Day, speaking for the court, said in part:

The only penalty fixed by the law against the employer is contained in section 6, where it is made unlawful for the employer to pass the coal over a screen or other device, for the purpose of ascertaining and calculating the amount to be paid the miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished.

There is nothing in the law to prevent the employer from screening his coal as he sees fit for other purposes, and so as to fit it for the market, in such wise as he may deem advisable. The inhibition on screening is only upon that operation when it is done for the purpose of calculating the amount to be paid to the miner for mining the coal. Moreover, it is important to be considered in this connection that the orders of the commission are not final, but are subject to review [by the commission, and, on appeal, by the supreme court]. It would seem that this system of law, with a right to review in the manner we have stated in the Supreme Court of Ohio, has provided a system ample for the protection of the rights of the employers. (See Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531, 34 Sup. Ct. 359 [Bul. No. 169, p. 170].) And of course in this, as in other cases, only alleged infractions of constitutional rights of those complaining can be considered in determining the constitutionality of the law. [Cases cited.]

The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of McLean *v.* Arkansas, 211 U. S. 539, 29 Sup. Ct. 206 [Bul. No. 81, p. 419], in which this court sustained a law of the State of Arkansas, requiring coal mined to be paid for according to the run-of-mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has often affirmed the right of the State, in the exercise of its police power, to place reasonable restraints like that here involved, upon the freedom of contract.

As to the alleged impracticability of the law, because of the impossibility of the industrial commission determining the quantity of dirt and other impurities in any coal mined, we can find no force in that objection. Agreements as to the amount of docking for dirt and impurities in the mining of coal have been constantly made, and it is not the province of a court to revise conclusions which men versed in the business have found practicable; certainly not in advance of an attempt to put the law into operation. The consideration of the law already given shows the means enacted to do away with these impurities, and to insure as far as possible the production of clean coal.

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As to the objection because of the penalties, this is not a suit to enforce penalties; nor, in view of the provisions of the statute, can we say that the penalties are so great as to prevent a resort to the courts to ascertain the constitutionality of the law.

We are unable to discover in the statute any infraction of the constitutional rights of the appellant, and the order denying the temporary injunction is accordingly affirmed.

WAGES—WEEKLY PAYMENT—EMPLOYEES—*People v. Interborough Rapid Transit Co., Supreme Court of New York, Appellate Division, First Department (July 9, 1915), 154 New York Supplement, page 627.*—The people, by John Mitchell and others constituting the State industrial commission, proceeded against the company named for a penalty of $50 for violation of the act requiring weekly payment of wages to its employees. The questions involved were whether a number of persons in various kinds of employment with the company were employees under the definition contained in the act, and also whether the payment of a civil engineer by check was a violation of the requirement of cash payment. As a part of the persons were held to be employees, the penalty was assessed. In rendering the opinion Judge Hotchkiss said in part:

Section 11 requires every corporation (except such as operate steam surface railroads, as to which a different provision is made) to "pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment." Section 2 of article 1 of the Labor Law defines the term "employee" to mean "a mechanic, workingman, or laborer, who works for another for hire." Each statute must necessarily be largely a law unto itself, and its proper interpretation must depend upon its own particular language. The statutory definition, which we have here to guide us, prevents any peculiar force being attached to the terms "wages" and "employee," and confines us to the simple inquiry whether, among the persons enumerated in the submission, there are any who are properly to be classed as mechanics, workingmen, or laborers, as those terms are ordinarily and naturally used.

It scarcely needs argument to show that the following are not within the defined classes: Stenographer, accountant, typist, chainman, levelman, civil engineer, bookkeeper, draftsman, structural designer, and clerk. The case of the rodman is not quite so clear. His work is apparently largely of a manual nature; but, as his duty is to "assist civil engineers" in their work, I think that we may infer that he belongs to the engineering staff, although in a humble capacity, rather than among the workingmen or laborers, and is accordingly not within the statutory definition. The blueprinter is also on the border line; but I am inclined to think that he may, upon a liberal construction, be deemed to be a workingman, as is the office boy. The matron, upon a similar construction, should be classed as a workingwoman, as should the telephone switchboard operator. The chauffeur is (or ought to be) a mechanic, but in any case he is a workingman.

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Section 10 requires various classes of corporations of which defendant is one to "pay to each employee * * * the wages earned by such employee in cash," and prohibits payment in scrip or store orders. It is clear, therefore, that the civil engineer, inasmuch as he is not a workingman, mechanic, or laborer, is not within the statute, and payment of his compensation by check is lawful.

WEEKLY DAY OF REST—CONSTITUTIONALITY OF STATUTE—*People v. C. Klinck Packing Co., Court of Appeals of New York (Feb. 5, 1915), 108 Northeastern Reporter, page 278.*—The company named was convicted in the county court of violating during December, 1913, section 8a of the Labor Law, by permitting certain employees to work for seven days or more consecutively without any day of rest, and the conviction was affirmed by the appellate division. The alleged violation occurred in the plant of the company in Buffalo for the killing of hogs and the preparation of meats in various forms for consumption. The court cited among other cases that of Hennington *v.* Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, and upheld the law as constitutional, with the exception of the amendment of 1914 to subdivision 2, delegating certain powers to the commissioner of labor, and affirmed the conviction. The following is quoted from the opinion of Judge Hiscock, who spoke for the court:

This appeal presents as its underlying question the important one whether the legislature may require that in certain occupations employees shall have 24 consecutive hours of rest in every 7 days. The statute which requires this has popularly come to be known as the "one day of rest in seven" law, and with certain exceptions and subject to certain qualifications it provides with appropriate penalties that every employer "carrying on any factory or mercantile establishment * * * shall allow every person * * * employed in such factory or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days."

It is undisputed that this defendant was conducting a factory within the meaning of this law and that it caused or permitted some of its employees to labor without the prescribed rest in violation of the terms of the statute. Its defense is based solely and squarely on the contention that the law is unconstitutional and invalid. Its broad claim is that, in attempting to limit the right of a male adult to contract for his labor in the pursuits named, the legislature violated the provisions of the constitution both of the State and the United States.

We agree with the appellant that the statute can not be sustained as one enforcing the religious observance of any day, but that it must be sustained, if at all, as a valid exercise of the police power of the State, for the promotion and protection of the public health and welfare.

We see at the outset that it is applicable only to certain classes of employees. But these are they who work in factories and mercantile establishments. We know as a matter of common observation that such labor is generally indoors and imposes that greater burden

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on health which comes from confinement, many times accompanied by crowded conditions and impure air. Thus special conditions are presented which become a reasonable basis for special consideration.

Can we say that the provision for a full day of rest in seven for such employees is so extravagant and unreasonable, so disconnected with the probable promotion of health and welfare that its enactment is beyond the jurisdiction of the legislature? Or does the very reverse seem to be its character? We have no power of decision of the question whether it is the wisest and best way to offset these conditions and give to employees the protection which they need, even if we had any doubt on that subject. That question, as we have many times said in other similar cases, is for the legislature. Our only inquiry must be whether the provision on its face seems reasonable, fair, and appropriate, and whether it can fairly be believed that its natural consequences will be in the direction of betterment of public health and welfare, and, therefore, that it is one which the State for its protection and advantage may enact and enforce. It seems to me very clear that we may answer that it is such an one.

I now come to the consideration of special and subordinate features of the act which are attacked as unjustifiable and invalid. These in the statute as originally adopted are found in subdivisions 2 and 5, and in the definition of the word "factory." The first subdivision exempts from the application of the statute janitors, watchmen, employees whose duties include not more than three hours' work on Sunday in setting sponges in bakeries, caring for live animals, maintaining fires, making necessary repairs to boilers or machinery, superintendents, or foremen in charge. The second subdivision provides that the industrial board may for definite periods except specific cases from the operation of the statute when necessary for "the preservation of property, life or health."

The definition of the word "factory" (as finally amended in 1914—Laws of 1914, ch. 512) has the effect of excepting employees in "power houses, generating plants, barns, storage houses, sheds and other structures owned or operated by a public service corporation, other than construction or repair shops, subject to the jurisdiction of the public service commission under the public service commissions law."

I think that the exemptions of the employees thus expressly specified are based on such obvious reasons and grounds of classification and that the powers conferred on the industrial board are so limited in extent and so governed by rules prescribed in the statute itself that it was clearly within the powers of the legislature to enact as it did and that we need not spend any more time in the consideration of these provisions than to state that we see nothing objectionable in them from the constitutional standpoint of legislative power.

In the year 1914 this section was amended in two important respects. Subdivision 2 was amended and supplemented by adding an exemption from its benefits of:

"Employees, if the commissioner of labor in his discretion approves, engaged in the work of any industrial or manufacturing process necessarily continuous, in which no employee is permitted to work more than eight hours in any calendar day." (Laws 1914, ch. 396.)

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Also of:

"Employees in dairies, creameries, milk condensaries, milk powder factories, milk shipping stations, butter and cheese factories, ice-cream manufacturing plants and milk bottling plants, where not more than seven persons are employed." (Laws 1914, ch. 388.)

While these amendments were not adopted until after the occurrence of the violations involved in this action, and are not, therefore, before us in it, they are a subject of consideration in the case Matter of Peach, 108 N. E. 1102, argued at the same term and to be decided at the same time as this case, and therefore, for purposes of convenience and of continuity of discussion, they will be considered in the present opinion.

The provision exempting employees of dairies, creameries, etc., numbering seven or less, seems to be based upon a perfectly reasonable classification and therefore within the legislative power. It is to be observed that all of these employments deal with perishable products consisting of milk or having milk as a basic element. It is apparent, therefore, that they could not be wholly suspended for 24 hours without either total destruction or serious impairment of their products, and that the only manner in which the statute could be complied with would be by laying off part of the employees from day to day. It is then quite probable that in a small establishment it would be more burdensome than in a large one, to lay off each employee one full day in seven. It is not difficult to perceive that it might impose a greater proportion of extra work on those who remain if no extra men were hired, or a greater proportionate burden on the business if extra men were employed to take the places of those who were temporarily idle.

In determining whether it will enact such legislation as this the legislature must necessarily always consider the two elements of necessity for the legislation and of the burdens which its enactment will inflict upon those who are subject to it. There must be a reasonable relation between the two, and frequently legislation has been condemned because the ends to be gained did not afford any adequate or proper justification for the interference and burdens which were imposed upon individual rights.

So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be made the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists. The wide discretion possessed by the State is not transgressed unless the classification is palpably arbitrary. We think there may be a real difference between the situation and labor of employees in large and small establishments of the kind covered by this exception and that therefore it was proper for the legislature to differentiate them. This being so, the question where the line should be drawn largely rested in its discretion, and that discretion seems to have been exercised in a manner naturally suggested by the relation between the number of employees and the days of the week. [Cases cited.]

The remaining provision of the statute which exempts "employees, if the commissioner of labor in his discretion approves, engaged in the work of any industrial or manufacturing process necessarily continuous, in which no employee is permitted to work more than eight hours in any calendar day," presents greater difficulties. In fact,

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we are compelled to express the belief that it is unconstitutional because of the attempt which the legislature has made to delegate its powers to the commissioner of labor. The proposition is so well settled that we need not cite authorities in its support that the legislature can not secure relief from its duties and responsibilities by a general delegation of legislative power to some one else. It seems to us that that is precisely and broadly what is here attempted. The provision as a whole means that certain employees shall be exempt if the commissioner of labor "in his discretion approves." (Laws 1914, ch. 396.)

This particular provision is not immediately involved in the cases before us and it is not so connected with the general scope and purpose of the legislation that its imperfections totally destroy the latter. As has been stated, it was adopted as an amendment, wherefrom the conclusion quite irresistibly flows that the original statute may stand, even though this provision falls as invalid.

WORKMEN'S COMPENSATION — ABROGATION OF COMMON-LAW DEFENSES—STATUS OF EMPLOYEE—CONSTITUTIONALITY OF STATUTE—*Wheeler v. Contoocook Mills Corporation, Supreme Court of New Hampshire (May 4, 1915), 94 Atlantic Reporter, page 265.*—Etta M. Wheeler brought action against the company named for damages for personal injuries suffered while employed by it in a stocking factory. Her work was in an upstairs room, and on the day of the accident it ran short, and she was directed to take her chair and go downstairs where there was piecework to be done. The stairs had no railing on one side for several steps from the bottom; the treads were also badly worn, and there were upon them large bundles of stockings which had been thrown down from the upper floor. While carrying her chair and attempting to pick her way down the stairs, she slipped and fell, receiving the injuries complained of.

Outside of technical matters as to the designation of the company in the writ, and certain instructions to the jury and remarks of the employee's counsel in argument, the defenses were largely directed to the constitutionality of the employers' liability and workmen's compensation act of 1911. The exceptions in this, as well as other respects were overruled, and the judgment of the superior court in the employee's favor was affirmed. The following is quoted from the opinion delivered by Judge Peaslee:

The defendant moved for a directed verdict upon various grounds. So far as it relates to the fault of the defendant in maintaining such stairs, so encumbered, and ordering the plaintiff to use them while hampered in her movements by the chair she was carrying, the evidence is clearly sufficient. The claim that because she had completed one kind of work upstairs and was going downstairs to begin work for which she was paid in a different way, therefore she was not, while in transit, the defendant's servant, does not demand extended

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consideration. If the claim were well founded, employers would be released from all liability under the act for the condition of the ways provided for the ingress and egress of employees. Such is not the law. (Boody *v.* Company, 77 N. H. 208, 210, 90 Atl. 859.)

Another objection made to the constitutionality of the law is based upon the taking away of certain defenses and alleged discriminations and inequalities in the provisions made for regaining the same by accepting the provisions of the act. It was within the legislative power to abolish entirely the defenses of contributory negligence, assumption of risk, and the fellow-servant rule. [Cases cited.]

The objection that the classification of employments adopted is unreasonable has been met and answered in many jurisdictions. It is not an open question in this State. (State *v.* Griffin, 69 N. H. 1, 89 Atl. 260, and authorities there reviewed.)

The defendant is in error in its claim that the act is similar to the one held to be unconstitutional in Ives *v.* Company (201 N. Y. 211, 94 N. E. 431 [Bul. No. 92, p. 251]). In so far as the acts are similar, their constitutionality was expressly declared in that case. The ground upon which the New York act was held to be unconstitutional was that it provided for compensation when there was no fault upon the part of the employer. As there is no such provision in our statute, the only part of that decision which is adverse to plaintiffs has no application here.

WORKMEN'S COMPENSATION—ACCIDENT AS CAUSE OF DEATH—INSANITY RESULTING FROM INJURY, AND CAUSING SUICIDE—*In re Sponatski, Supreme Judicial Court of Massachusetts (Mar. 31, 1915), 108 Northeastern Reporter, page 466.*—This was an application by Ellen C. Sponatski for compensation under the workmen's compensation act, and an award had been made in her favor and affirmed by the industrial accident board. On the appeal of the insurer, the supreme judicial court affirmed this decision.

The deceased employee received an injury in the course of and arising out of his employment on September 17, 1913, through a splash of molten lead into his eye. He was treated in a hospital until October 13, 1913, when, as the board found, "while insane as a result of the injury he threw himself from a window and was fatally injured."

After discussing the evidence and coming to the conclusion that it was sufficient to uphold a finding that the employee was insane as a result of the injury and committed suicide without conscious volition, Judge Rugg, who delivered the opinion, referring to the death being the proximate result of the injury, said in part:

The obligation to pay compensation under the workmen's compensation act equally is absolute when the fact is established that the injury has arisen "out of and in the course of" the employment. (Part 2, sec. 1.) It is of no significance whether the precise physical harm was the natural and probable or the abnormal and incon-

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ceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death "results from the injury." (Part 2, sec. 6.) When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death.

WORKMEN'S COMPENSATION—ACCIDENT—EFFECT OF RELEASE ON CLAIM OF DEPENDENT—*Milwaukee Coke & Gas Co. v. Industrial Commission et al., Supreme Court of Wisconsin (Mar. 2, 1915), 151 Northwestern Reporter, page 245.*—The company named brought action against the industrial commission and Pauline Dixon to set aside an award of the commission in favor of Mrs. Dixon. This award was of the sum of $3,000 as compensation for the death of her husband, Thomas Dixon. The circuit court of Dane County had affirmed the award.

Dixon was an engineer on a switch engine, and when relieved at 7 o'clock on the evening of March 23, 1912, started to ride back to the office on the apron between the engine and tender. This was smooth, and not rigid but movable, and he fell off, and suffered results which the physicians diagnosed as arising from concussion of the brain. He was at this time incapacitated for eight days and was paid $1.56 by the company, which was the exact amount to which he was entitled for the temporary disability under subsection 2 of section 2394–9 of the statutes, for one day more than the week which he had lost. At this time he executed a release of all claims. After working a large part of the time until the following October, he became ill again, and died December 15. The medical testimony was conflicting, but the court held that there was evidence to sustain the findings of the commission that the occurrence constituted an industrial accident, and that the death was the result of it. The court further held that the release was of no validity in barring the widow's right to compensation for two reasons: First, because, there being no dispute that the small amount paid Dixon was the exact sum due for the temporary disability, there was no consideration for the release of any other claim; and second, because the circumstances gave rise to two distinct claims, one belonging to the employee himself, and the other accruing on his death to the dependents, and he could not personally release the latter. The judgment was affirmed.

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WORKMEN'S COMPENSATION — ACCIDENT — HERNIA — FINDING OF COMMISSION—*Poccardi v. Public Service Commission, Supreme Court of Appeals of West Virginia (Jan. 26, 1915), 84 Southeastern Reporter, page 242.*—J. Gaetano Poccardi, royal consul of Italy, brought complaint against the Public Service Commission of West Virginia on behalf of the widow of Cataldo Greco, an Italian subject, she being the employee's sole dependent. The commission had rejected the claim of the widow against the workmen's compensation fund. Greco had been an employee of the Phillips Sheet & Tin Plate Co., and on the 10th day of April, 1914, he and others lifted a heavy iron pipe called a jim pole. This was on Friday, and he worked the next day, but was obliged to go to bed on Sunday, the 12th, and to call a physician on the 14th. The physician found the case serious, and had the man removed to the hospital on the 15th, where he operated on him for hernia on the 16th. The patient died on the 20th, the immediate cause of the death being heart trouble.

The evidence in this case was not well developed, but the court held that the commission in such cases was in the position of a demurrant to the evidence, that the court should regard the claim as proved if the evidence would sustain a verdict of a jury in favor of the complainant, and that there was such evidence in this case. It announced the principle, citing English and American cases, that a rupture or other internal injury, resulting from a strain while at work, is an accident within the meaning of the act. The rules applied by the Washington commission with reference to hernia were adversely criticized. An order was entered requiring the commission to ascertain the amount of the indemnity and cause it to be paid, stating that, "though a surgical operation for strangulated hernia precipitated Greco's death, the legally proximate cause was the hernia."

WORKMEN'S COMPENSATION—ACCIDENT—IVY POISONING—*Plass v. Central New England Railway Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 854.*—Jane Plass proceeded under the workmen's compensation law for compensation for the death of her husband, a section laborer of the company named. He came in contact with poison ivy while mowing the right of way of the railroad, and the poisoning resulted successively in blood poisoning, bronchitis and congestion of the lungs, from which he died. The company appealed from an award made by the compensation commission, but it was affirmed, Judge Kellogg, speaking for the court, saying:

It has been held that contact with poison ivy which results in death is an accidental death within a policy covering death by ex-

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ternal, violent, and accidental means. (Railway Association *v.* Dent, 213 Fed. 981.) The injury can not be called an occupational disease. Plass actually, inadvertently, came in physical contact with poison ivy. The poison to his system caused thereby resulted in his sickness, and reduced his power of resistance, and made him susceptible to bronchitis. The attending physician treated him for ivy poisoning, and then found he had developed more or less infection, the blebs breaking open, and in that way he became infected, and while in bed contracted bronchitis, which afterwards developed œdema of the lungs, and he died quite suddenly.

The commission has found that the ivy and septic poisoning was the remote cause of his death, and that his poisoned condition predisposed him to the acute congestion of the lungs of which he died. We are not at liberty to review the findings of commission upon a question of fact. There is certainly some evidence to warrant the finding.

WORKMEN'S COMPENSATION—ACCIDENT—TYPHOID FEVER FROM IMPURE WATER FURNISHED BY EMPLOYER—*Vennen v. New Dells Lumber Co., Supreme Court of Wisconsin (Oct. 26, 1915), 154 Northwestern Reporter, page 640.*—Frieda Vennen brought action as administratrix for the death of her husband, Gerhard Vennen, who had been an employee of the company named. The company maintained toilets for the use of its employees, the sewage from which was discharged into the river near its plant. It was alleged that the company took water from the river, in such location that it was contaminated by the sewage, as well as from the city waterworks, for use in the plant; that through improper connections the two supplies became commingled; that the company caused its employees to drink of this water; and that as a result Vennen became sick with typhoid fever and died. The company's answer set forth facts which, with the allegations of the declaration, it claimed brought the plaintiff's remedy under the workmen's compensation act. The plaintiff demurred to the answer, the demurrer was overruled, and the plaintiff appealed. The court affirmed the decision below, thus holding that the facts as alleged brought the matter within the scope of the compensation act, and that the proceeding must be as provided by it. Judge Siebecker, who delivered the opinion, said in part:

The facts alleged show that the parties to the action were subject to the compensation act. The inquiry then is: Was Vennen's death proximately caused by accident while he was "performing services growing out of and incidental to his employment"? The inference from the alleged facts is reasonably clear that Vennen at the time of the alleged injury resulting in his death was "performing services growing out of and incidental to his employment."

The contention that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the compensation act is not well founded.

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The fact that the deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while he was "performing services growing out of and incidental to his employment." It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employees while "performing services growing out of and incidental to his employment" are injuries within the contemplation of the workmen's compensation act. This was recognized in the case of Heileman Brewing Co. *v.* Industrial Commission, 152 N. W. 446 [evidence that inhalation of gas fumes following explosion excited latent infection, or lowered vitality so as to increase liability to infection, death resulting from miliary tuberculosis], and Voelz *v.* Industrial Commision, 152 N. W. 830. [Here English cases are examined.] We are of the opinion that the decision of the trial court holding that the facts pleaded show that Vennen's death was caused by accident while performing service growing out of and incidental to his employment is correct, and that the demurrer was properly overruled.

WORKMEN'S COMPENSATION—APPLICATION OF STATUTE—EMPLOYERS OF LESS THAN FIVE—FAILURE TO INSURE—*Bayon v. Buckley, Supreme Court of Errors of Connecticut (Feb. 23, 1915), 93 Atlantic Reporter, page 139.*—Mrs. Alvah Bayon was injured on May 7, 1914, while shaking a rug in the course of her employment with John G. Buckley. The commissioner of compensation made an award to her, and when the employer appealed, the superior court sent the case to the supreme court for decision on an agreed statement of facts. The employer claimed that he was not liable for compensation because the act does not apply to employers of less than five persons, and, if it were found thus to apply, that the employee was not entitled to compensation because the employer had failed to comply with section 30 of part B, requiring employers to give proof of financial ability or to insure their risks. The court decided against both these contentions, and dismissed the appeal. Judge Thayer, who delivered the opinion, discussed at length the reasons for and against the inclusion of employers of less than five persons under part B, in case they do not actively elect not to be within such provisions, and held that while the legislature intended to offer less inducements to the small employers and their employees, together

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with those concerned in agricultural, domestic and casual employments, it was not the expressed intention to exclude them. As to the other question he said in part:

But the chief inducement to the employee to accept part B unquestionably is the fact that he thereby secures compensation for injuries for which the common law gives him no remedy. It is too unreasonable to believe that the legislature intended that the employer, after having accepted part B, should be able to deprive the employee of these benefits without notice by simply neglecting to comply with the provisions of the act which he had accepted. It is consistent with the language of section 42 to hold that failure by the employer to comply with section 30 deprives the employer of his benefits under part B, but does not deprive the employee of his benefits under it, and that the latter in such case may claim compensation under the act or, in a case when the common law gives a remedy, may have his action at common law as modified by part A. This we think is the proper construction to be given to this section. It follows that compensation was properly awarded to the plaintiff.

WORKMEN'S COMPENSATION—APPLICATION TO MUNICIPALITIES—CONSTITUTIONALITY OF STATUTE—*Porter et al. v. Hopkins et al., Supreme Court of Ohio (Nov. 11, 1914), 109 Northeastern Reporter, page 629.*—This action was brought by various officers of Hamilton County, the city of Cincinnati, and other subdivisions of the State of Ohio, against the county treasurer and others to test the constitutionality of certain sections of the workmen's compensation act, the specific ground alleged being that the difference in the method by which the amount of premiums was to be paid in the case of the State and its subdivisions and in the case of other employers was an undue and unauthorized discrimination. The petition further alleged that the various municipalities had suffered a deduction from their taxes for premiums due to the State insurance fund under the provisions of the act mentioned, and asked that the various officers be enjoined from proceeding under the act in the making of the deductions complained of.

The opinion, which was written by Judge Johnson, quoted the constitutional amendment of 1912, which authorized the legislature to pass compulsory compensation legislation and to provide for a classification of occupations. Judge Johnson then called attention to the fact that the statute under consideration is an amendment of the original act of 1911, enacted since the constitutional amendment above, and continued:

This court in State ex rel. *v.* Creamer, 85 Ohio St. 349, 97 N. E. 602 [Bul. No. 99, p. 698], in upholding the constitutionality of that statute, pointed out that it was not compulsory or coercive, but that, while it did not compel the employer and employee to operate under

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its provisions, inducements were held out in the enactment to facilitate and make desirable its acceptance by both.

It is manifest that the purpose [of the amendment to the constitution] was to leave no doubt as to the power of the legislature to pass a compulsory act providing for an insurance fund which should be contributed to by employers only. The section further provides that the laws so passed may provide for the taking away of any or all rights of action or defenses from employees and employers subject to certain conditions named. It is then provided that laws may be passed establishing a board which may be empowered to classify all occupations according to the degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer, and distribute such fund and determine all rights of claimants thereto.

The State and its subdivisions and public employees are entirely distinct from employers and employees engaged in private business occupations. It may well be doubted whether the term "occupation" can be properly applied to the duties of one in the service of the State. The State and its subdivisions are not engaged in an occupation in the usual acceptation of that term. The political subdivisions of the State are merely instrumentalities to carry out the purposes of government, and their liabilities are entirely different in their nature and scope from those of employers in private business. Section 20 of the law provides that the board shall keep a separate account of the money paid into the State insurance fund by the State and its subdivisions and the disbursements therefrom on account of injuries to public employees. The board is further required by section 17 to communicate to the general assembly on the first day of each regular session an estimate of the amount necessary to be contributed to the fund by the State during the next two years. These provisions are obviously for the purpose of enabling the legislature to provide such ar insurance fund for the employees of the State and its subdivisions as would be sufficient to maintain the separate account above indicated. We think it clear that there has been no conflict raised between the sections of the statute named and the constitutional provision quoted.

The opinion then took up the contention that the act amounted to a diversion of taxes from the purpose for which they were levied, contrary to the provisions of the constitution of the State, as to which it said:

No such invalidity exists in the act we have under examination. It fixes a certain charge or debt which is to be paid by the several subdivisions named, the amount of which is to be deducted from the taxes collected before they are distributed by the proper ministerial officers. The maintenance of contingent and general funds for general purposes is provided for by statutes which are familiar. The municipal and other subdivisions are fully empowered to raise such funds. It would be wholly impracticable to specifically name in the different budgets the amount to be raised for each specific item. There are many incidental charges which are necessarily taken care of out of the funds of the character referred to as the

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needs arise. The fact that the amount raised does not meet the exact requirements from time to time, and that some inconvenience may arise, does not affect the validity of the statutory requirements.

WORKMEN'S COMPENSATION—AWARD OF LUMP SUM—*McCracken v. Missouri Valley Bridge & Iron Co., Supreme Court of Kansas (July 28, 1915), 150 Pacific Reporter, page 832.*—George M. McCracken was a common laborer in building a bridge and was in the employ of the company named. On December 29, 1914, he was killed in the course of his employment. Employer and employee were subject to the provisions of the workmen's compensation act. His wages were 25 cents per hour and he worked eight hours per day. Ellen McCracken, the mother and sole heir of the employee, proceeded against the company for compensation, and procured an award of a lump sum of $1,872, which was the amount of the earnings of the employee for three years at the rate of $2 per day.

The statute provides that in case the employment has been for less than one year the yearly earnings will be determined by taking 52 times the average weekly earnings for the time during which the employment is continued. The company attempted to construe this as allowing only one year's earnings in such a case; and also contended for periodical payments. Judge Burch, who delivered the opinion, after quoting the provisions of the statute, said:

It will be observed that the amount of compensation is three times the workman's earnings for a year. Anticipating that difficulty might be encountered in computing earnings for a year, the legislature provided a rule which applies to the facts of the present case. The period of the workman's employment with the defendant was less than a year, in fact less than a month within the year preceding his death. Therefore the amount of his earnings for a year were deemed to be 52 times his average weekly earnings during the period he was in the defendant's service. His average weekly earnings were $12. Fifty-two times this amount are $624, earnings for a year. Three times this sum are $1,872, the amount of compensation and the amount of the judgment. It is said that judgment should not have been rendered in a lump sum, but that the plaintiff should have been awarded periodical payments according to her necessities, so that, in case of her death, any unpaid balance would be saved to the defendant. The statute leaves the character of the judgment to the discretion of the trial court.

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award." (Laws 1911, ch. 218, sec. 36.)

In this case there is no possible hope for improvement like restoration of earning capacity to an injured workman. The son is dead.

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The mother was entirely dependent upon his earnings for her own continued existence, independent of charity. She is utterly destitute. She has no income or sources of income of her own. She is physically unable to earn her own living, and she is 62 years old. The statute gave her $1,872. With this sum she must establish herself according to her helplessness, and then employ the remainder so that it may last to the end of her days, for she will never have any more. Probably the plaintiff can not attain her life expectancy, and the insurance company wants this judgment doled out to her in installments " as her necessities require " so that, should she die soon, part of the judgment will not have to be paid.

The case was a typical one for the substantially automatic operation of the workmen's compensation law, and the bridge company was anxious to make compensation at once to the plaintiff for the loss of her sole means of support. But the insurance company informed the defendant that liability should be established in the court of last resort or the indemnity the defendant had purchased would not be paid. So an appeal had to be taken. Five grounds were stated. The first was that the judgment was contrary to the evidence, which, of course, was too frivolous to serve even as makeweight. The other four presented in four different ways the stale subject of judgment for a lump sum. It is submitted that the statute quoted above relating to the form of the judgment in compensation cases is too plain and unambiguous for fair minds or ordinary acumen to differ respecting the power conferred. This court had patiently spelled out time and again the legislative meaning and purpose, which were already too clear to be misconceived, and the attorney for the defendant had too much respect for himself and for the court to argue the matter. The point concerning the amount of the judgment, which is too much dignified by calling it a point, was pressed into service at the hearing.

The court does not possess adequate means of dealing with this kind of lawlessness. The attorney for the defendant, who signs the papers, is not amenable to discipline, because he was acting under duress of the peril to his client, who he assured the court was and always has been anxious to pay. The real culprit is not in court or subject to process. Because appeals of this kind, serving no purpose except to oppress claimants and to frustrate the law, are common in compensation cases, the court has adopted the practice of disposing of them summarily on motion to dismiss for want of merit.

Some time must be consumed even when this course is pursued. In this instance, by means of an utterly groundless resistance of payment accomplished by an abuse of judicial proceedings, the plaintiff will have been kept out of her money for the greater part of a year.

Insurance companies say they are preyed upon by " snitch " lawyers who secure lump-sum judgments for permanent injuries to the spine. If this be true in some instances, the course pursued in this case is not less disreputable and affords no remedy. It is quite possible that district courts have sometimes hesitated to render judgments for compensation payable in installments because of the practical certainty that workmen would be hounded into unjust compromises by one proceeding after another brought nominally to test restoration to earning capacity.

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WORKMEN'S COMPENSATION—BENEFITS—CONCURRENT AWARDS—*Fredenburg v. Empire United Railways Co., Supreme Court of New York, Appellate Division, Third Department (July 1, 1915), 154 New York Supplement, page 351.*—Guy Fredenburg was injured November 7, 1914, while in the employ of the company named, as a motorman, while removing a trolley pole from its socket. The pole came in contact with the trolley wire, and severely burned Fredenburg's feet and hands, the injuries in the case of the right foot, which was in contact with the socket at the time, necessitating its amputation. The compensation commission affirmed awards of $13.46 per week—two-thirds of the weekly wage—for 205 weeks for the loss of the foot, and of $13.46 per week, to run concurrently, for 14 weeks up to February 27, 1915, to which date it was found he would have been totally disabled by the other injuries, independent of that to the right foot. The court held that this was erroneous, as appears from the following quotation from the opinion delivered by Judge Lyon:

> The act provides but the single rate of compensation, to wit, 66⅔ per cent of the employee's average weekly wages; and this percentage for a longer or shorter period is applicable to all disabilities, whether total or partial, and is the maximum compensation provided for by the statute. The act was not intended as a source of profit to the employee, or as a means of punishment of the employer, who in many cases is wholly free from any fault in connection with the accident. If concurring awards may be allowed, it is easy to see how that practice may be carried to such an extent as to become very burdensome and unjust to the employer and very unfortunate to an improvident employee, and to a considerable extent render nugatory the beneficent purpose of the statute.
>
> While the commission has found that the injuries other than those resulting in the loss of the foot have disabled the claimant from working until January 28, the date of the report, and has awarded compensation therefor to February 27, 1915, and has continued the case for further hearing, there is no finding that such disability is permanent, as would be the case in the event of the loss of a thumb or finger, or that the disability will exist at the expiration of the period of 205 weeks.
>
> The award of compensation for the loss of the foot should be affirmed. The award of compensation for injuries other than the loss of the foot should be reversed, but without prejudice to the further continuance of the case, and to the right of the claimant to make further application to the commission, or its successor, for an award of compensation on account of such other injuries.

WORKMEN'S COMPENSATION—BENEFITS—EFFECT OF POSSIBLE OPERATION—*Feldman v. Braunstein, Supreme Court of New Jersey (Mar. 29, 1915), 93 Atlantic Reporter, page 679.*—Samuel Feldman brought

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action against Charles Braunstein under the workmen's compensation act. Judgment was for the petitioner in the court of common pleas of Hudson County. The judge found that the injury was temporary in character if an operation was performed, but that if an operation was not performed the injury was permanent, and amounted to 90 per cent of the loss of an eye. He therefore determined that the injury was temporary, and that the petitioner was entitled to compensation during the disability, not to exceed 300 weeks. The compensation for loss of an eye is for 100 weeks. The supreme court reversed the judgment, holding that compensation should be for the last-named period on a basis of permanent disability, as the determination could be based only upon the facts before the court and existing at that time, without reference to the probable effects of an operation. It pointed out that if the operation was had and the disability cured prior to 100 weeks, a modification of the decree reducing the period of compensation might be secured by petition.

WORKMEN'S COMPENSATION—BENEFITS—IMPAIRMENT OF USE OF ARM—*Northwestern Fuel Co. v. Leipus et al., Supreme Court of Wisconsin (June 1, 1915), 152 Northwestern Reporter, page 856.*—One Leipus was injured while in the employ of the company named, on October 6, 1913. Both bones of his forearm were broken, and, as they did not heal readily, several operations were necessary. The arm finally healed, but remained in a weakened condition. The industrial commission found that the total disability ceased January 3, 1915, and awarded the employee 65 per cent of his previous earnings for 65 weeks up to that date; and finding also that thereafter he would "have a forearm that is functionally 50 per cent of a normal forearm," it awarded him the same weekly amount for 100 weeks additional, being one-half the length of time for which the amount would by the workmen's compensation law be awarded for "the loss of an arm at the elbow," or for paralysis of the same. The question was whether subdivision 5 of section 2394–9 of the statute, containing a schedule of awards for specified injuries, had been correctly construed in making this decision. The court reversed the judgment, and remanded the cause for further proceedings, holding that, the provisions of the subdivision in question being so definite, there was no room for an award for mere impairment of function under it, but that the award in such a case should be made under the provisions of the previous subdivisions alone, which provide for "such benefit as shall fairly represent the proportionate extent of impairment of earning capacity."

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WORKMEN'S COMPENSATION—BENEFITS—INJURY TO HAND AND TO UPPER ARM—*State ex rel. Kennedy et al. v. District Court of Clay County et al., Supreme Court of Minnesota (Mar. 12, 1915), 151 Northwestern Reporter, page 530.*—The district court rendered an award of compensation in favor of an employee, Alex Rohrenbach, against his employer Kennedy, and the latter appealed on the ground of a wrong method of computation of benefits.

The finding of the trial court was that the plaintiff's right hand was crushed, and the flesh, muscles and tendons torn, causing a loss of use of the hand amounting to 85 per cent; and also that the right arm was injured to the extent of 35 per cent. The benefit for the total loss of the hand is one-half the wages for 150 weeks, and taking 85 per cent of this period gave the plaintiff, whose weekly wages were $15, $7.50 per week for 127½ weeks. The period for loss of an arm being 200 weeks, 35 per cent of this amounted to 70 weeks, and the two combined, according to the method adopted by the trial court, made 197½ weeks, or almost the total amount of 200 weeks specified for entire loss of an arm. The court held this wrong, as the injuries were evidently quite different from total loss, and held that the method should have been to estimate the entire injury on the basis of a percentage of total disability of the arm as a whole. Since the record did not even make it entirely clear whether or not the disability of the shoulder and upper arm was permanent, the court held that it could not make this estimate, but the previous judgment was reversed and the case sent back for further proceedings in accordance with the principle set forth.

WORKMEN'S COMPENSATION—BENEFITS—LOSS OF FINGER—*Fineman v. Albert Manufacturing Co. et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 909.*—Annie Fineman, while operating a sewing machine in manufacturing underclothing, was injured by a needle puncturing the third finger of her left hand, which necessitated its amputation at the first phalange. Cellulitis of the joints developed, so that the remainder of the finger, while not removed, became useless. Two-thirds of wages for 25 weeks is fixed by the law as the compensation for the loss of a third finger, and it is provided that in other cases of this class, not specifically provided for, the compensation shall be two-thirds of the difference in earning capacity during the continuance of partial disability. The compensation commission after several hearings had granted the allowance for 25 weeks, and then made a further award, adopting the theory of the claimant that there was not a "loss" of the finger, so that the provision for "other cases," permitting payments for wage loss, became operative. The court reversed this award, holding in accord-

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ance with the contention of the defendants, that the condition amounted to a loss of the finger, and that the amount of compensation under such circumstances should certainly not be more than that for the complete loss by amputation.

WORKMEN'S COMPENSATION—BENEFITS—LOSS OF HAND—*Rockwell v. Lewis et al., Supreme Court of New York, Appellate Division, Third Department (July 1, 1915), 154 New York Supplement, page 893.*—Judge A. Rockwell was injured while in the employ of John L. Lewis. The employer and insurer appealed from an award of compensation. In December, 1914, the compensation commission determined that the claimant had lost the index, second, and third fingers, and that his fourth finger was mutilated. For the four injuries they allowed respectively 46, 30, 25, and 4 weeks, aggregating 135 weeks at $11.54 per week, or $1,757.90. Subsequently, in February, 1915, the commission again took up the case, reached the conclusion that the employee had lost the use of his hand, and made an additional allowance, bringing the total time up to 244 weeks. The employer and insurer urged that the commission had no power to make awards other than those specifically provided for by the statute for the loss of the separate fingers. The court, however, affirmed the later award, holding that a finding of permanent loss of use of the hand, which is made by the statute equivalent to the loss of the hand, was justified by the facts.

WORKMEN'S COMPENSATION—BENEFITS—MEDICAL TREATMENT—*Massachusetts Bonding & Insurance Co. v. Pillsbury et al., Supreme Court of California (Aug. 5. 1915), 151 Pacific Reporter, page 419.*—This was a proceeding under the compensation act by L. D. Taylor against the Kissel Car Co., his employer, and the insurance company named, and an appeal was taken from an award made by the commission, of $175.34 plus the reasonable value of medical and surgical services. The employee, while working as a machinist upon automobiles, caught his little finger in a gear and it was crushed, and later amputated at the distal joint. The award was for 2¾ per cent of a total disability, or for 65 per cent of weekly wages for 11 weeks.

Besides constitutional objections to the law, which were settled by the case of Western Indemnity Co. *v.* Pillsbury, 151 Pac. 398 (see p. 229), the company contended that the commission was not authorized by the act to award compensation for less than 10 per cent partial permanent disability. This was based on the language of subdivisions 5 and 6 of section 15 of the act, but the point was overruled by the court; since, though the lowest rate of disability named is 10

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per cent, allowances are authorized for disabilities "intermediate to those fixed" by the schedule, and this was construed as permitting allowances for minor injuries. (An amendment of 1915 adds a provision allowing for a 1 per cent disability.) It was also held that the insurer was bound to pay for the medical and surgical treatment, where the employee had objected to the first physician furnished by the employer, had found another, to whom he was sent, out of town, and had finally gone to his family physician.

WORKMEN'S COMPENSATION — BENEFITS — PARTIAL DISABILITY — *Hirschkorn v. Fiege Desk Co. et al., Supreme Court of Michigan (Jan. 29, 1915), 150 Northwestern Reporter, page 851.*—While he was operating a machine for the company named, a piece of emery flew into the eye of the employee Hirschkorn. The emery was removed, but inflammation and iritis set in, and he was totally incapacitated for nine weeks. A scar on the cornea over the pupil remained, which diminished the vision of that eye between one-third and one-half. The employee, however, went to work at the same employment and wages as before. The board awarded him compensation for the total disability, and for 35 weeks in addition for partial disability, as the fair proportion of the 100 weeks provided for the entire loss of an eye.

Section 10 of the workmen's compensation act of Michigan, relating to partial disability, provides for payment of one-half the difference between the wages which the injured employee earns after the injury and that previously earned, and also contains a schedule of payments for specific injuries, which does not mention injuries to the eye less than total loss of vision. Since neither of these provisions applied to the present case, the court held that the additional compensation should not be allowed.

WORKMEN'S COMPENSATION—BENEFITS—"PERMANENTLY INCAPABLE OF USE"—*Floccher v. Fidelity & Deposit Co. of Maryland, Supreme Judicial Court of Massachusetts (May 19, 1915), 108 Northeastern Reporter, page 1032.*—Frank Floccher was granted certain compensation by the industrial accident board, and the insurer appealed. The employee's right hand was capable of a small amount of motion in the thumb and first finger, while the other fingers were paralyzed, and the circulation impaired so that the hand frequently went to sleep. The court affirmed the decision giving compensation for loss of a hand, holding that it was permanently incapable of use, since the possible use was so small as to be

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negligible. It also held that the evidence that an operation might improve the condition was so slight that the claimant could not be required to submit to it on peril of forfeiture of his compensation.

WORKMEN'S COMPENSATION—BENEFITS—TEMPORARY AND PERMANENT DISABILITY—*Maziarski v. George A. Ohl & Co., Court of Errors and Appeals of New Jersey (Nov. 16, 1914), 93 Atlantic Reporter, page 110.*—Joseph Maziarski was injured, and brought action against the employer under the workmen's compensation act. The opinion of the court states the facts and the method of computing the compensation adopted by it as the correct one, as follows:

The plaintiff suffered injuries to the index finger and the middle finger of the left hand. That to the index finger was found by the judge to be temporary, and he awarded 50 per cent of the plaintiff's wages for six weeks, during which the injury prevented the use of the finger. He found the injury to the other finger to be equal to the loss of one-half the phalange of that finger; as the plaintiff's wages were $15, the amount allowed for the loss of a finger would have been $7.50, and one-half of that, the amount allowed for the loss of a phalange, would have been $3.75; and an injury, equal as this was found to be, to the loss of one-half of the phalange, would, under the clause providing for a proportionate compensation, be entitled to one-half of $3.75. The judge, however, held the clause providing for a minimum compensation of $5 to be applicable, and fixed that amount for 30 weeks as the proper compensation. We have just sustained this view in James A. Banister Co. *v.* Kriger, 89 Atl. 923 [Bul. No. 152, p. 178]. The allowance of compensation for both the temporary injury and the permanent injury has been sustained in Nitram Co. *v.* Court of Common Pleas, 84 N. J. Law, 243, 86 Atl. 435. That distinct damage may be allowed for injury to each finger is sufficiently indicated by the provision of the statute that the amount received for more than one finger shall not exceed the amount provided in the schedule for the loss of a hand.

WORKMEN'S COMPENSATION—BENEFITS—TEMPORARY AND PERMANENT DISABILITY—*Vishney v. Empire Steel & Iron Co., Supreme Court of New Jersey (Aug. 7, 1915), 95 Atlantic Reporter, page 143.*—John Vishney petitioned for compensation against the company named, his employer, and the company appealed from a judgment fixing compensation. The employee was blinded by a powder blast, which resulted in the loss of four-fifths of the use of both eyes. His average wages were $11.66 per week. The accident occurred December 15, 1913. Two hearings were had upon the matter. At the first, on April 27, 1914, medical witnesses testified that the conjunctivitis from which the employee was suffering would, in their opinion, yield to hospital treatment in three months. The employee

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was therefore at this time awarded, for temporary disability, one-half his weekly wages from the time of the accident to that of the hearing to be paid in a lump sum, and the same weekly amount, $5.88, to be paid weekly for 13 weeks additional. Leave was given him to apply to the court at the end of that time if a cure had not been effected. This he did, and it was shown that permanent disability existed to the extent of 80 per cent of the use of each eye. The schedule compensation for the loss of one eye being 50 per cent of wages for 100 weeks, he was awarded this compensation for 80 weeks for each eye, or 160 weeks in all, to run from the termination of the payments for temporary disability on July 27, 1914.

The employee claimed that it was erroneous to find that the temporary disability ceased on July 27, 1914. The court held that there were facts to warrant such a finding, and defined temporary disability in the following language of Judge Kalisch:

> Temporary, as distinguished from permanent, disability, under the workmen's compensation act, is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit. An apt illustration is a case where there has been a loss of both arms. The temporary disability to be considered in such an instance is the physical state of the patient until the stumps are healed and he is able to get about. The actual disability to do effective work is the same in either case and continues for life. (Birmingham *v.* Lehigh & Wilkes-Barre Coal Co., 95 Atl. 242.)

That compensation for the permanent disability had not been awarded for a long enough period was determined by the court as follows:

> In the present case it was not ascertained until the second hearing whether or not the prosecutor's injuries would be of a permanent character.
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> The trial judge proceeded on the theory that because the compensation for the loss of an eye is fixed at 50 per cent of the weekly earnings for 100 weeks, compensation for the loss of or injury to each eye should be considered separately under that clause, and, having found that each eye had lost four-fifths of its usefulness, he calculated the number of weeks for which compensation should be made on the basis of an 80 per cent loss of each eye, which would make 80 weeks for each eye, or a total of 160 weeks for both.
>
> The trial judge evidently overlooked that provision of the statute which, among other things, provides that the loss of both eyes shall constitute a permanent disability, and that compensation shall be made therefor according to clause b.
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> Reverting to clause b we find that the compensation for the loss of both eyes shall not exceed 400 weeks. It appearing that there was a loss of usefulness of both eyes to the extent of 80 per cent the prosecutor was entitled to compensation for 320 weeks.

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WORKMEN'S COMPENSATION—BENEFITS—"WAGES"—*Smolenski v. Eastern Coal Dock Co., Supreme Court of New Jersey (Feb. 18, 1915), 93 Atlantic Reporter, page 85.*—This was an action under the workmen's compensation act in which the only dispute was as to the amount of wages on which the compensation should be based. The man was at the time of the injury employed as a car rider at 25 cents an hour. At other times he earned larger and smaller rates, and his work was irregular, so that the employer claimed that his wages should not be considered to be more than $12.40 per week, while the judge of the court of common pleas of Middlesex County determined that they were $15 per week, on the basis of 25 cents an hour for 10 hours a day and six days a week. Judge Swayze delivered the opinion of the supreme court affirming this judgment. He discussed the language of the statute, and concluded:

The language indicates that, in a case where weekly wages are not fixed, they shall be taken to be six times the daily wages, and that the daily wages shall be the wages for a working day of ordinary length, excluding overtime. We think it may fairly be held that the legislature meant that the daily wages should be taken to be what would be earned by working for the ordinary number of hours, and that the employee was not to lose by reason of enforced idleness during some of those hours, nor to gain because on some days he worked overtime.

Wages, the legislature said, must be construed to be the money rate at which the services were recompensed. What is to be considered is not the recompense in fact received but the rate which the contract of hiring fixed, whether that rate was in fact realized for the whole time or not. We think that in an employment and a community where the regular working week was six days of 10 hours each, and the workman was paid 25 cents an hour, the natural conclusion of most men, if they tried to reduce the hourly rate to a weekly rate, would be that the weekly rate was $15. The truth is there is no weekly rate, but we are forced by the statute to fix one in order to determine the compensation to which the workman or his dependents are entitled. Under this compulsion we can think of no better method.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—*Memphis Cotton Oil Co. v. Tolbert, Court of Civil Appeals of Texas (Dec. 5, 1914), 171 Southwestern Reporter, page 309.*—A. T. Tolbert brought action against the company named for compensation for injuries suffered in its mill. Judgment was for the plaintiff in the district court of Hall County, and the company appealed, a large number of assignments of error being considered. Only those having to do with the constitutionality of the workmen's compensation law will be noticed here, the law being upheld as to all points raised in

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this case. The company asserted that the act was unconstitutional for the following reasons:

(a) It is in conflict with section 35, article 3, of the constitution of the State, in that the subject of the act is not expressed in the title thereof, and for the reason that said act contains more than one subject; (b) it is unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws"; (c) it violates the fourteenth amendment of the Constitution of the United States, and section 19, article 1, of the constitution of the State of Texas, in that the act authorizes the taking of the property of a citizen and depriving him of his liberty without due process of law; (d) the act is contrary to public policy, and is not within the police power of the State; (e) it is in violation and contrary to article 12, sections 1, 2, of the constitution of the State of Texas, which provides:

"No private corporation shall be created except by general laws. General laws shall be enacted providing for the creation of private corporations."

The act undertakes to create by special enactment a private corporation to be known as the "Texas Employers' Insurance Association."

In discussing the point raised by (a), the court, speaking by Judge Huff, quoted the title and a part of the act, summarizing the provisions of the remainder, and discussed them, concluding as follows:

We have concluded that the subject of the act is stated in the title, and that there is not more than one subject contained therein. The ends to be reached are more than one, but all relate to the employer's liability and the proceedings for the compensation of certain employees, etc. The employer is liable when he is not a subscriber to the insurance association, and the act then further provides what compensation the employee may receive from the association when the employer is a member thereof.

As to the remaining contentions Judge Huff said:

Subdivisions b, c and d have been fully answered by the courts of the State in various decisions. They have held a similar statute relating to the employees of railroads not in violation of the fourteenth amendment to the Constitution of the United States, and we think the reasons advanced in those cases applicable to this. [Cases cited.] We think the Supreme Court of the United States has answered the appellant's proposition that the act in question is contrary to the Constitution of the United States, in that it is class legislation, and that it makes an arbitrary division of the employees, and that the act is contrary to public policy, and authorizes the taking of the property of the citizen, etc. It is held by that court that no one has a vested right in the common law. "The law itself may be changed at the will of the * * * legislature, unless prevented by constitutional limitations." If the appellant had been possessed of property created by the common law, the legislature could not deprive it of such property by changing the law, but that is not this case. (Mondou *v.* Railway Co., 223 U. S. 1, 32

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Sup. Ct. 169 [Bul. No. 98, p. 470]; Aluminum Co. *v.* Ramsey, 222 U. S. 251, 32 Sup. Ct. 76.)

Subdivision e asserts that the act is unconstitutional, because it violates article 12, sections 1, 2, of the constitution of this State. We shall not discuss the question of what is a general law within the meaning of the provision of the constitution, but it will, we think, be sufficient to say that, if the sections of the act authorizing the creation and regulation of Texas Employers' Insurance Association are unconstitutional because not authorized under the general incorporation law of this State, the sections of the law involved in this suit are not so connected with the insurance sections as to render void the sections relating to contributory negligence, assumed risk, and fellow servant.

It is a well-recognized principle that an act may be unconstitutional, and therefore void, as to some of its provisions and valid as to others. If the insurance sections are repugnant to the constitution and should be stricken out, yet, if that which remains of the act and which are involved in this suit are complete within themselves and capable of being executed in accordance with the legislative intent, then such parts so remaining should be held valid. [Cases cited.] We think the sections relating to insurance of employees may be so eliminated from the act, if they should be held repugnant to the constitution, without impairing other sections of the act in question. We do not wish to be understood as holding that the sections relating to insurance associations are unconstitutional. We do not pass on that question at this time, for the reason that we do not think it necessary in order to hold the other portions valid. This assignment will be overruled.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—*Middleton v. Texas Power & Light Co., Court of Civil Appeals of Texas (Jan. 20, 1915), 178 Southwestern Reporter, page 956.*—Charles Middleton brought action against the company named for damages for personal injuries, claimed to be the result of its negligence. The company pleaded that it, as an employer, had complied with the requirements of the workmen's compensation act of the State, known as the employers' liability act, and asked that the suit be dismissed. The plaintiff charged that the act was unconstitutional and void. The trial court dismissed the action, and the plaintiff appealed. The court of appeals, speaking by Judge Key, said in regard to the action of the lower court:

If that portion of the employers' liability act which prescribes that when an employer has complied with the requirements of the act his employees shall have no right of action against him for damages for personal injuries is unconstitutional and void as to nonconsenting employees, then the trial court committed error when it sustained the plea in abatement.

A synopsis of the provisions of the act was then given by the court, and the opinion, which reversed the decision of the court below, hold-

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ing that the part of the act mentioned is unconstitutional and that the employee has a right to bring suit under the common law, reads in part as follows:

We have reached the conclusion that so much of the statute here involved as undertakes to deprive an employee of what otherwise would be his cause of action against his employer is unconstitutional and void; but as the jurisdiction of this court is not final, and as the case will go to the supreme court, we shall not undertake to decide other constitutional questions. Our reason for holding that the provision of the statute referred to is unconstitutional is based upon the fact that it leaves it optional as to the employer, and makes it compulsory as to the employee when the employer has elected to avail himself of the benefits of the statute. The Federal Constitution declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and our State constitution, in section 3, article 1, in general terms declares the equal rights of men.

The constitution also vests in the legislature the exclusive power to make laws, and therefore that body has no power to delegate legislative authority to any private person. Undoubtedly, the statute here involved is optional as to the employer—he has his choice and may or may not become a subscriber, pay premiums, obtain insurance for the benefit of his employees, and thereby release himself from what would otherwise be his liability to such employees. It is true that if he does not pursue that course he loses some of his common-law defenses, but the fact remains that he has an option and may choose between two laws concerning himself and his employees and fixing their respective rights.

We think it is also quite clear that the statute is compulsory as to the employee, and allows him no choice as to whether he will accept its terms, or claim his rights as they formerly existed according to the common law. In other words, the statute presents to the employer two laws, differing widely and radically concerning his liability to his employee, and permits him to choose, without the consent of his employee, which of those two laws shall fix the rights of his employee as against him.

Has the legislature the power to enact a law that embodies such a fundamental and far-reaching discrimination in favor of the employer and against the employee? After careful and patient consideration, we think it is clear that this question must be answered in the negative, and that feature of the statute be declared unconstitutional.

Other cases were then cited, and especially a number holding the compensation laws of other States constitutional, the differences being pointed out, and the opinion continues:

In reaching the conclusion and making the decision we have made, it is deemed proper to say that, inasmuch as the Texas statute provides, in terms, that if any part of it shall be held invalid or inoperative no other part or parts shall be affected thereby, we do not hold that the entire act is invalid or inoperative; but merely hold that,

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unless it be shown that the appellant in this case, who is an employee suing his employer, has consented to accept the terms of the Texas act relating to employers' liability, he has not lost his common-law right of action. In so far as our decision is concerned, and unless the law is unconstitutional in other respects, we see no reason why it may not stand in force and be administered for the benefit of consenting employers and employees.

The judgment was therefore reversed and the case remanded for a new trial.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—CONSTRUCTION—STEAMSHIP LINES OPERATED IN INTERSTATE COMMERCE—*Jensen v. Southern Pacific Co., Court of Appeals of New York (July 13, 1915), 109 Northeastern Reporter, page 600.*—Marie Jensen proceeded under the workmen's compensation law against the Southern Pacific Co., as employer and self-insurer, for the death of her husband, who was killed August 15, 1914. He was employed in unloading the steamship *El Oriente*, alongside a pier in the Hudson River. This vessel was owned by the railroad company, and its route was between New York and Galveston. It did not appear that it was operated in connection with a line of railroad, and in its report of the accident the company stated its business to be "transportation by steamships engaged wholly in interstate commerce." The appellate division affirmed an award in favor of the petitioner, and the company appealed on grounds stated in the opinion, which was delivered by Judge Miller, who affirmed the award, which is quoted at some length below:

We are required, on this appeal: First, to construe the workmen's compensation law (chap. 67 of the Consolidated Laws; L. 1914, ch. 41) in so far as it relates to this case; and, second, to determine its constitutional validity. The scheme of the statute is essentially and fundamentally one by the creation of a State fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments.

By insuring in the State fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty.

The particular provisions requiring construction are the following:

"SEC. 2. Application.—Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: * * *

"'Group 8. The operation, within or without the State, including repair, of vessels other than vessels of other States or countries used

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in interstate or foreign commerce, when operated or repaired by the company. * * *

"'Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.'"

"SEC. 114. Interstate Commerce.—The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this State may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

It is claimed that loading and unloading are included in "operation," and that therefore the case falls within group 8, which excepts vessels of other States or countries used in interstate or foreign commerce, but the specific enumeration of longshore work in group 10 excludes such work from the other group.

It is next claimed that the statute was not intended to apply to employment in interstate or foreign commerce, and that in case of doubt that construction should be adopted, for otherwise it would offend against the commerce clause of the Federal Constitution by imposing a burden upon such commerce. The latter claim will be noticed first. The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employees in this State. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the State, until Congress by entering the field excludes State action. [Cases cited.]

Literally construed, section 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States" is meaningless. The legislature evidently intended to regulate, as far as it had the power, all employments within the State of the kinds enumerated. The earlier sections are in terms of general application, and section 114, which is headed "Interstate Commerce," is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words "may be" should be construed in the sense of "shall be."

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One other question in respect of the application of the act remains to be considered. It is said that the appellant is a carrier by railroad, and that therefore the Federal Employers' Liability Act of 1908 prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as appears, may not, even indirectly, be related to transportation by railroad, certainly not by any particular line of railroad. It is significant that the earlier Federal statute of 1906 applied to "every common carrier" engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happen to be conducted by a railroad corporation, and not otherwise—to apply one rule of liability to transportation by a steamship line, if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled. The Federal act provides a rule of liability of carriers by railroad for injury or death—"resulting in whole or in part * * * by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The words "boats" and "wharves" may be given due effect by applying them to adjuncts or auxiliaries to transportation by railroad.

Our conclusion, therefore, is that the employment in which the deceased was engaged was not governed by the Federal statute, that the workmen's compensation act applied to it, and that the latter act is not violative of the Federal Constitution for attempting directly to regulate or impose a tax or burden on interstate or foreign commerce. We now come to perhaps the most important question in the case: Does the act violate the fourteenth amendment to the Constitution of the United States for taking property without due process of law?

Much reliance is placed on the decision of this court in Ives *v.* South Buffalo Railway Co., 201 N. Y. 271, 94 N. E. 431 [Bul. No. 92, p. 251].

The opinion then discussed the act of 1910, declared unconstitutional in the case cited, called attention to the amendment to the State constitution in 1913, pointed out the differences between the earlier act and the one now under consideration, and concluded that "the two acts are so plainly dissimilar that the decision in the Ives case is not controlling in this."

Continuing, Judge Miller said:

Moreover, upon the question whether an act offends against the Constitution of the United States the decisions of the United States Supreme Court are controlling. The only one of the numerous workmen's compensation acts which appears to have been directly passed on by the United States Supreme Court is the act of Ohio, which contained an optional clause. (Jeffrey Manufacturing Co. *v.* Blagg, 235 U. S. 571, 35 Sup. Ct. 167 [Bul. No. 169, p. 203].) The single question decided in that case was that limiting the application of the act to shops with five or more employees did not result in arbi-

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trary and unreasonable classification. This [New York] act is compulsory. The employer is subjected to a penalty for not adopting one of the three methods of insurance allowed him, and the employee has no choice at all, except possibly as to whether he will enter one of the classified employments.

At this point the decision in Noble State Bank *v.* Haskell, 31 Sup. Ct. 186, sustaining the Oklahoma law requiring compulsory contribution by banks to a fund to guarantee deposits, was commented on as decisive, the court using practically the same language as was used by the Supreme Court of Iowa on this point in the Hunter case, below, and concluding:

We should consider practical experience, as well as theory, in deciding whether a given plan in fact constitutes a taking of property in violation of the Constitution.

Continuing, the court said:

A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong. It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but, if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer, and is afforded a remedy which is prompt, certain, and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyer's fees.

This subject should be viewed in the light of modern conditions, not those under which the common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both. Surely it is competent for the State in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. The act now before us seems to be fundamentally fair to both employer and employee. It is plainly justified by the amendment to our own State constitution, and the decisions of the United States Supreme Court, notably in the Noble State Bank case, make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—DEFENSES—*Hunter v. Colfax Consolidated Coal Co., Supreme Court of Iowa (Nov. 24, 1915), 154 Northwestern Reporter, page 1037.*—Hunter was a miner in the employ of the company named, and was injured by a fall of coal. The company was one which might have been subject to the provisions of the workmen's compensation act, but had rejected it. It was agreed that if the company was liable, the damages amounted to $100 and interest, and judgment was entered for the plaintiff for that amount, and the company appealed.

One defense made by the company was that the injury was wholly due to the employee's own negligence. It requested that the issue raised by this defense be submitted to the jury for determination, and this was refused. The company contended that the act, in taking away such a defense, was in violation of the Constitution of the United States. The court, however, speaking by Judge Salinger, held that the act does not take away this right of defense, and that the trial court had misinterpreted it in this respect.

A second contention was to the effect that the act was unconstitutional as destroying existing contracts, as to which the court said:

It suffices, for present discussion, that the statute at bar has not a suggestion that existing contracts are within its contemplation. On the contrary, it provides expressly that existing conditions are not to be affected.

The third division lists the objections to the constitutionality of the act (all of which were ruled upon adversely and the law upheld) as follows:

The constitutionality of the act is challenged, speaking in general terms, because:

(1) It interferes with the right to contract generally, and specifically, by fixing a scale of compensation to be made by the employer to the injured employee.

(2) It makes arbitrary discriminations by means of improper classifications, and is so improper class law.

(3) It improperly delegates judicial power and substitutes a hearing and determination which is not due process of law for the right to have due hearing in a proper court.

(4) It misuses the taxing power in providing a system by which the employer takes out insurance to assure payment of compensation to his employee.

(5) On the whole, it denies due process of law, deprives the defendant of property without due process, and abridges the privileges and immunities of the defendant as a citizen of the United States.

As to No. (1), the right to contract, the provisions regarding waiver or reduction of liability are mentioned, and the court says:

It is no interference with the right to make agreement that the legislature enacts what it thinks will prevent the breach of an agree-

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ment entered into. What is taken away is not the right to bargain, but the right, by deviousness, to break the bargain made.

Speaking of the provision that when influence is exercised by or on behalf of the employer to secure rejection of the act by the employee such rejection shall be null and void, the court says:

To put the ban upon such influences interferes with no right of contract, but simply heads off one method of evading and crippling the act. One underlying purpose of the statute is to promote acceptance by the employee. No valid right is infringed by making taboo the employment of methods that might press the employee to reject.

The provision that settlements within 12 days after injury shall be presumed to be fraudulent is upheld, although declared superfluous in view of the provision that all settlements reducing the amount of compensation are void. In concluding the discussion as to the right to contract, the court says:

There is power in the legislature to abridge the right of contract in the exercise of what may be termed the general power of community self-defense, the police power.

While the right to contract is a property right, like all other property rights, it is "subservient to the public welfare," and may be taken by the State in a well-directed effort to promote the public welfare by the exercise of the police power.

This is followed by a citation of instances in which the power referred to has been exercised and upheld.

Coming to objection No. (2), referring to discriminations and classifications, it is pointed out that the exception of household, domestic, and farm laborers and casual employees has been generally sustained.

As to the classification of employer and employee, and the effect of acceptance and rejection, Judge Salinger says:

Next, we are asked to hold that the statute contains an improper classification and an arbitrary differentiation because, as is claimed, if employer and employee both reject, the employee none the less takes the benefit of the act, and that where the master accepts and the employee rejects, the one who rejects gets as much as the one who accepts. We might well dispose of this contention with saying that it deals with what is not in this case. But, going beyond that, we find this to be the situation: Section 5 provides that where both reject, the liability of the employer shall be the same as though the employee had not rejected. But this does not stand alone. For paragraph B of section 3 provides that if the employee rejects, he must suffer, in his suit for injury, that the employer may plead and rely upon "any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk, and fellow servant," with certain limitations, and section 10 is that compensation under the act is to be awarded only if both have done what amounts to acceptance of the act. Construing all together, it is found that the act does penalize the employee who rejects. That the penalties im-

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posed upon the master and the servant may not be precisely the same is, as will presently be seen, not vital, and does not sustain the broad assertion made that an arbitrary difference is created as to the consequences of conduct which is, in substance, alike.

It may be well said, in passing, that such differences as do exist are sustained by the quite generally accepted doctrine that the freedom to contract is only in theory enjoyed by the employee as fully as by his employer, and that the police power may be invoked to sustain some differentiations in favor of the employee, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer.

As to No. (3), it is held that there is not an improper delegation of judicial power, nor a denial of due process of law.

As to No. (4), alleged unjust taxation, the court says in part:

The only inquiry we need address ourselves to is whether the so-called taxation involved in the maintenance of insurance be, if a tax, or though a tax, a tax for a public purpose, sustained by the police power; and we think the cases answer in the affirmative, and that independent thought sustains them.

Cases were then cited, notably the bank deposit guaranty case (Bank *v.* Haskell, 219 U. S. 104, 31 Sup. Ct. 186), and the opinion continues:

Granted that employers are compelled to insure and that there is in that sense a taking, they insure themselves and their employees from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking, no doubt, disappears in practical experience. As a matter of fact, every industrial concern, except the very large ones who insure themselves, have, for some time, been forced by conditions, not by law, to carry accident indemnity insurance. The difference is that a relatively small part of the sums thus paid actually reached injured workmen or their dependents.

We hold the insurance features of the act do not invalidate it.

As to the question of supposed infringement of constitutional rights raised under No. (5), brief quotations are given herewith:

It is significant, too, that appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. For all practical purposes, the rule prevailing in this court on the law side—for that matter, the language of the grant in the Constitution—take from us the power to pass upon pure questions of fact. The elimination of that power is certainly not the taking of power to review in toto. We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the courts all jurisdiction in the premises. That statute sanction of agreements which do divest the courts of all jurisdiction to settle disputes between contracting parties would nullify such statute is not at all determined by the cases that condemn such agreement. It is one thing that a particular contract is void because the law disapproves it; quite another that a law is void because it approves, rather than disapproves, such contract.

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The true scope of the inquiry is, then, whether our Constitution prevents the delegation of judicial powers by statute; paraphrased, inhibits statutory approval of such delegation by contract.

Our investigation has failed to find a case in which contracts unduly restrictive of the powers of courts have been avoided on the ground that their making was inhibited by a constitution.

Taking up the matter of removal of defenses, the court says:

There is a general challenge that if the employer rejects the provisions of the act he is deprived of certain defenses, and it is put epigrammatically that he is deprived of practically all defense if he insists upon his constitutional rights to trial by jury under due process of law.

Under this head, objections that the defenses of (1) the negligence of the employee, (2) contributory negligence, (3) negligence of fellow servant, (4) assumed risks, and (5) the right of trial by jury (except as to the amount of damages), are taken away from the employer, are reviewed, and the conclusion reached that there is nothing unconstitutional in the manner in which the act treats these matters.

The fourth and last division of the opinion takes up the objection that the act is unduly coercive in implying acceptance, and in making presumptively fraudulent compromises entered into within 12 days after the injury. With regard to coerciveness in the withdrawal of privileges in case of rejection, and in conclusion stating its decision, the opinion reads:

It comes to this: Can a law be void for coercion which attaches no penalty to rejection of its provisions other than taking away, in whole or in part, that which the citizen may lawfully be deprived of without reference to any statute which might be either accepted or rejected? If the legislature may validly say: You shall not defend with contributory negligence, nor with fault of fellow servants; you must prove you are not in fault for the injury suffered by your servant while doing your work; you must effect insurance so that your insolvency may not leave him a crippled public charge, or make a public burden of his dependents; you may contract with each other to arbitrate summarily, effectively and cheaply, and the award shall be not more than a stated sum, and you shall not contract for less payment—can validly compel all this without enacting a workman's compensation act—then how can the saying that these things you shall lose and these things you shall do unless you accept the act be undue compulsion?

One who is at liberty to do or not to do a thing can always say, I will not do what I can refuse to do, with or without reason, unless you do what I demand. There can be no coercion in the sight of the law effectuated by doing or not doing what one has the absolute right to do or not to do, no matter what terms are attached to doing or refraining. The only penalty for nonacceptance of this act is the infliction of what the legislature may do in any event. This is not invidious compulsion.

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The trial court erred in holding the act precluded the defense that the employer is in no wise at fault for the injury charged to him. For this, reversal must ensue. The cause is remanded to enable appellant to make such defense, assuming the burden of proof thereon, and to plead contributory negligence by way of mitigation of damages, if advised to do either. In all other respects, the decision below is right, and the validity of the statute under consideration is hereby affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—FOREMAN INJURED BY ASSAULT OF WORKMEN—*Western Indemnity Co. v. Pillsbury et al., Supreme Court of California (Sept 2, 1915), 151 Pacific Reporter, page 398.*—L. Rudder proceeded against his employer, the Ocean Shore Railroad Co., and its insurer, the Western Indemnity Co., for compensation under the California act of 1913, known as the Boynton Act. Compensation was awarded, and the insurer brought the case to the supreme court by means of a writ of certiorari.

Rudder was foreman of a crew of 15 or 20 section hands, mostly Greeks. According to the findings of the industrial accident commission Rudder, on the 12th of April, 1914, observed that one Pappas was not doing his work of shoveling properly, and took the shovel from the Greek and showed him how it should be done. The laborer continuing to work in an improper manner, the foreman told him to drop his shovel and get his time. This was not done, and when the foreman attempted to take the shovel away, the man struck him with the flat side of it. Rudder then said he would make him drop the shovel, and stepped back to get a stick 5 or 6 feet long. The workman meantime picked up a stone, but on the approach of the foreman dropped this and again struck with the shovel, missing his mark, however. The foreman then inflicted a blow with the stick, which felled the man to his knees. The latter seized the foreman by the legs and threw him, and climbing upon him, for 15 minutes inflicted severe lacerations with his teeth upon the foreman's face, hands and arms, which resulted in blood poisoning and prolonged disability. There being conflicting evidence, the court accepted as true the findings of fact of the commission as above stated; it also held that the commission was not in error as a matter of law in holding that the occurrence was an accident, and one arising out of and in the course of Rudder's employment. As to this Judge Sloss, who delivered the opinion of the majority of the court, said in part:

> The circumstance that the injury was the result of a willful or criminal assault by another does not exclude the possibility that the injury was caused by accident [citing authorities].
>
> Under these and other authorities, it is clear that an injury caused by the attack of a third person may be accidental so far as the injured

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person is concerned. On the other issue, whether the injury occurred in the course of the employment of Rudder, it must also be held that the finding of the commission was sustained by sufficient evidence. The question, simply stated, is whether the injury resulted from Rudder's undertaking to do something in the line of his duty, or whether it occurred as the result of his going outside the scope of his employment and entering upon a private quarrel for reasons of his own. The facts found justify the inference that Rudder was hurt in an altercation which grew out of his justifiable efforts to maintain his authority as foreman and to protect the property of his employer intrusted to his care.

As to the question of the constitutionality of the act, on the decision of which it was stated a number of pending cases turned, there are two opinions, each expressing the views of three judges and upholding the constitutionality of the act; and a vigorous dissenting opinion by Judge Henshaw. The principal opinion was written by Judge Sloss. He first refers to the previous act of 1911 and to the constitutional amendment adopted for the purpose of authorizing a compulsory compensation act. The provisions of the present or Boynton Act are summed up, and the new section of the constitution quoted. In taking up the objections to the act on the ground of conflict with the fourteenth amendment to the Constitution of the United States, as depriving persons of due process of law and the equal protection of the laws, the nature and purpose of compensation legislation, the nature of the police power which, if anything, it is stated, must give validity to the act, and the decisions upholding the validity of several of the State compensation acts are first discussed. Taking up the decisions on the laws most similar to the one under consideration, the opinion, with some omissions, reads:

Counsel have cited but two decisions dealing directly with the validity of acts which make the scheme of compensation, irrespective of negligence, compulsory with respect to employers and employees. And in these cases opposing conclusions were reached. In Ives *v.* South Buffalo Railway Co., 201 N. Y. 271, 94 N. E. 431 [Bul. No. 92, p. 251], the court of appeals of New York declared that the statute of 1910, providing a system of workmen's compensation for certain employments, was in conflict with the constitution, in two respects: (*a*) Because it deprived the employer of property without due process of law; and (*b*) because it deprived both employer and employee of the right to trial by jury, guaranteed by the constitution of the State. The second ground, whether well taken or not, has no application to the case at bar; for, although our constitution has always contained a provision securing the right of trial by jury (art. 1, sec. 7), the legislature is expressly authorized to provide for the settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers. On the other point, that of "due process," the main stress of the opinions in the Ives case is laid upon the proposition that the statute imposes a liability

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upon an employer who has been guilty of no fault, and who, under the preexisting law, was under no obligation to compensate his employee for an injury. This, it is declared, is a violation of the employer's constitutional rights.

On the other hand, in State ex rel. Clausen *v.* Burr, 65 Wash. 156, 117 Pac. 1101 [Bul. No. 96, p. 814], the validity of an act similar, in its main purpose, to the New York statute and to the Boynton Act, was upheld; the court handing down an exhaustive and able opinion to support its conclusion.

The essence of the decision in the Ives case is that freedom from liability on the part of an employer who has been guilty of no fault is a fundamental property right of which he can not be deprived by mere legislative declaration. With all possible respect for the eminently learned court which pronounced this decision, we are unable to give our assent to the doctrine. The rules of the common law defining the rights and obligations of persons holding various mutual relations are not necessarily expressions of fixed and immutable principles, inherent in the nature of things [citing Mondou *v.* Railroad Co., 223 U. S. 1, 32 Sup. Ct. 169, Bul. No. 98, p. 470, and other cases].

The line is sharply drawn, however, by the New York court of appeals, between the fellow-servant and contributory negligence rules, on the one hand, and the rule that fault on the part of the employer must be shown, on the other. Why this distinction? Is the latter doctrine any more sacred or inherently necessary than either of the former? Under the common law the burden of industrial accident, where no fault was attributable to employer or workman, fell on the workman. Under the new law it falls, primarily at least, on the employer. It can not be said that the one rule or the other is a necessary or logical result of fundamental principles of justice. The very trend of legislation exemplified by the act before us illustrates how general is the belief that an enlightened conception of justice requires that the old rule be superseded by the new. There is nothing contrary to the permanent and underlying notions of human right in the declaration that he who is conducting an enterprise, in the operation of which injury to others is likely to occur, shall respond for such injury to those who have not, by their own willful misconduct, brought it upon themselves.

Such a change in the "law itself, as a rule of conduct," is as fairly within the scope of legislative power as is the abolition of the defense of fellow servant or that of contributory negligence. If the lawmaking body deems such change to be needed for the furtherance of the general well-being, it is taking a view that may at least be entertained by reasonable minds, and its action is justified by the broad authority embraced within the police power.

The fourteenth amendment was "intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society." (State ex rel. Clausen *v.* Burr, supra.) Therefore a law which disturbs no vested right of property, which is not retroactive in its operation upon the conduct of persons, but which, looking to the future, merely changes the existing rules governing the liability of masters for injuries caused by accidents occurring to their servants

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while in the service, does not come within the scope of the fourteenth amendment. The employment [relation] creates a status involving relative rights and obligations, and it is properly for the legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations. If the lawmaking body determines that one of the incidents of that relation shall be that the employer must compensate his employee for an accidental injury received in the service, an enactment to that end is neither arbitrary nor outside the scope of legislative authority.

The fixing of liability on one who is without fault is not new to the law. The opinion of the Washington Supreme Court in State ex rel. Clausen *v.* Burr, supra, gives numerous instances of such liability, both at common law and under statutes which have withstood attack on constitutional grounds. Some, at least, of the cases thus referred to, can not, we think, be distinguished from the case at bar, so far as the point now under discussion is concerned.

We have not overlooked the circumstance that the Boynton Act, unlike some of the other statutes to which we have referred, does not limit the newly created scheme of compensation to specially enumerated industries, selected as and declared to be extrahazardous in character. We do not conceive that this difference has any real bearing upon the constitutional questions heretofore discussed. The legislative power to impose the liability upon an employer who is without fault does not, in the view of the courts which have dealt with the subject, rest upon the consideration that the particular employer is conducting an industry in which injury is more likely to result than in some other. If the burden may be imposed upon any employer conducting a lawful and necessary industry, it may be imposed upon all who are conducting industries in which, in the judgment of the legislature, the public welfare requires this measure of protection.

Nor do we think that any distinction, so far as constitutional objections are concerned, can be based upon the fact that this act imposes upon the employer a liability to compensate his employees for injuries actually received in the particular employment, while under other statutes—for example, that of Washington—all employers are required to contribute sums, proportioned to their pay roll and graduated according to the nature of the industry, into a fund out of which all claims for compensation are to be paid. The essential question is whether liability for injury suffered by employees through accident may be imposed upon employers who have been guilty of no breach of duty. Once this question is answered in the affirmative, the mode of imposing the liability, whether it be by way of a proportionate contribution having some of the characteristics of a tax, or by fixing a direct liability upon each employer for each accident as it occurs, is a matter for legislative determination.

The exclusion of casual employees and those engaged in agriculture, horticulture, and domestic service, was held not to be an invalidating or unreasonable classification, and the act as a whole was upheld.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—PRESUMPTION AS TO ELECTION BY EMPLOYEE—*Mackin v. Detroit-Timkin Axle Co., Supreme Court of Michigan (June 14, 1915), 153 Northwestern Reporter, page 49.*—Thomas Mackin brought action at common law to recover damages for injuries received by him while at work for the company named. He had been in its employ for over two months previous to the injury, which occurred on October 8, 1912. He was oiling shafting when he received an electric shock which threw him from a stepladder onto a grinding machine from which he received severe bruises and injuries. He was confined to his bed for several weeks and was attended by a physician furnished by the company. On the question of negligence it was stipulated that owing to defective insulation the shafting which the employee was oiling was heavily charged with electricity, and had been for eight days before the injury. The company had filed a statement with the industrial accident board electing to accept the provisions of the compensation act, and its election and method of compensation had been approved by the board. No notice of this had been given to the employee. When the company tendered the amount due him under the provisions of the compensation law he declined to accept on the ground that the law was unconstitutional and brought this action. The lower court declared the act constitutional and directed a verdict for the company. The supreme court affirmed the judgment entered on this verdict, upholding the constitutionality of the act in an opinion written by Judge Steere, from which the following is quoted:

Though more fully elaborated and subdivided, the propositions urged by plaintiff's counsel against the constitutionality of the act under consideration may be summarized and stated as follows: It conclusively imputes to the employee knowledge of the employer's election to come under the law; it confers upon the industrial accident board judicial powers; it includes provisions not covered by the title, and the title embraces more than one subject; it discriminates against domestic, farm, and casual employees, and is class legislation; it deprives a parent of right of action for injury to his child; and it deprives an injured employee of the right to be represented by an attorney or agent of his choice, in making all attorney fees subject to regulation by the industrial accident board.

It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. Common and statute laws only remain in force until altered or repealed.

At this point a quotation is made from the Second Employers' Liability Cases, 223 U. S. 50, 32 Sup. Ct. 175 (Bul. No. 98, p. 470), supporting the statement just made, and attention is called to the fact

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that nearly all the foreign compensation laws and those of the States have been sustained as constitutional when brought before the courts. Continuing, the opinion reads:

In some States the law is made compulsory upon both parties or upon one with choice to the other, giving rise to questions which need not be considered here, since the law in this State, as applied to this case, becomes operative upon neither employer nor employee who does not expressly or impliedly consent; but, if the employer so elects, and the employee does not give written notice to the contrary he is conclusively presumed to have consented, and comes under the act. Plaintiff contends the act is unconstitutional in that particular, contravening both the Federal and State constitutions, because it deprives an injured employee of his right to resort to the courts for redress and have trial by jury without knowledge, consent, or waiver on his part, and there can be no waiver of constitutional rights without knowledge of the facts upon which it is based.

The record fails to disclose whether plaintiff did or did not have actual notice that defendant elected to become subject to the act, but he did have constructive notice and was presumed to know the law, and to know that it became operative as to him if his employer elected, unless he gave notice to the contrary as provided in the act.

The decision upon the Massachusetts act in Young *v.* Duncan, 218 Mass. 346, 106 N. E. 1 (Bul. No. 169, p. 221), is commented upon as supporting the propriety of such a provision. The remainder of the opinion upon this point is as follows:

No constitutional provision is pointed out which prohibits the legislature, in framing this law to best avoid uncertainty and contention tending to litigation, from adopting a rule of conclusive presumption upon the question of notice so long as the employee was left in the first instance free to forestall, overcome, or prevent such presumption by his own act if he so desired. This being true, the constitutional objections raised, which are necessarily founded upon the idea of coercion, disappear because the employee has had a free choice, and, by having failed to give notice, must be held to have elected his remedy under the workmen's compensation law. Such legal presumptions are not unconstitutional nor uncommon. A familiar illustration is the conclusive presumption that a party entitled to jury trial in a civil action has waived his right and elected to go to trial without a jury unless he took some affirmative action and made demand before a certain time or point of progress in the case arrived.

The contention that the industrial accident board and the arbitration commission are unconstitutional bodies, because combining the functions of the three departments of government, is shown to be untenable because the act is elective, and the board merely an administrative agency. The decisions of the courts of Michigan itself and other States are referred to in support of this view.

As to the equal protection of laws the court says in part:

The law is unquestionable that it is within the power of the legislature to classify both employers and employees, if the classification

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is not fanciful or arbitrary and for reasons of public policy, is based upon substantial distinctions, is germane to the object sought to be accomplished by the act, not limited to existing conditions only, and applies impartially and equally to each member of the class. Classifications of this nature, some of them identical with that under consideration, have been sustained in various States where workmen's compensation acts and other laws affecting industrial workers were under consideration.

Finally, the contention as to the parent's loss of action for services of a minor is dismissed as not applicable to this case, and the provisions of the act relating to attorneys' and physicians' fees are also held not to be invalid.

WORKMEN'S COMPENSATION—DEPENDENCY—*Petrozino v. American Mutual Liability Co., Supreme Judicial Court of Massachusetts (Dec. 31, 1914), 107 Northeastern Reporter, page 370.*—Florinda Petrozino, who instituted this action under the workmen's compensation act, was administratrix of a deceased workman. The decree in the superior court having been in her favor, the insurer appealed and raised the point that the mother and sister of the workman were not wholly dependent upon him. This contention was rejected and the decree affirmed, as indicated in the following quotation from the opinion by Judge Braley:

The evidence shows that they are residents of Italy, and having become unable by reason of failing eyesight to follow their usual occupations were forced to rely wholly upon him for the means of subsistence. The insurer, however, contends, that the 6 or 7 cents a day earned by another sister who was a member of the family, and the remittances from time to time to the mother of various sums by an aunt of the decedent were sufficient to take the case out of the statute. But the findings, that the remittances were mere gratuities, and that the pittance earned by the sister was hardly sufficient for her own maintenance, and that no part was paid to the dependents who never relied upon either for aid, eliminates those relatives as contributing and dependable sources of support. It being plain on the facts that during his life the mother and sister had no other source of income except his earnings, they were rightly found to be wholly dependent upon the employee, and the rulings requested could not be given.

WORKMEN'S COMPENSATION—DEPENDENCY—*Pinel v. Rapid Railway System, Supreme Court of Michigan (Jan. 29, 1915), 150 Northwestern Reporter, page 897.*—Edgar Pinel was killed on May 29, 1913, while in the employment of the company named. He left no widow or children, but a mother, brothers and sisters. The board of arbitration denied the claim of the mother, and the industrial accident board affirmed this decision, whereupon the claimant secured a review

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of the proceedings by the supreme court. The injured man was not making any contribution to his mother's support, and as he would be under no legal obligation to do so until proceedings were brought against him to compel such contribution, the court held that the mother was not a dependent within the meaning of the law.

WORKMEN'S COMPENSATION—ELECTION—CONTRACT OF EMPLOYMENT—*Johnson v. Nelson, Supreme Court of Minnesota (Jan. 8, 1915), 150 Northwestern Reporter, page 620.*—Frank A. Johnson brought action against Peter Nelson for damages for injuries alleged to have been suffered by reason of the negligence of Nelson, the employer. These injuries were received on June 30, 1915, while Johnson was at work for Nelson in Wisconsin on railroad construction. Nelson's answer alleged that the case was governed by the Wisconsin Workmen's Compensation Act, and that the plaintiff Johnson could not therefore recover in this suit. Judgment was rendered in Nelson's favor in the district court of Hennepin County, and the plaintiff appealed.

The employee had been engaged in the same kind of work for the same employer in Minnesota for some time, and there was no definite contract as to the duration of the employment. Eighteen days before the injury he had been sent into Wisconsin to work. The employer had elected to come under the Wisconsin act as far as his work in that State was concerned, but the employee claimed to know nothing of that statute.

The act provides that the employee in such case shall be subject to its provisions if he gives no notice at the time of entering the employment of his election not to be so subject. The court concluded that the plaintiff, by his failure to give notice, had accepted the provisions of the act, and that his sole remedy was under it. The judgment of the court below was therefore affirmed.

WORKMEN'S COMPENSATION—ELECTION—DAMAGES FOR DEATH—RECOVERY BY INSURER FROM THIRD PERSONS—SUBROGATION—*Turnquist v. Hannon, Supreme Judicial Court of Massachusetts (Dec. 31, 1914), 107 Northeastern Reporter, page 443.*—Ida C. Turnquist, administratrix of a deceased workman, brought action for the benefit of the insurer, who had paid compensation to her, to recover the amount from Frank J. Hannon, a third party, through the negligence of whose agent the fatal injury had occurred. There were findings for the plaintiff administratrix in the superior court of Suffolk County, and the case came before the supreme court on exceptions by Hannon to the trial court's refusal to give certain rulings requested by him.

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The opinion, which was in affirmation of the position of the court below, was delivered by Judge Rugg, and is in part as follows:

This action is brought in her [the administratrix's] name by the insurance company for its benefit under section 15 of part 3 of the act, which is in these words:

"SEC. 15. 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 that 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."

If the injury in the case at bar had not resulted in his death, two alternatives would have been open to the employee under the terms of part 3, section 15, of the act: (1) To bring an action at law against the defendant for the injury done him, or (2) to proceed for compensation under the workmen's compensation act. But he could not have pursued both remedies. He would have been bound to elect between the two.

The opinion then holds that the requirement for election applies to the representative of a deceased employee, under the definition of the word "employee" given in part 5, section 2 of the act, and that therefore the administratrix was bound by the election made. In conclusion Judge Rugg said:

The act by part 3, section 15, does not import into its terms the equitable principle of subrogation. It simply provides that where the insurer has afforded the prompt relief to the dependents of a deceased employee which the act requires, it may enforce for its own benefit the rights against tortious third persons causing his injury which would otherwise have been available to the employee or his representatives.

This right is not dependent upon reimbursement or subrogation. It puts upon the insurer the burden of undertaking what in many instances might be litigation uncertain by reason of disputed facts or novel law, but gives it all the advantage of the right of action which in substance is assigned to it. Hence, it is an immaterial circumstance how much it may have paid or be liable to pay under the act.

Inasmuch as the liability established by the death statute is in substance a penalty or fine, the Commonwealth, through its legislature, can make such fine payable to any person equitably entitled to it. Where the legislature provides that the one who has afforded prompt relief to the dependents of the deceased may receive the penalty, there is no legal reason why it should not be enforced.

WORKMEN'S COMPENSATION—EMPLOYEE—CONSTRUCTION OF STATUTE—*In re Rheinwald, Supreme Court of New York, Appellate Division, Third Department (May 14, 1915), 153 New York Sup-*

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plement, page 598.—Mary Rheinwald instituted proceedings to obtain compensation for the death of her husband, Robert Rheinwald, who was killed on July 1, 1914, while painting a sign on the walls of the building owned by the Builders' Brick & Supply Co. He was doing this work personally and alone, and was performing it for a lump sum, under a written contract as to quality of the materials and permanence of the result. The employer and insurer contended that as an independent contractor he was not an "employee" within the meaning of the law, and consequently the claimant was not entitled to compensation. The commission, by a vote of three to two, upheld this view, and declined to grant the compensation petitioned for. This decision the court reversed, also by a divided court, two judges dissenting. The majority opinion was delivered by Judge Woodward, who said in part:

Was Rheinwald an "employee," in fairness and in fact, within the meaning of the workmen's compensation law? Was he of the grade and status of worker, rather than of the grade and status of independent enterpriser? I am of opinion that he was, and that such a holding is essential to effectuate the purpose of the act, in transmitting the burden of this bereavement from the scanty purse of this workingman's widow and children to all the patrons of the product or service furnished by his employer. The fact that he was to be paid a lump sum or "by the job" can not be recognized as taking him out of the class of "employee." The fact that his contract to do the work was in writing is not decisive on that issue, or the fact that by it he made certain undertakings of satisfaction of the employer or replacement if the finished work did not endure an expected length of time. The fact that his employment by the respondent was casual or intermittent can not deprive him of the status of employee, in the absence of explicit legislative pronouncement to that effect. The fact that he furnished tools or materials, or undertook to do a specified "job" or produce a given result, does not prevent his being in fact a workman, an "employee," within the purview of this statute. Common sense and regard for the actualities should be potent on this issue, rather than technical distinctions and elaborate refinements. Rheinwald really was a worker; the sum he received for his painting was in an economic sense wages, and not profits; he had no helpers, on whose work he made a profit; he was not an employer, with employees whom it was his duty to insure under the act; he personally performed all the work; it was contemplated by the employer that he would; and the employer had at least potential control, direction, and supervision of all the work Rheinwald did at his trade for the respondent.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—*In re Powley, Supreme Court of New York, Appellate Division, Third Department (July 1, 1915), 154 New York Supplement, page 426.*—A. Ray Powley proceeded for compensation against Vivian &

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Co. (Inc.), and the insurance company carrying its compensation risks. He was given an award of $15 a week for six weeks, but an appeal was taken on the ground that he was not an employee. Powley had let his dredge to the company during the continuance of a contract which it had to perform, and himself operated the dredge. The company agreed to furnish certain supplies. These were carried out in a gasoline launch, but on the day of the accident, in the absence of anyone to run the launch, Powley was obliged to attempt to make a trip himself. While starting the motor it back-fired and broke his wrist. The court held that in his principal employment as operator of the dredge he was an independent contractor, but that in going to procure supplies he was an employee, and therefore his injury was covered by the compensation act.

WORKMEN'S COMPENSATION—EMPLOYEE—MINOR EMPLOYED IN PROHIBITED HAZARDOUS OCCUPATION—*Foth v. Macomber & Whyte Rope Co., Supreme Court of Wisconsin (Oct. 5, 1915), 154 Northwestern Reporter, page 369.*—Clarence Foth brought action for damages for injury to his left arm received while in the employ of the company named. The employee was a minor who was of such age as to be legally employed, but not on the hazardous work which he was doing when injured. He claimed that under these circumstances he was entitled to bring a liability action, while the employer argued that the remedy would be under the compensation law. The court took the latter view, and reversed the judgment in the plaintiff's favor. The compensation statute includes as an employee every person in the service of another, etc., "including minors who are legally permitted to work under the laws of the State." Judge Marshall spoke for the court, and the following is a quotation from the latter part of his opinion:

We reach the conclusion that the legislative purpose was as above indicated, and the words "(who, for the purposes of section 2394–8, shall be considered the same and shall have the power of contracting as adult employees)," were added to render clear that, without prejudice to liability under the penal statutes, any minor who is legally permitted to work at all in a gainful occupation is to be regarded as being competent to contract, as regards subjecting himself to the provisions of the workmen's compensation law, as fully as an adult person.

WORKMEN'S COMPENSATION—"EMPLOYEE"—PIECEWORKER—*State ex rel. Virginia & Rainy Lake Co. v. District Court of St. Louis County et al., Supreme Court of Minnesota (Dec. 18, 1914), 150 Northwestern Reporter, page 211.*—One Bashko had been awarded compensation by

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the district court of St. Louis County for an injury which resulted in the loss of sight of one eye. He was at work for the company named in getting out ties, poles and posts from the company's timberlands, being paid by the piece according to the size, character and grade of the different articles. He could largely proceed in his own way so far as time and method of working was concerned, and the company contended that he was an independent contractor and not an employee entitled to compensation. It invoked the test laid down by the courts as to the relation of employer and employee with reference to responsibility for negligence causing injury to third persons, that is, whether or not the alleged employer had power to control the acts of the other in respect to the transaction out of which the injury arises. The court, speaking by Judge Taylor, held that the evidence in this case that Bashko was such an employee was sufficient to have required its submission to the jury, if this had been an action at law to which the rule mentioned applied, saying in part:

In the present case Bashko did not contract to perform a specific and definite undertaking, nor to accomplish a specific and agreed upon result. He did not agree to cut any specific quantity of timber, nor to cut the timber from any specific quantity of land. The company owned the timber and wanted it made into ties, poles and posts. It had established a schedule of prices which it paid for piecework. Bashko had worked at piecework for some years and could earn more than the ordinary wages at such work. He applied for a job getting out timber by the piece and the company set him to work. The company had a large number of men doing the same kind of work upon the same terms. It is not likely that the owners of valuable timber would permit ordinary workmen to cut and manufacture it for them wholly free from supervision or control. The evidence tends to show that the company did not surrender, but reserved, the right to supervise and control the work of Bashko, at least to the extent necessary to prevent waste and loss. They required him to cut the timber clean as he went, and to manufacture it according to specifications furnished by them, and also to pile the brush. They inspected his work from time to time and occasionally directed him to remedy defects therein. They had the right to discharge him at any time, and this right afforded adequate means for controlling his work. The evidence was ample to sustain the finding of the trial court under the rule invoked.

The court therefore held that the injured man was an employee under the workmen's compensation act, and affirmed the judgment of the court below.

WORKMEN'S COMPENSATION—EMPLOYEES INCLUDED—POLICE OFFICERS—*Blynn v. City of Pontiac, Supreme Court of Michigan (Mar. 18, 1915), 151 Northwestern Reporter, page 681.*—Millard F. Blynn was a policeman of the city of Pontiac, and was killed, while riding in

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an automobile with two other policemen on January 2, 1912, by an automobile dashing against a telegraph pole. His widow made claim for compensation, the act providing that employees of cities, etc., shall be covered by it, and defining the term "employee" as including every person in the service of the State or any county, city, incorporated village, etc., under an appointment or contract for hire, except an official of the State, city, etc. Under the city charter policemen are appointed by the governing commission and take an oath of office. After examining the evidence and the decisions in point, the court concluded that the decedent had been not an employee, but an officer of the city, and disallowed the claim.

WORKMEN'S COMPENSATION—EMPLOYER—*Rongo v. R. Waddington & Sons (Inc.) et al., Supreme Court of New Jersey (June 4, 1915), 94 Atlantic Reporter, page 408.*—The petitioner for compensation in this case was injured while employed as a teamster by the company named. The team which he drove was let out, with others, to one Vanderbilt, who directed what work should be done, and could object to having the services of a particular teamster, in which case the man would not be further assigned to the Vanderbilt work. The teamster was hired and paid, however, by the Waddington company. At the trial, compensation was awarded the employee against Vanderbilt, and the question on appeal was whether there was evidence to justify such finding. The court held that there was not, the Waddington company being the employer under the meaning of the compensation act. Judge Parker, who delivered the opinion, said in part:

"Employee * * * includes all natural persons who perform services for another for financial consideration."

In the case at bar the financial consideration moving to the injured employee was the wages that he was paid by Waddington and consequently Waddington was the "other" that was his employer in the intendment of the act.

We conclude therefore that it was an error on the part of the trial court to hold Vanderbilt as the employer. Vanderbilt had no direct dealings with the petitioner; he had nothing to say on the question how much wages petitioner should be paid; the only contract that he made was a contract with Waddington for the supply of a team consisting of a wagon, horses, and driver, for which he paid as a team. There was of course ample evidence to justify an award as against Waddington, and this is what we think the court ought to have done.

WORKMEN'S COMPENSATION—EMPLOYMENT OBTAINED UNDER FALSE PRETENSES—RELATIONSHIP—CAUSATION—*Kenny v. Union Railway Co., Supreme Court of New York, Appellate Division, Third*

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Department (Mar. 3, 1915), 152 New York Supplement, page 117.—Elizabeth Kenny made claim for compensation for the death of John J. Kenny, and the company named appealed from a decision of the workmen's compensation commission making an award in her favor. It was claimed that the company was not liable to make the payment because Kenny, in his application for employment, had falsely stated that he was not married, when in fact he was married and had two children; also that he had not previously worked on a railroad, when he had been employed by another company and had been discharged for dishonesty. Obtaining employment by false statements in writing as to previous employment is made a misdemeanor by the Penal Code. The company made no distinction between single and married men in its employment, but might have refused to hire the deceased, had it known the facts, because of his making a misstatement of his marital condition. It was stated that he probably would not have been employed if he had truthfully stated that he had been previously employed by another company and been discharged. The court affirmed the award of the commission, holding that there was no doubt of the existence of the relation of employer and employee. Judge Lyon, who delivered the opinion, said in part:

> The compensation law does not except from its benefits employees who have obtained employment in violation of this provision of the penal law.
>
> The false representations in no way related or contributed to the cause of death. The plain purpose of the statute was to provide compensation to an employee for an accidental personal injury, and to the family of an employee who has suffered death as a result of such injury sustained by an employee arising out of and in the course of such employment "without regard to fault as a cause of such injury," with the two specified exceptions of "where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results wholly from the intoxication of the injured employee while on duty." Concededly the injury was wholly accidental, and neither exception applies.

WORKMEN'S COMPENSATION—EMPLOYMENTS INCLUDED—ELEVATORS—CONSTRUCTION OF STATUTE—*Guerrieri v. Industrial Insurance Commission, Supreme Court of Washington (Mar. 3, 1915), 146 Pacific Reporter, page 608.*—Melville Guerrieri appealed from an order adverse to him as to his claim for compensation. He was injured while operating an elevator in a mercantile establishment, and the question raised was whether this is one of the extrahazardous employments contemplated by the law. The court held that from its connection, and the fact that classes of business rather than kinds

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of machinery are there listed, the word "elevators" in section 2 of the law refers to grain elevators or warehouses, and not to the kind of elevators, or lifts, in one of which the employee was injured; also that by section 4 only construction work on elevators is covered. The order below was therefore affirmed.

WORKMEN'S COMPENSATION—EVIDENCE—PRESUMPTION AS TO CAUSE—*Englebretson et al. v. Industrial Accident Commission et al., Supreme Court of California (Aug. 7, 1915), 151 Pacific Reporter, page 421.*—John Englebretson, employer, brought proceedings against the commission to review its action in granting an award for an injury causing death claimed to have been suffered by James M. Wells while in Englebretson's employ. Wells was driving a team of horses attached to a scraper, in the construction of a railroad embankment. Another man loaded, operated and dumped the scraper. Teams drawing dump carts were also engaged in the work. On March 4, 1914, Wells became sick while at work, and was obliged to be taken home. It was found that an internal hemorrhage of the abdominal cavity was the cause of the sickness. He grew worse, and died on March 17, 1914. An autopsy showed a rupture of blood vessels. It was claimed that the man was called upon, while at work with the scraper, to assist in swinging around the end of one of the dump carts, and that this caused the strain which brought about the rupture. The court did not pass upon the question whether an injury so occurring is caused by accident within the meaning of the law; but annulled the award because there was no competent evidence to prove that the rupture was caused in the manner claimed, holding that the making of an award without proof of the essential fact that the injury resulted from an accident is an act in excess of the jurisdiction of the commission. It was held that the testimony of physicians amounted merely to proof that the rupture might have been caused by muscular exertion, but was no proof that the employee lifted a wagon as claimed. The court found that the only other testimony was what the employee said as to the cause of the condition which resulted in his death, and that this was inadmissible as hearsay. In discussing this point the court took up the provision that the commission shall not be bound by technical rules of evidence, and concluded that the rule by which hearsay evidence is excluded is not merely a technical rule. Finally, it was held that the decision would only annul the award, leaving the commission free to hold a further hearing if evidence in support of the claim can be produced.

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WORKMEN'S COMPENSATION—EVIDENCE—PRESUMPTION OF ACCIDENTAL DEATH—*Milwaukee Western Fuel Co. v. Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (Feb. 9, 1915), 150 Northwestern Reporter, page 998.*—George Hartmann, while in the employ of the company named, met his death on May 29, 1913, by drowning in the Menominee River. At lunch time he went along a walk on the bank of the river leading to a toilet used by the employees, when a splash was heard, and he was seen in the river, not struggling, from which he could not be rescued. The industrial commission made an award to the claimant, Barbara Hartmann, but the circuit court of Dane County set this aside, holding that, the evidence being equally consistent with the theory of accident or that of suicide, the claimant did not sustain the burden of proof necessary to make out her case. The supreme court held, on appeal, that the rule in certiorari cases requires the upholding of the original conclusion if there is evidence to support it, and that this was true in this case. It held further, that the presumption of accidental death instead of suicide would operate in a case of this kind, and make it necessary for some evidence to be adduced to the contrary before the weight would preponderate in the direction of the suicide theory.

The judgment of the circuit court was reversed, with direction to enter a judgment affirming the award of the industrial commission, giving to the claimant $2,259.11 in stated weekly installments.

WORKMEN'S COMPENSATION—EVIDENCE—PROCEDURE—*Carroll v. Knickerbocker Ice Co., Supreme Court of New York, Appellate Division, Third Department (Sept. 15, 1915), 155 New York Supplement, page 1.*—Bridget Carroll made claim for compensation for the death of her husband Myles Carroll, against the company named. The commission awarded $100 funeral expenses, and a weekly compensation of $4.61 to the widow and $1.13 to each of five children. The deceased was driver of an ice wagon and, according to the findings of the commission, was injured by his ice tongs slipping and causing a cake of ice weighing 300 pounds to strike him in the abdomen. He, with the assistance of two others, was able to lift the ice 4 feet and put it in the ice box. It appeared that he drank liquor on this occasion, and was and had been for 25 years a hard drinker. He went home and was taken sick, and shortly afterwards was taken to a hospital, where he died four days later, after developing delirium tremens. The proof of death made by the attending physicians gives, as the remote cause, that 300 pounds of ice struck his epigastrium, causing gastric hemorrhage—rigidity

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in upper abdomen. * * * The immediate cause is given as "Oedema of the lungs—delirium tremens." No person saw the alleged accident, though several were about, and practically the only proof of it was his statements to certain persons. The court affirmed the award, interpreting the statute as allowing the admission of hearsay evidence. Two of the five judges dissented, one of them presenting his reasons in a dissenting opinion. Judge Howard, who delivered the majority opinion, said:

The proof offered was of such a character that no court would have hesitated a moment to reject it. All the rules of evidence, the accumulation of centuries of experience and wisdom, were ignored by the commission. But was the commission not authorized to ignore them? Indeed, in order to keep step with the spirit of the law, was the commission not bound to ignore them? It is clearly evident that the great bulk of the testimony in this case was hearsay, and in some instances hearsay upon hearsay. There is slight evidence that the deceased vomited blood, and some evidence from which it might be inferred that he strained himself by lifting on the ice. From these two slender items of evidence the commission might have inferred that the injury arose from the accident. Everything else is wholly hearsay. The doctor's certificate that the remote cause of death was because 300 pounds of ice hit the deceased is, of course, only hearsay. So that the question arises here whether the commission, under section 68 of the compensation act, were authorized to receive the hearsay evidence and base their findings upon it. Section 68 reads as follows:

"Technical rules of evidence or procedure not required.—The commission or a commissioner or a deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, * * * but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

Subdivision 2 of section 67 also provides that the commission shall adopt rules providing the "nature" of the evidence to be accepted by it. As to proceedings before the commission, these two sections wholly abrogate the substantive law of evidence—abrogate the common law, the statute law, the rules of procedure formulated by the courts, and all the technicalities respected by the legal profession. The commission is authorized by this section, it seems, to make its investigation in any manner that it chooses, wholly unfettered by any law previously invented by man. This is the spirit of the statute. The commission is to be bound neither by custom nor by precedent. The trials before the commission are to be summary, speedy, and informal. The very instant that the old rules of evidence are invoked, the informal character of the hearing disappears, and the rigid, formal rules of procedure and all the technicalities incident to the practice of the law will grow up around the commission, hampering and delaying it, working inconvenience and hardship upon the claimants, and defeating the intent of the law.

Assuming, then, that the commission had the right to receive the hearsay evidence which it did receive, and act upon it (and if it had

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a right to receive it, it had a right to act upon it), its decision on the questions of fact was final and is beyond our power to criticize or revoke.

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF REMEDY—THIRD PARTIES—CONSTITUTIONALITY OF STATUTE—*Northern Pacific Railway Co. v. Meese et al., Supreme Court of the United States (Jan. 17, 1916), 36 Supreme Court Reporter, page 223.*—This case arose in the United States district court for the death of a laborer employed as a loader of cars by a brewing company in the city of Seattle, Wash. While he was so engaged, owing to the alleged negligence of the railroad company, the car which he was loading, and which was on a siding, was violently struck. The action was brought under the State statute authorizing recovery for fatal injuries, commonly known as Lord Campbell's Act. The company, though not the employer of Meese, contended that the only redress available was that granted by the compensation act of 1911 in the State of Washington, which abrogated suits at law in cases of injuries to employees. The act contains provisions fixing the liability of third parties, and the contention that the effect of the statute was to exclude damage suits in such cases was sustained by the district court (206 Fed. p. 222, Bul. No. 152, p. 195). On appeal, the circuit court of appeals reversed this decision (211 Fed. 254, Bul. No. 169, p. 250), holding that the fatal accident act has not been repealed and was available. The case was then brought to the Supreme Court of the United States, which reversed the judgment of the circuit court of appeals as to the nature of the law available, and affirmed the judgment of the trial court.

The compensation act repealed certain liability statutes of the State, but did not repeal the fatal accident act. The effect of the compensation law had been passed upon by the supreme court of the State in Peet *v.* Mills (76 Wash. 437, 136 Pac. 685 [Bul. No. 152, p. 193]), wherein it was decided that the new remedy was exclusive in so far as injuries to employees are concerned. The railroad company's contention was that the circuit court of appeals erred in not accepting the opinion in Peet *v.* Mills as controlling. The Supreme Court sustained this contention, Mr. Justice McReynolds, who delivered the opinion, saying that "It is settled doctrine that Federal courts must accept the construction of a State statute deliberately adopted by its highest court." Quotations were then made from the opinion of the supreme court in Peet *v.* Mills, in which it was said that it was intended by the legislature that the new remedy "should be ample, full, and complete, reaching every injury sustained by any workman while engaged in any such [included] industry, regardless of the causes of the injury or the negligence to

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which it might be attributed." Attorneys for respondent Meese had suggested that such a construction of the act would cause it to conflict with the equal protection clause of the fourteenth amendment, but this the Supreme Court declared was a contention without merit, and no other question having been raised involving the application of the Federal Constitution, the action already indicated was taken.

WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—*Post v. Burger & Gohlke, Court of Appeals of New York (Jan. 11, 1916), 111 Northeastern Reporter, page 351.*—Burger & Gohlke formed a corporation engaged in sheet-metal work, their office being in Brooklyn, N. Y. Post, a resident of that place, had been in their employ for more than two years, and was sent by them on September 1, 1914, to perform work on a building in Jersey City, N. J., and while there engaged he received an injury to his wrist for which compensation was awarded. To secure compensation due to its employees from time to time the company named was insured, and from the award of the State commission, affirmed by the appellate division of the supreme court, the employer and its insurer brought this appeal to the court of appeals. The sole question involved was that of the effect of the law as covering work done outside the limits of the State, and the construction adopted by the courts was to the effect that the law does so apply, on the ground that the act reads into the contract between every employee and his employer the provisions of the compensation system without regard to the place of the occurrence of the accident. Having stated the facts, and announced certain fundamental principles, Judge Chase, who delivered the opinion of the court, said:

It is well settled that the legislature has the power to compel a contract between employer and employee that is extraterritorial in effect.

In determining the intention of the legislature in enacting the workmen's compensation law of this State there are two important provisions of the act that must constantly be borne in mind, as they affect and characterize all the other provisions of the act:

1. In the absence of substantial evidence to the contrary, it must be presumed that the claim comes within the provisions of the act. (Workmen's compensation law, sec. 21.)

2. The liability of the employer for compensation includes every accidental personal injury sustained by the employee "arising out of and in the course of his employment, without regard to fault as a cause of such injury."

He then discussed the various provisions of the act, defining the parties affected, the duty of the employer as to medical attendance, security of compensation, and mode of determination of rights under the act. Reference was then made to the inadequacy of the common-

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law doctrine of employer's liability under present industrial conditions, after which Judge Chase continued:

The act was passed pursuant to a widespread belief in its value as a means of protecting workingmen and their dependents from want in case of injury when engaged in certain specified employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity and to make reasonable compensation for injuries sustained or death incurred by reason of such employment, a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act. It was also the intention of the legislature to make such compensation not only a part of the expense of the business and a part of the cost of the things manufactured and of transportation as defined by the act, but ultimately to require such compensation to be paid by the consumer of the manufactured goods and by those securing transportation. The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory; that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract. (6 Ruling Case Law 588; Board of Highway Commissioners *v.* Bloomington, 253 Ills. 164.)

Our conclusion as to the intention of the legislature is reached from the act as a whole. The intention is also specifically shown by the fact, as already stated, that an employee as defined by this act includes a person engaged in the course of his employment away from the plant of the employer. The language of the statute, if construed literally, and we see no reason why it should not be, expressly includes the employee in this case, as he was engaged in his employment in New Jersey, away from the plant of his employer, and under the employer's express direction.

It is also specifically shown by the fact that the cost of insurance is determined by ascertaining the number of all the employees of the employer and the wages paid to them. There is no provision in the act for ascertaining the number of employees of an employer engaged in employment within the State of New York, nor is there any deduction from the amount to be paid for State or other insurance by reason of the fact, if true, that a portion of the employees of an employer are or may be engaged outside of the boundaries of the State. The provision in regard to insurance and the manner of ascertaining the premium for the same and the fact that no provision is made for basing the insurance premium on employment within the State or in any way limiting the liability of the insurance carrier to injuries received in the State, shows that the act was passed without intending to limit the same to a contract for employment within the State. The purpose of the legislature would seem to require that the act be read into every contract of employment and provide compensation for every injury incurred while engaged in such employment without limitation.

The appellants had referred to a case arising under the compensation act of Massachusetts, in which it was held that the law of that

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State did not have effect beyond its boundaries; as to this, however, it was pointed out that the statute of Massachusetts contained expressions not found in that of New York, so that the case did not afford a precedent. Reference was also made to a case in the Connecticut courts, Kennerson *v.* Thames Towboat Co., 94 Atl. 372 (see p. 251), and to Rounsaville *v.* Central Railroad Co., 94 Atl. 392 (see p. 258), a New Jersey case, in which cases the laws of the respective States were held to have extraterritorial effect. Concluding, Judge Chase said:

The courts of this State have recognized the compensation laws of other States and countries and give effect to such laws, unless they are contrary to the laws or policy of this State. [Cases cited.]

We appreciate that any determination that may be made of the question under consideration will result in some practical difficulties in administering the statute, but the difficulties that will be met with in administering the statute construed as requiring a contract binding upon both parties without limitation will be less burdensome than the difficulties that would be experienced with a contrary construction of the statute. The practical difficulties that may be met in administering the statute as herein construed can be substantially overcome by adopting rules for the commission or perhaps by further legislation.

The order should be affirmed with costs.

WORKMEN'S COMPENSATION—FEDERAL AND STATE JURISDICTION—ADMIRALTY—ELECTION OF REMEDIES—*In re Walker, Court of Appeals of New York (July 15, 1915), 109 Northeastern Reporter, page 604.*—This case, a claim by W. A. Walker for compensation, involved a point not considered in Jensen *v.* Southern Pacific Co., 109 N. E. 600 (see p. 221). The claimant was injured on a steamship lying alongside a pier in the Hudson River, and the question of the application of the workmen's compensation act arose; also whether, if it was applicable, it was not in conflict with the clause of the Constitution of the United States which declares that the judicial power of the Federal Government shall extend to all cases of admiralty and maritime jurisdiction. The court pointed out that in such cases the suitor has an election whether to proceed in admiralty or under the common law, and since the compensation law is a substitute for the common-law remedy, a choice may still be exercised in this respect.

As to the alleged denial of equal protection of the laws to the employer Judge Miller, who delivered the opinion, said:

But it is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property may be proceeded against in admiralty, it is as to them a denial of the equal protection of the laws. The exemption, however, is from suits at common law, of which all employers complying with the act equally

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have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the legislature.

WORKMEN'S COMPENSATION—FEDERAL AND STATE JURISDICTION—ADMIRALTY—SOLE REMEDY—*State ex rel. Jarvis v. Daggett et al., Supreme Court of Washington (Sept. 13, 1915), 151 Pacific Reporter, page 648.*—Frank Jarvis made claim under the compensation act for injury while working on the steamship *Whatcom*, engaged in intrastate traffic in Puget Sound. The vessel was owned by two foreign corporations. The commission rejected the claim on the ground that it had no jurisdiction over the owners, as they had paid no compensation premiums, nor had demand been made upon them for the same. Jarvis then commenced an action at common law, which was removed to the United States district court. This court entered judgment in favor of the defendants, because no demand had been made upon them for compensation premiums, which, under the compensation act, is the necessary prerequisite to a suit. The suit under consideration was then started against the commission, it being a mandamus proceeding to compel the commission to make such demand. This was denied, the court first calling attention to the language of the compensation act, which positively excludes every other remedy for personal injury to employees than those available under it. It was stated that prior to the passage of the compensation act a person injured in such employment had an option to proceed in admiralty or under the common law. Since the State legislature has no power to modify the admiralty law, nor take from any workman any right under it, the court held that the legislature will be presumed to have intended to grant compensation only in cases where it had the power to abolish every other remedy. It was pointed out that there would be discrimination against the operators of vessels, which might amount to a denial of the equal protection of the laws, since such operators would be obliged to pay premiums like other employers, but would still be liable to be proceeded against in admiralty, while the other employers would be relieved of all liability. It was argued on Jarvis's behalf that, as Congress had passed no workmen's compensation act applicable to this class of employees, the State could exercise its right to legislate in the matter. This was also held untenable, the court showing that there might be a violation of the restriction of owners of vessels, fixed by the maritime law, to an amount of liability equal to the interest of the owner in the vessel and freight, in cases where the owner was not himself negligent. It was held that the legislature had no power to fix a different standard or measure.

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WORKMEN'S COMPENSATION—FEDERAL AND STATE STATUTES—INTERSTATE COMMERCE BY WATER—EXTRATERRITORIAL EFFECT OF STATUTE—ADMIRALTY—*Kennerson v. Thames Towboat Co., Supreme Court of Errors of Connecticut (June 10, 1915), 94 Atlantic Reporter, page 372.*—Two cases resulting from proceedings under the workmen's compensation act were here taken up together, awards of compensation having been made by the superior court of New London County.

The accident resulting in the death of the two men occurred in the waters of Raritan Bay, and it was agreed that it occurred in the navigable waters of New Jersey. Employer and employees were citizens of Connecticut, and the contract of employment was made in that State to be performed partly within and partly without the State. Both parties had accepted the provisions of part B of the workmen's compensation act.

The company contended that the admiralty court had exclusive jurisdiction of the matter, but the court held that in personal actions the State courts have concurrent jurisdiction.

As to whether the Federal Employers' Liability Act applied to these cases so that compensation could not be granted and whether the compensation act was limited to accidents within the State, Judge Wheeler, who delivered the opinion of the court, said in part:

Again, it is insisted that an action for the injury in question is given in the admiralty court, and hence, under section 40 of the compensation act, it does not apply to this case. By this section the liability must have occurred in interstate or foreign commerce. There is nothing in the record to indicate whether the injury occurred while the employee was engaged in interstate or foreign commerce. If this be disregarded, it is still manifest this section has no application. The laws of the United States do not provide for compensation such as this contract gives, nor for a recovery for death or injury not predicated upon fault. Congress has not as yet legislated in regard to injuries occurring in interstate commerce by water; the State therefore may. (Stoll *v.* Pacific Steamship Co., 205 Fed. 169 [Bul. No. 152, p. 213].)

Presumably section 40 and similar provisions in other compensation acts have reference to the Federal Employers' Liability Act. Where the injury arises from a cause not covered by the Federal act, this section does not apply. To come within the Federal act there must be interstate traffic, interstate employment, and negligence. Though the first two conditions be present in this proceeding, the latter is not. (Note to 6 Neg. and Compensation Acts, p. 920.) It is not claimed, nor do we see how it could be with success, that a State may not provide that contracts of employment entered into without its bounds may include compensation for injury arising out of and in the course of the employment in another jurisdiction.

We come then to the next question, whether our compensation act provides for compensation for injuries received outside our State

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and arising out of and in the course of the employment. The respondent insists that our act has no extraterritorial effect. That is not the precise question to be determined, but, rather, whether our act provides for compensation arising out of a contract of employment authorized by our act, for injuries suffered without our jurisdiction. If our act authorizes such a contract, recovery may be had; otherwise not.

Unless the intention to have a statute operate beyond the limits of a State is clearly expressed or reasonably to be inferred from the language of the act, or from its purpose, subject matter, or history, the presumption is that the statute is intended to have no extraterritorial effect. A like presumption should control the operation of a contract based upon a statutory authority.

We find no clearly expressed intention in our act that the contract authorized should operate without the State. If found in the act, it must be found as an inference reasonably to be inferred from the language of the act, read in the light of its purpose, subject matter, and history.

Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost in the case of every injury not caused by the willful and serious misconduct or intoxication of the injured employee to the industry in which it occurred. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the State, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the State, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The State boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system.

Specific provisions of the act covering "any action," "any injury," records of injuries sustained by employees without reference to place, and the like, were discussed, and from these terms of general inclusiveness the court concluded that, as the act was contractual, the contracts arising under it will, "unless a contrary intent appears, be found to cover injuries without as well as within the State."

The other questions of law submitted to the supreme court were decided in favor of the claimants, and the superior court was advised to render judgment dismissing the appeals of the company.

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WORKMEN'S COMPENSATION—FEDERAL AND STATE STATUTES—INTERSTATE EMPLOYEE INJURED WITHOUT NEGLIGENCE OF EMPLOYER—*Staley v. Illinois Central Railroad Co., Supreme Court of Illinois (June 24, 1915), 109 Northeastern Reporter, page 342.*—Laura Staley proceeded against the company named under the Illinois Workmen's Compensation Act for the death of her husband. He was run over and killed on March 28, 1913, by a switch engine of the company, his employer, in its yards near Centralia, Ill. The company set up in defense that the cause of action stated was not comprehended in the field of the workmen's compensation act, but was within the scope of the Federal Employers' Liability Act. The circuit court before which the trial was held found in the plaintiff's favor, and entered judgment for $3,500, payable in a lump sum. This judgment the appellate court affirmed, with the exception of the amount, which it reduced to the present value of $3,500, but the supreme court reversed the judgments.

The evidence in the case showed that the employee was on the way to repair an engine engaged in switching and handling interstate commerce, and was run down by an engine engaged in handling all classes of freight, both interstate and intrastate. The court held that he was clearly engaged in interstate commerce, and the question then arose whether, where there is no negligence proved on the part of the employer, the matter is so covered by the Employers' Liability Act as to exclude the operation of a State workmen's compensation act. Referring to the general principle of law involved in case of such conflict of statutes, and to certain decisions, Judge Carter, who delivered the opinion, said:

> The power of Congress to regulate commerce among the several States is supreme and plenary under the Constitution. The reservation to the States to legislate on questions affecting interstate commerce is only of that authority which is consistent with and not opposed to the grant of Congress, which extends to every instrumentality or agency by which interstate commerce may be carried on. The decisions hold that with respect to certain subjects embraced within the grant of the Constitution which are of such a nature as to demand that if regulated at all their regulation should be prescribed by a single authority the power of Congress is exclusive, while in other matters admitting of diversity of treatment, according to the special requirements of local conditions, "the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation." (Simpson *v.* Shepard, 230 U. S. 352, 33 Sup. Ct. 729.)
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> The question in the case before us is not whether the deceased was engaged in interstate commerce at the time of the accident, for that is conceded. Neither is it necessarily the question whether the workmen's compensation act affected directly and substantially an instru-

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ment of commerce. The argument of counsel for plaintiff in error that the workmen's compensation act affects the employee "solely as a member of society and not as an instrument of society," and is therefore within the police power of the State, can not be sustained if Congress has by legislation acted on the "subject matter" or the "particular subject" or in the "same field" (as those terms are understood in the decisions) as that covered by the Illinois Workmen's Compensation Act.

In Atlantic Coast Line Railroad Co. *v.* Georgia (234 U. S. 280, 34 Sup. Ct. 829 [Bul. No. 169, p. 182]), the court sustained a State statute requiring locomotives engaged in interstate commerce to be equipped with electric headlights of a certain candlepower, as a police regulation [Congress not having acted in this field].

In Southern Railway Co. *v.* Railroad Commission of Indiana (236 U. S. 439, 35 Sup. Ct. 304 [see p. 186]), the court had under consideration an Indiana statute requiring railway companies to place secure grab irons and handholds on the ends and sides of cars engaged in interstate commerce, and it was held that until Congress had entered that field the State could legislate as to the equipment of cars in such a manner as would only incidentally affect, without burdening, interstate commerce, but also held that Congress had entered upon that field and therefore superseded existing State legislation on the same subject.

The court then quoted a part of the Employers' Liability Act, and discussed the subject matter covered by that act. Quotations from opinions dealing with this point were given, in answer to the question—

What is the "subject," "particular subject," "subject matter," "field," "particular field," or "chosen field" covered by the Federal Employers' Liability Act?

Some of these follow:

The first and perhaps the leading case discussing and construing the present act is Mondou *v.* New York, New Haven & Hartford Railroad Co. (223 U. S. 1, 32 Sup. Ct. 169 [Bul. No. 98, p. 470]). In that case the court said:

"Prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. [Citing authorities.] The inaction of Congress, however, in no wise affected its power over the subject. [Citing authorities.] And, now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In Michigan Central R. Co. *v.* Vreeland (227 U. S. 59, 33 Sup. Ct. 192 [Bul. No. 152, p. 88]), the court, in discussing the scope of the Federal Employers' Liability Act, said:

"We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is

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one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States. * * * By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States. * * * It therefore follows that in respect of State legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States." [Citing authorities.]

In Wabash R. Co. *v.* Hayes (234 U. S. 86, 34 Sup. Ct. 729 [Bul. No. 169, p. 77]), it was said:

"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."

Judge Carter therefore held, in accordance with the precedents cited, that the Employers' Liability Act so covers the field that the workmen's compensation act is not applicable in cases like the present, and that the judgment below must be reversed and the case remanded, saying in part:

We have referred to and commented on practically every decision of the United States Supreme Court bearing upon this question. It is clear that there can be no "recovery" under the Federal Employers' Liability Act, properly construed, in the absence of negligence on the part of the employer, as that term is used in the statute and in the decisions construing the same. But if the question of negligence alone determines the applicability of the Federal law, then, before it can be held that such law is applicable, there must be a final adjudication as to whether the injury resulted from negligence. Obviously, Congress legislated on more than the subject of negligence. It legislated on that but also on the amount of recovery, and superseded all State laws on that subject, as shown by the decisions already cited. It also legislated on the subject of limitation when an action could be begun. The question of comparative negligence of employee and employer, assumed risk, contributory negligence, liability under indemnity or insurance contracts, under the wording of the act are so involved with that of negligence that it would seem impossible to separate the cases under the Federal Employers' Liability Act solely on the line of the negligence of the employer.

Counsel for plaintiff in error argue that the title of the Federal Employers' Liability Act, especially the phrase "certain cases," shows that Congress did not intend to cover all cases of injuries occurring on railroads while engaged in interstate commerce. With this we

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do not agree. We think the phrase "in certain cases" was inserted in this title to obviate some of the defects suggested in the title of the act held unconstitutional in 207 U. S. 463, 28 Sup. Ct. 141, supra, and that the "certain cases" was meant to limit it to those cases where the liability arose in interstate commerce. The wording of the statute and the reasoning in these decisions lead inevitably to the conclusion that "the particular subject," "subject matter," "field," or "chosen field" taken possession of by the Federal Employers' Liability Act was the employer's liability for injuries to employees in interstate transportation by rail, and the real question, as clearly stated in distinct terms in several of the cases that we have quoted from in deciding whether the Federal statute is applicable, is whether the injury for which the suit was brought was sustained while the company and the injured employee were engaged in interstate commerce. The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal Government.

WORKMEN'S COMPENSATION—FEDERAL AND STATE STATUTES—INTERSTATE EMPLOYEE INJURED WITHOUT NEGLIGENCE OF EMPLOYER—*Winfield v. New York Central & Hudson River Railroad Co., Supreme Court of New York, Appellate Division, Third Department (May 7, 1915), 153 New York Supplement, page 499.*—James Winfield made claim for compensation against the railroad company named, and an award was made in his favor by the commission, from which the company appealed. While he was tamping ties upon a track used in both interstate and intrastate commerce, a stone flew up and injured his eye. There was no dispute that if he had been injured by the employer's negligence he might have brought action under the Federal Employers' Liability Act, and the question arose whether, as the company contended, he was confined to a remedy under that act, or whether he was entitled to benefits under the compensation act. The majority of the court held that the award of the commission should be affirmed, two judges dissenting. Judge Kellogg, who delivered the majority opinion, said:

The Federal Employers' Liability Act is entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases." The title clearly indicates that it does not cover all the grounds of liability, but that the act relates only to the particular cases expressly provided for in it. The provisions of the act relate solely to liability on account of negligence. The several States, therefore, in the exercise of their police power, may make such laws and regulations for the protection of the laborers within the State as may seem best, unhampered by the Federal Employers' Liability Act, except so far as they attempt to prescribe a liability for negligence or the remedies therefor in interstate commerce.

The workmen's compensation law has no reference to the question of the negligence of the employer and creates no liability or remedy for negligence.

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The State insurance fund makes the compensation to the injured employee. By insuring in the State fund the employer is under no liability to pay, and does not pay, anything to his employee. The premium of insurance represents the only expense to him imposed by the law, and the constitution provides that the moneys paid by him under the act shall be held to be a proper charge in the cost of operating the business.

The employer has been guaranteed by the act protection from any liability on account of accidents occurring in its business, and the employee has been promised protection from such accidents. The State fund, therefore, would not be in a good position to contend that the moneys so received were not applicable to compensate for an injury received in an employment which it has assessed and insured. The moneys in its hands for the benefit of injured employees would in part be paid for carrying this very risk.

It is true that the statute permits the compensation commission to accept the employer as a self-insurer, if he satisfies it of his ability to respond or furnishes to it proper security; but, when he becomes a self-insurer, he in effect takes the place of the State fund as an insurer, and his liability therefor under the act is not strictly as an employer, but as a self-insurer. He has taken the place which the statute primarily intended the State fund to take, and necessarily assumes corresponding liabilities. He may choose not to be a self-insurer, and not to insure in the State fund, and to obtain insurance in a company or association authorized to make such insurance; but the company or association is simply taking the place of the State fund. The self-insurer, the company, or the association pays the losses to the fund. The fund, in all cases, through the commission, makes the compensation to the employee.

The statute should be given a broad and liberal construction, in order to carry out the beneficent purposes for which it was enacted. It is not a law fixing a liability for negligence, or fixing a liability upon or creating a cause of action against the employer, but, as we have said, is in substance a provision that the State will make compensation to injured employees in hazardous employments from moneys which it has collected or secured from them. It is a State system of insurance. No liability other than for premiums is imposed upon the employer, except by way of penalty. He may relieve himself from the payment of premiums by becoming a self-insurer.

An employee is not prejudiced by the fact that his employer qualifies as a self-insurer, or insures otherwise than in the State fund. The rights of the employee under the act do not depend at all upon the manner in which his employer has elected to carry his insurance. The Federal statute giving a remedy in certain cases of negligence does not interfere with the rights of the State to require that every employee in a hazardous employment shall be insured.

It is urged that the claimant may claim under the Federal and the State statutes, thus securing a double compensation. That question must be met when it arises. This resident of the State, working as a common laborer at the place of his residence upon a railroad track, who perhaps never was in or upon a railroad car, should not be deprived of the benefits of this remedial statute, enacted for his benefit, simply because at times interstate trains passed over the

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road upon which he was working. The statute should not be killed by refinements, or construed to death, but, within the spirit of section 21 of the act, should be applied to every case arising in such hazardous employments where a Federal statute does not necessarily conflict with it.

Congress has not established any general rule of liability or method of compensation between employers and employees. It has by the Federal Employers' Liability Act only regulated the method of enforcing liability in cases of negligence, and that statute is not the action of Congress referred to in section 114 of the compensation law. If Congress makes a general regulation as to liability or compensation for accident occurring from the business without regard to fault as a cause thereof, as distinguished from actions of negligence, then section 114 must be considered.

This case came before the court of appeals of the State on appeal from the foregoing ruling, and was there affirmed (110 N. E. 614). This court pointed out the exclusiveness of the Federal act in its field, but maintained that the act was of such restricted scope as to leave room for the operation of the State law. There could be no double compensation, since if the Federal law applied it would be exclusive; and if it did not, only the State law affords relief. The employer's insurance covers his liability under the State law, and only that; the boundary between the two laws is sufficiently clear, and the State may act so far as Congress has not acted, and until it shall see fit to do so.

WORKMEN'S COMPENSATION—FEDERAL AND STATE STATUTES—INTERSTATE EMPLOYEE INJURED WITHOUT NEGLIGENCE OF EMPLOYER—EXTRATERRITORIAL EFFECT OF STATUTE—*Rounsaville v. Central Railroad Co., Supreme Court of New Jersey (June 7, 1915), 94 Atlantic Reporter, page 392.*—Proceedings were commenced by George A. Rounsaville to obtain compensation, and the judgment in the court of common pleas was adverse to him. Two questions were in dispute; one, whether compensation was barred by the admitted fact that the workman was injured while employed on an interstate train, and the other, whether it was barred by the fact that the accident occurred in another State, although the contract of employment was clearly a New Jersey one. The court reversed the decision below on these points, and decided that compensation might be granted. Judge Swayze, who delivered the opinion, said in part:

The Federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. No new right of action is given. All that is done is to take away certain defenses which had come to be thought unjust. The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby.

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The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the workmen's compensation act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract. A new right of action is given, of a character unknown to our law, at least for several centuries. The liability of the employer depends, not on any fault of his own or his servants, but on whether, by act or by silence, he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury. Employer and employee adopt, as a part of their contract, a novel method of procedure, in which the liability and the compensation are determined by the judge, instead of by a jury. And the compensation is ordinarily meant to be paid by installments, in lieu of wages, as it were, and may be changed if circumstances change. The scheme is more like a pension scheme than a liability for a breach of contract, or damages in tort. The difference between the two kinds of legislation is illustrated in our act. Section 1 is an employer's liability act similar to the act of Congress, and regulates the liability in a common-law action of tort. Section 2 creates and regulates the new statutory right. But for paragraph 8 of section 2 there might have been a double recovery, a recovery for the tort in a common-law action, and a recovery of the statutory compensation by means of the statutory procedure. Nor would that double recovery have been illegal, however unjust it might be and was in fact considered to be by the legislature, for compensation by way of pension from the master is quite different in character from compensation by a tort-feasor, master, or third person, for a wrong not arising out of contract.

We think it clear that the act of Congress deals with an entirely separate matter from the act of our own legislature. No confusion would have arisen if the distinction recently pointed out by Justice Trenchard had been observed in the early days of this kind of legislation. (Gregutis *v.* Waclark Wire Works, 92 Atl. 354 [Bul. No. 169, p. 255].)

The question whether our act applies in a case where the accident happens in another State is novel. We are dealing with the question, whether a New Jersey court will enforce a New Jersey contract, according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured, in an action on a contract of accident insurance, or the place of death of the assured, in an action on a contract of life insurance.

There is no proof in the pending case as to the law of Pennsylvania. If it be said that the Pennsylvania law may provide a different scheme of compensation, and that the effect of our decision may be to allow a double recovery, we can only say that questions of that kind had better be dealt with as they arise, and in the light of the exact scheme of compensation that may be involved. It is enough for the present to say that recovery of compensation in two States is no more illegal, and is not necessarily more unjust, than recovery upon two policies of accident or life insurance.

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WORKMEN'S COMPENSATION—FEDERAL AND STATE STATUTES—INTERSTATE RAILROAD OPERATING CANAL—DEPENDENTS—*Hammill v. Pennsylvania Railroad Co., Supreme Court of New Jersey (June 4, 1915), 94 Atlantic Reporter, page 313.*—Delia Hammill proceeded as administratrix under the compensation act for the death of her brother in the employment of the defendant company, and was awarded compensation by the court of common pleas of Middlesex County. The employee was drowned when he fell off a canal boat on which he worked, the railroad company named operating the canal as lessee.

The employee had no other dependents, and the company contended that the petitioner was not such. The deceased and another brother considered their sister's residence as their home as far as they had any; they stopped there from Saturday night until Monday morning each week, and each paid her $5 per week. The supreme court held that the finding below was justified, that these payments were materially greater than the mere value of board and lodging, and that therefore they were contributing to her support and she was an actual dependent.

The company contended that the Federal Employers' Liability Act and not the workmen's compensation act applied to the case. This contention was also held untenable, Judge Parker, who delivered the opinion, saying:

It is further argued that the canal is an interstate waterway; ergo, the Federal Employers' Liability Act applies; ergo, our workmen's compensation act does not apply. Conceding the interstate character of the canal, we think these deductions are erroneous. The Federal act does not apply, because by its terms it affects only common carriers by railway. (Act Apr. 22, 1908, ch. 149, 36 Stat. 65, Comp. Stat. U. S. (1913) sec. 8657 et seq.) It is true that the employer is a railroad company, but as such employer of deceased it was operating a canal and not a railroad. Again, the Federal and State acts are not in pari materia. The one is an act creating a liability to the employee as in tort, based upon common-law negligence, or the failure to comply with some statutory provision for the safety of the employee; the other, so far as its section 2 is concerned, is a compensation act purely contractual in character, and requiring compensation for injury or death to be made as an incident of the mere relation and quite irrespective of any question of negligence on the part of the employer. It was manifestly intended, among other things, to give relief in just such cases as the present one, where no claim of negligence on the part of the employer could reasonably be made. As to this class of cases at least, we deem the Federal act not to be exclusive. The authorities cited by prosecutor will be found to involve in each case a conflict between the Federal act and a State act imposing a liability as in tort for breach of a statutory or common-law duty.

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The award had included $100 for funeral expenses. The law originally allowed funeral expenses only in cases where there were no dependents. An amendment of 1914 allows them in all cases, but this was not enacted until after the accident in question. The award was therefore reduced by that amount, and as so modified was affirmed.

WORKMEN'S COMPENSATION — HAZARDOUS EMPLOYMENT — DRUGGIST'S EMPLOYEE—*Larsen v. Paine Drug Co. et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 759.*—Kris Larsen was killed while in the employ of the company named, and his widow, Ingeborg Larsen, proceeded for compensation. An award was made, and the employer and insurer appealed.

The commission found that Larsen was employed as a porter, elevator man and general utility man by the company, which was in the business of manufacturing and selling drugs, chemicals, medicines and pharmaceutical preparations at both retail and wholesale. The court held that it might reasonably be inferred that a wholesale druggist manufactured drugs. The commission further found that the employee at the time of the accident was engaged in building a shelf near an elevator well, and while reaching into the well to obtain a board which he had placed there, fell down the shaft and was instantly killed. The court upheld the award of compensation, Judge Howard, who delivered the opinion, saying:

A general utility man, engaged in an establishment where drugs and chemicals are manufactured, must be presumed to participate more or less in the work of the establishment. The deceased was engaged at the instant of the accident in building a shelf, but in order to do this it may have been necessary to handle the drugs and chemicals in the building; that is, move them so as to have room to build the shelf, and after it was built place them upon the shelf. In fact, the evidence before the commission shows that the deceased was required to rearrange cases and do work of that character. In McQueeney *v.* Sutphen & Hyer (153 N. Y. Supp. 554 [see p. 264]), this court said:

"If the employee is engaged in an employment declared hazardous by this law, but at times may work in a nonhazardous employment, it is not unreasonable that the injury should be considered within the act, if the employer fails to show all the facts."

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—HARVESTING ICE FOR COMPANY PREPARING FOODSTUFFS—*Aylesworth v. Phoenix Cheese Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 916.*—

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Earle Aylesworth, while employed by the cheese company in harvesting ice, froze some of his fingers, and was awarded compensation amounting to $159.50. Harvesting ice is not a hazardous employment mentioned in the compensation act, while preparation of foodstuffs, in which the company was presumably engaged, is included. It was held that since the employee's regular work was the harvesting of ice, and he had nothing to do with the preparation of foods, he was not entitled to compensation, and the award was reversed.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—JANITOR—PUTTING OUT FLAG—*Gleisner v. Gross & Herbener et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 946.*—Albert Gleisner suffered a fracture of the femur while in the employ of the company named. His employment was as janitor of a building, which is not a hazardous employment under the law. Group 42 of the compensation act includes: Structural carpentry; painting; construction, repair and demolition of buildings; plumbing; heating engineering; covering of pipes or boilers. It appeared that the employee sometimes engaged in some of the employments named in this group. The industrial commission's finding was that Gleisner slipped and fell "while going up on the roof to perform some work on the flagpole." The notice of injury and claim for compensation stated that he was going to hang out the flag. The court set aside an award in the claimant's favor, Judge Woodward saying in the concluding portion of his opinion:

Where, as apparently here, the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually or incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute.

It is clear that additional evidence must be adduced and more comprehensive findings made before a janitor, who casually and incidentally did plumbing, repair, and heating work, may receive compensation under the statute for injuries received while ascending a ladder to the roof for the purpose of hanging a flag.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—PREPARATION OF MEATS—*Kohler v. Frohmann et al., Supreme Court of New York, Appellate Division, Third Department (May 5, 1915), 153 New York Supplement, page 559.*—Katie Kohler made claim for compensation for herself and children for the death of Nicholas

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Kohler. The employer was a retail butcher, and the employee was injured while grinding meat in an electric meat chopper. He lost four fingers of his right hand, which resulted in pneumonia, causing his death. It was contended that he was engaged in an occupation declared hazardous by the statute. Group 30 is "Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue." The court held that in the absence of evidence to the contrary he had been properly held to be within the statute by the commission, which made an award to the claimants. Judge Kellogg, in delivering the opinion, said:

It does not appear what kind of meat he was grinding or for what purpose it was being ground. The employer, in his report, gives no further details of the matter. Evidently he knew, or had the means of knowing, the particular purpose for which the chopper was being used at the time of the accident. It does not appear that the intestate was not grinding the meat for sausage, or to make some other preparation of meat.

Section 21 of the act called upon the employer for more particular information than he gave. The position most favorable to the employer is that a part of his business might fall within the hazardous employment and a part not, and if he claimed the injury occurred outside of the hazardous employment it rested with him to show the facts. In McQueeney *v.* Sutphen & Hyer et al. (153 N. Y. Supp. 554 [see p. 264]), we have considered the application of this section. The award should be affirmed.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—PREPARATION OF MEATS—HOTEL EMPLOYEE—*De la Gardelle v. Hampton Co. et al., Supreme Court of New York, Appellate Division, Third Department (May 5, 1915), 153 New York Supplement, page 162.*—Anna de la Gardelle claimed compensation for the death of her husband, Peter, while in the employ of the company named. He was a butcher, or assistant to the chef, at the Hampton Hotel in Albany, and his duty was the distribution of meats to the cooks as ordered. While boning a leg of mutton on the block, his knife accidentally slipped and cut an artery in his groin, resulting in death. The workmen's compensation commission decided that he was not engaged in a hazardous employment within the meaning of the workmen's compensation law, and denied the claim, whereupon the claimant appealed, contending that he had been so engaged within groups 30 and 33, which read as follows:

"Group 30. Packing houses, abattoirs, manufacture or preparation of meats, or meat products, or glue."

"Group 33. Canning or preparation of fruit, vegetables, fish, or foodstuffs; pickle factories and sugar refineries."

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The court concurred with the commission in holding that work such as that in which the employee was engaged was not included in the meaning of the law, Judge Lyon, who delivered the opinion, saying the provisions quoted could not, in his judgment, be regarded as covering any employment consisting of the preparation of meat or foodstuffs for cooking purposes, in the ordinary course of household duties, domestic service, or the conduct of hotels or restaurants in which foods and meats are prepared and cooked for eating on the premises.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—PRESUMPTION OF INCLUSION OF EMPLOYEE—*McQueeney v. Sutphen & Hyer et al., Supreme Court of New York, Appellate Division, Third Department (May 5, 1915), 153 New York Supplement, page 554.*—Thomas McQueeney made claim for compensation for an injury against the employer named and the insurer, and an award was entered in his favor by the commission, upon which the employer and insurer appealed. The business of the employer was "polishing plate and window glass, jobbers and manufacturers of mirrors and beveled plates." The employee was injured while assisting two other employees in raising a light of plate glass from the cutting table. The commission found that his employment was within group 20 of section 2 of the compensation law, which is: "Manufacture of glass, glass products, glassware, porcelain or pottery." As to this and other questions arising in the case, Judge Kellogg, who delivered the opinion affirming the award, said for the most part:

Cutting up and beveling glass, or making looking-glasses of it, may be considered a manufacture of glass products within the meaning of this law.

The appellants contend that it does not appear that the claimant was engaged in one of the hazardous employments defined by section 2 of the law; that it does not appear that the glass which the claimant was handling was being made into looking-glasses or beveled glass plates, or even was to be cut into small-sized plates; that for all that appears he may have been packing glass which had been sold to a customer in the same condition it was in when received at the shop. This contention overlooks the provision of section 21 that in any proceeding for the enforcement of a claim it shall be presumed, in the absence of substantial evidence to the contrary, "(1) that the claim comes within the provisions of this chapter." The presumption in itself is not unreasonable.

If the exact cause of the injury is not made plain to the commission, the employer is at fault, as he failed properly to report the accident. He has every means of knowing the facts, and should not benefit by withholding them. If the employee is engaged in an employment declared hazardous by this law, but at times may work in a nonhazardous employment, it is not unreasonable that

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the injury should be considered within the act if the employer fails to show all the facts.

The State, in a way, assesses upon such hazardous employment such a sum as may fairly meet its risks, collecting the money in advance, or requiring security for its payment, for the benefit of the injured employees. The amount it collects in each year from each employment is based upon the number of men employed, the pay rolls, and the particular nature of the employment. The commission, however, permits an employer to contract for insurance by which, in cases of an injury, the amount of the award shall be paid by the insurance carrier to the State for the benefit of the injured persons, and also permits the employer to be a self-insurer upon his satisfying the commission that he is able to pay and will pay to it the sums necessary to meet awards for the injuries received by employees in his business. In effect, therefore, the State through its commission, undertakes to make compensation for injuries received in these hazardous employments from moneys which the employer has in advance paid or secured to it under a law which declares that such payments may be treated as a proper charge of the cost of operating the business, thus in the end putting the premium upon the ultimate consumer. In contemplation of the act and the constitutional provision under which it was passed, accidents in the employment finally fall upon the consumer, and not upon the employee or employer; the State commission standing between the employee, the employer, and the ultimate consumer.

We therefore have a situation in which, if the employer had insured in the State fund, the insurance premium would rest upon the basis that, when at work for his employer, the claimant, McQueeney, was to be engaged in the hazardous employment all the while, and the premium having been exacted upon that basis, prima facie the loss should be met upon that basis.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—"VEHICLE"—*Wilson v. C. Dorflinger & Sons et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 857.*—William H. Wilson was killed when he accidentally fell down an elevator shaft in the establishment of his employer, the company named. He was a porter and shipping clerk, and incidentally operated the elevator when he had occasion to use it, there being no regular operator. The court held that the employee was included within the classification of group 41, which includes operation of vehicles otherwise than on tracks, deciding that the elevator car was such a vehicle.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—WAREHOUSING—*Mihm v. Hussey et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 860.*—William E. Mihm proceeded against his em-

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ployer, William H. Hussey, and the insurer, for compensation for injuries sustained while employed as a shipper, and engaged in placing barrels of vinegar in a storehouse maintained by the employer, who was in the wholesale produce business. The State industrial commission submitted to the court the question whether the employee was engaged in a hazardous employment, it being alleged that the occupation was included in group 29, which embraces "warehousing." Judge Lyon, after stating the facts and quoting definitions of "warehousing" and "employment," said:

Claimant's employer was not carrying on the business of warehousing for pecuniary gain; hence the submitted question should be answered in the negative.

WORKMEN'S COMPENSATION—INJURY—PROXIMATE CAUSE—*Great Western Power Co. v. Pillsbury et al., Supreme Court of California (Oct. 18, 1915), 151 Pacific Reporter, page 1136.*—On July 1, 1914, Ernest Dreyer was in the employ of the company named, shaving and painting poles. He accidentally caught his left hand between a pole and another piece of timber, bruising the flesh and knocking a small piece of skin from the back of the hand. He continued at work on July 2 and 3, using the other hand only. July 4 was Saturday, and when work was resumed on Monday he was unable to go to work because of the condition of the hand and the severe pain. Blood poisoning appeared to be the cause of the condition, and the time when the pain and suppuration ensued was said by physicians to be consistent with the period of development of a common germ causing this condition, if the bacilli had entered at or about the time of the accident. An award of $78.97 was made, with the further sum of $9.37 weekly, beginning September 17, 1914, and continuing until the termination of the disability. This award was affirmed, Judge Shaw saying in the opinion:

We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces; that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses. The accident was the proximate cause of the injury, within the definition of the term "proximate cause" as elaborately stated by Justice Henshaw in Merrill *v.* Los Angeles, etc., Co. (158 Cal. 503, 111 Pac. 534).

WORKMEN'S COMPENSATION—INJURY—PROXIMATE CAUSE—*Kill v. Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (Apr. 13, 1915), 152 Northwestern Reporter, page 148.*—

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Edward A. Kill cut his left wrist on April 16, 1915, while in the employ of the Plankinton Packing Co. as a tinsmith. The company sent him to a physician, who treated him, and on April 25 the wound was practically healed. On the evening of April 26 the injured man engaged in a boxing bout, and the wrist afterwards grew worse and became infected, finally resulting in the loss of bones of the hand and wrist, incapacitating him from following his trade. The commission found that the bacteria had been walled off by natural processes at the time he engaged in the boxing match, and would not have done further harm, and eventually would have been expelled from the system but for the strenuous exercise which stirred them to renewed activity and at the same time lessened his resisting power. The commission on these findings dismissed the application for compensation, and the circuit court of Dane County entered judgment confirming this order. The supreme court affirmed the judgment, holding that the injury was not the proximate cause of the ultimate disability. Judge Kerwin, in delivering the opinion, said in part:

In the instant case the bout which was subsequent to the original injury intervened and was the efficient cause and had its origin independent of the original cause and superseded it and thereby became the proximate cause of the injury. [Cases cited.]

As appears from the statement of facts, the commission found that had the applicant refrained from entering the boxing bout, and given his wrist only moderate exercise for a few days more, no serious result would have followed. This finding is supported by the evidence, and establishes the fact that the boxing bout proximately caused the injury complained of, within the meaning of the workmen's compensation act; therefore the decision below is right and must be affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ATTEMPTED RESCUE—*Dragovich v. Iroquois Iron Co., Supreme Court of Illinois (Oct. 27, 1915), 109 Northeastern Reporter, page 999.*—Peter Dragovich brought proceedings for compensation for the death of Frank M. Markusic, which occurred while the latter was in the employ of the company named. Judgment was awarded in the sum of $3,500 in the circuit court of Cook County, on an appeal by the employer from the report of the board of arbitration.

One point urged by the company was that the act had not been passed by the legislature in accordance with constitutional provisions. The court, however, rejected this contention on the evidence.

It appeared that the employee, in running to aid another employee who had fallen through an opening in the floor into hot water, and who shouted for help in Croatian, the native language of both, had himself fallen into the hole. This opening could not be seen on ac-

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count of steam arising from it. The other employee was rescued by others about the same time that Markusic fell in. The latter died two days later from the effects of the scalding. The court held that the injury arose out of and in the course of employment, and affirmed the award. Judge Carter, who delivered the opinion, referring to the phrase "arising out of and in the course of employment," said:

This provision of the statute has never been construed by this court, but somewhat similar acts have been construed by the courts in other jurisdictions. Under these authorities it is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman, but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees. From every point of view it was the duty of the deceased, as a fellow employee, in the line of his duty to his employer, to attempt to save the life of his fellow employee under the circumstances here shown. That he failed in his attempt does not, in the slightest degree, change the legal situation.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—BOARDING CAR AFTER WORK TIME—*De Voe v. New York State Railways, Supreme Court of New York, Appellate Division, Third Department (Sept. 15, 1915), 155 New York Supplement, page 12.*—The widow of Edward De Voe was awarded compensation of $5.59 weekly during widowhood, together with funeral expenses, for the death of her husband. He had been in the employ of the company named, which was a self-insurer, as a motorman, and was run down and killed by an automobile while going from the car barn to take a car to go and have his watch tested. This testing was a requirement of his employment, and was to be done every two weeks under penalty. Employees were not paid for their time in having the test made, but the person making it was designated and paid by the company. The court set aside the award, Judge Woodward, who delivered the opinion, saying in part:

The crucial question at all times is whether he is engaged in the hazardous employments mentioned in the statute, for it was only as to these that the legislature has required the employer to provide compensation.

The evidence is that the deceased had closed his day's work, and made his report of his time in writing, on which his wages were based, and that he had passed out of the employer's barn, and had reached the middle of the street, when he was struck by a passing automobile, and if the master is liable here he must be so because of a general insurance liability. It can not be under the terms of the

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workmen's compensation act. The State has not yet required the employer to become a general insurer of the lives of his employees. It has simply required that they be protected while engaged in the performance of certain hazardous employments.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—BURDEN OF PROOF—*In re Savage, Supreme Judicial Court of Massachusetts (Nov. 23, 1915), 110 Northeastern Reporter, page 282.*—Mrs. Eva Savage proceeded for compensation for the death of her husband, Joseph W. Savage. The industrial accident board decided adversely to the claimant, and the superior court of Worcester County entered a decree accordingly. The decree was affirmed, Judge Carroll, who delivered the opinion, saying:

Under the workmen's compensation act, the findings of the industrial accident board are equivalent to the verdict of a jury or the findings of a judge and are not to be set aside if there is any evidence to support them. [Cases cited.]

The industrial accident board has found that:

"The employee, Joseph W. Savage, did not receive a personal injury arising out of and in the course of his employment; that his death occurred by reason of his unexplained absence from the car which he was engaged in unloading; that his presence on the railroad track was unnecessary under the circumstances and subjected him to a needless risk of injury from moving railroad trains; and that, therefore, the widow, Mrs. Eva Savage, is not entitled to compensation under the statute."

The plaintiff is not entitled to recover under this statute, unless the injury arose out of and in the course of her husband's employment; and to establish these facts the burden of proof rests upon her. It is not enough "to show a state of facts which is equally consistent with no right of compensation as it is with such right." There being no evidence to show that the fatality was caused by her husband's employment or that it occurred while he was engaged therein, she can not recover. [Cases cited.]

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CLEANING MOTORCYCLE USED IN BUSINESS—*Kingsley v. Donovan et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 801.*—Harry H. Kingsley proceeded against his employer, William F. Donovan, and the insurer, for compensation for the loss of the distal phalanges of the first and second fingers of his right hand. While cleaning the clutch of his motorcycle the fingers were caught in the chain guard, and portions of them taken off. The motorcycle was owned by the employee, who used it in riding to and from his work, and occasionally in the business of the

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employer. The court, with one judge dissenting, affirmed an award of the compensation commission, Judge Kellogg saying in the opinion delivered by him for the court:

The appellants contend that the accident was not one arising out of and in the course of employment. There is some evidence tending to prove those facts, and under the workmen's compensation law the decision of the commission is conclusive upon the facts. Clearly, if the bicycle was only used for the convenience of the claimant in bringing him to and from his place of work, the case would not be within the act. But the evidence shows that from time to time it was used in the business of going to and from the work off the premises, and that at other times, when it had been cared for during working hours, no question had been raised by the employer. It could not be used in the business, unless kept in proper condition. The fact that the workman was engaged upon it near the place of business and during business hours, and that it was frequently used in the business, do not make the findings of the commission unreasonable.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH BY LIGHTNING—*Klawinski v. Lake Shore & Michigan Southern Railway Co., Supreme Court of Michigan (Apr. 19, 1915), 152 Northwestern Reporter, page 213.*—The widow of a railroad section man who was killed by a stroke of lightning while he was in a barn in which he had taken refuge from a storm at the direction of the foreman made application for compensation. The industrial accident board made an award in her favor, and the company appealed. The supreme court reversed and set aside the award, saying in the opinion delivered by Judge McAlvoy:

It is our opinion that in the instant case claimant's husband did not come to his death as the result of "a personal injury arising out of and in the course of his employment," within the meaning of the workmen's compensation law. It is clear from the stipulated facts that this injury was in no way caused by or connected with his employment through any agency of man which combined with the elements to produce the injury; that plaintiff's decedent by reason of his employment was in no way exposed to injuries from lightning other than the community generally in that locality.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH BY LIGHTNING—*State ex rel. People's Coal & Ice Co. v. District Court of Ramsey County, Supreme Court of Minnesota (June 4, 1915), 153 Northwestern Reporter, page 119.*—Caroline Newman brought action for compensation for the death of her son, employed by the company named in the title of the case. Compensation was awarded her by the district court, and the company brought certiorari to review the decision.

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The employee was the driver of an ice delivery team, and was required to cover his route regardless of weather, though he was permitted to seek shelter from storms. On the morning of September 1, 1914, during a severe rainstorm accompanied by lightning, he was on the usual route. He left the team in the street and went toward a large elm tree at the side of the road, either for protection from the storm or on his way to solicit orders. The tree was struck by lightning, and he was killed.

The court reviewed the few and conflicting cases in Great Britain and this country involving death by lightning, and held that, since the Minnesota law makes the review by the court one on questions of law only, and since there was evidence to sustain the finding that the injury arose out of the employment, it was not called upon to disturb the judgment rendered.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DOING FORBIDDEN ACT—*Smith v. Corson, Supreme Court of New Jersey (Feb. 14, 1915), 93 Atlantic Reporter, page 112.*—Lillie B. Smith, administratrix, petitioned in the court of common pleas of Cape May County against Leander Corson for benefits under the workmen's compensation act. Her decedent had been employed as a carpenter, and was killed on the 21st day of April, 1913, by a fall from a board laid across a scaffold. The trial judge found as facts that the deceased was not a strong, healthy man, was employed at less pay than the regular carpenters, and was expressly told by his employer not to go upon the scaffolds nor do any climbing; also other facts which might indicate that at the time of the accident he was not actually working. This judge nevertheless found that the accident was one arising out of and in the course of employment. The supreme court reversed the judgment in favor of the petitioner, Judge Kalisch, who delivered the opinion, saying in part:

This latter finding [that the accident arose out of and in course of employment] can not be reconciled with the other facts found by the trial judge, and is expressly gainsaid by his finding of fact that the decedent was told by his employer "to keep off scaffolds and not to do any climbing." His mishap and death were directly due to his own disregard of his master's express orders. He was, on the scaffold, not in the course of his employment but in direct violation of it, and therefore it can not be said that the injuries which caused his death arose out of his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FAILURE OF HEART WHILE LIFTING—*In re Fisher, Supreme Judicial Court of Massachusetts (Apr. 1, 1915), 108*

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Northeastern Reporter, page 361.—This was a proceeding under the workmen's compensation act by Mabel Fisher, widow of George T. Fisher, against Zebulon L. Canady, who had been his employer, and the latter's insurer. The superior court of Suffolk County entered a decree in favor of the widow, following a decision by the committee of arbitration that the deceased met death by an injury arising out of and in the course of employment, and the affirmance of this decision by the industrial accident board. The decision was upheld by the supreme judicial court. The employee, after several times carrying water, two pails at a time, for some distance, was changed to the work of carrying bags of coal weighing 150 or 200 pounds. He carried one and lifted it on a car, and the second was rested on the wheel of the wagon from which it was being unloaded, for him to take. He reached for it, and about one minute later the passer, who had turned his back, saw him on the ground in a dying condition. He had had articular rheumatism, and there was testimony that valvular trouble of the heart was to be expected after this disease, and also that such heart trouble was undoubtedly the cause of death, and was probably induced by a final effort after the heart muscles were already very tired. The court held that there was sufficient evidence on which to base the finding that an injury in the course of employment was the cause of death.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—IMPLIED AUTHORITY TO DO CERTAIN WORK—*State ex rel. Duluth Brewing & Malting Co. v. District Court of St. Louis County et al., Supreme Court of Minnesota (Mar. 19, 1915), 151 Northwestern Reporter, page 912.*—Charles De Cook was injured while in the employment of the company named, and compensation was awarded him by the district court. The question presented was as to whether the injury was one arising out of, as well as in, the course of his employment, and the supreme court decided that it was such, affirming the judgment below in the employee's favor.

The employee was foreman's helper, and had varied duties among which was that of replacing the electric light bulbs in the bottling room when defective. These were covered with wire screens to prevent breakage, and each was locked, the foreman carrying the key, a simple three-cornered contrivance. On April 9, 1914, De Cook was handed by another workman what was apparently an empty cartridge shell of unusual length. It occurred to him that this could easily be made into a key, and save the time necessary to hunt up the foreman and carry the key back and forth when the light bulbs had to be replaced. He attempted to do this, using a hammer, and it

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proved that the article was an unexploded dynamite cap, which exploded, a portion piercing his right eye and destroying the sight. Judge Holt, in delivering the opinion, from which one judge dissented, spoke in part as follows:

The trial court evidently took the view that De Cook in good faith believed he was furthering his master's business and performing an act which he might reasonably be expected to do when he undertook to supply himself with a key. He had never been told that the light bulbs were to be under lock as to him who was charged with the duty of seeing that the broken and defective ones were replaced. When a servant undertakes in the course of his employment, during the proper hours therefor, and in the proper place, to do something in furtherance of his master's business, and meets with accidental injury therein, the trial court's finding that the accident arose out of and in the course of employment should not be disturbed, unless it is clear to us that the ordinary servant, in the same situation, would have no reasonable justification for believing that what he undertook to do when injured was within the scope of his implied duties. If another servant duly engaged in the master's work had had his sight destroyed, instead of De Cook, in this accident, the thought would have been almost irresistible that this law was meant to cover such injury. But, upon the facts in this case, we doubt whether De Cook should occupy a less favorable position. If the attempt to make a key was reasonably within the scope of his employment, the fact that, from ignorance or error of judgment, he made use of dangerous material, not provided by the master, should not necessarily exclude the conclusion that the injury arose out of the employment. The term can not be restricted to injuries caused from anticipated risks of the service, if the law is to be of the benefit intended.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—OPERATION OF TRUCK—*Hendricks v. Seeman Bros., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 638.*—Charlotte Hendricks proceeded under the workmen's compensation act for the death of Richard Hendricks, who had been a helper on a truck belonging to the firm named. The operation of a truck on a highway is defined in the law as a hazardous employment. It was held that this included the work of the helper in loading and unloading, watching and protecting the goods, etc.

The employee had ordered some boys to get off the rear of the wagon, and when they did not obey, he jumped from it to drive them away, fell and was killed. It was held that the work of protecting the employer's goods and interests was a duty arising out of and in the course of his employment, and that the fact that he may have been impulsive and imprudent made no difference. An award in favor of the claimant was therefore affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—SAVING EFFECTS FROM SINKING LIGHTER—*In re Brightman, Supreme Judicial Court of Massachusetts (Dec. 31, 1914), 107 Northeastern Reporter, page 527.*—Emma L. Brightman, widow of Ira B. Brightman, deceased, brought action for compensation for his death against the insurer of his employer. Brightman had been a cook on a lighter, where his employment required him to live a large part of the time. When the craft began to sink he went below several times to secure his effects. The exertion and excitement aggravated an existing weakness of the heart, so that he died soon after reaching the dock. The court held that the injury came within the scope of the compensation act, saying that "The perils of the sea were risks arising out of and in the course of the employment," that "The deceased did not abandon the service of his employer and embark on a venture of his own when he tried to save his clothing," that "The standard to be applied is not that which now, in the light of all that happened, is seen to have been directly within the line of labor helpful to the master, but that which an ordinary man required to act in such an emergency might do while actuated with a purpose to do his duty," and that "There may be found a causal connection between the employment and the thing done by the employee at the time of the sinking of the lighter." A decree in favor of the plaintiff was accordingly affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—SUPERINTENDENT MURDERED BY TRESPASSER—*In re Reithel, Supreme Judicial Court of Massachusetts (Oct. 18, 1915), 109 Northeastern Reporter, page 951.*—Alma Reithel instituted proceedings under the workmen's compensation act for the death of her husband, Erhardt Reithel, who had been superintendent of the Pondville Woolen Mills. She was awarded compensation, and the insurance company appealed. The employee was shot and killed by an intruder whom he ordered from the premises in accordance with his general duty and with specific instructions given by the manager on a previous occasion when the same man had created a disturbance. The award was affirmed in an opinion by Judge Rugg, who said:

> This finding [of the industrial accident board] presents a case of wholly unprovoked murder. The question is, whether this personal injury was one "arising out of and in the course of" the employment of Reithel. Plainly it arose in the course of his employment. It came upon him while he was doing his duty in the place and manner required by his contract of hire.
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> The only point of difficulty is whether it also arose out of the employment. The industrial accident board has found that it did.

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The facts are not in dispute. The question to be decided is whether as a matter of law this finding was erroneous.

The employee was the superintendent of a mill. It was a part of his general duty to order trespassers from the premises. In this respect he was required to deal with those more or less heedless of the rights of others in their conduct. Superimposed upon this general obligation resting on him by reason of his contract of employment was a special one respecting Bombard. It came into existence because Bombard on some occasion within a few weeks before the event in question had been upon the premises of the employer. His conduct on that occasion was of sufficient importance to form the subject of a report by the superintendent to his superior, the manager of the factory. In view of these circumstances, the employee was given a special direction respecting Bombard. His duty was defined in this particular. He was to be ordered out, and the police were to be summoned if he did not go. The liability to whatever personal injury might be likely to arise in dealing with such a person was, therefore, within the contemplation of the employer and employee in establishing the boundaries of the latter's duty. That became a risk of the employment.

Under our workmen's compensation act it is not required that the injury be also an accident, differing in this respect from the English act and being more liberal to the employee. But even under the English act, in the present case, the dependent would be awarded compensation. [Cases cited.]

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VOLUNTEER—*Spooner v. Detroit Saturday Night Co., Supreme Court of Michigan (July 23, 1915), 153 Northwestern Reporter, page 657.*—Mary Spooner made claim under the compensation act for the death of her husband, James Spooner. The newspaper publishing company named, having suffered a fire, had contracted for the use of certain printing apparatus of the Winn & Hammond Co. in the plant of the latter, which also furnished elevator service. The Saturday Night Co. was to furnish an engineer in case it wished to use the machinery, and therefore needed power, after 5 p. m. The company began to operate at night on February 6, 1913, and engaged an engineer named McCabe for that purpose. On that night Spooner, the engineer for the Winn & Hammond Co., told McCabe that he himself would run that night, that McCabe need not stay; and the latter accordingly went away. Spooner had been employed as engineer for many years, and running the elevator was no part of his duties. About 2 o'clock in the morning he went from the basement, where the engine room was, up the stairway. On the second floor he met three employees of the Saturday Night Co. and engaged in conversation with them. The three men then started to go to the third floor to get stools upon which to sit while at work, and Spooner offered to take them up in the elevator. The elevator,

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upon which there was no light, passed one floor safely, and as it was passing the next floor Spooner received the injury which caused his death, but the three men were unable to tell the cause of the accident. An arbitration committee made an award of $2,520 in favor of the claimant, and this was affirmed by the industrial accident board. That board found that Spooner was in the employ of the Saturday Night Co. after 5 o'clock on February 6, while the contention of that company was that he never became its employee, and that there was nothing upon which to base this finding. It also claimed in appealing from the decision that the injuries did not arise out of and in the course of his employment, and if he was an employee of that company his employment was casual. The court reversed the ruling of the board, in an opinion delivered by Judge Stone.

As to the question of employment, Judge Stone said:

A careful reading of the evidence contained in this record leads us to the conclusion that we can not say there was no evidence to support the finding that Spooner was an employee of the Detroit Saturday Night Co.

Continuing he said:

Did the injuries arise out of and in the course of his employment? The appellant needed and had employed an engineer to operate the engine and dynamo upon the night in question. It was not concerned with and did not need the use of the elevator. If we are right in saying, under the first proposition, that there was evidence that Spooner was in the employ of the appellant, that employment was solely to operate the engine and dynamo. The engine room was located in the basement of the building; and, so far as this record shows, Spooner had no occasion to leave it, and had no duty to perform upon the upper floors of the building during the night of the injury. Under the evidence he had gone upon these upper floors purely and solely to visit with the men working there. The evidence is undisputed that he walked up the stairway. He owed no duty to those men, or to anybody, to take them to the upper floors upon the elevator; neither was he requested to do so. It was doubtless a friendly act upon his part, which did not tend to further the business of appellant. At the time of the injury we think that he was engaged in an act outside of, and not in the course of, his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—DEATH BY LIGHTNING—*Hoenig v. Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (Feb. 9, 1915), 150 Northwestern Reporter, page 996.*—Helena Hoenig applied to the industrial commission for compensation for the death of her husband, who was killed by a stroke of lightning while at work on a dam on August 8, 1913. The industrial commission found that the exposure to hazard from lightning stroke at the time and place of

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injury was not different, substantially, from that of ordinary out-of-door work, and accordingly ordered that the application be dismissed. The court held that, there being substantial evidence to support the finding of the commission, it would not be disturbed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—EMPLOYEE WARMING HIMSELF BETWEEN CARS—*Northwestern Iron Co. v. Industrial Commission et al., Supreme Court of Wisconsin (May 4, 1915), 152 Northwestern Reporter, page 416.*—The industrial commission awarded compensation to one Kretkovich for injuries suffered while employed by the company named, and the company brought action to set aside the award. The company manufactures iron briquettes, and these are run out in small dump cars into the yard, where it was the duty of the injured employee to dump the cars, move them onto a return track, and pick up any briquettes which had fallen off the cars. A car usually came out every 15 minutes, and the men had about 5 minutes' leisure between trips. The injury occurred at about half past 10 on a cold night, and the employee was caught between two cars, while either picking up briquettes or warming himself by the car of heated briquettes which had last come out. The commission decided that in either case he was entitled to compensation, which view the supreme court upheld, as is shown by the opinion delivered by Judge Winslow and quoted from as follows:

> If we credit the claimant's own story, there is no question about his right to compensation, because he was picking up briquettes at the time the second car came from the kiln and struck him. The commission, however, did not decide whether the claimant or Vignovich told the truth, but held that in either case compensation must be paid; hence we must consider the case on the assumption that the story told by Vignovich is true. This story is in effect that, the night being cold, they blocked a car as it came out and sat down on the track in front of it to get warm from the heat of the briquettes, which were just out of the kiln; that in a few minutes he left claimant lying on the track in front of the car and went over to his own track 25 feet away, and some minutes later heard claimant holler, and came over and found him caught between the cars. The only reasonable inference from this testimony seems to be that the claimant, instead of at once proceeding to pick up the fallen briquettes, dump the car, and thus prepare to receive the next car, blocked the car, and proceeded to sit down or lie down in front of it in order to get warm, and was there caught by the next car, either while he was engaged in getting warm or while he was picking up briquettes after he had got warm. This would be good ground upon which to find the claimant negligent, but negligence does not prevent compensation.
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> Clearly this testimony does not show that the injury was intentionally self-inflicted; hence the only question is, Does it show that at

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the time of the accident the claimant was not performing service growing out of or incidental to his employment? We think not. The man's duties involved periods of leisure during which apparently he was expected to kill time as best he might, with no specific direction as to what he should do or where he should wait; the night was cold, and he put off dumping the car until he could warm himself from its heated contents; to say that in so doing he had left the master's employment, was pursuing his own private purposes, and doing something foreign to the work he was employed to do is illogical to a degree. To protect himself from undue and unnecessary exposure to the cold was a duty he owed his master as well as himself, and it does not follow that he left his master's employment because he negligently allowed the second car to run into him while he was warming himself.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—HAZARDOUS EMPLOYMENT—*Newman v. Newman et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 665.*—Belle Newman brought proceedings for compensation for herself and children for the death of Frank Newman, against George H. Newman, employer, and his insurer. The compensation commission entered an award, and the insurance company appealed.

The employee Newman worked in connection with a packing house, and his ordinary duties were to drive a meat delivery wagon, also at times to assist about the abattoir, cut meat for retail delivery, and occasionally, after 7 p. m., when the wagon delivery ceased, to make near-by deliveries on foot. On the evening of the injury he cut meat from 7 till 10 p. m., and started to deliver an order, when he fell over a bucket of broken glass, severed a vein, and died from the resulting hemorrhage.

The court held that the employee was not engaged at the time in a hazardous employment under group 30, "Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue," nor group 41, which includes the operation of wagons. It was held that the hazard was one to which any individual would have been equally exposed while walking in the same way, and therefore was not incident to his employment. The award was reversed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—PLAYFUL ASSAULT BY FELLOW SERVANT—*De Filippis v. Falkenburg et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 761.*—Millie De Filippis, claimant for compensation in this proceed-

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ing, was a girl 15 years of age, employed as operator of a buttonhole machine in the manufacture of shirts. There were in the factory two adjoining toilet rooms separated by a partition. The employee went into one of these, and felt something touch her on the arm. She looked through the crack to see where the article came from, and a girl thrust some scissors through the crack into her right eye, causing nearly a total loss of vision of the eye. The employer and insurer appealed from an award of compensation to her. The court held that the occurrence was an accident, since it was unlooked for, and not intended by either employee.

The court reviewed a number of cases in which it had been determined that accidents more or less similar did or did not arise out of the employment, largely English cases, but including the New York Supreme Court's decision in favor of the employee in Hulley *v.* Moosbrugger (93 Atl. 79 [see below]). It is pointed out, however, that in New Jersey, where the last-named case arose, all employment excepting casual employment is covered, while in New York only certain hazardous employments are included. It was held that the accident was not reasonably incidental to the service, and that the judgment must be reversed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—PLAYFUL ASSAULT OF FELLOW WORKMAN—*Hulley v. Moosbrugger, Court of Errors and Appeals of New Jersey (Nov. 15, 1915), 95 Atlantic Reporter, page 1007.*—Action was brought by Annie E. Hulley against Herman F. Moosbrugger, under the workmen's compensation act, for the death of her husband, William Hulley, while in the defendant's employment. Hulley was a plumber, and went to a bin in the shop for fittings to be used on a job he was doing in a dwelling house. While he was descending an inclined concrete floor a fellow workman whom he was passing made a playful attempt to knock off his hat or strike him, and in dodging this attack Hulley slipped, and sustained injuries which caused his death. The court of common pleas of Somerset County rendered judgment for the plaintiff, and this was affirmed by the supreme court (93 Atl. 79) on the ground that such an event was "reasonably incident to the employment." On appeal, however, the court of errors and appeals reversed this judgment, since to entail responsibility on the employer, the injury must be the result of an accident which not only arises out of but also in the course of employment, which was not found to be true in the present instance.

Chancellor Walker, who delivered the opinion, referred to a number of English cases, the compensation law of Great Britain containing the same phrase as to "arising out of and in course of employ-

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ment," saying, "cases in that jurisdiction construing that language will be useful in construing the same language in our own act." In accordance with the views set forth in the cases cited, the court concluded that:

In the case at bar the employer was not charged with the duty to see to it that none of his employees assaulted any other one of them, either willfully or sportively. And when one made such an assault upon another he was guilty of the doing of a negligent act as an individual tort-feasor for which his employer was not responsible.

The accident in this case was clearly not one within the scope of the employment of the decedent, nor was it one arising out of a risk reasonably incident to that employment.

We are of opinion that an employer is not liable, under the workmen's compensation act (P. L. 1911, p. 134), to make compensation for injury to an employee, which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of it, it can not be said to arise out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—PROXIMATE CAUSE—*City of Milwaukee v. Industrial Commission et al., Supreme Court of Wisconsin (Mar. 2, 1915), 151 Northwestern Reporter, page 247.*—Julius Torney was principal of a school in Milwaukee. He was engaged on May 29, 1912, in testing the applicants for positions on the basket-ball team of the school in order to select a team for competition in an annual field meet required by the school board. He was struck in the head by a basket ball, which ruptured a blood vessel and caused unconsciousness. He never recovered from the effects of this accident, and died on December 27 of the same year. He was undoubtedly suffering from an advanced stage of arteriosclerosis at the time he was injured. Otherwise, the blow would probably have caused no serious injury. The commission awarded compensation to the widow, and the circuit court entered judgment in her favor. The court stated that under the compensation act a finding of the industrial commission could be reviewed by the court only upon the grounds: (1) that the board had acted without or in excess of its powers; (2) that the award was procured by fraud; (3) that the findings of fact did not support the award. Neither the second or third ground was relied upon, so that the only ground open was that the board had acted in excess of its powers by making findings having no support in the evidence. The court said that if any reasonable view of the evidence did so support the finding of fact, the latter would be upheld. It held that the evidence did so support the finding that the accident grew out of the employment.

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As to the accident being the proximate cause of the injury, the court drew a distinction between the meaning of proximate cause under the law of negligence and that of compensation, and held that under the latter the fact that the result was not one that would be reasonably anticipated to follow the cause—if it appeared that it in fact did follow—did not have the important bearing that the city attributed to it. Judge Vinge, who spoke for the court, said in part:

To incorporate into the phrase "proximately caused by accident" all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be traced back to the conduct of a responsible human agency; under the compensation act the words "proximately caused by accident" in terms relate to a physical fact only, namely, an accident. Hence, if the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation. The term "proximately" was no doubt used to exclude physical causes so remote in time or place or both as to make them of doubtful value in tracing the relation between cause and effect.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—ACTING AS FIREMAN—*In re McPhee, Supreme Judicial Court of Massachusetts (Sept. 16, 1915), 109 Northeastern Reporter, page 633.*—The dependent of Otis McPhee was awarded compensation by the industrial accident board. McPhee had been employed as superintendent by the Atlantic Park Co., proprietor of an amusement resort in the town of Hull and a subscriber under the workmen's compensation act. As a part of his duties he organized a fire brigade to protect the property of the company. He was also a member of the fire department of the town, receiving a small compensation. On the evening of June 22, 1913, fire broke out in a garage about 40 feet from the buildings of the company. In the proceedings for compensation the company's general manager stated that he considered that it was in the course of employment, and the duty of the employee, to attempt to put out this fire. He and the men of the brigade went with the company's chemical engine, and remained until the fire had been extinguished. The industrial accident board found that the employee while operating the chemical apparatus became drenched with water and saturated with smoke, and that the injury inflicted by this means caused lobar pneumonia and death; that if, according to some testimony presented, he went to the top of a ladder and used a hose as a member of the town department, after all that could be had been done with the chemical engine, this did not alter the matter. This finding and the award were affirmed by the supreme judicial court as based on sufficient evidence.

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WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—PUTTING UP HORSE—*Smith v. Price et al., Supreme Court of New York, Appellate Division, Third Department (May 5, 1915), 153 New York Supplement, page 221.*—Lillian F. Smith made claim for compensation on behalf of herself and her children for the death of her husband, Erwin D. Smith, an employee of the company named, and secured an award from the commission, from which the employer and insurer appealed. The deceased was employed in driving a truck at Cortland, N. Y., and was putting up his horse in the stall when it jumped and squeezed him against the side of the stall, causing his death. The court held that this part of the duty was included in the employment designated in the law under group 41, Judge Kellogg, who delivered the opinion, saying in part:

> The benefit of the act is not limited to the actual time that the horse is moving or that the employee is upon the truck. It covers every injury or death received in the course of the employment. The loading and unloading of his truck, hitching and unhitching his horse to the truck, feeding and caring for his horse, are a part of the employment of operating the truck, and are fairly within the provisions of the law.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—WORKMAN SEEKING SHELTER FROM STORM—*Moore v. Lehigh Valley Railroad Co., Supreme Court of New York, Appellate Division, Third Department (July 1, 1915), 154 New York Supplement, page 620.*—Ralph R. Moore was awarded compensation against the railroad company named for injuries sustained in its employ, and an appeal was taken. The company owned and operated a railroad between points in New Jersey and New York, and telegraph and telephone lines along its route. The employee was assisting in erecting a new line of poles and wire at a place where it was desired to change the location of them. On July 23, 1914, a violent rainstorm arose during working hours. Several of the men went under a tree until it no longer afforded protection, when some of them went into a paper mill; but there being no more room in it, Moore, with others, went under cars standing on a switch, about one-fourth mile from where they had been working. No shelter was furnished by the company for such occasions, nor was there any rule of the company in regard to the matter; but it was customary for the men to find shelter where they could, and no deductions were made from their wages for time lost on other occasions nor on this one.

While the employee was sitting under a car, an engine moved the cars. He was struck upon the forehead by a projection of the car and fell over, and both legs were cut off, when they in some manner

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got upon the rail. An award was made to him of two-thirds his weekly wages for the remainder of his life. On appeal the company's contentions were that the compensation act was unconstitutional; that in such cases State legislation is excluded by the acts of Congress relating to interstate commerce, viz, the Hours of Service, Safety Appliance, and Employers' Liability acts; and that the injury was not an accident arising out of and in the course of employment. As to the first two questions the court held that previous decisions governed, Judge Lyon, who delivered the opinion, saying:

In the case of Jensen *v.* Southern Pacific Co. (109 N. E. 600 [see p. 221]) the workmen's compensation act was held to be constitutional; and in the case of Winfield *v.* New York Central & Hudson River Railroad Co. (153 N. Y. Supp. 499 [see p. 254]) we held that the claimant, although engaged in interstate commerce, was not excluded by section 114 of the workmen's compensation law from claiming benefits under that law, where the injury was in no way attributable to the negligence of the employer, but was as to him wholly accidental.

In discussing the question whether the occurrence was an accident arising out of and in the course of employment, the English and American cases were gone into quite fully, and the court, which concluded that this was an accident, and within the language of the statute, and which affirmed the award, said in part:

That the injury was sustained by claimant during the course—that is the period, or time, or extent—of the employment is not seriously disputed by the defendant; but the defendant strenuously contends that the injury did not arise out of the employment. It was not only customary that the claimant should seek shelter from the storm, but doing so was not a remote, but a necessary, and unquestionably frequent, incident of his employment during the summer months. Had he taken shelter in the paper mill, and the roof fallen in, or the floor given way, and he been accidentally injured, he would have been entitled to the benefit of the compensation law. Whether a place in a stone crusher being operated by machinery, or under a car standing upon a switch, was the safer place, does not appear. The four linemen chose places under the cars. However, assuming that the place under the car was the more dangerous, the fact that the plaintiff's judgment led him to choose it, and that he was injured there, does not bar him from the operation of the act. Contributory negligence furnishes no ground of defense. The compensation law says that the employer shall provide compensation "without regard to fault as a cause of such injury." The risk of accidental injury was incidental to the claimant seeking and obtaining shelter, and to his employment, and was fairly within the contemplation of both employer and employee. The act of seeking and obtaining shelter arose out of—that is, was within the scope or the sphere of—his employment, and was a necessary adjunct and an incident to his engaging in and continuing such employment.

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WORKMEN'S COMPENSATION—LIABILITY OF RECEIVER FOR PAYMENT OF BENEFITS—*Wood et al v. Camden Iron Works, United States District Court, District of New Jersey (Feb. 15, 1915), 221 Federal Reporter, page 1010.*—Suit was brought by Walter Wood and others against the corporation named, and a receiver was appointed for the corporation. The receiver petitioned for instructions as to whether or not he should continue to make payments which the corporation was making at the time of his appointment to employees entitled to the same under the workmen's compensation act, in one case pursuant to a judgment, and in the others without suit. The court held that the statute contemplated that compensation payments should be a part of the wages paid for labor, and decided that the receiver should make the payments, and could do so under the head of operative and administrative expenses.

WORKMEN'S COMPENSATION—RAILROADS—INTERSTATE COMMERCE—CAR REPAIR SHOP—*Okrzsezs v. Lehigh Valley Railroad Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 919.*—The workman in this case was injured while repairing a car in the shops of the company. There was evidence that the car had been used in both interstate and intrastate commerce. The compensation act contains a provision that in proceedings under it, it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the act. It was held that compensation had been properly awarded, and the contention of the company that the workman was engaged in interstate commerce at the time of his injury was rejected.

WORKMEN'S COMPENSATION—RAILROADS—INTERSTATE COMMERCE—SWITCHING ON INTRASTATE RAILROAD—*Fairchild et al. v. Pennsylvania Railroad Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 751.*—Proceedings were brought under the workmen's compensation act for the death of William Fairchild while in the employ of the railroad company named. On August 25, 1914, he was attempting to uncouple two cars from a train, when he was killed by "some sort of an explosion of electricity, which is not very well explained, and is not material." The train was one of the Long Island Railroad, all trains of which operate entirely within the State. There was no proof that any passengers on board were destined outside the State; but the compensation board found that the train had carried interstate baggage, which had however been pre-

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viously unloaded. The court held that the employee was not engaged in interstate commerce, and was entitled to an affirmation of the award entered in his favor, Judge Howard saying in the opinion:

Even if train No. 423 had carried baggage, on its trip just ended, destined for another State, that baggage had been unloaded before the time of the accident, and, at the time of the accident, the deceased was breaking up the train of empty cars preparatory to the formation of a new train. If the actual work being performed at the time of the injury is the real test as to whether it was interstate, surely the work being performed by the deceased when he was injured was not interstate, for he was uncoupling empty cars on a local railroad, operating always exclusively within this State—a railroad having no interstate characteristic whatever, except when actually engaged in carrying interstate passengers, baggage, or freight.

WORKMEN'S COMPENSATION—RAILWAY RELIEF ASSOCIATION—RELEASE—*West Jersey Trust Co. v. Philadelphia & Reading Railroad Co., Supreme Court of New Jersey (Nov. 3, 1915), 95 Atlantic Reporter, page 753.*—The trust company named proceeded as administrator for compensation for the death of Amos B. Calloway, who was killed while in the employ of the railroad company named, as a brakeman, engaged in interstate commerce. He left a widow and two young children. Compensation was denied by the court of common pleas, but the supreme court reversed this decision, pointing out that all the grounds urged by the company against the recovery of compensation had been decided adversely to it except perhaps the last. Judge Parker names the first three objections and cites the cases disposing of them, and discusses the fourth, as follows:

That as deceased was engaged in interstate commerce, the Federal act is exclusive. It is decided otherwise in Rounsaville *v.* Central R. R. Co. (94 Atl. 392 [see p. 258]).

That deceased was willfully negligent. But willful negligence is not a defense under section 2 of the act. (See Taylor *v.* Seabrook, 94 Atl. 399 [see p. 292].)

That the act is inapplicable on account of the rule of lex loci contractus. (Aliter in American Radiator Co. *v.* Rogge's Administrator, 86 N. J. Law 436, 92 Atl. 85, affirmed 93 Atl. 1083 [see Bul. No. 169, p. 226].)

That the claim is barred by a release by decedent in his lifetime, contained in his application for admission into the railroad relief association, and a further release by his widow, on receipt of the death benefit from said association.

The first seems to refer to damages only. The compensation act, as has been more than once pointed out, created a right of recovery contractual in its nature, and irrespective of negligence or other common-law liability on the part of the employer. (American Radiator Co. *v.* Rogge, supra; Jacowicz *v.* Delaware, Lackawanna & Western Railroad Co., 92 Atl. 946.)

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But apart from this, the statute of 1911, which was on the statute book at the time of the second employment, created an irrebuttable presumption in the absence of an express contract, or notice, as therein provided, of the assent of the parties to a new contract, or quasi contract, whereby in case of injury or death there should be compensation according to the statutory scheme. (American Radiator Co. *v.* Rogge, supra.) This must be taken to have superseded preexisting arrangements between the parties, and, among them, the release in advance of all claim for "damages" in view of the membership in the relief association. The subsequent release of the widow, which by its recitals is expressly founded upon the agreement contained in the membership application, and which includes the relief association as a party released, must be held, as a matter of construction, to be limited in its application to the rights and liabilities of the parties as they would have existed if the compensation act had not been passed. This construction is fortified by considering that the act of 1911, by paragraph 12 (P. L., p. 139), provides for awards based on the existence of children, as well as the widow, and for distribution to them in case of intestacy, according to the intestate law of this State. The release is made by the widow qua widow, and of course can not bind the personal representative of the deceased, who sued in the right of the estate.

WORKMEN'S COMPENSATION—RIGHT TO APPEAL—*Crockett v. State Insurance Fund, Supreme Court of New York, Appellate Division, Third Department (Nov. 10, 1915), 155 New York Supplement, page 692.*—Compensation was awarded in this case to Elizabeth K. Crockett for the death of her husband while in the employ of the International Railway Co. The company was insured with the State fund, from which the compensation was payable. The employer appealed, but the appeal was dismissed, on the ground that when the insurance is placed with the State fund, absolutely relieving the employer from all liability, the law gives the employer no right to appeal. The possibility that an award from the fund would cause an increase in the premium rates was held to create too remote an interest to confer upon the employer the right to appeal. An appeal from this judgment was taken to the court of appeals by the State.

WORKMEN'S COMPENSATION—TERMINATION OF BENEFITS—FINDINGS OF BOARD—EVIDENCE—*Spooner v. Estate of P. D. Beckwith (Inc.), et al., Supreme Court of Michigan (Dec. 18, 1914), 149 Northwestern Reporter, page 971.*—Alden Spooner was injured while employed as a molder by the corporation named, which had elected to come under the provisions of the workmen's compensation act. The company in its report of the accident, which occurred October 22, 1913, described it as "molten iron splashing into right eye, right eye burned." A section of the act provides that if the employer or the insurance com-

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pany reach an agreement in regard to compensation with the employee this agreement, if approved by the industrial accident board, shall be final and binding upon the parties to it. On November 14, 1913, an agreement was filed with the board, under which Spooner was to receive $8.80 per week as compensation. Later a letter from the eye specialist to whom a local physician who treated the employee at first had referred him, written to the local physician, expressed the opinion that the condition of the right eye then existing was due to senile cataract, and was not traumatic. The company petitioned for termination of the compensation and a hearing was had before the board. Both physicians were witnesses. The board found that the condition was due to the injury, and a reversal of this finding was sought in the appeal to the court. Besides urging that the findings of fact were unwarranted, the company claimed that the employee had never produced any proof that he sustained any injury, nor of the other essential facts entitling him to compensation. The court pointed out that the agreement took the place of an arbitral hearing and award, and established the facts set forth in it, except that the physical condition of the employee always remains open to inquiry. Examining the evidence of the physicians, the court concluded that from it different inferences of fact might legitimately be drawn, and that the court would therefore not disturb the findings of the board. The order of the board denying the petition of the company was accordingly affirmed.

WORKMEN'S COMPENSATION — TOTAL AND PARTIAL DISABILITY — FINDINGS OF BOARD—*In re Stickley, Supreme Judicial Court of Massachusetts (Dec. 31, 1914), 107 Northeastern Reporter, page 350.*— Job Stickley was injured December 13, 1912, losing four fingers of his right hand. It was conceded that he was totally incapacitated until May 16, 1913. Between May 16 and October 17 he worked 18 days for his old employer, as watchman and at his old job as a pile driver. It was agreed that he was entitled to compensation for partial incapacity from July 11 to October 17. After October 17, 1913, he was unable to obtain work although he made diligent efforts. The committee on arbitration found that on account of his incapacity to work and his inability to secure employment he was entitled to $8.70 per week from the last-named date for an indefinite time, subject to the right of review provided in the statute. Since his original wages were $2.75 per day, this was equivalent to a finding of total incapacity. The industrial accident board made a similar finding. The insurer contended that as a matter of law, there being no physical change, a man who had been only partially incapacitated

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could not become totally incapacitated, and that even if that were possible such a situation had not occurred in this case. Since, while the board detailed certain testimony, the record did not show that the court had before it all the evidence on which the board based its findings, the court held that it could not determine whether the rulings requested by the insurer should have been given. The decree was therefore affirmed.

WORKMEN'S COMPENSATION—TOTAL AND PARTIAL DISABILITY—LOSS OF REMAINING HAND—*Schwab v. Emporium Forestry Co. et al., Supreme Court of New York, Appellate Division, Third Department (May 5, 1915), 153 New York Supplement, page 234.*—Jacob Schwab made claim against his employer, the company named, and its insurer for compensation under the workmen's compensation act. His injury consisted of the loss of his right hand at the wrist, on July 6, 1914. His left hand had been amputated in 1892. The commission certified to the court the question whether the claimant was entitled to compensation for permanent total disability, or for loss of one hand. The court determined that he was entitled to an award for permanent total disability, as is shown in the opinion delivered by Judge Smith:

If a man has two hands, he is presumably a more efficient worker and can receive higher wages than if crippled by the loss of one hand. The method of payment of compensation for the loss of one hand is to allow the salary which the injured party was earning for 244 weeks. If the injured party had two hands and were earning $20 a week, if he lost one hand he would recover $4,880. Another workman having lost one hand before entering the employment would be receiving, say, $10 a week for less efficient service. If that workman lost the second hand in the service, if the claim of the insurance carrier is right, he would recover for 244 weeks at $10 a week, or $2,440. So that for the loss of the second hand, which had its double value on account of the previous loss of the first hand, under this system he would be entitled to recover only half as much as for the loss of the first hand. This anomalous result would indicate that the legislature could not so have intended. By subdivision 1 of section 15, the loss of both hands shall presumably constitute total disability. As compensation for that total disability, he is to receive 66⅔ per cent of the average weekly wages that he is then earning. As the man with one hand is presumably earning less wages than a man with two hands, to allow for the loss of the second hand as a permanent disability, a percentage of the weekly wage that he was then earning would be in complete harmony with compensation to one who had lost both hands by the accident, who receives his 66⅔ per cent upon the greater wages that he was earning at the time of the accident.

Moreover, this reasoning accords with the rule which seems to be laid down in subdivision 6 of section 15, which provides that the

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fact that an employee has suffered previous disability shall not preclude him from compensation for a later injury, "but in determining compensation for the later injury, or both, his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury." Cases are cited upon the attorney general's brief which indirectly lend support to his contention that the claimant has the right to recover as for a permanent disability. But the decision may well rest upon the logic of the situation, in view of the fact that the amount of compensation depends upon the weekly wage, and the weekly wage is influenced by his crippled condition at the time of the accident.

In answer to the question certified, we decide that the claimant is entitled to recover as for total disability.

An appeal from this judgment was taken to the court of appeals of the State.

WORKMEN'S COMPENSATION—TOTAL AND PARTIAL DISABILITY—LOSS OF SECOND EYE—*State ex. rel. Garwin v. District Court of Cass County et al., Supreme Court of Minnesota (Mar. 19, 1915), 151 Northwestern Reporter, page 910.*—John Garwin, who was totally blind in one eye, having lost the sight thereof by accidental injury, was injured while in the employ of J. Neil's Lumber Co., the sight of the other eye being destroyed. The trial court awarded him the amount designated by the statute for permanent partial disability consisting of loss of an eye. He appealed, contending that the award should be for permanent total disability, as he was now totally blind. The court affirmed the previous judgment, holding that section 15 of the act clearly indicates that in such cases the compensation is to be for partial disability only, and quoting that section as follows:

If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury.

WORKMEN'S COMPENSATION—TOTAL AND PARTIAL DISABILITY—LOSS OF SECOND EYE—*Weaver v. Maxwell Motor Co., Supreme Court of Michigan (June 7, 1915), 152 Northwestern Reporter, page 993.*—Charles Weaver, who had lost one eye several years before, lost the other by accident while in the employ of the company named. The question arose as to the construction of the act, whether he should be compensated as for total disability, or under the provision that for the loss of an eye the injured person should receive one-half his weekly wages for 100 weeks. The court decided that the latter provision would apply, Judge Moore, who delivered the

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opinion, after quoting the findings of the industrial accident board and the provisions of the law, saying:

Since the case was submitted counsel for the claimants has called the attention of the court and opposing counsel to the case of State ex rel. Garwin *v.* District Court et al. (Minn.), 151 N. W. 910 [see p. 289], which is a case on all fours as to the facts. It is not a precedent in the instant case, however, because the Minnesota statute contains language not found in the Michigan statute, reading:

"If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

And it was held the compensation should be based upon the permanent partial disability, and not, as claimed by the appellant, on the basis of permanent total disability.

It must be confessed that the provisions of the Michigan statute are so ambiguous as not to be free from doubt. All of its provisions, however, should be given effect, if possible. The compensation fixed in section 9 must be based upon the fact that the total incapacity for work resulted from the injury. Section 10 deals with the partial incapacity for work resulting from the injury, and fixes the compensation, and then proceeds:

"For the loss of an eye fifty per centum," etc. "The loss * * * or both eyes * * * shall constitute total and permanent disability."

In the instant case the loss of the first eye was a partial disability for which, if our workmen's compensation law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the result of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity can not be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity; and it is so ordered.

WORKMEN'S COMPENSATION — TOTAL DISABILITY — INABILITY TO FIND WORK—FINDINGS OF BOARD—*In re Septimo, Supreme Judicial Court of Massachusetts (Dec. 14, 1914), 107 Northeastern Reporter, page 63.*—This was a procedure by Thomas Septimo under the workmen's compensation act, in which the insurer appealed from a determination of the industrial accident board, reversing the report of the committee of arbitration. The employee received an injury arising out of and in the course of his employment, and during a part of the period between the date of his injury and the filing of his claim, was employed by his former employer and

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paid $9 a week. Before the injury his weekly wages were $10. While he was so employed after the injury, the mill was shut down for a time for lack of work. The question was whether he was entitled to compensation for partial or total incapacity for work for the period when the mill was closed. The court sustained the finding of the board that the incapacity was total, following previous decisions in holding that such finding will stand if there is any evidence to warrant it. As to the evidence, and the effort of the man to secure employment, Judge Crosby, who delivered the opinion, said in part:

> The insurer contends that because the employee was employed after his injury and paid wages at the rate of $9 a week, a finding of total incapacity for work during the time that the mill was closed was not warranted.
>
> We do not think that this contention can be maintained. While such employment was evidence that the employee was not wholly incapacitated for work, yet it was not conclusive.
>
> The record shows that he was seriously crippled and disabled. He has lost the whole of every finger, except the forefinger of his right hand and the little, or fourth, finger of his left hand. When the grave character of these injuries is considered, we can not say, without the evidence before us, that the finding of total disability for work of the employee was not warranted.
>
> The finding that the employee was physically unable to earn anything during the period when the mill was closed renders immaterial the finding of the committee of arbitration that he did not make any effort to obtain employment.
>
> In view of this finding of fact we need not consider the further contention of the insurer that the failure of the employee to work during this time was due to the condition of the labor market and not to his incapacity to earn wages. (Sullivan's Case, 218 Mass. 141, 105 N. E. 463 [Bul. No. 169, p. 241].) [English cases also cited.]

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—*Gignac v. Studebaker Corporation, Supreme Court of Michigan (June 7, 1915), 152 Northwestern Reporter, page 1037.*—Harry Gignac proceeded against the company named for compensation for an injury suffered while in its employ. He was a checker, whose duty it was to check the automobiles placed in railroad cars by the company for shipment. While returning from a track farther from the plant, he attempted to cross a string of cars which had been placed on the sidetrack next the platform, without looking to see where the train crew were, or whether there was likely to be a movement of the cars at that time. The engine backed up while his foot was on a coupling, and crushed it so that the toes had to be amputated. The question arose whether he was guilty of intentional and willful misconduct, so as to bar him from the benefits of the act. The court held that he

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was not, affirming the award of the industrial accident board in his favor. Judge Brooke said, in part, in the opinion:

These cases [cited on behalf of the company] all arose in foreign jurisdictions and under statutes containing somewhat different language from that used in the Michigan act. The question has twice been presented to this court, in the case of Clem *v.* Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848 [Bul. No. 169, p. 242], and again in the case of Rayner *v.* Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665 [Bul. No. 169, p. 244].

While it is quite clear that the claimant's injury was brought about by his own gross negligence, we are of opinion that it can not be said as a matter of law that he was guilty of such intentional and willful misconduct as would defeat his recovery.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—POWERS AND FINDINGS OF BOARD—*Great Western Power Co. v. Pillsbury et al., Supreme Court of California (June 10, 1915), 149 Pacific Reporter, page 35.*—James Mayfield, an employee of the company named, was killed by electric shock while removing a transformer from a pole in the course of his employment. He was not wearing rubber gloves, in spite of strict rules of the company that they should be worn when working among "hot" wires, and in spite of personal directions by his foreman, once three days before his death and once one and one-half hours before it. His gloves were at hand in a wagon accompanying him. In the proceedings to secure compensation for Mayfield's death there was no dispute as to the facts in regard to this, and the court, after a somewhat elaborate discussion of the powers of the industrial accident board, and of the court in reviewing cases brought before it on certiorari, held that the court has the power to set aside awards which have been made without any warrant in the evidence for the decision on the question of "serious and willful misconduct," that being one of the matters giving the board jurisdiction. In the present case the court held that, as a matter of law, there was willful misconduct, and it annulled the award of the board in favor of the claimants.

WORKMEN'S COMPENSATION—WILLFUL NEGLIGENCE—*Taylor et al. v. Seabrook, Supreme Court of New Jersey (June 4, 1915), 94 Atlantic Reporter, page 399.*—This was a proceeding for compensation for the death of Thomas B. Stout. The compensation was awarded by the court of common pleas. The death resulted from the fall of a masonry pier in a cellar which the employee was digging out. The employer contested the award on the ground, among others, of the willful negligence of the employee, but the court held that there is

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no provision as to willful negligence in the law applicable to cases of compensation, but only to those coming under the liability section of the statute. Judge Parker, in his opinion, said as to this:

The first ground urged for a reversal is that the accident was due to the willful negligence of the deceased. We think counsel misapprehends the provisions of the act of 1911, so far as they relate to willful negligence. All that that act says on this subject is contained in the portion of the act designated as section 1, which may be called, for convenience, the employer's liability section of the statute. In this part of the act the liability is made to depend, not upon any implied contract for compensation, but upon the negligence of the employer, either at common law or resulting from the requirements of the act itself. When we come to section 2 we find that the provision of willful negligence is entirely omitted, and that the only exemption is when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury.

DECISIONS UNDER COMMON LAW.

ARMED GUARDS—STATUS—LIABILITY OF EMPLOYER FOR ASSAULT—*Pennsylvania Mining Co. v. Jarnigan, United States Circuit Court of Appeals, Eighth Circuit (Mar. 8, 1915), 222 Federal Reporter, page 889.*—The District Court of the United States for the Western District of Arkansas gave judgment to Frank Jarnigan against the company named for damages for an assault committed upon him. He was a union leader and organizer. There had been trouble in the company's mine, and the company's superintendent testified that he had heard of danger of the union's "cleaning up the camp and burning all the buildings." To prevent this and protect their property the company employed armed guards, who were under the direction of one Eyster, a superintendent. The latter, with a group of the guards, met Jarnigan on the highway, and after some conversation, set upon him and beat him severely, after which Eyster said:

"Frank, you done well to get out as well as you did; if you ever come again, and try to organize, you will get more than you did."

The court held that the complaint stated a cause of action, and that the jury's verdict finding the company responsible to the injured man could not be found to be without support in the evidence. It affirmed the judgment in Jarnigan's favor, Judge Amidon, who delivered the opinion, saying in part:

At the conclusion of all the evidence, defendant moved for a directed verdict. This is the only assignment of error that has merit. There was evidence tending to support the claim of the company that the assault was personal, and not made for the purpose of protecting the company's property. On the other hand, there was evidence and circumstances tending to support the claim of the plaintiff. This issue was submitted to the jury in a charge of which the defend-

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ant has no cause of complaint. If the guards acted within the general scope of their authority, the company is responsible for what they did, although they acted wantonly. [Cases cited.] When the evidence and circumstances are open to conflicting inferences, the question whether the acts were within the scope of the agent's authority is for the jury. [Cases cited.]

The jury returned a verdict in favor of the plaintiff for $5,000. The trial court, on motion for new trial, required this to be reduced in the sum of $1,800. Upon that being done, the motion for new trial was denied. We find no error in the record.

BLACKLIST—RAILWAY BENEFIT ASSOCIATION—DIRECTING EMPLOYEES NOT TO CALL DESIGNATED PHYSICIAN—DAMAGES—*Peek v. Northern Pacific Railway Co. et al., Supreme Court of Montana (Oct. 18, 1915), 152 Pacific Reporter, page 421.*—William A. Peek brought action against the railway company named, and against Nichols, its general superintendent, Fowler, its division superintendent, Kennedy, its yardmaster at Helena, and Welsh, its assistant yardmaster, charging them with conspiring to injure plaintiff in his business as a physician, in publishing and bringing to the notice of the employees of the company the following:

"HELENA, MONT., *Mar. 3, 1911.*

"*All Yard Employees:*

"In case of an accident to an employee where medical attention is needed at once, do not in any case call Dr. Peek. If company doctor can not be located, order ambulance and have party sent to hospital.

"(Signed) F. E. KENNEDY,
"*General Yardmaster.*"

It was alleged that the notice was maliciously intended to and did injure Dr. Peek in his business.

On the trial testimony for the plaintiff only was received. It was shown that the Northern Pacific Beneficial Association is an organization of employees of the railway for the purpose of furnishing medical and surgical aid to the members. It operates hospitals, and employs physicians at various points on the line, two of whom are located in Helena. The rules require members to call the nearest authorized physician, except that in emergencies arising from accident other physicians may be employed temporarily until the arrival of a "company physician." Membership is made a condition of employment by the railway company, with some exceptions. The association is distinct from the railway company, and the company makes up the deficit in case the stated contributions from the wages of the employees are insufficient. In January, 1911, Kimberly, then president of the association, wrote to General Superintendent Nichols, complaining that annoyance and expense was caused by a disposition of employees at Helena to call upon Peek without regard to the

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rules. A large bill recently rendered by Peek for services to an employee was mentioned as an illustration. Mr. Nichols wrote to the division superintendents under him, including Fowler, and Fowler issued a circular, addressed to "All Concerned." These communications, however, simply called attention to the rules, and urged that they be followed in the matter of employing the association's physicians as far as possible. Mr. Fowler also had a conversation with Kennedy about a particular case, in which he again referred to the rules. The notice quoted above was posted by Welsh at the direction of Kennedy. Testimony as to the damages was largely confined to that of Dr. Peek himself, who estimated his total falling off of business from the railway employees to be $70 per month. Instructions given at the trial are quoted in the opinion. The jury exonerated Nichols and Welsh, and returned a verdict of $700 against the other defendants. The supreme court showed that Fowler also should have had judgment in his favor, and that the damages, for want of proof of actual damages, should be nominal; and accordingly gave the physician judgment against the railway company and Mr. Kennedy for $1. The following quotations are made from the opinion as delivered by Judge Sanner:

From the instructions just quoted it is clear that the plaintiff prosecuted his case upon the theory—which was entirely correct—that his right of action was not for the loss of general practice among employees of the defendant company, but for loss of such emergency practice chargeable to the beneficial association as would have come to him but for the notice complained of; in other words, that the defendants had and could have no authority to say that the beneficial association would not deal with Dr. Peek in any case. That the beneficial association could, under proper circumstances, have lawfully signified to its members by any proper means its indisposition to have any dealings whatever with Dr. Peek, is, we think, beyond dispute; but that it did not do or authorize anything of the kind is equally clear from the evidence of record. The letter of Mr. Kimberly was ample warrant for defendants to proceed according to its purport, but it did not go beyond the request for suitable steps to enforce the rule of the association restricting the call of outside surgeons to cases of emergency and pending the arrival of the authorized surgeon. From this the notice in question was a material departure, and the question is: Whose is the liability and to what extent is that liability established?

The exoneration of Mr. Nichols by the jury was entirely just. His only participation in the matter was his letter to the division superintendents, and that letter was well within the range of Mr. Kimberly's request. For the same reasons the defendant Fowler should also have prevailed. Nothing written or said by him exceeded the scope of Mr. Nichols' letter or constituted any order to the defendant Kennedy to go beyond what the rules of the association require. Mr. Kennedy, however, was liable, notwithstanding his alleged want of actual malice. The rules were called to his attention, and he was told that preference was due to the authorized

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surgeon in every case; but he was not directed to publish, as in effect he did, that under no circumstances should Dr. Peek be called. To that extent, and in that sense, his action was wrongful, and malice, if necessary, might be implied. The company was also liable, though upon other grounds. Mr. Kennedy was its yardmaster at Helena, and it was within the general scope of his employment to publish suitable notices to such of the company's employees as were under his direction, including, when authorized, such notices as the one complained of. Had the railway company directed the publication, unauthorized by the beneficial association as it was, its liability would be obvious. So in permitting its channels to become the medium through which the beneficial association should speak to its employees, it undertook to answer for wrongs committed in that process.

We can not agree, however, that liability in any amount has been established against any of the defendants. Under his own theory of the case plaintiff was entitled to enjoy only that practice chargeable to the beneficial association which, save for the notice, would have come to him in emergency cases. His testimony—unsatisfactory at the best—touches only his entire activities among yard employees. No figures are given, no circumstances stated, upon which cross-examination might be based or a determination reached as to what portion of the whole loss came within the class for which liability was claimed. So far as damages are concerned, there is a total failure of proof, and the plaintiff must be relegated to his right to nominal damages only.

CONTRACT OF EMPLOYMENT—ABANDONMENT—RECOVERY OF WAGES AND DEPOSIT— *Koch v. Siff et al., Supreme Court of New York, Appellate Term, First Department (June 28, 1915), 154 New York Supplement, page 223.*—Max Koch brought action against Ephraim Siff and another, and secured a judgment in the municipal court of the Borough of Manhattan. The reason for the modification and affirmance of the judgment is given in the court's opinion as follows:

As the evidence clearly shows that the plaintiff left the employ of the defendants on account of his fear of strikers, who had assaulted him on the street, and was not discharged or requested to leave, there is no ground for allowing him to recover his unearned wages. On the other hand, the defendants consented to his leaving, and should not be allowed to retain the $50 deposit.

The recovery should therefore be reduced to $62, the amount of the deposit, and $12 for the three days' work for which he received no pay, and, as modified, affirmed.

CONTRACT OF EMPLOYMENT—BREACH BY EMPLOYEE—DAMAGES—DEPOSIT—*Silbert v. Katz, Supreme Court of New York, Appellate Term, First Department (Feb. 4, 1915), 151 New York Supplement, page 510.*—Meyer Silbert brought action against Philip Katz for a

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deposit of $100 which he had made for the faithful performance of a contract to work for the defendant as foreman. The defendant put in a counterclaim for damages for breach of the contract. Judgment was for the plaintiff in the municipal court of the Borough of Manhattan. The result of the appeal was a reversal of the court below, as is shown in the following opinion by Judge Bijur:

Although the deposit is described as "liquidated damages," the question whether it is to be treated as such or as a penalty does not arise. It is shown, without contradiction, that plaintiff refused to perform his contract by failing even to begin to render services thereunder. Thereupon the defendant employed another man in his place. Although the subject was not amplified nor thoroughly developed, the defendant gave some evidence, from which it appeared that he had made efforts to replace the plaintiff for the same wage, but was unable to obtain another foreman for less than $55 a week.

Upon the record, defendant's [employer's] counterclaim for damages was proved, and he should have had judgment therefor.

Judgment reversed, and new trial granted.

CONTRACT OF EMPLOYMENT—DISCHARGE—REMEDIES—*Continental Aid Association v. Lee, Court of Appeals of Georgia (July 2, 1915), 85 Southeastern Reporter, page 790.*—L. A. Lee brought action against the association named for damages for his discharge. A statement of the remedies open in such cases, and the reason for the reversal of a judgment in the plaintiff's favor, are given in the following paragraph of the syllabus by the court:

One who is employed as a clerk, and who is discharged, has the right of electing either of three remedies: (1) He may bring an immediate action for any special injury received from the discharge; (2) he may wait until the expiration of the term for which he was employed, and sue for the entire amount due him under the contract; or (3) he may treat the contract as rescinded and seek to recover upon quantum meruit the value of the services actually performed. Reasonably construed, the present suit is an action to recover the value of the plaintiff's services for the entire term fixed by the contract, though it was brought before the expiration of the term; and a finding for the plaintiff was not supported by the evidence. Proof that the plaintiff was willing to perform the services for the unexpired part of the term, and that the value of the services as fixed by the contract amounted to $137.30, would not authorize a recovery of that amount, where it appeared that the suit was brought prior to the expiration of the term.

CONTRACT OF EMPLOYMENT—IMPLIED RENEWAL—GROUNDS FOR DISCHARGE—*Akron Milling Co.* v. *Leiter, Appellate Court of Indiana (Dec. 18, 1914), 107 Northeastern Reporter, page 99.*—John C. Leiter brought action against the company named for payment for his

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services. He was employed as manager of its grain business for one year, being paid weekly. At the expiration of the year the employment continued without further express contract and on the same terms for over four months, when the employee was discharged, upon which he sued for pay for the balance of the second year. The company alleged as a reason for the discharge that the employee had been unfaithful to its interests in that he had a secret agreement by which he received a commission from a seller of machinery, whose goods he caused to be installed in the mill, and that he allowed an inferior article to be used in order to obtain larger profit. It appeared, however, that this had been known to the company before the expiration of the first year's contract, although perhaps more fully proved later. The trial judge instructed the jury that under these circumstances the facts alleged by the company constituted no justification for the discharge during the second year of the employment. Judgment was in favor of the plaintiff.

The appellate court held that certain technical objections made by the company were unavailing, and cited and adopted the principle found in several cases in other jurisdictions, that the continuation of the employment at the conclusion of the original contract constituted a new contract for a year. It then decided that the instruction of the trial judge was correct, as appears from the following quotation from the opinion by Judge Hottel:

It is urged that it was the duty of appellee [Leiter] to frankly inform the appellant [the milling company] of the things done by him that were inconsistent with the faithful discharge of his duties to his employer, and appellant had a right to refrain from informing appellee of its discovery of the facts concerning his duplicity with them until such time as they should be fully convinced, by authentic proof concerning the same, whether this was acquired before or after the expiration of said contract. There is no doubt but that appellant had the right to refrain from telling appellee of his supposed duplicity until such time as it saw fit, whether before or after the expiration of the original contract, but whether knowledge of such duplicity, either supposed or real, acquired before the expiration of the old contract, would be a sufficient excuse, under the law, for a discharge of appellee from the employment under the new contract which the law implied, is a very different question. Such information or knowledge would have furnished a very good excuse for refusal to renew the contract, but we think it is entirely insufficient to justify a discharge after the renewal. The instruction was, we think, in the respect for which it is criticized, as favorable to appellant as the law would permit.

CONTRACT OF EMPLOYMENT—LIFE EMPLOYMENT—CONSIDERATION FOR RELEASE OF CLAIM FOR DAMAGES—RATIFICATION—*Swanson v. Union Pacific Railroad Co., Supreme Court of Nebraska (May 14, 1915), 152 Northwestern Reporter, page 744.*—Nelse Swanson brought

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action against the company named for breach of a contract of employment for the remainder of his life. The employee had been injured in August, 1905, the injury resulting in the loss of a leg. While in the hospital he was visited by his foreman, Baldwin, who, it was shown, was frequently intrusted by the claim agent of the company with the making of settlements with the employees working under him. The employee testified that a settlement was there made, by the terms of which he received $500 in cash, and an agreement that he should be employed for life, or as long as he desired to work, at his former salary of $3 per day, and he signed a release. After he had sufficiently recovered he was employed under Baldwin from the early part of 1906 until November, 1911, when, Baldwin having died, he was discharged by his successor.

The court reviewed and adopted as sound the reasoning in the case of Tylee *v.* Illinois Central R. Co., 150 N. W. 1015 (see p. 311), and held that the evidence of the oral agreement to employ was properly admitted. It held that the evidence of ratification of the contract by the company was much stronger than in the Tylee case, since the employment of a crippled man, older than the maximum age at which the foreman was authorized to hire men for such duties, for a period of years, could be explained only on the theory of such a contract as claimed by the plaintiff.

The judgment, which had been in Swanson's favor in the district court of Douglas County, was affirmed.

CONTRACT OF EMPLOYMENT—TERM—BREACH—*Gabriel v. Opoznauer et al., City Court of New York (Mar. 20, 1915), 153 New York Supplement, page 990.*—Lucille Gabriel brought action against Jack Opoznauer and another for breach of contract of employment, and the verdict was in her favor. The defendants then moved to set aside the verdict. The defendants were manufacturers of gowns in Chicago, and the alleged contract between them and the plaintiff, a designer, was made on October 10, 1912, when they were arranging to enter the same business in New York. Opoznauer signed and handed to the plaintiff a letter memorandum, which contained the words "We herewith engage you at a salary of five thousand two hundred dollars ($5,200), to be paid in weekly installments of $100, for each week of work conscientiously performed." This is followed by a provision that if her qualifications were not as she had represented them, the connection might be terminated. There was no claim, however, that her services were not satisfactory. At the time he handed her the letter the employer specifically stated, "This is for a year." The contract was carried out for nine months until July 10, 1913, when the designer was discharged because of adverse busi-

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ness conditions, and in a manner which the court's opinion states plainly discloses that the employers considered that they were under obligation to employ her until October. They later claimed, however, that they had the right to discharge her at the end of any week. The court denied their motion to set aside the verdict, and its views on the questions of law are set forth in the following quotations from the opinion delivered by Judge Rawson:

The contention that, because the memorandum of hiring and discharge conditions which Opoznauer handed the plaintiff contained no words of express covenant on her part, the agreement made between them on October 10 was unenforceable for lack of mutuality, is untenable. Whatever the agreement was as to duration of the employment, there was an agreement, both parties acted on and under it, both performed its terms for most of the contract period claimed by the plaintiff, and the plaintiff was prevented from completing performance only by discharge under circumstances in no wise contemplated by any terms of the memorandum prepared by Opoznauer for his own protection on the subject of right to discharge.

The authorities lead to the conclusion that the hiring was for a year. Probably I would have been warranted in so ruling as a matter of law, construing the letter memorandum of October 10, alone. The agreement, it will be noted, was to pay a salary of $5,200, not a salary at a rate of $5,200, per year, as in cases relied on by the defendants, and the plaintiff was discharged before she received the $5,200 stipulated. If it had been intended to give an absolute right to discharge at any time, Opoznauer could readily have so stated, without leaving it to inference. It seemed perhaps preferable, in view of the border-line character of the legal question involved, to buttress the rule of legal construction with the jury's deliberate determination as to what the agreement of October 10 really was, taking into account all the facts brought out as to that hiring. Defendants certainly have no right to complain because the present verdict stands fortified by such a reference to the jury, which reached from all the evidence the same conclusion as the court might justifiably have declared to them as matter of law.

CONTRACT OF EMPLOYMENT—TERM—BREACH—DAMAGES—*Halpern v. Langrock Bros. Co., Kings County Court, New York (Feb. 16, 1915), 153 New York Supplement, page 985.*—The plaintiff in this case, Emanuel Halpern, was an engraver, and was in the employ of the company named when the contract was made, for the breach of which he brought suit against it. The contract reads:

In consideration of Langrock Bros. Company engaging me in their manufacturing establishment from week to week on a salary of $15 for the first six (6) months, starting August 29, 1912, to February 29, [sic] 1913; $16 for the second six months, starting February 29, [sic] 1913; $17 from August 29 to February 29, [sic] 1914; $18 from February 29 [sic] to August 29; $19 from August 29 to February 29 [sic], 1915; $20 from February 29 [sic] to August 29; $21 from August 29 to February 29, 1916:

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(1) I hereby agree to comply in every detail with the following requirements:

[Paragraphs 2 to 5 inclusive contain requirements to be performed by the employee.]

(6) It is agreed and understood between Langrock Bros. Company and myself, should I remain in their employ for a period of three (3) years from the above-mentioned date and faithfully carry out all the above requirements, I shall be paid by Langrock Bros. Company $2 for each week that I have been employed during the period of said three (3) years. The said three years to expire from the above-mentioned date.

(Signed) LANGROCK BROS. COMPANY.
L. L. LANGROCK.
EMANUEL HALPERN.

(Date) JULY 23, 1912.

The employee was not permitted to begin work under this contract. The company conceded the making of the contract and offered judgment for $15, one week's wages. The plaintiff testified that at the time of the signing of the contract he had a talk with the president of the company and was told that he was hired for a period of three and one-half years for the reason that, being a foreigner and not accustomed to work as they do it in New York, the company wanted to secure his services so that he would not leave as soon as he learned the company's method of doing business. The company claimed that the contract was unilateral, and therefore not binding upon either party; and that if binding it provides only for a hiring at will or from week to week.

The court gave judgment for the employee, holding that the contract was one of employment for three and one-half years, and that the employee was entitled to his wages less the amount he had been able to earn. Judge Roy, who delivered the opinion, said in part as to the questions above stated as being in issue:

In view of the defendant's offer that the plaintiff have judgment for one week's salary under the contract, it is difficult to understand how the defendant can support its claim that the contract is unenforceable (irrespective of the period), because, since the plaintiff was not permitted to even commence his employment, the defense that the contract is unenforceable, because unilateral, applies equally to plaintiff's claim to one week's salary as to his claim to three and one-half years' salary. I am not willing, however, to dispose of defendant's claim entirely upon admission and concession. I think it sufficiently appears from the above paper that there was an agreement between the parties. The subject of mutuality of contracts, so far as actions at law are concerned, and the subject of unilateral contracts, has been discussed at length by the court of appeals recently in the case of Grossman *v.* Schenker, 206 N. Y. 466, 100 N. E. 39. I quote some of the pertinent passages:

"A contract includes not only what the parties said, but also what is necessary to be implied from what they said." "What is implied in an express contract is as much a part of it as what is expressed."

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The same subject was considered in Moran *v.* Standard Oil Co., 211 N. Y. 187, 105 N. E. 217; the court said:

"There may be a promise to serve without a promise to employ, but there can be no 'agreement' for service without mutuality of rights and duties."

We find words of agreement in paragraphs first and sixth of the instrument in the case at bar. In paragraph sixth, by reference to the "above requirements" and the "above-mentioned date," I think a promise on the part of defendant to pay the consideration mentioned in the first part of the instrument can be inferred or implied. Certainly the paper in question is at least an offer on the part of the plaintiff to work for the defendant for a certain term at a certain consideration, and I think the acceptance by the defendant of the plaintiff's offer is clearly indicated by the signature of the defendant to the paper. This also makes an agreement.

The next question is, For how long a term did the parties agree that the plaintiff should be hired? It can hardly be claimed that the agreement is clear on this point. There is very little in the surrounding circumstances and the situation of the parties to throw light upon the question, except the fact that the contract was prepared by the defendant and that when the contract was signed the plaintiff was told by the defendant's president that he (plaintiff) had a contract for three and one-half years. Of course, the intention of the parties must be determined from the language which they employed in the agreement. The meaning of the agreement is not at once apparent, and so assistance must be obtained from the rules of law which are designed to guide us in these circumstances. These rules are well settled, and the only difficulty is in applying them.

"In this State the rule is settled that, unless a definite period of service is specified in the contract, the hiring is at will, and the master has the right to discharge and the servant to leave at any time." (Watson *v.* Gugino, 204 N. Y. 535, 98 N. E. 18.)

"The fact that the compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but that in all such cases the contract may be put to an end by either party at any time, unless the time is fixed." (Martin *v.* New York Life Insurance Co., 148 N. Y. 117, 42 N. E. 416.)

It is also a fundamental rule that, if possible, effect should be given to all the language employed in an agreement. It is difficult to understand why, if the contract in question was only a hiring for a week, the obligations of the plaintiff had to be set out in such detail. Again, if it were a weekly hiring, or a hiring at will, why were seven periods of six months each provided for in the agreement? Why, when the compensation was fixed at $21 for the last period of six months, did the agreement not say, "$21 from August 29 to February 29, 1916, and thereafter." Further, why was the extra compensation of $2 a week carefully limited to three years of the period of three and one-half years, unless it was for the purpose of clearly indicating that the extra compensation of $2 should not be paid for the last six months of the term? Literally the words mean that the salary was only $15 for the first six months and not $15 a week; but the defendant, by its offer of judgment of $15 for one week's salary, has con-

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ceded that this is not the meaning of the language or the intention of the parties.

The plaintiff is entitled to judgment for $15 a week for the three and one-half years, less the $800 which he earned during that time. (Milage *v.* Woodward, 186 N. Y. 252, 78 N. E. 878.)

On appeal the appellate division of the court set aside this judgment and dismissed the complaint, on the ground that the suit was brought for an amount in excess of $2,000, and was not therefore within the jurisdiction of the county court. (See 155 N. Y. Supp., p. 167.)

CONTRACT OF EMPLOYMENT—TERMINATION—RECOVERY OF WAGES—"SEAMEN"—*The "J. P. Schuh," United States District Court, Southern District of Alabama (Jan. 30, 1915), 223 Federal Reporter, page 455.*—Anderson Jackson and others, employed as deck hands on the vessel named, sued to recover their wages. At the time of hiring no term of service or rate of wages was mentioned, but, one at least of the men having been employed similarly by the same employer, it was understood that the pay was to be at the rate of $35 per month, or $1.16⅔ per day. The employees cleaned the barges which the steamer took in tow, made the trip up the river from Mobile, loaded the barges with ties, and began the return trip. Three of the four barges became stranded on a sand bar, and the employees worked a part of the night in attempting to get them afloat. The next morning they were ordered to carry the ties from one of the barges to the steamer, which they refused to do, on the ground that they were too tired, having worked all the preceding day and a part of the night. They were told, if they would not do the work, to get off the boat, and did so. Previous to this, the men had worked 15 days.

The court stated the rule of law that a hiring at a specified rate, no time being specified, is an indefinite hiring, and may be determined at any time at the will of either party; and a recovery may be had for the services actually rendered. It held that the employees were not "seamen" under the statutes of the United States providing that deserters shall forfeit wages due them. It therefore held that they were entitled to recover the wages earned for services rendered prior to the day on which they left the boat.

EMPLOYER AND EMPLOYEE—LIABILITY OF RAILROAD TO MAN BOARDING WORKMEN'S TRAIN TO SECURE EMPLOYMENT—*Schifalaqua v. Atlantic City Railroad Co., Supreme Court of Pennsylvania (May 26, 1915), 95 Atlantic Reporter, page 260.*—The plaintiff in this case was injured while boarding a workmen's train used by the company named

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to carry its laborers to their working place, where he hoped to secure work. That he was not either an employee or a passenger was held by the court, which reversed a judgment in his favor. In delivering the opinion Judge Stewart said in part:

That the train was exclusively a train to carry workmen was a fact not in dispute. That either invitation or permission was given plaintiff by anyone in charge of the train to enter the car nowhere appears in the evidence for the plaintiff, except as the general directions given by a presumed boss could be so construed; while, on the other hand, the uncontradicted evidence adduced by the defendant is to the effect that neither invitation nor permission was given by any employee. The trial judge was correct in holding that, except as plaintiff was a passenger when injured, there could be no recovery; but on the state of the evidence he should have held as matter of law that he was not a passenger, and directed a verdict for the defendant.

EMPLOYERS' ASSOCIATIONS—EXPULSION—CHARGES—TRIAL—RESTORATION TO MEMBERSHIP—*Grassi Bros. (Inc.) v. O'Rourke et al., Supreme Court of New York, Special Term, New York County (February, 1915), 153 New York Supplement, page 493.*—The corporation named was a member of the Employing Plasterers' Association, a voluntary association composed of firms and corporations engaged as employers in the plastering trade. The object of the association is stated in its constitution to be "to foster, protect and promote the welfare and interest of its members," and it is provided that membership shall be held as personal property by either person, firm, or corporation. The institution fee is fixed at $100, annual dues at $80, and there is a schedule of fines for nonattendance at meetings. The company was expelled from this association, and brought action for restoration on the ground that its expulsion was illegal under the constitution of the association. The court held that the proceedings of the association were not legal, Judge Goff, who delivered the opinion, saying in part:

The relations of a member of an unincorporated society to the society are fixed by the contract of the parties, as expressed in the constitution and by-laws. With their operation when applied as disciplinary measures a court of equity will not interfere, provided they are applied justly and fairly. If they are so applied, further inquiry will not be made. By his voluntary act the member assumes obligations and submits to liabilities; and if, after due observance of his rights, unsatisfactory results follow, he will not be heard in complaint of the tribunal which he has selected. This is the essence of all judicial authority that has pronounced upon the subject. (Cohen *v.* Thomas, 209 N. Y. 407, 103 N. E. 708, and cases cited; People ex rel. Holmstrom *v.* Independent Dock Builders' Union, 164 App. Div. 267, 149 N. Y. Supp. 771.)

The interest which plaintiff acquired by its membership was not merely of a sentimental or social nature. It was of substance and

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value in its business aspect, and it can not be deprived of it, except by proceedings in accordance with the law of its membership. [Cases cited.] Article V, section 5, of the Constitution provides that:

"The executive committee shall act as a * * * trial committee and shall decide * * * all charges involving irregularities, such as violations of contracts, etc.; but their finding shall be subject to appeal to the association for final action. It shall be the duty of the committee to hear all charges and to make a careful investigation of same before taking action thereon, and to accord a fair hearing before the committee."

Section 6 reads:

"All charges must be preferred in writing over the signature of the person or persons making the charge," etc.

Reduced to essentials, these provisions require (*a*) that charges must be in writing over the signature of the person making the charge; (*b*) that the committee shall hear all the charges; and (*c*) that the accused shall have a fair hearing, which means that he shall have a fair trial. There is no provision requiring notice of the preferring of charges to be served on an accused member; but there should be, and since there is not, the law will insert such provision, because it would be repugnant to a sense of justice that an accused should be haled before a trial committee without being apprised of the cause. [Cases cited.]

On the 19th of September, 1913, plaintiff received from the secretary of the association this letter:

"GENTLEMEN: You are hereby cited to appear before the executive committee of the Employing Plasterers' Association on Monday, September 22, 1913, at 3 o'clock, No. 30 West Thirty-third Street."

The opinion shows that this was entirely inadequate as a notice to answer charges. On the appearance of the representative of the company before the committee no charges were read or exhibited to him, nor were any witnesses heard, but the company was found guilty on the finding of the "trade board" and expulsion recommended. A special meeting of the association was held, at which also no charges were preferred nor witnesses examined. The plaintiff's representative was excluded while a vote was taken to expel the plaintiff. The court says:

From the initial step, when plaintiff was "cited" to appear before the executive committee, to the culminating vote for expulsion, the association ignored its own laws and thereby deprived plaintiff of its right. The course taken was not marked by irregularities which might be waived by appearance and participation, but it was fundamentally invalid, in that, there being no charges, there could be no trial, and consequently there could be no verdict of guilty and sentence of expulsion.

The contention was made by the association that authority had been given to a "trade board," instituted under an agreement between the employers' association and the workmen's associations, to take action in such cases. This is examined, and the conclusion

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reached that such authority is not given by the constitution, which alone could legally confer it as far as the association involved was concerned, nor even under the trade agreement.

It was adjudged that plaintiff should be restored to membership, with all its rights and privileges, and with damages to be determined by reference as previously agreed. Injunction against the local unions of workmen was refused, as it would not be presumed that the workmen would refuse to work for the company until action was actually taken in that respect.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISKS—FELLOW-SERVANT DOCTRINE—*Kligo v. Rome Soil Pipe Manufacturing Co., Court of Appeals of Georgia (Sept. 3, 1914), 86 Southeastern Reporter, page 82.*—J. A. Kligo brought action against the company named for damages for personal injuries, but was nonsuited. On appeal the judgment against him was affirmed. The facts of the case are not stated in the reporter, but the syllabus by the court is a concise statement of the unmodified common-law doctrines as to fellow servants and assumption of risks. The statements of law are supported by many citations from the statutes of the State and decisions of its courts, which are here omitted:

If the injury to the plaintiff in fact resulted from negligence at all, it resulted from the negligence of a fellow servant, with whom and by whose side the plaintiff had worked almost continuously for more than two years prior to the injury. For an injury arising alone from the negligence of a fellow servant there can be no recovery, except in the case of railroad companies.

A servant can not recover for injuries resulting from the incompetency of a fellow servant, if he had equal opportunity with the master of discovering such incompetency, or in the exercise of ordinary care should have known of such incompetency.

The presumption exists that the master exercised ordinary care in the selection of his servants; and one who complains of injuries which he alleges resulted from the incompetency of his fellow servants must overcome this presumption by direct proof, and can not successfully rebut the presumption by inferences drawn from facts which fail to disclose knowledge on the part of the master of the incompetency of the fellow servants. The incompetency of a fellow servant must be established by the plaintiff, who complains of injuries resulting therefrom, as a fact in the case, and not by any inferences.

No recovery can be had upon mere proof of negligence on the part of the master; but the plaintiff must show, in addition to the exercise of due care on his own part, that he was not aware of the danger, that his opportunities of knowing the existence of the danger were not equal to those of the master, and that in the exercise of ordinary care he could not himself have known of the danger.

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An adult servant will be presumed to have knowledge of existing defects or dangers in machinery in connection with which his duties require him to work, and to know of the competency or incompetency of his fellow servants working with him about such machinery, after established by the plaintiff, who complains of injuries resulting therefrom, as a fact in the case, and not by any inferences.

EMPLOYERS' LIABILITY—CONTRACT FOR PAYMENTS TO WIFE TO AVOID SUIT—*Kelly v. Burnham, Williams & Co., Supreme Court of Pennsylvania (Feb. 22, 1915), 93 Atlantic Reporter, page 949.*—Margaret Kelly brought an action for damages against A. B. Johnson and others, constituting the firm named.

On May 31, 1907, Andrew Kelly, the husband of the plaintiff, was injured while in the employ of the firm by the bursting of a wood-polishing wheel. He was rendered unconscious for three days, and permanently incapacitated for work. He became of unsound mind, and was confined in an insane hospital from shortly after the accident up to the time of the trial. Within a day or two after the accident one Pooley, claiming to be an employee of the firm, called and, according to plaintiff's testimony, agreed to pay the rent of her house, $16 per month, and $8 per week for household expenses so long as her husband was unable to work, and thereafter to employ him at $12 per week, if she would not "go to law." Payments were made aggregating $790 and continuing up to July 7, 1909, when the firm ceased to make them, with the result that after a time the wife brought suit upon the alleged contract. The court of common pleas of Philadelphia County dismissed the case, and the plaintiff appealed. The Supreme Court reversed the judgment, holding that Mrs. Kelly showed a good cause of action.

In delivering the opinion Judge Fraser stated the reasons of the trial court for entering a nonsuit, and the grounds for reversal of the judgment, as follows:

At the trial in the court below a compulsory nonsuit was entered; the reasons assigned therefor being: (1) Insufficient evidence to establish Pooley's authority to make the contract; (2) want of consideration; and (3) that appellant had no right of action for the injury received by her husband. The refusal of the court to take off the nonsuit is assigned as error.

For the purpose of determining the question now before us, we may assume, as testified to by Mrs. Kelly, that Pooley made an agreement with her for the payment of certain sums of money if she would not bring suit against appellees. An examination of the testimony fails to show authority in Pooley to make such a contract in their behalf. That being the case, was the evidence sufficient to take the question of ratification of Pooley's act by appellees to the jury? The payments claimed to have been agreed upon between Mrs. Kelly and

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Pooley were made from time to time at the office of appellees by Mr. Vauclain, one of the appellees, and by authorized employees of the company, during the 27 months following the accident without objection or protest upon the part of either Mr. Vauclain, who apparently had knowledge of some understanding or agreement with Mrs. Kelly, or any other member of the company. This evidence was amply sufficient to require the submission to the jury of the question of a contract by Pooley and its ratification by appellees. If the sums allowed her were a charity, voluntarily made, as set forth in the affidavit of defense, and were not made under a contract as claimed by Mrs. Kelly, that question was also for the jury.

To sustain a consideration, appellant relies on Hamaker *v.* Eberley, 2 Bin. 506, 4 Am. Dec. 477. The rule laid down in that case would seem to sustain her contention. While it is true as a general rule that a promise to forbear a suit against a person against whom the plaintiff has no legal cause of action is not a sufficient consideration, the situation here makes that rule inapplicable to the facts before us. While Mrs. Kelly probably had no right of action against appellees at the time Pooley was "coaxing her not to go to law," we can fairly assume from the testimony that it was believed by both herself and Pooley that her husband's injuries would terminate fatally. In that event Mrs. Kelly would have an action against appellees, and if under those circumstances she "gave up all her legal redress, either present or future, under any circumstances which might arise" (Hamaker *v.* Eberley, supra), as she did according to her testimony, there was ample consideration to sustain the contract which she avers existed between herself and appellees. We are of opinion that, under the circumstances developed by plaintiff's testimony, this case was for the jury.

EMPLOYERS' LIABILITY—CONTRACT TO FURNISH MEDICAL SERVICES—*Liliopoulos v. Oregon-Washington Railroad & Navigation Co., Supreme Court of Washington (Sept. 24, 1915), 151 Pacific Reporter, page 818.*—Evangelos Liliopoulos was employed as a laborer by the company named in the early part of April, 1913, his wages being $1.75 per day, a deduction of 50 cents per month being made for the company's hospital fund. This employee, also the others of the gang, and the foreman who hired them, were Greeks.

April 27, 1913, was a holiday known as the Greek Easter, and no work was done. Liliopoulos did not take part in the celebration, but remained in and near the car in which were his sleeping quarters. After the dinner hour, and between 1 and 1:30, the subforeman, timekeeper and others came to him, and undertook to get him to join them in drinking. He took one glass of beer, and refused to take more. One of the drunken men drew a pistol and threatened to shoot him if he did not drink. Liliopoulos attempted to take away the pistol, and it was discharged through his upper arm, severing the main artery, splintering the bone, and severely lacerating and bruising the

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tissues. The company had no physician or surgeon at the place, nor was any located there. The employee's colaborers bound the arm so as to stop the flow of blood, and demanded from the foreman that he be taken to the company's hospital for treatment. This was refused on account of the rule of the company that hospital benefits would not be furnished to an employee injured in a fight or brawl. The use of a hand car was also refused, and he was taken to a hospital in a town about 10 miles distant on the next passenger train, which passed at 6 p. m. He was taken to the hospital at the expense of the other laborers, and he and his brother bore the expense of the treatment there. The railroad company sustained the claim of the foreman that the man was not entitled to hospital benefits at its expense. The arm was finally removed four days after the injury, when the lower arm had become gangrenous, and there was infection above the wound, causing slow healing of the amputation wound.

The employee brought action against the company for breach of contract, alleging failure to furnish medical attendance as agreed, and consequent loss of the arm. On the trial the employee testified that he was told by the foreman that the deduction from his wages would entitle him to medical and hospital services in case he should become sick or injured while in the company's employ, no mention being made of the exception relied upon by the company; and this evidence was corroborated by others hired at the same time. Judgment was rendered for the employee in the superior court of King County, and this was affirmed. As to the authority of the foreman who hired the employee to bind the company as to the terms of the contract, and also his agency for the company in receiving demand for hospital services, Judge Fullerton, who delivered the opinion, said:

The evidence makes it clear that he was empowered to take men into the employ of the company and discharge them after they had been so employed. Presumptively, at least, he was empowered to state the terms of the contract of hire to those whom he hired, and if he stated them incorrectly, or even contrary to his instructions, any loss caused thereby must fall upon the person whose agent he was, not upon the person dealing with him as a stranger.

It is argued further in this connection that, since the respondent was not engaged in the service of the company on the day of his injury, he was not under the authority of the foreman, and hence notice to the foreman was not notice to the company, and any lack of attention on the part of the foreman would not bind the company. We can not think this contention tenable. The foreman was the representative of the company with whom the contract of hire was made. He had charge of the force of men of whom the respondent formed a part. He was the only agent of the company authorized to deal with the respondent which the company had brought to the respondent's notice. He contracted with the respondent on behalf

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of the company to furnish him with medical and surgical attendance in case he should become sick or be injured during the time he was in the company's employ. Surely it can not be said under these conditions that his power to represent the company with reference to the contract existed only during the periods of the employment in which the respondent was actually engaged in manual labor in the course of the employment; on the contrary, his power to so represent the company continued during the entire course of the employment or until such time as the respondent should receive notice from the company that the foreman no longer represented it.

There was evidence both for and against the probability of recovery without amputation if there had been timely attention to the wound, and the court held that the question had been properly submitted to the jury as to whether the loss was due to the breach of contract on the part of the company in not promptly rendering medical and surgical services.

EMPLOYERS' LIABILITY—REFUSAL OF OPPORTUNITY FOR SICK EMPLOYEE TO LEAVE STORE—*Keefe v. Straus et al., Supreme Court of New York, Special Term, New York County (September, 1915), 155 New York Supplement, p. 530.*—On December 20, 1912, a cold winter day, Louisa Keefe, a saleswoman in the store of the defendants in this action, was, as alleged in the complaint, taken sick at her counter, with a chill and vomiting. She expressed a desire to go home for immediate medical treatment, and asked for a pass to get her hat, coat, etc. According to a rule of the store, these were in a locker, and could not be obtained without a pass. This was refused on the ground that no passes could be given before closing hours until after the holidays, and she was obliged to remain in the store for over two hours, from about 4 p. m., when she was taken ill. When she left she was still suffering from the severe chill, but made her way as best she could to her home in Brooklyn 5 miles away, no assistance being given or offered. She took to her bed and secured medical treatment, but died from pneumonia on December 26. It was alleged that her death was caused solely by the defendants forcing her to remain in the store for over two hours after she was seized with the chill, and by their failure to take any precautions to protect her from the elements or assist her home. The suit was brought against Nathan Straus et al., by Hannah Keefe as administratrix, and the defendants demurred to the complaint, thus raising the question whether, conceding the facts alleged to be true, they constitute a cause of action. The court held that actionable neglect to perform a legal duty was set forth, and judgment was given to the plaintiff, with leave to the defendants, however, to withdraw the demurrer and file an answer, thus bringing the case in order for trial in the usual way.

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EMPLOYERS' LIABILITY—RELEASE—AGREEMENT TO PAY SALARY WHILE UNABLE TO WORK AFTER INJURY—*Tylee v. Illinois Central Railroad Co., Supreme Court of Nebraska (Jan. 29, 1915), 150 Northwestern Reporter, page 1015.*—Gus A. Tylee brought action to recover $900 due as salary as traveling watchman for the company named at $75 per month for one year. He had been injured while alighting from a train on March 6, 1911. He signed a release for the damages resulting from this injury, purporting to be on consideration of $10, but claimed that a further consideration was the payment to him of his regular salary during such time as he should be unable to resume work. His salary for the month of March, 1911, was paid in full, but the company refused to pay it thereafter. He claimed that he was unable to resume work for one year, and in the district court of Douglas County recovered a verdict for the full amount claimed. On appeal, the judgment was affirmed, Judge Rose, who delivered the opinion, saying:

One of the assignments of error challenges testimony of plaintiff on the ground that it varies and modifies the terms of a written instrument. The release signed by plaintiff makes no mention of a promise to pay his salary as a part of the consideration.

The oral testimony of plaintiff tends to show that the promise to pay his salary during the temporary disability resulting from his injuries was part of the consideration for the release. It is argued that proof of this nature varies and modifies the terms of the written instrument, and is consequently inadmissible. What plaintiff signed was an agreement releasing defendant from liability for personal injuries. There is no attempt to vary the terms of the release itself. Plaintiff is not seeking damages for the tort. In effect, the action is one on an oral promise to recover part of the consideration for the release. The rule of law applicable to the present inquiry is that an oral promise by an employer to pay an employee his regular salary during a temporary disability may be shown by parol to be a part of the consideration for a release of the employer's liability for personal injuries, though the employee signed a release for the expressed consideration of a specific sum of money. [Cases cited.] It follows that the oral evidence was properly admitted.

As to the company's contention that its claim agent had no authority to make the oral agreement upon which the employee's action was based, it is pointed out that the company, in introducing in evidence the release and invoking its protection, adopted the instrumentalities employed by its claim agent in procuring it, including the oral promise.

EMPLOYERS' LIABILITY—RELIEF FUND—CONTRACT FOR HALF PAY DURING DISABILITY—JUDGMENT FOR DAMAGES AS BAR TO AWARD—*McAdow v. Kansas City Western Railway Co., Supreme Court of Kansas (Oct. 9, 1915), 151 Pacific Reporter, page 1113.*—G. B. McAdow brought action against the company named upon an oral con-

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tract of insurance claimed to have been made at the time of his employment as a motorman. By its terms as alleged by him 50 cents per month was to be deducted from his wages, and he was to receive half pay while disabled, if the duration of the disability was not over one year. The employee had sued the company for damages for the injury which caused the disability, and recovered $7,500 on the ground that it was negligent, and it was suggested that the claim under the contract was barred thereby. The company claimed that the 50 cents per month was used to buy accident insurance from a company in that business, and that the employee's action should be against that company. The fact that on an occasion when the employee had been paid a small sum for a minor injury the receipt indicated that the source of the money was the insurance company is mentioned, also the fact that notices had been posted indicating that the deductions were made for such insurance. Reference was made to a case in the Indiana courts, in which a certificate of insurance was furnished the employee; this was decided in favor of the employer, but Judge Mason, who delivered the opinion reversing the judgment of the court below in favor of the company in the present case, said:

> The language quoted [in the Indiana case] makes it entirely clear that the employee was a party to a contract under which the insurance company had written an accident policy for his benefit, any payments under it to be made to him through the railroad paymaster. Here the plaintiff did not testify to such an arrangement, nor did the defendant introduce any incontestible proof of its existence. That the evidence as a whole may have tended strongly in that direction does not affect the question now under consideration. A Canadian court, however, has reached a conclusion contrary to that arrived at in the Indiana case cited, upon a contract quite similar to the one there interpreted.

It was then pointed out that the liability for negligence in an action for damages and that on a contract of this character are entirely distinct, so that recovery in the former is no bar to this action. It was also held that the company had the power to bind itself by such a contract, although it did not have power to conduct a general insurance business.

EMPLOYERS' LIABILITY INSURANCE—AMOUNT OF PREMIUMS—INSPECTION OF BOOKS—*Frankfort Marine Accident & Plate Glass Insurance Co. v. California Artistic Metal & Wire Co., District Court of Appeals, Third District, California (Aug. 12, 1915), 151 Pacific Reporter, page 176.*—The companies named entered into two contracts of liability insurance, the premium in one case being 2 per cent and in the other 1 per cent of the last-named company's pay roll, and the

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policies running for one year from September 17, 1907. The pay roll was estimated at $2,500, there being an additional clause providing for adjustment of the premium at the end of the year in accordance with the fact as to the actual pay roll. After September 17, 1908, the insurance company repeatedly demanded an opportunity to inspect the books of the metal company to ascertain the amount due it for additional premiums, but this was refused. A suit in equity for discovery and for judgment for the amount found to be due was brought, and in the trial court a decree compelling an accounting was made, and judgment rendered in the sum of $2,600 in favor of the insurance company. The metal company appealed from the judgment and the order denying a new trial. It contended that the insurance company had no right to sue it in equity, as there was adequate remedy at law. The court held that there was ground for an action in equity, as the contract created a fiduciary relation between the parties, making the metal company the agent of the insurance company to inform it as to the amount of the pay roll, and consequently of the amount of premiums due.

The trial court had decided that the policies would be construed as applying to the compensation paid by the metal company to all its employees, both inside and outside the office building. The court of appeals sustained the decision in this respect also, and affirmed the judgment on the ground that by its failure to keep a separate account of the payments to outside employees as wages for the insurance year, the employing company itself had so construed or should be held to have so construed the policies as to embrace within them its entire pay roll; or that at any rate, the company having failed to discharge its duty of keeping a separate account of the wages paid, thus making it impossible to determine what proportion was paid to outside employees, the court was justified in concluding and deciding that the basis of the amount to which the insurance company was entitled as premiums on the policies was the total wages paid all its employees, inside as well as outside.

EMPLOYERS' LIABILITY INSURANCE—CONSTRUCTION OF CONTRACT—EXPENSES—*Little Cahaba Coal Co. v. Aetna Life Insurance Co., Supreme Court of Alabama (Apr. 15, 1915), 68 Southern Reporter, page 317.*—The coal company named was insured by an indemnity policy of the insurance company, which limited the liability for loss on account of an accident resulting in the injury or death of one person to $5,000, but required that the insurance company should also pay the expenses of litigation, and provided that the insurance company might assume the defense of any case at its own cost. An employee, Gilbert, was injured, and recovered a verdict for $5,000. On appeal

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the judgment was affirmed, which decision carried with it 10 per cent damages and interest pending the appeal, which brought the amount to $6,672.25, exclusive of costs. The insurance company paid the costs and contributed $5,000 toward the payment of the judgment; but the coal company brought action against it for the balance of $1,672.25. The coal company contended that this amount was an expense of litigation which the insurer was liable to pay under the contract, and also that the insurer, having caused the additional expense by its appeal, was responsible therefor. The court overruled both these contentions, and held that the insurance company was not further liable.

INJUNCTION—CONTEMPT—EVIDENCE—*Oates v. United States, United States Circuit Court of Appeals, Fourth Circuit (May 4, 1915), 223 Federal Reporter, page 1013.*—James Oates and three others were found guilty of contempt of court in separate proceedings in the District Court for the Northern District of West Virginia, and sentenced to pay the costs and be imprisoned for six months. The contempt alleged was violation of a temporary restraining order issued September 29, 1913, in the case of West Virginia-Pittsburg Coal Co. *v.* John P. White et al., enjoining interference with the company's business by the use of threats, force, intimidation or persuasion to induce its employees to break their contracts or leave their work, or by using like means to induce any person to refuse to accept employment with the company; also trespassing upon the company's premises for the above purposes. The judgment of conviction was reversed on this appeal, Judge Woods, who delivered the opinion of the court, saying:

The district judge made specific findings of a number of acts of disobedience of the order by each of the parties charged, and the sentence imposed on each defendant was the payment of the costs and imprisonment for six months. The questions here made, recently considered and decided in Schwartz *v.* United States, 217 Fed. 866 [see p. 315], and Scoric *v.* United States, 217 Fed. 871, will not be reconsidered.

There was before the district judge competent evidence sufficient to warrant a finding of contempt in disregarding the orders of the court against all of the plaintiffs in error. As to some of these findings there was, indeed, no conflict of evidence. As to others, however, there was conflicting evidence, and hence it was important that irrelevant and incompetent evidence should be excluded from consideration. Numerous objections were made to testimony as hearsay which were either overruled or left for future consideration. It is true the court in its decree recites that it bases its finding upon "the legal evidence produced upon the trial rejecting all improper and irrelevant parts thereof," but hearsay evidence was admitted, and it is impossible for this court to say from the record what the district

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judge ultimately rejected and whether any of the incompetent testimony influenced his findings or the extent of the punishment inflicted.

A part of the decree of Judge Dayton in the district court is quoted, reciting the facts as to the opinion of that court in Hitchman Coal & Coke Co. *v.* Mitchell et al., 202 Fed. 512 (Bul. No. 152, p. 137), and as to the issuance of a final decree in that case. The opinion of the circuit court of appeals then concludes as follows:

Some of these conclusions were held to be erroneous in the case of Mitchell et al. *v.* Hitchman Coal Co., 214 Fed. 685 [Bul. No. 169, p. 315], and it is impossible to determine from the record to what extent the erroneous views of the district judge as to the legality of the labor union influenced his findings of fact or his infliction of punishment. Following the rule laid down in Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492 [Bul. No. 95, p. 323], we are obliged to hold, further, that it was not in accordance with law to impose a general sentence for the separate acts of contempt alleged and found against the defendants. The punishment for distinctly different offenses should have been so separated that this court on review could analyze the evidence and determine which, if any, of the charges were sustained.

The judgment of the district court must be reversed, and the causes remanded, so that the district judge may reconsider them, indicating in his finding the evidence rejected as hearsay, announcing his conclusions of fact in view of the judgment of this court in Mitchell *v.* Hitchman Coal Co., and imposing sentence in accordance with the view of the Supreme Court of the United States in Gompers *v.* Buck's Stove & Range Co.

INJUNCTION—CONTEMPT—POWER OF COURT—*Schwartz v. United States, United States Circuit Court of Appeals, Fourth Circuit (Sept. 8, 1914), 217 Federal Reporter, page 866.*—Proceeding was brought against Meyer Schwartz for criminal contempt in violating an order of the District Court for the Northern District of West Virginia, directed against the officers of the United Mine Workers of America "and all persons combining and conspiring with the said designated persons and all other persons whomsoever." The charge against Schwartz fell under the following provision of the order: "from ordering, aiding, directing, assisting, or abetting, in any manner whatsoever, any person or persons to commit any or either of the acts aforesaid." By petition the plaintiff, the West Virginia-Pittsburg Coal Co., made the following allegation against Schwartz:

Meyer Schwartz, who keeps a store near your petitioner's Locust Grove mine, after being advised of the terms and provisions of the said restraining order, has continued to furnish a meeting place for your petitioner's striking employees and to assist in inducing your petitioner's striking employees to remain away from their work, in violation of their respective contracts of employment.

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An affidavit attached to the petition alleged service of the order on Schwartz, his acts of furnishing a place for the striking miners to hold their meetings as near as possible to the mines, and of providing a conveyance and a driver for two of the officers of the United Mine Workers to go over the plaintiff's property to a meeting of the strikers.

Schwartz with others promised in open court on December 2, 1913, to desist from the acts charged as contempt and to comply strictly with the order of injunction, but in January a petition to the court alleged that he had continued in violation of it, and after hearing he was adjudged guilty and sentenced to imprisonment for 60 days, which judgment was on the present trial affirmed, as appears below.

The errors alleged by Schwartz as reasons for reversal of this judgment are rather technical, and some will not be noticed here. As to others Judge Woods, who delivered the opinion of the court, said in part:

There is no force in the position that the judgment should be reversed because the court exceeded its power in adjudging the defendant guilty of contempt for furnishing a meeting place for organizers of the United Mine Workers of America and others, and thus aided them in inducing by force, threats, intimidation, and persuasion the employees of West Virginia-Pittsburg Coal Co. to quit work. It is true that the judgment for contempt, as well as the order of injunction, will be set aside on writ of error, when the trial court had no jurisdiction to make the order of injunction. [Cases cited.] But that condition is not presented here. The court had jurisdiction of the subject matter—the protection of the West Virginia-Pittsburg Coal Co. in its property rights—and of the defendant, who had appeared in the cause to answer the charge that he had unlawfully interfered with those rights.

Under these conditions it can not be said by the defendant that the order of injunction and the order to show cause, acquiesced in by him and not appealed from, is a nullity, because it may have been erroneous in embracing acts which should not have been held to be unlawful aid to those who were charged with unlawful interference with the business of the West Virginia-Pittsburg Coal Co.

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution fittingly calls the 'judicial power of the United States' would be a mere mockery." (Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492 [Bul. No. 95, p. 323].)

The well-established principle is that in a case of criminal contempt the trial court must be convinced of the guilt of the accused beyond a reasonable doubt, but when there is evidence tending to show guilt the finding of fact by the trial court can not be reviewed by this court. (Bessette *v.* Conkey Co., 194 U. S. 338, 24 Sup. Ct. 665.) In this case there was evidence that the defendant rented his land to the officials of the United Mine Workers of America and others, who were taking means forbidden by the injunction to induce the em-

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ployees of West Virginia-Pittsburg Coal Co. to quit work, not only with the knowledge that it would be used, but with the purpose that it should be used, as a base for their operations. There was also evidence that he furnished conveyances to some of the same persons for a like purpose. This was evidence tending to show the "aiding and assisting" by the defendant which the court had forbidden.

This court in a unanimous opinion (Mitchell et al. *v.* Hitchman Coal & Coke Co., 214 Fed. 685 [Bul. No. 169, p. 315], has expressed its views fully on the limits to which an injunction of this sort should go. It was there held that it is an invasion of the rights of the citizen to enjoin the promotion of a labor union by persuasion and other peaceable and lawful means. Had this order of injunction been brought up for review by the defendant, it would have been modified in his behalf. But it is too late to allege before this court that the injunction was too broad when the defendant appeared in court to answer the charge of violating the injunction, and, instead of bringing the order up for review, waived all objections to it by submitting himself and promising obedience to it.

INTERFERENCE WITH EMPLOYMENT—BLACKLIST—*McCarter v. Baltimore Chamber of Commerce, Court of Appeals of Maryland (May 5, 1915), 94 Atlantic Reporter, page 541.*—Robert McCarter brought action against the Baltimore Chamber of Commerce, which set up the claim that the declaration against it did not properly charge an offense, and in the Baltimore city court this contention was sustained and judgment was rendered for the defendant organization. The chamber of commerce had provisions in its by-laws to the effect that any company, firm, or individual whose dealings with any member were "inconsistent with just and equitable principles of trade," should be tried before the complaint committee of the chamber; and if the charge should be sustained, any member doing business with the party should be expelled. Proceedings were had under these provisions with respect to McCarter, and several members who had employed him ceased to do so. The court affirmed the judgment below, Judge Constable, who delivered the opinion, saying in part:

It will be noticed that the declaration avers no particular nor definite period of time for the termination of the contracts of employment, and therefore it is to be assumed that they were terminable at the will or wish of either party without actionable liability upon the part of either, in other words, a case of hiring from day to day. We do not mean to intimate that because of this a third party has the legal right to maliciously interfere so as to terminate an employment, but only to note that it was the legal right of either employer or employee to bring the employment to an end.

The argument of the appellant is that this is not a case of one voluntarily refusing to continue business with him, but a case of one, against his will, being forced by threats and intimidations made by a third party, the appellee, to sever those relations. And this brings us, to our minds, to the crucial test of the liability of the appellee,

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whether the by-law in question was, in law, a coercive threat upon the minds of the members of the appellee corporation. If the posting of the appellant by virtue of it did not so amount, then the fact that the corporation directed certain members to observe it under penalty of the enforcement of its provisions adds nothing to the claim of the appellant.

The question of whether such a by-law is coercive has given rise to a conflict of the authorities. There have been many cases where associations have had by-laws similar, or practically so, to the one in this case, and in some jurisdictions courts have held the associations liable to parties injured through their enforcement, while in others the opposite conclusion has been reached. [Cases cited.]

Of the above-cited cases we think it only necessary to review that of Bohn Manufacturing Co. *v.* Hollis [54 Minn. 223, 55 N. W. 1119], for the reason that in a recent case (Klingel Pharm. *v.* Sharpe & Dohme, 104 Md. 218, 64 Atl. 1029) this court has reviewed the facts and approved the finding of the Minnesota court. In that case a large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers at a place where a member of the association was engaged in the retail business, and they provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff made such a sale, and the secretary made demand upon him for the penalty prescribed by the by-laws, but the plaintiff delayed so long in the payment of the penalty the secretary threatened to send notices to all the members. By the provisions of the by-law any member who continued dealings with such wholesale dealer was subject to expulsion from the association. The plaintiff applied for an injunction to restrain the sending of the notices, but it was held no action would lie, and that there was no ground for an injunction.

Chief Judge McSherry, in delivering the opinion in Klingel Pharm. *v.* Sharpe & Dohme, supra, approved the opinion in the above case and declared "there was nothing unlawful in this." Under the authority of those cases there was not such an interference with the rights of the appellant by the appellee corporation as to amount in law to a wrongful and malicious interference for which an action will lie.

INTERFERENCE WITH EMPLOYMENT—BLACKLIST—STRIKES—INJUNCTION—*Cornellier v. Haverhill Shoe Manufacturers' Association et al., Supreme Judicial Court of Massachusetts (Sept. 16, 1915), 109 Northeastern Reporter, page 643.*—John Cornellier brought action by bill in equity to secure an injunction against the association named and others, to restrain interference with his securing employment, by means of blacklist. A justice of the court affirmed the report of a master and dismissed the bill, and this action was affirmed by the supreme judicial court, which overruled the plaintiff's exceptions, on grounds set forth in an opinion written by Judge De Courcy.

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Cornellier was one of 40 employees of the Witherell & Dobbins Co. who struck on December 12, 1912. He secured employment at another factory, and was summarily discharged about two hours later, the master finding that the cause of his discharge was the fact that he was one of the strikers. It appeared that on the day of the strike or the day after, at the request of Mr. Child, manager of the Shoe Manufacturers' Association, Mr. Dobbins brought to a meeting of the manufacturers several lists of the names of the employees who had gone on strike, and these were circulated to prevent them from getting work in Haverhill or vicinity, so that they would be forced to return to their former employment. The master named from the 20 respondents in the suit 10 companies and individuals whom he found to be responsible for the acts complained of, and these are referred to in the opinion under the term "defendants." In rendering the opinion that the procedure must be in law rather than in equity, Judge De Courcy said:

Did this combination of the defendants to blacklist the striking employees of the Witherell & Dobbins Co., resulting in the discharge of and damage to the plaintiff, give him a legal cause of action? The statement of the general right of the Fox Co. to terminate a workman's employment when and for what cause it chooses, where no right of contract is involved, does not carry us far. (See Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240 [Bul. No. 169, p. 147].) The same is true of the recognized equal rights of employers and employees to combine in associations or unions, so long as they employ lawful methods for the attainment of lawful purposes. (See Hoban *v.* Dempsey, 217 Mass. 166, 104 N. E. 717 [Bul. No. 169, p. 303].) But it is settled that the intentional interference by even an individual, without lawful justification, with the plaintiff's right to have the benefit of his contract with his employer would be an actionable wrong. (Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603 [Bul. No. 60, p. 702]; Hanson *v.* Innis, 211 Mass. 301, 97 N. E. 756 [Bul. No. 112, p. 161].) A combination to blacklist is the counterweapon to a combination to boycott, and is open to similar legal objections, when directed against persons with whom those combining have no trade dispute, or when the concerted action coerces the individual members, by implied threats or otherwise, to withhold employment from those whom ordinarily they would employ. (See New England Cement Gun Co. *v.* McGivern, 218 Mass. 198, 105 N. E. 885 [Bul. No. 169, p. 298], and cases cited.) It is true that in Worthington *v.* Waring, 157 Mass. 421, 32 N. E. 744, this court refused to enjoin the defendants from making use of a blacklist, stating that the rights alleged to be violated were personal and not property rights, and that there were no approved precedents in equity for issuing an injunction against the grievance there complained of. In the light of more recent decisions of the court recognizing that the right to labor and to its protection from unlawful interference is a constitutional as well as a common-law right there appears to be no sound reason why it should not be adequately protected under our present broad equity powers. As intimated in Burnham *v.* Dowd, 217 Mass. 351, 104

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N. E. 841 [Bul. No. 169, p. 270], the case of Worthington *v.* Waring can not well be reconciled with our later decisions. It must be considered as no longer binding as an authority for the doctrine that equity will afford no injunctive relief against an unlawful combination to blacklist.

It should be added that Stats. 1914, ch. 778, was enacted after the events in controversy and has not been considered. Nor, on the facts, have we had occasion to determine how far the "peaceful persuasion" statute (Stats. 1913, ch. 690) permits one employer to advise another not to employ his striking employees. In several States legislation has been enacted to prevent blacklisting; and most of the decisions deal with the validity or construction of the different statutes. (See Labor Laws of the United States, Bureau of Labor Statistics, Bulletin No. 148; Labor Decisions, 1912, Bulletin No. 112; Id. 1913, Bulletin No. 152.)

Assuming that if this were an action at law the plaintiff could recover for the damages caused by the unlawful combination of the defendants to blacklist him, the question remains whether he is entitled to prevail in the present suit. He has brought these proceedings in a court of equity. Under the established maxim that "he who comes into equity must come with clean hands," the court will not lend its active aid to him if he has been in equal wrong with the defendants touching the transaction as to which relief is sought, but will leave him to his remedy at law. The strike at the Witherell & Dobbins factory in which he joined is intimately connected with the blacklist of which he complains. The plaintiff individually was free, under his contract at will, to terminate his employment for any reason that he deemed sufficient. He had an undoubted right to join a labor organization. The employer as an individual had similar rights. But while each had a right to organize with others, it by no means follows that the organizations lawfully could do everything that the individual could do. [Cases cited.] An act lawful in an individual may be the subject of civil conspiracy when done in concert, provided it is done with a direct intention to injure another, or when, though done to benefit the conspirators, its natural and necessary consequence is the prejudice of the public or the oppression of individuals.

Without discussing the conflicting authorities in other jurisdictions, in this Commonwealth, in the present stage of the industrial controversy, the principle is defined that the legality of a strike depends first upon the purpose for which it is maintained, and secondly on the means employed in carrying it on. As to the first, it is no longer in question that organized labor lawfully may strike for higher wages, shorter hours, and improved shop conditions. (Minisian *v.* Osborne, 210 Mass. 250, 96 N. E. 1036 [Bul. No. 99, p. 727], and cases cited.) On the other hand it has been decided that a strike instituted merely to compel a closed shop would not be justifiable on principles of competition, but would be unlawful. (Reynolds *v.* Davis, 198 Mass 294, 84 N. E. 457 [Bul. No. 77, p. 393]; Folsom *v.* Lewis, 208 Mass. 336, 94 N. E. 316 [Bul. No. 95, p. 341].) In the debatable ground between these extremes the conflict of rights must be adjusted as new conditions arise. And the question whether any particular strike is lawful is a question of law. (De Minico *v.* Craig,

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207 Mass. 593, 94 N. E. 317 [Bul. No. 95, p. 344]; Burnham *v.* Dowd [supra].)

What then was the purpose of the Witherell & Dobbins strike? The master has found that it was instituted and maintained for the reason that the company, although willing to grant the request for an increase of wages, was unwilling to make an agreement as to prices with or through the union or its representatives; and the employees were unwilling to make such an agreement except through the union or its representatives. Plainly it would not be unlawful for the men to combine to secure an experienced spokesman for their collective bargaining, and to select an outsider in order to avoid future criticism from the employer or fellow employees. Further, the fact that the person they select to speak for them, and to act personally as their agent in presenting the proposed price list to their employer, happens to be an official of the union would not render unlawful a strike called to enforce their demand. Apparently that is as far as the employees of the Witherell & Dobbins shop went. The master expressly finds that:

"The price list did not contain any provisions that the union must be recognized or make any stipulation as to the employment of union or nonunion labor, and no such demand was made."

Not all the men who went on strike were members of the union. Later there developed what probably was latent from the beginning, a struggle between the manufacturers to deal with their employees as they saw fit, and the union to secure recognition. As a practical matter it might be difficult to find a permanent position where the union would rest content with a degree of "recognition" that allowed it to represent its members without interfering with the rights of their nonunion fellow workmen and virtually forcing them to join the organization. But so far as the record and the findings of the master disclose, the strike in question did not contemplate the discharge of nonunion men, and was not immediately or remotely a strike for a closed shop. On the facts appearing in the record we can not say that the combination to strike at the Witherell & Dobbins shop was for an unlawful purpose, any more than a similar combination of employers for nonrecognition of the union would be.

It is clear from the findings of the master, however, that the Witherell & Dobbins strike was conducted by unlawful means; that laws were violated and the well-established rights of others invaded. On several occasions crowds of strikers paraded in front of the factory, cheering and shouting "Come out!" and occasionally adding the names of men who remained at work; once at least 100 or more paraded in front of the factory, 2 by 2 in one direction and 2 by 2 in the opposite direction, so that there were 4 persons abreast most of the time, and the operatives leaving the factory had difficulty in breaking through the line. Some of the employees were intimidated and followed by crowds, others had to be escorted home by police officers, and 4 or 5 were assaulted by strikers or their sympathizers because they took the place of striking employees. One serious attack, characterized by the master as cowardly and unprovoked, was made on an employee named Mills, as he was going home after dark at the conclusion of his day's work. And while the persons who committed the assaults were not identified, the union and its

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officials made no effort to stop or control them; and the union men who were present when Mills was assaulted and rendered unconscious made no effort to give any aid or to pursue the man who struck the blow. The strike was carried on in a manner that reasonably caused the average employee to be apprehensive for his personal safety. The plaintiff can not avoid responsibility for some, at least, of these acts. The strike, which was pending for more than three months after the bill was filed (as well as the "general" strike), was maintained under the direction of the union to which he belonged, and for the recognition of which he went on strike. He took part in the picketing and in at least one of the parades, and otherwise aided and encouraged it. (See Lawlor *v.* Loewe, 235 U. S. 522, 35 Sup. Ct. 170 [Bul. No. 169, p. 140].)

The conduct of the plaintiff and the acts of others with whom he was legally identified preclude him from obtaining the active aid of a court of equity. For any damage caused by the blacklist which the defendants maintained he must seek his redress, if any, at law. Accordingly it becomes unnecessary to consider the effect upon his rights of his participation in the general strike of December 30, and the further questions, whether that strike was for a lawful or an unlawful purpose, and whether it was conducted by lawful or unlawful means.

For the reasons herein set forth a decree is to be entered overruling the exceptions, confirming the master's report, and dismissing the bill of complaint.

INTERFERENCE WITH EMPLOYMENT—CAUSING DISCHARGE—FALSE STATEMENTS—*Scott v. Prudential Outfitting Co. (Inc.), Supreme Court of New York, Appellate Term, First Department (Nov. 3, 1915), 155 New York Supplement, page 497.*—Agnes Scott, a minor, brought action by her guardian ad litem against the company named for causing her discharge from employment. She had been for two years in the employ of a corporation, when the Prudential Outfitting Co., as alleged, falsely represented that she was indebted to it, and that she had given an assignment of her wages. It was also alleged that she had been out of employment since her discharge in April, 1915, and the amount due her at the time of the discharge had been withheld because of the alleged assignment. Judgment was in her favor in the municipal court, and on appeal this was affirmed, Judge Bijou stating the law as to the main questions as follows, and also ruling for the plaintiff on more technical points:

It can scarcely be doubted that in the present state of the law this complaint sets out a cause of action. (Warschauser *v.* Brooklyn Furniture Co., 159 App. Div. 81, 144 N. Y. Supp. 257.) As intimated in that case, and as held in Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125 [Bul. No. 37, p. 1202], the mere fact that the employment was at will does not impair the cause of action, however it may modify the amount of damages. There are many other cases

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to the same effect. Nor does the fact that the complaining employee was an infant preclude a recovery, since we can not indulge in any presumption that the infant was not lawfully entitled to receive and retain the wages for her labor.

INTERFERENCE WITH EMPLOYMENT—CAUSING DISCHARGE—FILING UNAUTHORIZED ASSIGNMENT—*Kennedy v. Hub Manufacturing Co., Supreme Judicial Court of Massachusetts (May 21, 1915), 108 Northeastern Reporter, page 932.*—Matthew P. Kennedy brought action against the company named for damages for unlawfully causing his discharge by his employers, J. L. Walker & Co. In 1902 the plaintiff gave a power of attorney to Oscar F. Berry, with power of substitution, "to execute and deliver to the said Oscar F. Berry an assignment of my wages or future earnings," and at the same time became indebted to him in the sum of $3 for a hat. Berry was then doing business under the name of the Hub Manufacturing Co., and in 1910 he with two others organized a corporation under that name, which was the defendant in the present suit, and transferred to it bills receivable, etc., to the amount of $6,000. Berry was president and a director of the company, and in 1912 one Thornrose, treasurer and also a director, by substitution made an assignment of the plaintiff's wages to the Hub Manufacturing Co. Shortly after the date of the assignment it was shown to the plaintiff by the superintendent of his employers, and for the 8 or 10 weeks before the discharge, there was conversation about it about twice a week, a collector of the Hub Co. calling at the office, etc. The superintendent testified that the plaintiff's work was satisfactory, and that there was no reason in his work or conduct for his discharge. The superior court of Suffolk County had rendered a verdict in Kennedy's favor, and in delivering the opinion of the supreme judicial court affirming it Judge Rugg said that this evidence "warranted, if it did not require a finding that the reason [for the discharge] was the annoyance and possible litigation and expense which might be occasioned to the employers in connection with the assignment," the liability of the company being due to the fact that the power of attorney did not warrant the execution of an assignment to the Hub Manufacturing Co., but only to Berry personally, so that the assignment made was unsupported by any act of the plaintiff, Kennedy.

LABOR ORGANIZATIONS—BY-LAWS—EXPULSION OF MEMBER—*Schouten v. Alpine, Court of Appeals of New York (June 1, 1915), 109 Northeastern Reporter, page 244.*—Lambert Schouten brought action against John R. Alpine, as president of the United Association

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of Journeymen Plumbers, Gas Fitters, Steam Fitters, and Steam Fitters' Helpers of the United States and Canada. Schouten, a journeyman plumber, was expelled from Local No. 498 of New York City in August, 1908, and a penalty of $100 as a new initiation fee imposed upon him. This action was on appeal affirmed by the United Association. He thereupon brought suit against the United Association, claiming that he was illegally expelled; that he was not served with written charges or given notice or an opportunity to be heard; that the expulsion and penalty imposed were in violation of the constitution and by-laws of the local, and the affirmation by the United Association was illegal and contrary to justice. Judgment was in his favor in the trial court, and was affirmed in the appellate division, but was on the present appeal reversed and a new trial granted. As to the trial and the instructions given and requested, and other facts, the following is the statement of the court of appeals in the opinion delivered by Judge Hogan:

The trial justice submitted to the jury in various forms the question as to whether the plaintiff was given a trial in accordance with the rules and by-laws of the labor union to which he called attention in his charge, and charged that the only theory upon which the plaintiff could recover was that he was not given a fair trial and was not given an opportunity to put in his defense. The jury rendered a verdict in favor of the plaintiff for $3,500, which was reduced $150 by the appellate division.

It is unnecessary to refer to the conflict of evidence between the parties relating to the proceedings of the local union. For the purposes of this appeal, it may be assumed that the plaintiff was entitled to written notice of charges against him, an opportunity to defend himself against the same, and to have a fair trial as provided in the constitution and by-laws of the local union, and in view of the verdict of the jury, that such was not properly afforded him. The important question arises as to the liability of the United Association to plaintiff for damages in this case.

It was only by affirmative action of the plaintiff that the matter could be brought to the attention of the executive board of the United Association, as the constitution and by-laws of the local did not contain provision for such appeal. When plaintiff petitioned the United Association to review the action of the local union it must be assumed that he appreciated the fact that such review would involve a consideration of the proceedings of the local union as well as the statement made by him. He had no right to assume that the United Association would act on his statement alone.

The executive board of the United Association had before it for review a record of the proceedings of the local union and the statement of plaintiff when it passed upon the appeal taken by plaintiff. It is not alleged in this case that the members of the United Association individually, or as representing that association, were guilty of any fraud, misconduct, or bad faith in the performance of the duty imposed upon them by plaintiff's appeal. Assuming, for the purposes of argument, that the executive board of the United Asso-

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ciation made an erroneous decision, in the absence of bad faith, the members of that body or the association which they represent can not be held liable in damages by reason of such a determination induced by the appeal of a member. The ostensible object of such organization was a lawful one, and has been so declared by the court. (National Protective Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 [Bul. No. 42, p. 1118].)

This action is sought to be maintained under section 1919 of the Code of Civil Procedure. The provisions of this section, however, in an action against an unincorporated association, are limited to a cause of action for which the plaintiff might maintain an action against all the associates by reason of their liability therefor either jointly or severally, and in the event of a recovery satisfaction is to be made under subsequent provisions of the code out of personal property belonging to the association, or owned jointly, or in common, by all the members thereof. It is essential, therefore, to a right of recovery in such a case that the cause of action was one for which an action might be maintained against the 30,000 members of the United Association, and for this reason we do not agree that this action is maintainable in its present form. (McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728.)

As to the action of the United Association approving the imposition of a penalty of $100 in the nature of a new initiation fee upon the plaintiff, while it is true that section 115 of the by-laws of the United Association contains an inhibition against a local union imposing a fine of more than $25 upon any member without the consent of the United Association, we do not construe that section to be applicable to the case at bar. Under the constitution of the local union provision is made for the imposition of fines by sections 15, 50, 72, which fines are limited in the several sections, except as provided by sections 15 and 69, to such amounts as may be fixed in the several cases therein specified. By section 54 provision is made:

"Any member refusing to obey the orders of the local union as conveyed by the delegates shall, upon conviction, after a trial before the executive board, forfeit his membership and be subject to such penalty as the local union may impose for said offense."

The plaintiff herein, according to the report made by the local to the United Association, was expelled and penalized for working upon a job after the same had been declared unfair both by the conference board and the local, and, as asserted by it, after notice thereon had been given plaintiff. The local's right to determine the penalty was conferred upon, and was not limited by the constitution and by-laws in a case within section 54 above quoted.

The conclusion that the United Association is not liable in this case renders unnecessary a consideration of the exceptions taken by counsel for the defendant to the charge of the court.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—LIABILITY TO CONTRACTOR NOT NOTIFIED, FOR REDUCTION OF WAGES—*Powers v. Journeymen Bricklayers' Union No. 3 et al., Supreme Court of Tennessee (Dec. 21, 1914), 172 Southwestern Reporter, page 284.*—This

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was a suit by L. C. Powers against the labor union named and others. Judge Neil, who delivered the opinion of the court, stated the facts involved and the history of the case up to the appeal to the supreme court as follows:

The case stated by the bill is this: The defendant union is composed of the bricklayers in Knoxville and vicinity. Under the terms of the organization there is devolved upon it the duty of fixing the rate of wages for all of its members for each year in advance. The union fixes this scale about the beginning of the calendar year, and gives notice to contractors before the employment or union year begins, which runs from the 1st of May of any given calendar year to the last day of April of the following year. The complainant is a contractor in Knoxville, and necessarily has to employ the members of the union to work for him in carrying out his contracts, as he can obtain no others. He received a notice in the early part of the year 1910 that the regular wage for the ensuing union year would be 62½ cents per hour. On the faith of this notice, and accepting the terms, he employed certain of the members, and for a series of months paid them at the rate of 62½ cents, without any knowledge or notice that the rate had been changed by the union, after it had been given to him. The fact was, however, that after he had been notified of the 62½-cent rate, and had employed the men, the union changed the rate to 56¼ cents per hour, but gave complainant no notice. In ignorance of the change, he continued to pay his employees at the rate of 62½ cents, the result of which was that he suffered a loss of $322.59 difference in his profits between the 56¼-cent and 62½-cent wage. He sues for this sum.

There was a demurrer filed which raised the point that the above facts did not state a cause of action. The chancellor and the court of civil appeals so held. We think they were both in error.

The following is the greater portion of the remainder of the opinion, in accordance with which the court remanded the case, which the courts below had attempted to dismiss, placing it in condition for further proceedings:

A labor union organized for the purpose of regulating the wages of its members and protecting them in their contracts and the promotion of their interests as laboring people is lawful. (Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997 [Bul. No. 81, p. 434, and other cases cited].) It has even been held that it is lawful for a single employer to contract with a labor union that he will employ only union men. (Jacobs *v.* Cohen, 183 N. Y. 207, 75 N. E. 5 [Bul. No. 64, p. 896].)

The situation in Knoxville, under the allegations of the bill, was such that the union had absolute control of the labor market in respect of the services of bricklayers, fixed the term of employment and the wages, and the bricklayers all had agreed thereto by becoming members of the union which exercised this power. The result was that the complainant was bound to accept these terms if he employed any of their men. He could employ no other. Now, while each several contract of employment was made with the men who agreed to work for him, and while they might accept his employment

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or refuse it, yet, if a contract was made between them and the complainant, it was bound to be on the terms fixed by the union. So, while there was no contract between the union and the complainant for the services of the men who worked for him, yet the relation established by the facts existing at the time was the same in practical effect and result as if he had agreed with the union to employ no one but its members. Possessing the power, as it did, to make it impossible for the complainant to employ any member except on terms fixed by it, and having assumed, as a part of the duty imposed, the obligation to give notice of the terms on which contractors were authorized and expected to rely, the duty was likewise imposed on the union by necessary implication of law to give notice of any change made in these rates which would affect the rights of contractors justified in acting under a previous notice. To hold differently would authorize the conclusion that the union could with impunity use its lawful powers for the purpose of enabling its members to practice a fraud on contractors who justly relied on, and were expected to rely on, its representations or notices as to the rate of wages. In issuing these notices the union necessarily informed contractors that they were final, and were to be the basis of contracts, or at least were to continue for the period fixed in the notice, unless changed by the same power which issued the notice. When the union so issued a notice, knowing it must be and would be relied on by the contractor, and issued it for the purpose of having it relied on, and it was relied on and acted on by the contractor to his prejudice, because of a subsequent change made without notice, the liability arose against the union to make good the injury so caused. The notice of the rate fixed for a year was a continuing representation on the part of the union that such was the agreed basis of contract with the men for the whole year, and upon a subsequent change of the basis without notice to the contractor such former notice thereafter operated as a continuing misrepresentation, and, being relied on by the contractor to his prejudice, raised a cause of action against the party making such misrepresentation—that is, the union. The failure to give the notice of the change in the rate naturally resulted in such damage as is claimed by the complainant in the present case, and of this the union was bound to take notice.

Before closing the opinion we should say that it appears from the bill that the union is an unincorporated association. As such, of course, it can not be made a party. (Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753 [Bul. No. 70, p. 747].) To avoid this difficulty the complainant made sundry members of the union parties defendant, stating that these were all he could learn the names of. It is not distinctly alleged in the bill that these were made defendants as representing all others of the same class—that is, standing for the union. (Pickett *v.* Walsh, supra [other cases cited].) Proper allegations, however, can be made on this subject when the case again reaches the chancery court on the remand.

On the ground stated we are of the opinion that both the chancery court and the court of civil appeals committed error in dismissing the bill. Their decrees are therefore reversed, and the cause remanded, to the end that the amendment above mentioned may be made, and that an answer may be filed and proof heard.

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LABOR ORGANIZATIONS—INJUNCTIONS—BY-LAWS—INTIMIDATION—*Rhodes Bros. Co. v. Musicians' Protective Union, Local No. 198, American Federation of Musicians of Providence et al., Supreme Court of Rhode Island (Jan. 4, 1915), 92 Atlantic Reporter, page 641.*—The company named brought action for an injunction against the labor union named and the members of its board of directors, and secured a preliminary injunction in the superior court of Providence and Bristol counties, whereupon the respondents appealed. The company maintains a place of entertainment at Cranston, R. I., where it conducts a dance hall and employs an orchestra daily during the summer. E. M. Fay, engaged in leading and furnishing orchestras, and a member of the union, entered into a contract with the company on March 5, 1914, for the employment of an orchestra for the season, which contract contained clauses reserving to the musicians the right to maintain their obligations to the federation without interference. Mr. Fay selected an orchestra from the members of the union, and it furnished the music from April 11 to June 6, 1914. Fay did not conduct it personally, the contract not calling for this. The company claimed that there was much dissatisfaction with the music among its patrons, and canceled the contract, after which another orchestra composed of members of the union was employed. The board of directors of the union then passed a vote forbidding its members to enter or continue in the employment of the company as musicians. The company thereupon filed its bill of complaint, setting forth the facts, stating that the union comprised all available musicians, and asking that it be restrained from interfering with the company's right to engage members of the association or with the members' right to enter such employment, from imposing fines or expelling members for so doing, from intimidation, etc.

At the first hearing in the superior court the decision was that a case had been made out except as to irreparable injury. At a second hearing the decision was in favor of the complainant, and a decree was entered enjoining the union as prayed for.

After stating the facts substantially as above, Judge Vincent, who delivered the opinion of the supreme court reversing the judgment of the court below, discussed the points raised on appeal, with slight omissions, as follows:

The novelty of the question presented resides in the fact that the complainant, feeling that its interests would be better served through the employment of union men, desires to employ the members of this union, and certain members of the union desire to enter the employment of the complainant, providing they can do so without imperiling their membership in the union or subjecting themselves to any fines or disciplinary measures which the by-laws of the union authorize. The desires of both the complainant and of the men whom it desires to employ are therefore conditional.

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The contract between the complainant and Mr. Fay is in the form prescribed by the union and upon one of the blanks provided by the union. The representatives of the complainant [company], in executing this contract, must have been aware that they were dealing with Mr. Fay as a member and under the rules and regulations of the union. This is further evidenced by the fact that when the difficulty arose between the complainant and the union, and the contract was rescinded by the former, the complainant appealed to the directors of the union for a settlement of the question and appeared, through its representatives, and presented its side of the controversy. Upon this hearing the directors of the union found that the contract was binding upon both parties, and a vote was subsequently passed forbidding members of the union from entering the employment of the complainant without permission of said directors.

The by-law of the union under which this action was taken is as follows (sec. 13, art. 7):

"Members shall not play for the proprietor of a hall, concert saloon, theater, or any person, club, company or organization who has broken a contract with a member or members of this union. In case of doubt as to which party has broken the contract, it must be referred to the board of directors."

The complainant does not claim that the members of the respondent association are deterred from accepting employment at its place of business through any acts of violence or any acts or threats producing a fear of violence, but it does claim that any disciplinary action under this by-law, based upon such employment, would be unlawful and would amount to a combination or conspiracy having for its purpose the exclusion of the complainant from the open labor market and resulting in irreparable injury.

We can not say that this by-law is in itself unlawful, or that its enforcement upon the members of the union who have voluntarily subjected themselves to its provisions amounts to an intimidation or to a threat which would justify the interference of a court of equity. It left the members of the union free, in one sense, to enter the employment of the complainant, although it practically compelled them to choose between the benefits of such an engagement and membership in the union.

As the court said in Jetton-Dekle Lumber Co. *v.* Mather, 53 Fla. 969, 43 South. 590 [Bul. No. 72, p. 763]:

The risk of fines and expulsion is "one voluntarily assumed by the members entering the unions, and if no longer willing to pay the price—if the advantages derived are not equal to the burdens assumed—each member has a perfect right to withdraw from the union."

The law as to the duties of members to obey the rules and regulations of the association to which they belong is well set forth in the opinion of Sheldon, J., in Wilcutt & Sons Co. *v.* Driscoll, 200 Mass. 110 et seq., 85 N. E. 897 [Bul. No. 80, p. 180], as follows:

"When one chooses voluntarily to unite with others of the same craft in forming an organization for the purpose of bringing about by the united action of all its members more favorable conditions of employment, he is bound, so long as he desires to remain a member of that organization, to submit within certain limits his own

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freedom alike of judgment and of action to the judgment of his associates, and to conform his conduct to that standard which they shall have agreed to be for the best interest of all and of each. Unity of action would be impossible upon any other terms."

Martin, in his work on The Modern Law of Labor Unions, says in this connection (sec. 150, p. 207):

"This general right of a union to make and enforce by penalties, rules and by-laws for the government of its members, has never been denied, where the rights of the union and its members only are involved. Can it be held unlawful, then, as between a union and its members, for the union to impose penalties, in accordance with its rules and by-laws? * * * The lawfulness of such action by the union, as between itself and its members, is amply sustained by many well-considered decisions, and denied by none, nor could any valid reason be assigned for such denial. * * * Nor can any sound reason be advanced why this right should be restricted or denied, merely because the employer may suffer incidental damage thereby."

To say that the musicians after subjecting themselves to the laws and regulations of the union, which provide for a finding as to the validity of a contract between its members and outside parties, and that in case of a broken contract members shall not enter the employment of the party breaking it, were willing to enter such employment, is not correctly expressive of the situation in the present case. While they may signify their desire to enter the employment of the complainant, they only desire to do so upon the condition that they can at the same time retain their membership in the union. It is quite apparent that the interest of these musicians in the union is paramount to that of their employment by the complainant, and that, on the other hand, the desirability of these particular musicians and their value to the complainant over other musicians resides in the fact that they are members of the union. These men are not ready to enter, or continue in, the employment of the complainant, nor does the complainant care for their services except they be retained as members of the union. This being the situation, it seems to follow that the further dealings between the complainant and these musicians must depend on the willingness of the union to waive its by-law before mentioned and to consent that its members may continue in the employ of the complainant without penalty, discipline, or expulsion, or that the musicians accept such employment in disregard of the union and its regulations, assuming the responsibility of its discipline.

If we eliminate from the consideration of this case the authorities based upon violence, threats of violence, conspiracies, and unlawful combinations, little remains in the way of authority which could be usefully applied to the determination of the particular question before us. All that the respondent union is attempting to do or contemplates doing, so far as appears, is to enforce against its own members the provisions of a by-law under the terms of which they have voluntarily brought themselves and promised to abide. The union is not acting with others either by way of conspiracy or combination. It is, at most, only claiming the right to act for itself in the enforcement of its by-laws governing the conduct of its own members, and this we think it has a right to do.

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We do not think that the case which the complainant presents is one for the exercise of the authority of a court of equity by way of injunction.

The decree of the superior court granting to the complainant a preliminary injunction is reversed, and the case is remanded to that court for further proceedings.

LABOR ORGANIZATIONS — INJUNCTIONS — PICKETING — *Stoner v. Robert, Supreme Court of the District of Columbia, 43 Washington Law Reporter, page 437.*—Theodore G. Stoner brought action in equity against William Robert and others, members of labor organizations, for an injunction to prevent the picketing of his saloon by them, in an endeavor to prevent would-be patrons from making purchases there. There was a strike in certain breweries in Washington, D. C., and in Roslyn, Va., one of which was the property of the National Capital Brewing Co., whose beer the plaintiff sold, in addition to some brands of union beer. The plaintiff alleged interference with persons about to enter the saloon, and the answer admitted the presence of pickets, but alleged that their acts were confined to giving in a quiet way the information that nonunion beer was sold there, and as to where union beer exclusively was sold. The injunction was denied, the opinion delivered by Justice McCoy stating that the preponderance of the evidence showed the picketing to be entirely peaceful, and that no definite loss of business on the part of the plaintiff was shown. Certain cases are quoted as precedents for the holding such practice lawful, and the opinion continues:

The defendants then having the right to attempt to curtail the sale of nonunion beer or to increase the sale of union beer by giving information to others, is there anything in the present case which warrants enjoining them from doing so? The plaintiff contends that he has proved the existence of a secondary boycott, arguing that the purpose of the defendants is through injury to his business to compel him to cease selling the beer of the brewer against whom the strike exists, thereby to coerce the latter to come to terms with them, and to prove this purpose relies not only on the acts of the defendants but on an admission in the answer "that the differences with respect to the terms of employment of labor which have arisen between the brewing companies of Washington and their employees are the sole cause of the picketing hereinbefore referred to, and that it is simply aimed to affect the continued sale of nonunion beer." This admission adds nothing to the facts for the purposes of this decision, for if it amounts to proof of a boycott against the brewers (a boycott the existence of which the defendants deny elsewhere in the answer) the other question still remains—are the defendants' acts lawful? The proof leads to a finding that no direct effort has been made to divert plaintiff's trade, unless the making of the statement that he sells nonunion beer is for that purpose. The plaintiff says that the inference of such purpose should be drawn, but it seems just as reason-

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able not to draw it, especially in the absence of any clear proof that defendants have accomplished the result said to be desired. But even though such a result has followed still if defendants have the right to endeavor to lessen the sale of nonunion beer generally or of that made by the particular brewer of whom the plaintiff purchases, and do not endeavor otherwise to interfere with plaintiff's business, it is not clear that they have not the right to do as they have done. See Gill Engraving Co. *v.* Doerr, 214 Fed. Rep. 111 [Bul. No. 169, p. 301], and My Maryland Lodge *v.* Adt, 100 Md. 238 [Bul. No. 58, p. 1002], in which case the court said:

"* * * They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy," which statement of the law is quoted with approval in Mitchell *v.* Hitchman Coal Co., 214 Fed. Rep. 685, 702 [Bul. No. 169, p. 305].

LABOR ORGANIZATIONS — INJUNCTIONS — STRIKES — *Commercial Binding & Printing Co. v. Tacoma Typographical Union No. 170 et al., Supreme Court of Washington (Apr. 20, 1915), 147 Pacific Reporter, page 1143.*—The company named brought suit against the union mentioned for an injunction restraining against unlawful interference with its business. A strike occurred in December, 1913, at which time the employees of a number of other printing establishments also struck. The company secured other employees. Charles F. Brown was sent from Cincinnati by the executive council of the International Typographical Union to take charge of the strike. He unsuccessfully attempted to secure from the employers the wage scale demanded by the members of the union, and about April 1, 1914, told the manager of the company that, unless their demands were acceded to, the company would not be able to stand the pressure that would be brought to bear upon it "in the way of rough stuff." Soon afterwards the strikers and others began to assemble at the entrance of the company's place of business about the closing hour, and jostle the nonunion employees upon the sidewalk and try to engage them in conversation. There was evidence of threats and the calling of vile names. This continued until about May 15. On the 14th a nonunion employee named Jones was assaulted, and on the 15th he secured a warrant against Brown and his arrest upon the charge of assault. Brown gave bond and left town, and it appeared that from that time the objectionable conduct ceased. The superior court of Pierce County, upon a showing of these facts, dismissed the prayer for permanent injunction apparently on the ground that such injunction was unnecessary. This

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judgment was affirmed by the supreme court, Judge Main, who delivered the opinion, stating the facts and saying:

The principal question is whether the trial court erred in refusing to grant a permanent injunction after the trial upon the merits. Brown, under whose direction the strike was conducted, had departed from the State prior to the time when the present action was instituted. Throughout the testimony constant reference is made to his conduct while in charge of the strike. No complaint is made as to the conduct of the striking employees prior to the time Brown came to Tacoma. The evidence does not show that the acts above detailed occurring prior to May 15 were continued after that date; that being the time of Brown's arrest upon the charge of assaulting Jones. The acts complained of being directly under the charge and direction of Brown, and not having existed before he came to take charge of the situation, nor after he departed from the State, there does not appear from the evidence any reasonable probability of further interference. If the acts complained of had continued up to the time of the institution of the present suit, or if at the time of the trial there had been any reasonable probability that the same conduct would be continued, an entirely different question would be presented. To destroy a business is not different from the destruction of physical property. If employees may be intimidated while in their employment, the business of the employer may be destroyed. It is as much the duty of the court to restrain conduct which will have the effect of destroying the business as it is to prevent the destruction of physical property.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—CLOSED-SHOP AGREEMENT—PROCURING DISCHARGE—*Cusumano v. Schlessinger, Supreme Court of New York, Appellate Term, First Department (May 5, 1915), 152 New York Supplement, page 1081.*—Robert Cusumano brought action against Benjamin Schlessinger as president of the International Ladies' Garment Workers' Union, an unincorporated association. The plaintiff set forth in his complaint that the agents of the defendant had unlawfully caused his discharge from the employment of one Rodin as an operator on ladies' garments. It appeared that Rodin was a member of the Cloak and Suit Makers' Association, and that there was an agreement between this association and the labor organization that only members of the latter should be employed by members of the former; and that when the employer was informed by officers of the labor union that Cusumano was not a member, he discharged that employee. The plaintiff showed that he had been idle for about eight weeks, and that his earnings before his discharge were not more than $20 a week; also that, not being a union member, he had been unsuccessful in his efforts to obtain work. Judgment was rendered in his favor in the municipal court of the Borough of Manhattan for the

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sum of $500. The supreme court reversed the judgment and dismissed the complaint, for reasons which appear from the opinion delivered by Judge Hendrick, who, after stating the facts in the case, said:

It is impossible to sustain this judgment upon any legal basis. The plaintiff has not shown that he was employed for any definite time by Rodin. If his hiring was for an indefinite term, Rodin had a right to discharge him at any time for cause, or without cause. He evidently was discharged by reason of the statements made by Lubin and Schuster, the latter representing the defendant. But these statements were not false or untrue. On the contrary, they were true, and were merely to the effect that, according to the existing agreement between members of the two associations, Rodin could not, in consonance with that agreement, longer continue plaintiff in his employ. If plaintiff had been employed for a definite time, and discharged for the reason that he was not a union man, in an action brought against Rodin for a wrongful discharge, it could have been determined whether or not this was a sufficient reason therefor. No action will lie, however, against this defendant for requesting an employer to discharge an employee, for the reason that such employee is not one of its members, or for any other reason, if such statement is true. The responsibility of such discharge rests entirely upon the employer, and he alone must respond in damages to such discharged employee, if the discharge is wrongful. There is also no evidence that the defendant in any way attempted to prevent the plaintiff from obtaining employment elsewhere, and it is perfectly clear that the plaintiff has no cause of action against the defendant.

LABOR ORGANIZATIONS—LIABILITY OF MEMBERS FOR TORTS OF OTHER MEMBERS—INJUNCTIONS—*Hill et al. v. Eagle Glass & Manufacturing Co., United States Circuit Court of Appeals, Fourth Circuit (Jan. 13, 1915), 219 Federal Reporter, page 719.*—The company named had been granted a temporary injunction against the appellants Hill and others in the District Court for the Northern District of West Virginia, and they appealed. The history of the case, and the reasons assigned by the court of appeals for reversing the decree are shown in the opinion by Judge Woods, which is as follows:

In this suit for injunction by the Eagle Glass & Manufacturing Co. against Thomas B. Rowe, individually and as president, and a number of other officers of the American Flint Glass Workers' Union, individually and in their official capacity, all alleged to be residents of the State of Ohio, none of the defendants were served except Joseph Gillooly, a member of the executive board and one of the organizers of the union, who was found in the State of West Virginia. A temporary order was granted restraining the defendants from doing certain alleged illegal acts in furtherance of their alleged illegal scheme to unionize the plaintiff's plant. The fact that Gillooly was not a resident of the State of Ohio, but of the State of West Virginia, having been made to appear through his counsel,

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Mr. John A. Howard, the court dismissed the bill as to him and retained it as to the other defendants, on the ground that Mr. Howard had formally appeared for all the defendants. Mr. Howard having made a perfectly clear, uncontroverted showing to the court that he had no authority to represent the other defendants, and that he had appeared generally by inadvertence, when he intended to appear for Gillooly alone, the court upon the most obvious principles of right and common sense ordered the appearance as to the defendants other than Gillooly struck out.

In the meantime, however, on November 27, 1913, an order was made allowing the plaintiffs to amend the bill by making Peter J. Glasstetter and others, members at Steubenville, Ohio, of the American Flint Glass Workers' Union, defendants. The amended bill alleged that these members of the union were assisting the officers of the union named in the original bill "in the efforts to unionize plaintiff's employees and to force plaintiff to recognize said American Flint Glass Workers' Union." The new parties defendant submitted affidavits that they were only members, not officers, of a local union, that Rowe and others, who were the general officers of the union, were not authorized to represent them in their alleged illegal acts, and that they knew nothing of their efforts to unionize plaintiff's factory. There was no showing whatever to the contrary. Under these conditions the court issued a temporary injunction against all of the defendants named in the bill and the amended bill, except Gillooly, as to whom the bill had been dismissed.

We think this was error. Rowe and others, general officers of the union, were not served, and therefore no relief could be given against them, unless it could be said they were brought before the court by representation when Glasstetter and others, mere members of the local union, were ordered to be made parties and appeared. This effect is asserted under equity rule 38 (198 Fed. xxix):

"When the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The union is a voluntary association, and its members are not responsible for a tort of other members, unless they have authorized or participated in it, or have aided in some way in its perpetration after knowledge of the illegal purpose, or facts from which such knowledge may be inferred. (Pettibone *v.* United States, 148 U. S. 197, 13 Sup. Ct. 542; Lawlor *v.* Loewe, 209 Fed. 721 [Bul. No. 169, p. 137].)

When the allegation of a general or common interest to many persons is denied, the duty devolves on the court to determine whether the common or general interest exists before decreeing against those who are alleged to be in court by representation. The plaintiff had no pretense of a case against Glasstetter and the other defendants, brought in by amendment for participating or aiding the defendants not served, in the alleged torts committed by them, and therefore there was no such common or general interest as authorized the court's decree against the defendants served, by virtue of the service and appearance of the defendants brought in by amendment.

All the questions involved in the merits of the appeal were decided adversely to the appellee by this court in Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed. 685 [Bul. No. 169, p. 315].

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LABOR ORGANIZATIONS—LIABILITY OF TREASURER FOR FUNDS—*Tinkler et al. v. Powell, Supreme Court of Wyoming (Oct. 5, 1915), 151 Pacific Reporter, page 1097.*—William H. Powell had been treasurer of a local union of the United Mine Workers. The president brought action in behalf of the union to recover an alleged deficit in the funds turned over by him to his successor. The shortage was alleged to be over $5,600, but by admissions by the plaintiff during the trial the amount was reduced to less than $3,400. It appeared that by examination of the treasurer's books only, the money could not all be accounted for, and that the checks by means of which disbursements had been made had been destroyed by the auditing committees, who had, however, approved the accounts as correct. The officials of the banks where the money had been deposited corroborated the testimony of the treasurer that all checks drawn had been signed by officials of the union and sealed as required by its by-laws, and the lists of checks kept by the banks appeared to account for the payment of the amount of the discrepancy. The court held that the evidence was such as to sustain a judgment which had been given in the trial court in favor of the defendant, as the mere fact that certain disbursements had not been entered in his books would not make him liable for the amounts.

LABOR ORGANIZATIONS — STRIKES — BOYCOTTS — INJUNCTION — *A. Fink & Son v. Butchers' Union, No. 422, of Newark, et al., Court of Chancery of New Jersey (July 24, 1915), 95 Atlantic Reporter, page 182.*—The plaintiff, a corporation, brought action for an injunction to restrain the labor organization from acts in the nature of boycott. The company produces food products, mostly meats and sausages, which are sold over the portion of the State near Newark. Its monthly sales before the strike of its employees in January, 1915, were $100,000. Another company whose principal stockholders were the same persons and which does a similar business in Hudson County had trouble with its employees, which caused a strike, and the Newark company determined that after the first Monday in July, 1915, it would conduct its factory as an open shop. When this was announced the greater part of the men went out on strike. Their places were filled, and the business went on, but the strike, accompanied by a boycott, continued up to the filing of the bill praying for an injunction.

The bill alleged that the striking employees had combined among themselves and with the officers and delegates of Local Union No. 422, of Newark, N. J., and the Essex Trades Council and its affiliated unions, and with Butchers' Union, Local No. 190, of Hudson County, for the purpose of preventing all persons from having business dealings with the complainant. Damage to the business during two

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months to the extent of $22,000 was alleged. The circulation of printed matter addressed to the consuming public and the dealers in meat products was alleged and not denied; and threats of ruin to the business of retail dealers, parades with placards in front of their shops, and the use of lists of dealers who were customers of the complaining company, were also alleged as methods used in the boycott.

The injunction was granted, Judge Howell, who delivered the opinion, saying:

All these things are universally held to be unlawful. They constitute together a cause of action based upon a conspiracy entered into by the defendants for the purpose of ruining the business of the complainant and its customers, not for the benefit of the unions or their policies, not because there is in contemplation any sort of influence on the labor market, but to maliciously interfere with and ruin the business men and stop their sales, in whom and in which they have no interest whatever, in order to drive the complainant into compliance with their wishes. [Cases cited.]

It is quite clear that in the case at bar the action of the defendants consisted of a conspiracy or combination to injure, not only the complainant, but all persons who as merchants or otherwise dealt in or purchased the complainant's products. If it were lawful to go so far as this, there is no limit to the mischief to the public which such combination and confederacy would not reach to. It would go to the extent of forbidding an absolutely disinterested person from purchasing or eating meat prepared by the complainant—a most absurd proposition.

An injunction order should therefore issue restraining the defendants from instituting or maintaining a boycott against the complainant and the products of its factories.

LABOR ORGANIZATIONS—STRIKES—DISCRIMINATION AGAINST SINGLE CONCERN—*Bossert et al. v. Dhuy et al., Supreme Court of New York, Appellate Division, Second Department (Nov. 27, 1914), 151 New York Supplement, page 877.*—Louis Bossert and John Bossert, copartners doing business as Louis Bossert & Son, brought action against Frederick Dhuy and others, among the defendants being representatives of the Joint District Council of the United Brotherhood of Carpenters and Joiners of America. The object of the suit was to restrain the defendants from refusing to work on the plaintiffs' material, and from calling strikes against it. The carpenters' brotherhood, having their field of labor narrowed by competition from the use of machine-made doors and trim, had come to an agreement with the workmen making the trim, which latter had in many cases organized. The brotherhood was conducting a fight against the nonunion trim. In Manhattan the woodworkers had become largely union, but in Brooklyn the larger shops manu-

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facturing trim were mostly nonunion. In the fall of 1910, the carpenters' brotherhood adopted a plan to bring about the unionization of the woodworkers' shops, by taking up one shop at a time, and refusing to work upon jobs where the product of the particular shop was used. Further history of the general situation and of this case, and the decision thereon in favor of the plaintiffs, are given in the opinion of Judge Putnam at the special term, which was adopted by the appellate division as its own opinion, and from which the following is quoted:

Eventually, on or about September 15, 1910, four strikes were called in one day against building operations where the trim of the Albro J. Newton Co. was used. It was announced that the purpose was to organize these industries, mentioning several large nonunion concerns, which were to be taken up one at a time, beginning with the Newton Co. All of these Newton strikes were eventually arranged by the builders agreeing not to use any more nonunion material. The Newton Co. sought relief by injunction proceedings, in which the special term held that the plaintiff was entitled to restrain defendants from thus conspiring to attack the plaintiff's good will. (Newton Co. *v.* Erickson, 126 N. Y. Supp. 949, affirmed without opinion 129 N. Y. Supp. 1111.) Subsequently in the Newton case a final decree was rendered making permanent that injunction.

About October, 1911, strikes essentially similar to those against the Newton Co. occurred against the trim of L. Bossert & Son, the present plaintiffs.

The full and elaborate proofs in this hearing raise squarely the right of the organized body of carpenters to single out one nonunion mill and direct their members to refuse to work on material which it produces, as a step in the conflict which the labor organization is conducting against nonunion mills in this borough. The testimony has shown that in Manhattan the struggle has resulted in favor of the exclusive use of trim produced under union conditions, and that this situation is now accepted by large builders of Manhattan, and certain advantages therefrom to builders as well as workmen appear to be acknowledged.

There is no evidence of any grudge or personal malice against the plaintiffs, whose material was singled out for attack for reasons of convenience, in pursuance of a plan to refuse to handle nonunion material by means of successive strikes against individual manufacturers, so as eventually to bring it about that only the factory-made trim produced under union conditions shall be handled by the carpenters. Defendants do not circulate unfair lists or make threats to boycott opposition plants. They do, however, circulate lists of union mills in New York and vicinity, with a statement that the labor union will refuse to handle shop-made carpenter work unless constructed under union conditions, with a list of manufacturing firms who are stated to be working under an agreement with the Joint District Council.

The question here is in narrow compass. Can the Joint District Council—exercising the right of its members to labor or to withhold their labor—discriminate against the plaintiffs' mill, and refuse to

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handle the plaintiffs' material, as distinguished from other nonunion trim? The strike committee having decided that plaintiffs' shop carpenter work is obnoxious to its organization, and having a right to refuse to work with or without giving any reason, here maintains that it may strike against the material made by plaintiffs, but for the time suffer their nonunion rivals to continue their production, at least until after plaintiffs' mill shall be reduced to submission. Thereby the labor organization may be said to act affirmatively and aggressively, as the damage to the good will and business of the plaintiffs is the specific object aimed at, the direct result sought. Granted that the selection of the plaintiffs was made with no personal hostility, and was an act to affect ultimately the whole body of nonunion mill owners, the destructive result to plaintiffs is not mitigated. The refusals to work on plaintiffs' trim so nearly simultaneous, in October, 1911, were in the eye of the law affirmative and aggressive, and not merely negative.

It is, however, forcibly urged that so long as the public peace is kept, and unless a strike or lockout be malicious in fact, courts should not interfere in such an economic conflict. This, however, is for a higher court, or for the legislature. In October, 1911, when these strikes occurred, the law of this precise situation and the rights of the open shop producer in this judicial district had been settled and determined by the Newton case, which, until overruled, controls the special term.

The plaintiffs under that authority are therefore entitled to have the temporary injunction continued by final judgment.

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