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# DECISIONS OF COURTS AFFECTING LABOR: 1916

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

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# DECISIONS OF COURTS AFFECTING LABOR, 1916.

BY LINDLEY D. CLARK AND AUGUSTUS P. NORTON.

## INTRODUCTION.

This is the fifth bulletin in the series presenting court decisions, the preceding numbers being 112, 152, 169, and 189. Prior to the year 1912 decisions were noted in practically every issue of the bimonthly bulletins, ending with No. 100, since which date the decisions have been published annually. The more important decisions by Federal and State courts are summarized and commented on in the MONTHLY REVIEW of the Bureau of Labor Statistics as soon as they are handed down. 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 being 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 Publish-



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ing Co., and the Washington Law Reporter for the District of Columbia. With a few exceptions the cases appearing are those which were published during the calendar year 1916, the volumes covered being as follows:

Supreme Court Reporter, volume 36, page 94, to volume 37, page 21.

Federal Reporter, volume 227, page 337, to volume 236, page 608.

Northeastern Reporter, volume 110, page 545, to volume 114, page 320.

Atlantic Reporter, volume 95, page 921, to volume 99, page 256.

Southeastern Reporter, volume 87, page 97, to volume 90, page 800.

Southern Reporter, volume 70, page 113, to volume 72, page 1031.

Southwestern Reporter, volume 180, page 465, to volume 189, page 800.

Northwestern Reporter, volume 155, page 145, to volume 160, page 208.

Pacific Reporter, volume 153, page 97, to volume 161, page 112.

New York Supplement, volume 156, page 1, to volume 161, page 960.

Washington Law Reporter, volume 44.

The largest single group of cases is that referring to the subject of workmen's compensation. Questions of constitutionality as well as of construction still arise, but in no instance under review in the present bulletin has a court failed to uphold as constitutional a law of this class.

The most important and far-reaching decisions that have been handed down in many years on the subject of labor were rendered at the October, 1916, term of the Supreme Court of the United States, three of March 6 upholding the compensation laws of Iowa, New York, and Washington, respectively; one of March 19 declaring the Adamson "eight-hour law" constitutional; and two of April 9 sustaining the Oregon statute fixing a ten-hour day for factory employees without regard to sex, and a law of the same State fixing a minimum wage for women and for minors under 18 of both sexes. These decisions, though rendered after the expiration of the calendar year 1916, are, on account of their interest and importance, given a place in this bulletin.

Other decisions are noted on the subject of hours of labor, a city ordinance fixing 6 o'clock as the closing hour for certain establishments being declared unconstitutional, while the Supreme Court of Wisconsin on reconsideration held valid the law of that State which regulates the hours of labor of women and confers upon the State industrial commission certain investigative and discretionary powers as to the application of the law.

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A number of decisions are reproduced construing the rights and powers of members of labor organizations in their relations to the union. A decision of particular interest in this field is one that holds unconstitutional a law of Massachusetts that sought to restrain the issue of injunctions in disputes not affecting property, and declared that labor is not property.

The determination of questions involving classifications of employment as within or without interstate commerce continues to furnish a large number of cases, several of which are noted.

## REVIEW OF DECISIONS.

In the presentation of decisions in past numbers of the bulletin, it has been the custom to divide the matter into two groups: Those discussing statute laws and those applying the rules of common law. This has resulted in the separation of decisions relating to the same subject, as the liability of employers, and the activities and status of labor organizations, on the ground of whether the right of action was based on the common law or some provision of a statute either embodying the common law or modifying it to a greater or less extent. With the extension of statutory provisions and the very considerable substitution of the compensation idea for the liability idea, whatever reasons for a division of the matter may have existed in the past have in a measure disappeared, and the present compilation sets forth cases affecting the same subject matter in a single group. It is usually possible, of course, to determine from the discussion whether or not a statute is being applied or whether the principles of common law control.

### EMPLOYER AND EMPLOYEE.

#### BREACH OF CONTRACT.

The determination of the right of a workman to damages for discharge before his contract has expired was before a United States circuit court of appeals in a case (American Music Stores *v.* Kussel, p. 64), the right of recovery turning on the construction of a term in the contract to the effect that service should be satisfactory to the employer. It was held in this case that the proper test was not whether the employer ought in reason to be satisfied, but whether there was actual and good faith dissatisfaction; a decision of the court below was, therefore, reversed, wherein it had been held that, the contract being one of an ordinary business or commercial character, it was proper for the jury to decide whether or not the employer ought in reason to be satisfied. A similar question was involved in Hanaford *v.* Stevens & Co. (p. 66), but a contrary conclusion was reached, the court distinguishing between contracts

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involving mere business relations and those which involve personal taste or feeling, and a judgment for damages was affirmed. In another case where it was decided that discharge had been unjustifiable, the amount of damages allowed by the trial court was for only part of the salary claimed, for the reason that the employee was ill during a part of the period of the unexpired term of his contract, the court assuming that damages should be granted only for the period when he would have been able to work, and that the illness would have taken place if the employment had continued. This was reversed on appeal (Marx *v.* New York Ribbon Co., p. 63) on the ground that it was not a necessary assumption that the illness would have taken place, and the employee was entitled to his wages for the entire time lost by reason of the discharge. What was a sufficient justification for discharge was considered in Board of Education *v.* Gossett (p. 70), insubordination and malicious accusations by an employee being held to warrant a discharge by his employer.

It was held in Colloraff *v.* Hickson (p. 67) that a breach of contract was effected by the employer imposing upon the employee duties not contemplated at the time of the employment. A similar question arose in Burden *v.* Woodside Cotton Mills (p. 67), the parties to the contract maintaining diverse views as to its basis. The lower court had refused to consider custom generally, and the Supreme Court of South Carolina ruled that unless there had been an agreement on the same point there was no contract, and remanded the case that the facts as to the basis of the contract might be determined.

### CLEARANCE CARDS.

In Chicago, R. I. & P. R. Co. *v.* Medley (p. 69), a question arose as to the liability of the employer for a statement made in the clearance card or service letter furnished a discharged workman at his request. In this letter it was stated that the employee's services were not satisfactory because he was an agitator, whereupon he sued, alleging libel, but failed to recover, since special damages were not shown, and the declaration was not found to be libelous per se.

### INTERFERENCE WITH EMPLOYMENT.

Statutes covering two phases of this subject were considered in decisions this year, one being a law of South Carolina prohibiting enticement. In the case construing the South Carolina law it was shown that the contract of the employee was voidable, and that he had given notice of intention to leave before the defendant took any action, and therefore no enticement appeared (Poston *v.*

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Lyerly, p. 71). The other case involved a statute of New York forbidding the giving of gratuities to the employee of another in respect to his work or employment without the knowledge and consent of the employer. The constitutionality of this act was challenged (People *v.* Davis, p. 61), but it was upheld as tending to the public welfare, preventing fraud, and protecting employers in their relationships with their employees who might be influenced by commissions or gratuities to the disadvantage of the employer.

### LABOR OF CONVICTS.

An unusual case coming before the Supreme Court of Rhode Island was that of Anderson *v.* Salant (p. 59), in which a convict sought to recover for the value of his services against certain contractors for convict labor. Services had been rendered under a State law the constitutionality of which was challenged as providing for involuntary servitude. The law was upheld and the suit therefore failed.

### VOTING BY ABSENT EMPLOYEES, ETC.

A law of Missouri authorizes voters absent from their precincts on election day to vote elsewhere in the State by conforming with certain conditions. This act is obviously advantageous to railroad employees, traveling salesmen, and others, and was enacted in their interest. In the case under consideration (Straughan *v.* Meyers, p. 218) the constitutionality of the law was challenged by a contestant in an election case, the decision being that the law was constitutional but that its provisions must be strictly complied with.

### SEAMEN.

The contract conditions affecting seamen have set them off from the great body of employees, though modern legislation tends to assimilate their status more closely to that of other employed persons. In Ex parte Larsen (p. 212) the release of certain seamen held under Virginia laws for desertion was sought in a United States district court. It was ruled that the Federal statute of 1915 in effect prohibits imprisonment for deserting seamen, and the Virginia laws under which the men were held were declared repugnant to the Federal legislation. Another provision of the Seamen's Act of 1915 was considered in a case involving the negligence of the master in allowing the escape of an officer of the ship who had unlawfully assaulted a seaman (The *Blakely*, p. 213). The court held that under the circumstances a suit would lie against the vessel. Failure of the ship's officer promptly to call a physician to minister to a sailor injured by accident was held to warrant a judgment against the vessel where an unnecessary delay of some 10 hours was shown (The *Governor*, p. 212).

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## WAGES.

### MODE AND TIME OF PAYMENT.

The constitutionality of a law establishing a semimonthly pay day was considered in two cases before the Supreme Court of Louisiana, in one of which (State *v.* Cullom, p. 224) the objection was raised that the law was invalid because of faulty classification. The law in question applies only to establishments employing 10 or more persons, but the court held that it could not say that the classification was not based upon a real distinction, and rejected the contention of unconstitutionality. The same contention was raised in State *v.* McCarroll (p. 224), with the additional claim that since to enforce the statute might cause imprisonment for debt, it was in violation of "an unwritten article of the constitution." It was pointed out that neither the State nor the Federal constitution contained a prohibition on the subject, and the legislative power to impose a penalty follows if the act is constitutional, as has already been held.

The constitutionality of an act requiring wages to be paid on discharge and providing automatic penalties for violation was considered in Olson *v.* Idora Hill Mining Co. (p. 222), an Idaho statute being involved. The claim that there was a conflict with constitutional provisions forbidding the impairment of the obligation of contracts was rejected and the act upheld. In Burden *v.* Woodside Cotton Mills (p. 67) the construction of the penalty clause of a similar law of South Carolina was involved. The law establishes $5 per day as the penalty, and there was a question of unlawful discharge. The jury held that there had been such a discharge, but awarded half the amount of the statutory penalty as damages. On appeal, such an award was held unwarranted, and for this and other reasons the cause was remanded.

The effect of a weekly payment statute on a contract providing for the forfeiture of one week's wages where an employee quits work without notice was before the Supreme Court of Maine (Veitkunas *v.* Morrison, p. 218). It was held that the power to make a contract for such forfeiture was not interfered with by the weekly payment law.

A statute of Mississippi allows an attorney's fee where successful suits are brought against manufacturers for failure to make monthly payment of wages. It was held (Sorenson *v.* Webb, p. 221) that this imposition of a penalty on certain classes of employers, other classes being exempt, was an unwarranted classification, and the provision was held unconstitutional.

Whether or not coupon books issued by an employer to be redeemed only at company stores could be transferred was considered in a Kentucky case (Pond Creek Coal Co. *v.* Riley Lester & Bros., p. 221).

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A law of the State requires semimonthly payment of wages in lawful money. The court found no criminal liability for the issue of such books, but overruled the company's contention as to nontransferability, holding that after the wages actually became due they must be redeemed in money, and the right to such payment was transferable.

#### PROTECTION.

The question of priority of wages over a debt secured by mortgage under a New York law was before a Federal court in Schmidtman *v.* Atlantic Phosphate & Oil Co. (p. 223). It was held that under the New York and Federal laws the statutes did not give wage debts precedence over specific liens, but that they were simply preferred to unsecured debts.

The mechanics' lien law of North Carolina was construed (Bryson & Bryson *v.* Gennett Lumber Co. (p. 200) to be applicable only where there is a remaining indebtedness from the owner of the property to the contractor who owed the labor debt. The constitutionality of a California statute requiring contractors to give bonds to cover debts for wages and materials was passed upon in Roystone Co. *v.* Darling (p. 199), the court upholding such a law.

#### MINIMUM WAGES.

The minimum wage law of Oregon was before the Supreme Court of the United States on questions of constitutionality (Stettler *v.* O'Hara, Simpson *v.* O'Hara, p. 220). The court was evenly divided, one justice not voting, leaving undisturbed the decision of the State court upholding the law.

### HOURS OF LABOR.

#### GENERAL LAWS.

An Oregon statute fixing a 10-hour day in factories generally was declared by the Supreme Court of the United States to be within the power of the legislature to enact (Bunting *v.* Oregon, p. 160), the court thus for the first time upholding a law limiting the hours of labor of adult males on other grounds than the special conditions affecting specific occupations.

The scope of the Arkansas 10-hour law relating to saw and planing mills was considered in State *v.* Arkansas Lumber Co. (p. 159), a night watchman being excluded from its application, since he was not employed "in any department relating to the running and management" of the company's saw and planing mill.

City ordinances were before the courts for a determination of their constitutionality in two cases involving closing hours. In Chan Sing *v.* City of Astoria (p. 137), an ordinance requiring certain stores to

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be closed at 6 o'clock except on Saturdays was held unconstitutional by the Supreme Court of Oregon as discriminatory because it permitted other establishments selling similar goods to remain open. The second case involved an ordinance of the city of San Francisco addressed specifically to the subject of laundries (Yee Gee *v.* City and County of San Francisco, p. 138). The case was decided in a Federal court and was discussed at length. Work between the hours of 6 a. m. and 7 p. m. on week days only was permitted by the ordinance, with other restrictions which were found, however, not to be unlawful. The court decided against the provision of the ordinance restricting hours of labor, on the ground of its unwarranted interference with the civil and industrial rights of adult males.

### PUBLIC WORKS.

Courts of Texas and Wisconsin had before them the power of the public to regulate hours of service on public work, in one instance (Bradford *v.* State, p. 142) a Texas statute and in the other (City of Milwaukee *v.* Raulf, p. 142) a city ordinance being held constitutional largely on the authority of Supreme Court decisions, though it was also maintained that such legislation is within the police power of the State.

### RAILROADS.

Much the most important of the opinions coming under this head is that in the case of Wilson *v.* New (p. 144), in which the Supreme Court, by a divided bench, sustained the constitutionality of the law fixing a standard workday of eight hours for trainmen in interstate commerce, declaring such employment to be affected by a public interest, so that it lay within the power of Congress to determine conditions of hours and wages by reason of its control over commerce under the Constitution, which was said also to extend to working conditions of every kind.

The hours of service law of 1907 was considered in a case (United States *v.* Atchison, Topeka & Santa Fe Railway Co., p. 168), in which it was held that employment from 8 a. m. to 6 p. m., or 10 hours, with a required absence from office for one hour at dinner time, was in conformity with the statute fixing at nine the maximum hours of service for telegraph operators in certain offices, the employee being subject to call only in case of emergency.

What constitutes an emergency was passed upon in Denver & Rio Grande Railroad Co. *v.* United States (p. 164). The crew of a derailed train left the train and went to a farmhouse, where they ate and rested until a wrecking crew came to assist them. The court held that the case was covered by the provision as to emergencies, so that the judgment against the company must be reversed. In another case

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(United States *v.* Missouri Pacific Railway Co., p. 165), the forgetfulness of a dispatcher to order cars of live stock to be picked up by a passing train was held not to constitute an emergency within the meaning of the act. A number of other charges were involved in the case, comprising an instance of erroneous reports by a dispatcher, and various minor occurrences, all being held insufficient as excuses, with the exception of a count based on a delay shown to be due to the wreckage of a train.

### WOMEN.

The Wisconsin statute fixing the hours of labor of women, and authorizing the State industrial commission to perform certain duties with respect to the application and enforcement of the law, was considered in State *v.* Lange Canning Co. (p. 161). The law was upheld as constitutional, and was construed so as to apply to a case where employment was partly by day and partly by night, over the contention of an employer who claimed that the statute did not apply in such a case.

### SUNDAY LABOR.

The New York law permits work on Sunday by those who observe Saturday as a holy day, provided it does not interfere with the repose and religious liberty of the community. The operation of a shoe factory was held not permissible under this act, even though the proprietor might observe Saturday (People *v.* Adler, p. 214). In another case the New York law was held (People ex rel. Bender *v.* Joyce, p. 215) to forbid the giving of moving-picture shows on Sunday, such action coming within the definition of "other public sports, exercises, or shows." The operation of a sawmill on Sunday to secure fuel for the running of the water and light plant of a town was held not to be a work of necessity by the Supreme Court of Arkansas (Wilson *v.* State, p. 217); and the gathering of dirty clothes by a laundry team was held not to be such a work by the Supreme Court of New Hampshire (State *v.* Lavoie, p. 217).

A New York law prescribes a weekly day of rest, but permits this to be on some other day than Sunday by complying with certain requirements. It was held (People *v.* Eberhart, p. 225) that the details of these requirements must be strictly complied with in order that a laundryman may take advantage of these provisions as to work on Sunday.

### FACTORY REGULATIONS.

The Supreme Court of Missouri upheld as constitutional a statute of that State requiring foundries to provide suitable toilet, wash and dressing rooms, over the contention that there was an unwar-

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ranted discrimination in singling out this particular industry (State *v.* Scullin-Gallagher Iron & Steel Co., p. 136).

The New York law as to fire escapes was considered in People *v.* Pease & Elliman (Inc.), (p. 135), the court holding that the agent in charge of the building for collecting rents and making minor repairs should be held responsible under the law for the installation of such fire escapes as are required. In People *v.* Diamond (p. 133), the same law was held to support indictments for manslaughter against both the owner and the agent where death had followed the disregard of the law forbidding workroom doors to be locked during working hours in a factory.

## RAILROADS.

In Spokane & Inland Empire Railroad Co. *v.* United States (p. 203), the Federal safety appliance law was held by the Supreme Court to apply to electric cars operated in part as a street railway and in part as an interurban interstate system. The same court affirmed a judgment against a railroad company where damages had been awarded on the basis of its failure to maintain safety appliances in accordance with the statute, the law being held available in behalf of an employee not engaged in interstate commerce (Texas & Pacific Railway Co. *v.* Rigsby, p. 205).

## RESTRICTION OF EMPLOYMENT.

### LICENSING.

The fact that a plumbers' examining board had adopted unreasonable and unconstitutional rules was held in Commonwealth *v.* McCarthy (p. 132) not to warrant a journeyman plumber to undertake work as a master plumber without a master's license under the Massachusetts statute, the remedy lying in a writ of mandamus and not in an ignoring of the law.

### ALIENS.

A Massachusetts statute directs the preference of citizen labor on public works, and an attack on the constitutionality of this law resulted in the law being upheld in Lee *v.* City of Lynn (p. 56), on the authority of Supreme Court decisions.

Falling appropriately under this head is a case involving the prosecution of an employer for a violation of the alien contract labor law of the United States (United States *v.* New York Central & Hudson River Railroad Co., p. 55). Conviction followed a showing that an employee had instructed another to secure five men from Canada, which was done, using a pass for laborers over the road, which extends into the Dominion.

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## LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

### SUPERINTENDENCE.

Employers' liability statutes usually contain a provision charging the employer with responsibility for the conduct of persons acting in his stead. In Pelow *v.* Oswego Construction Co. (p. 77), the New York statute on this subject was construed, holding the employer liable for acts of a person "intrusted with any superintendence," even though the negligent act was such as would naturally be performed by a fellow servant. Quite similar was the conclusion of the Supreme Court of Oregon in Deyo *v.* Arizona Grading & Construction Co. (p. 72), in construing the law of that State. It was held in De Francesco *v.* Piney Mining Co. (p. 250) that the employer was not required to give warning as to an obvious and commonly known danger.

### SAFE PLACE AND APPLIANCES.

The common-law requirement of safe appliances and a safe place to work is made more explicit by statute in many States, and violation of these statutes is usually regarded as negligence per se. In Continental Public Works Co. *v.* Stein (p. 80), a United States circuit court of appeals affirmed a judgment where an unguarded set screw on an asphalt mixer used in highway construction caused an injury, the incident being held to come within the labor law of the State of New York. Quite similar was the ruling of the Supreme Court of Iowa (Plew *v.* James Horrabin & Co., p. 79), holding the law of that State as to guarding dangerous machinery in manufacturing and other establishments to apply to a concrete mixer used in laying pavements.

Failure to safeguard a paper stamping machine so as to prevent the accidental movement of the treadle was held to be a violation of the New York statute supporting a charge of negligence (Flynn *v.* McLoughlin, p. 78).

The liability of the owner of property for the safety of employees on buildings in course of erection by contractors was affirmed by the Supreme Court of Wisconsin in construing the law of that State (Butera *v.* Mardis, p. 127). The specific requirement of a provision for fire escapes on factories, etc., was construed by the Supreme Court of Illinois (Greene *v.* L. Fish Furniture Co., p. 76), the court holding that mercantile establishments were properly included under a reasonable and therefore constitutional classification.

The Federal safety appliance laws for railroads may be said to be in general of absolute application, both as to equipment and maintenance. The Supreme Court of the United States (San Antonio & Aransas Pass Railway Co. *v.* Wagner, p. 125) affirmed a judgment awarding damages to a man injured by reason of defects in auto-

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matic couplers, the fact of the defective condition in violation of the statute being regarded as negligence; it is further said that contributory negligence is excluded from consideration in such a case. The same safety law was applied by the Missouri court of appeals in Noel *v.* Quincy, Omaha & Kansas City Railroad Co. (p. 124), with like results.

It was held by the Supreme Court of Minnesota (Coleman *v.* Illinois Central Railroad Co., p. 123) that the action of Congress in permitting extensions of time for full conformity with the provisions of the safety appliance laws did not warrant the use of defective cars in train service.

The absolute duty of maintenance of safety conditions was held by the Supreme Court of Appeals of Virginia (Virginian Railway Co. *v.* Andrews, p. 124) not to apply to the case of a locomotive engine which was turned over to the engineer in proper condition, since the maintenance of such condition throughout the run would depend upon personal factors as to which the company could not be held answerable in the absence of proof of negligence.

The duty to install new appliances of superior merit was passed upon by the Supreme Court of the United States in Chicago & Northwestern Railway Co. *v.* Bower (p. 116), the court holding that under the circumstances appearing in the case the company could not be held free from negligence in delaying as long as it did the installation of an improved device.

Another case involving the safety of railroad employees, but falling under the rules of common law, was decided by the Supreme Court of California (Humphfres *v.* Western Pacific Railway Co., p. 121). In this case the company was held liable for permitting a signboard to be erected near its tracks in violation of one of its own rules, and the fact that it had called the injured man's attention to another rule requiring employees to inform themselves as to the proximity of such obstructions did not relieve it.

### OVERTIME WORK.

The effect of a violation of the Hours of Service Act by a railroad company was passed upon by the Supreme Court of the United States (Atchison, Topeka & Santa Fe Railway Co. *v.* Swearingen, p. 120), the court holding that unless the injury was proximately caused by the violation of the act such violation was not in itself ground for liability for injury occurring during the time of excess employment.

### STATUS OF PLAINTIFF.

The status of a student fireman was passed upon by the Supreme Court of Appeals of West Virginia in Findley *v.* Coal & Coke Railway Co. (p. 107), the court holding that such a person was in the service

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of his employer, performing some duties, as indicated by the fact that he was on the payroll of his employer, who was therefore liable for his injuries.

The status of the employee of an employer who has released a railroad company from carrier liabilities was considered by the Supreme Court of Nebraska in Maucher *v.* Chicago, Rock Island & Pacific Railway Co. (p. 202). In this case it was held that the owners of a circus could not relieve the railroad company from liability for injuries to one of the circus employees where the injury was the result of the negligence of a train crew in the railroad company's employment. The question of status was also involved in a case passed upon by the Supreme Judicial Court of Massachusetts (Ross *v.* John Hancock Mutual Life Insurance Co., p. 72). In this case an employee of a company was injured by the negligence of an elevator boy employed by the company at a time when the employee was going about a personal errand. Judgment rested on the finding that the injured employee was not at the time in her employer's service, damages being allowable for an injury to her on account of the negligence of its employee, the elevator tender.

### UNLAWFUL EMPLOYMENT OF CHILDREN.

The violation of a Wisconsin statute prohibiting the employment of children below a fixed age was held to afford grounds for affirming a judgment for damages where injury followed such employment (Green *v.* Appleton Woolen Mills, p. 73). The same view was taken by the Supreme Court of Oklahoma (Tulsa Cotton Oil Co. *v.* Ratley, p. 75), the court ruling that the ignorance of the employer as to the correct age of the child was not an adequate defense. The Supreme Court of Wisconsin also adopted this view (Stetz *v.* F. Mayer Boot & Shoe Co., p. 73), reversing a finding of the court below that the company's foreman was entitled to rely upon the representations of the child's father. The court also nullified a release based on an agreement under the compensation law of the State, on the ground that a child unlawfully at work was not an employee under that law. A settlement under the compensation law of New Jersey was reversed in Hetzel *v.* Wesson Piston Ring Co. (p. 74), where the claim involved injuries to a child 13 years of age unlawfully employed, the reasons assigned being the same as in the Stetz case.

### EFFECT OF COMPENSATION LAWS.

A case involving the effect of compensation legislation was also passed upon by the Supreme Court of Washington (Remsnider *v.* Union Savings & Trust Co., p. 128). The compensation law of that State applies to "inherently hazardous" employments, and it was held that a janitor injured by an elevator in an office building was

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not within the act, so that a damage suit was properly brought. Another phase of this question was discussed in Shanahan *v.* Monarch Engineering Co. (p. 80), in which it was held that the compensation law of New York declared the full liability of an employer coming within the act, for injuries to his employees, so that beneficiaries not embraced in the act could recover nothing under other laws.

### SUIT AGAINST A COUNTY.

The exemption of a county from liability under the Oregon statute of 1911 was declared by the supreme court of that State in Rapp *v.* Multnomah County (p. 127), a judgment of the lower court awarding damages being reversed. The law was held to be explicit in denying right of action for tort, suits being permitted only on contract, so far as existing authorizations are concerned.

### FEDERAL STATUTE.

*Interstate commerce*—The Federal statute being applicable only where the injured workman is engaged in interstate commerce, and the question of interstate commerce being determinable only by the facts in the individual instance, there is no apparent diminution in the number of cases coming before the courts for the determination of this point. Supreme Court decisions are of course controlling where the facts are seen to be identical, but the various State and subordinate Federal courts are not agreed as to when such a condition exists. Indeed, it may require a decision of the court to inform the parties as to the proper statute under which action may be brought. Such was the case in Alexander *v.* Great Northern Railway Co. (p. 93), in which the Supreme Court of Montana held that the conductor of a train hauling railroad ties for general use within and without the State was not within the act, reversing on this point the lower court, but affirming a judgment in the plaintiff's favor on the ground that a declaration under the Federal law may lead to a recovery under the State law if the pleadings and proof are sufficient under the latter. Shifting cars of coal intended for indiscriminate railroad use was said by the Supreme Court to be work of such a nature that recovery under a State law was proper, the contention of the company that the employment was in interstate commerce being rejected (Chicago, Burlington & Quincy Railroad Co. *v.* Harrington, p. 105).

In other cases before the Supreme Court it was held that a person injured while taking a defective engine to a repair shop in another State was engaged in interstate commerce (Chicago, Rock Island & Pacific Railway Co. *v.* Wright, p. 112); so also of a switchman distributing cars from an interstate train (Seaboard Air Line Railway *v.* Koennecke, p. 111); and of a switch foreman placing a damaged car containing interstate goods on a repair track (Great Northern Rail-

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way Co. *v.* Otos, p. 110). Circumstances quite similar to those in the last-named case were considered by the Supreme Court of Washington (Bolch *v.* Chicago, Milwaukee & St. Paul Railway Co., p. 108), a similar conclusion being reached to that above noted, the judgment of the court below being reversed. This court also considered a case (Aldread *v.* Northern Pacific Railway Co., p. 107) in which a car was being moved between two yards about a mile apart after having been iced to receive an interstate shipment. An injury received during this movement was held to be received in interstate commerce.

A Federal court considered the status of a member of a train crew on call but not in service (Pryor *v.* Bishop, p. 96). The injuries for which suit was brought were received while the injured man was occupying the caboose under privilege, and it was held that he was not at the time an employee, so that no liability attached under the Federal law. The position of persons not engaged directly in train service was passed upon in a few cases noted, one of them (Pecos & Northern Texas Railway Co. *v.* Rosenbloom, p. 114) being decided by the Supreme Court of the United States. It was held in this case that a yard clerk taking numbers and sealing cars of a train moving in interstate commerce was within the provisions of the Federal statute, and not of the State law of Texas, and a contrary judgment of the Supreme Court of Texas was reversed. In Wesseler *v.* Great Northern Railway Co. (p. 95), the Supreme Court of Washington held that an express agent who was also in charge of the train's electric plant was within the Federal statute, he having been injured while turning on the electric current to illuminate the train. It did not appear in this case that there was interstate traffic on the train, but the court held that the injured man was a part of the equipment of an interstate vehicle, and was within the law whether the vehicle was at the time full or empty. The Federal statute was held not to apply to the case of a station agent acting as express agent, where the injury resulting in his death was received while the injured man was handling express matter, the court holding that he was not at the time an employee of the railroad company (Bogart *v.* New York Central & Hudson River Railroad Co., p. 106).

A track inspector injured by the collision of his hand car with an engine was held to be under the Federal law (Anest *v.* Columbia & Puget Sound Railroad Co., p. 95), the court saying that there was no possible separation between inspection for interstate and that for intrastate commerce. A similar view was taken of work in the setting of a telegraph pole in the process of repairing a line used for the transmission of train orders (Coal & Coke Railway Co. *v.* Deal, p. 94); so also of cleaning an ash pit (Cincinnati, New Orleans & Texas Pacific Railway Co. *v.* Clarke, p. 92). The Supreme Court of Arkansas (Long *v.* Lusk, p. 101) held the Federal law to apply to the case of a

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member of a bridge crew injured while removing bolts from timbers taken out of a bridge and lying alongside the track. The Kentucky court of appeals took an opposite position in Illinois Central Railroad Co. *v.* Kelly (p. 102), where the injured man was engaged in removing old rails from the side of the right of way. A workman engaged on excavation for a new bridge was likewise held not to be covered by the law by a ruling of the Supreme Court of Appeals of West Virginia (McKee *v.* Ohio Valley Electric Railway Co., p. 114), the instrumentality not being as yet in actual railway use.

Shop work was considered in a case before the Supreme Court, that court holding in Shanks *v.* Delaware, Lackawanna & Western Railroad Co. (p. 97), that the work of moving a countershaft in a railway shop was not work in interstate commerce. The rule of exclusion was also applied by the Supreme Court of Alabama (Louisville & Nashville Railroad Co. *v.* Carter, p. 103), in a case in which a workman was injured while repairing an engine of a work train used wholly in the State of Alabama in repairing tracks used in both interstate and intrastate commerce. A United States circuit court of appeals, on the other hand, held (Chicago, Kalamazoo & Saginaw Railway Co. *v.* Kindlesparker, p. 104), that the work of repairing an engine which was itself used indiscriminately in interstate and intrastate commerce was within the act. A like conclusion was reached by the Court of Appeals of Maryland (Baltimore & Ohio Railroad Co. *v.* Branson, p. 100), where the injuries complained of were received while painting engines and cars used in interstate commerce though it does not appear that such interstate use was exclusive. An interesting feature of this case was that the injury complained of was poisoning due to the breathing of a mist or spray of paint while using a paint "gun," the court holding that the words "suffering injury" were not limited to injuries due to force or violence, but should include such injury as that appearing in the case in hand.

*Releases.*—The provision of the Federal law forbidding releases was before the Supreme Court in Chicago & Alton Railroad Co. *v.* Wagner (p. 119). The plaintiff, conductor of a switching train, was injured while running over the tracks of a company other than his employer, and sued the owner of the tracks. He had signed a release on the receipt of benefits from the relief department of which his employer was a member, but proceeded on the ground that such release was void under the Federal statute—a position which the Supreme Court sustained, and affirmed the judgment in his favor. The facts in the case of Chicago, Rock Island & Pacific Railway Co. *v.* Bond (p. 90) led the Supreme Court to decide that an injured man was an independent contractor, reversing the judgment of the Supreme Court of Oklahoma, which had adopted the view that the contract under which the deceased was working was really a contract of employment, and

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was an attempt to exempt the company from liability in contravention of the provision of the Federal law forbidding waivers.

*Limitation.*—The Federal liability law requires actions to be brought within two years from the time the right of action accrues. This provision was held in a United States circuit court of appeals (American R. Co. of Porto Rico *v.* Coronas, p. 115) to require an action to be brought, not within two years after the death of an injured man, but within two years after the appointment of a representative, so that an administrator appointed in 1914 on account of one dying in 1908 was held entitled to bring action within the period of limitation. Another phase of this law relating to death was considered in Louisville & Nashville Railroad Co. *v.* Rhoda (p. 91). In this case the claim that death was immediate, so that no right of action survived, was rejected by the court, on the ground that if life continued but a mathematical moment after the injury was received the cause of action might logically arise and survive.

*Comparative negligence.*—The Federal law has been largely instrumental in establishing the doctrine of comparative negligence. This provision was before the Supreme Court in Great Northern Railway Co. *v.* Wiles (p. 88), in which it was decided that the injured man's negligence was the proximate cause of his death, so that the rule of comparative negligence had no application. The question of proximate cause was involved in another case before this court (Seaboard Air Line *v.* Horton, p. 86), the provision of the statute as to assumption of risks being also involved. The act of a locomotive engineer in using an engine with a water-gauge guard glass missing was held not to be such an exposure of himself to danger as to remove him from protection of the law, nor was it shown that such conduct was the proximate cause of his injury, and a judgment in his favor was affirmed.

*Procedure.*—Questions of procedure under the act were involved in two cases before the Supreme Court, in one of which (Louisville & Nashville Railroad Co. *v.* Stewart, p. 118), the Kentucky law authorizing a verdict on an agreement of 9 or more jurymen out of 12 was held valid, as well as a provision authorizing an addition of 10 per cent to a judgment where a supersedeas is procured and the judgment subsequently affirmed. In the other case a somewhat similar provision of the Minnesota law, authorizing five-sixths of a jury to reach a verdict where deliberation in a civil case extends beyond 12 hours, was held not in conflict with the Federal statute (Minneapolis & St. Louis Railroad Co. *v.* Bombolis, p. 117).

*Relation to compensation laws.*—The relation of the Federal law to State laws providing compensation was considered in two cases before a United States circuit court of appeals, both involving the



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Michigan statute. In one instance (Grand Trunk Railway Co. *v.* Knapp, p. 82), a bridge carpenter injured while on a work train on his way to repair a bridge, and in the other (Waters *v.* Guile, p. 84), a brakeman on a train carrying both interstate and intrastate freight, were plaintiffs in suits at law, the employers in both cases contending that the claims should be disposed of under the compensation law of the State. This contention the court rejected, and affirmed judgments of the lower court in favor of the injured men.

## WORKMEN'S COMPENSATION.

### CONSTITUTIONALITY OF STATUTES.

Of primary importance under this head are three cases decided by the Supreme Court sustaining the laws of the States of Iowa, New York, and Washington. It should be noted that the State courts of last resort had upheld their respective laws in each instance, so that only Federal questions were considered by the Supreme Court. The opinion in the New York case (New York Central Railroad Co. *v.* White, p. 232) was first written, though all were handed down on the same day. The statute was upheld against contentions that it offended Federal constitutional principles in regard to due process of law, liability without fault, and interference with freedom of contract.

The New York statute provides a compulsory compensation system, and establishes alternative methods of securing payments, while the Washington statute provides not only for a compulsory system, but also for a State fund from which payments are to be made, instead of directly by the employer, as under the New York law. This raised other questions than those presented in the New York case, but no objection was found by the majority opinion to the constitutionality of this law (Mountain Timber Co. *v.* Washington, p. 252). The maintenance of a fund to which employers must contribute regardless of the fact of accidents occurring or not occurring in their establishments was a point that was involved in the present case, not appearing in the White case, but this and other difficulties were resolved in favor of the validity of the law as a reasonable activity of the State in behalf of the public welfare, and so within its police power.

The Iowa statute is elective in form, and its fundamental principles fall within the boundaries of those discussed in passing upon the New York law. Specific distinct provisions called for some consideration, but none were found to be unreasonable or inappropriate, and the law was sustained as not offending against the Federal constitution in its mandatory provisions; other features were held not open to discussion, since their acceptance or rejection was a matter of election, the appellant not having accepted the act (Hawkins *v.* Bleakly, p. 243).

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A number of State court decisions on constitutionality involved points in laws already upheld by them, though there are also a few cases in which first decisions of constitutionality were rendered. In Western Metal Supply Co. *v.* Pillsbury (p. 237) the question was raised as to the constitutionality of the California law in attempting to provide compensation for death, it being contended that the amendment to the constitution only authorized compensation to employees and not to dependents. This contention was rejected by the court. In Illinois a new law was enacted in 1913, repealing a former statute, which had been held constitutional. It was claimed (Victor Chemical Works *v.* Industrial Board of Illinois, p. 240) that the new law was in effect compulsory, and therefore unconstitutional. This contention was rejected, and the law upheld on the authority of the earlier decision.

In Kentucky the law of 1914 was found unconstitutional as being compulsory, but in Greene *v.* Caldwell (p. 242) the law of 1916 was found free from the objectionable features of the earlier statute, and with the right of election secured to both parties the law was upheld.

In a Michigan case the claim was advanced that the State's statute was unconstitutional in its application to third parties, as depriving of the right of trial. The court held that the law as properly construed did not violate the constitution, and the statute was upheld (Grand Rapids Lumber Co. *v.* Blair, p. 322). In another case arising under this statute a municipality claimed a constitutional right to be exempt from liability in damages to an employee, a contention which the State supreme court rejected (Wood *v.* City of Detroit, p. 341). A similar contention was made in Purdy *v.* Sault Ste. Marie (p. 345), but met the same fate.

The constitutionality of the Oregon law was sustained in Evanhoff *v.* State Industrial Accident Commission (p. 238), over numerous objections, among others being one that the act deprives persons of property without due process of law. The elective feature of the act was held to overthrow this charge, and the law was upheld. The objections offered against the Pennsylvania statute included that noted in the Evanhoff case, also that the law unconstitutionally took away the common-law defenses and interfered with the right of contract by forbidding waivers. Other objections were that it deprived of the right of trial by jury, and that there was a limitation of the amount recoverable for death, in violation of a provision of the State constitution. The court rejected all these contentions, some as invalid in themselves, and others as being disposed of by the fact that the act is an elective one (Anderson *v.* Carnegie Steel Co., p. 239). Similar objections were made to the Rhode Island law (Sayles *v.* Foley, p. 248), with the added one that there was improper classification, but here again the law was upheld.

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The Texas law had been upheld by a lower court with the exception of a provision which takes from employees of accepting employers their option to accept or reject the act. The law was upheld in its entirety by the supreme court in Middleton *v.* Texas Light & Power Co. (p. 245), the benefits conferred by the act and the practical waiver of other remedies by the employee remaining in service being held to meet this particular objection. Other points were disposed of as in the cases already noted. Though the West Virginia act is compulsory, it was decided (Rhodes *v.* J. B. B. Coal Co., p. 338) that it was but a form of industrial insurance and within the power of the State to provide as a matter of public policy. An earlier decision (De Francesco *v.* Piney Mining Co., p. 250) had sustained the constitutionality of the law over the contention that the abrogation of defenses was unconstitutional. The question of due process of law was decided favorably to the Washington statute by a Federal court (Raymond *v.* Chicago, Milwaukee & St. Paul Railway Co., p. 346), the court citing decisions of the State supreme court sustaining the law.

## PARTICULAR PROVISIONS OF THE LAWS.

### INJURIES COMPENSATED.

*Accident.*—The laws in general make use of the word "accident" in defining the basis of compensation awards. That intentional acts may be construed as accidental in their effect on the persons injured was held by the Supreme Court of Washington (Stertz *v.* Industrial Accident Commission, p. 284), this case being one in which a foreman was shot and killed by a discharged workman. See also Western Metal Supply Co. *v.* Pillsbury (p. 237). On the other hand, the Court of Errors and Appeals of New Jersey reversed a judgment of the supreme court of the State, which had affirmed an award in a case (Walther *v.* American Paper Co., p. 287) where a night watchman was murdered and robbed by an employee in the same establishment.

The rupture of a small blood vessel in the brain chargeable to excessive heat and overexertion was held to be an accident in La Veck *v.* Parke, Davis & Co. (p. 226); also a hernia said to have been caused by excessive strain (Robbins *v.* Original Gas Engine Co., p. 226). Muscular spasm due to strain was also classed as a compensable accident in Bystrom Bros. *v.* Jacobson (p. 227).

*Occupational disease.*—The Supreme Court of Errors of Connecticut (Miller *v.* American Steel & Wire Co., p. 306) and the Supreme Court of Ohio (Industrial Commission of Ohio *v.* Brown, p. 305) alike reject claims based on lead poisoning as not being covered by the acts of their respective States.

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*Proximate cause.*—The question of proximate cause of the disability was considered in Ruth *v.* Witherspoon-Englar Co. (p. 322), in which case it was held that the existing disability was due in large degree to negligent medical practice, and an award covering the full measure of disability was reversed, the employer being held not responsible for other than the direct results of the accident. In a case (Frey *v.* Kerens-Donnewald Coal Co., p. 321) before the Supreme Court of Illinois, the injury was held to be the proximate cause of disability against the company's claim that there was paralysis due to other causes. Refusing to undergo a safe and simple surgical operation to relieve disability was held to bar a claim for compensation, the court holding that the disability was not due proximately to the accident where proper treatment was refused (Lesh *v.* Illinois Steel Co., p. 336). In Ramlow *v.* Moon Lake Ice Co. (p. 320) compensation was allowed for death as proximately caused by the injury where delirium tremens intervened, and a nonalcoholic person would probably have suffered no such consequences, the court saying that this fact could not shift the proximate cause of death from the injury.

## COVERAGE.

*Employment status.*—The status of a workman, i. e., as being an employee or not of the person from whom compensation is claimed, is of course an essential factor. A teamster sent by his employer to do hauling for another person was held (Dale *v.* Saunders Bros., p. 273) to be in the employ of his original employer, and not of the person to whom he had been sent by them. A like conclusion was reached in the case of In re Comerford (p. 271), in quite similar circumstances. A contractor for teaming does not become an employee of the person for whom hauling is being done, even though he himself be one of the drivers of a team, his relationship being one of contract rather than of personal service (Western Indemnity Co. *v.* Pillsbury, p. 268).

The claim that a workman was an independent contractor was rejected in Tuttle *v.* Embury-Martin Lumber Co. (p. 270), where it appeared that though the man was hauling by the job rather than by the day, he was under the control of the company by which he was engaged in the performance of his work.

Where an independent contractor was engaged to attend to other matters in connection with the undertaking, and was injured while so employed, a claim for compensation was approved on the basis of a relationship of employer and employee (Dyer *v.* James Black Masonry & Contracting Co., p. 272).

A regular employee reporting for work, but dismissed by reason of unfit physical condition and injured while leaving the working place, was held entitled to compensation in Kiernan *v.* Priestedt Underpin-

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ning Co. (p. 274). The relationship of master and servant was held to exist in the case of an apprentice elevator operator serving under an instructor, and the fact that he was without a license did not change his status so as to permit suit for damages (Pettee *v.* Noyes, p. 267).

What employer should be held responsible where an employee serves several firms was passed upon in Western Metal Supply Co. *v.* Pillsbury (p. 237). In this case a watchman having charge of the premises of six employers was held to be the employee, for purposes of compensation, of the employer on whose premises he was at the time of his injury.

*Casual employees.*—Under the provisions of many of the laws casual employees or those not engaged in the conduct of the employer's business are excluded. Such a provision served to bar recovery in a case where a workman was injured while helping to erect a shed for a farmer, the latter being held not to be engaged in the enterprise of building (Uphoff *v.* Industrial Board of Illinois, p. 274). A like construction prevented recovery for the death of a carpenter engaged in making alterations in a factory building, the employer not being engaged in such work "for pecuniary gain," as required by the New York law (Bargey *v.* Massaro Macaroni Co., p. 270). In a Connecticut case, on the other hand, it was held (Thompson *v.* Twiss, p. 268) that the owner of a tract of land engaging men to clear it was employed in such an undertaking, even though it was not his main business, so that his workmen engaged therein were not excluded.

*Numerical basis.*—Another limitation found in some laws excludes persons having less than a fixed number of employees. It was held in Kelley *v.* Haylock (p. 277) that the Wisconsin statute did not apply where the employment of four or more employees was but temporary, as for threshing, filling silos, etc.

*Hazardous employments.*—Several laws apply by their terms only to hazardous or extrahazardous employments. The provision of the New York law limiting it to hazardous employments has given rise to considerable discussion and difficulty, following which important amendments were made in the law. It was held in Costello *v.* Taylor (p. 276) that the operation of trucks, wagons, etc., an enumerated hazardous employment, included the care of horses in the stable. A ruling of a lower court that an elevator was within the law as a "vehicle operated otherwise than on tracks" was reversed by the court of appeals (Wilson *v.* C. Dorflinger & Sons, p. 282). A salesman for a clothing factory (Lyon *v.* Windsor, p. 281) and a fruit buyer for a storage company (Sickles *v.* Ballston Refrigerating Storage Co., p. 281) were held not to be within the provisions of the law, though workers in the establishments themselves would be included. In Bargery *v.* Massaro Macaroni Co. (p. 270), a carpenter making alterations in the factory of the company was not engaged in the

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hazardous employment of the factory, and was barred from benefits under the act. The Illinois statute uses the term "extrahazardous," and it was held by the supreme court of that State (Vaughn's Seed Store *v.* Simonini, p. 265) that where an employer's business involved extrahazardous occupations in a part of its branches it could not be presumed that all employees, regardless of their employment, were entitled to the benefits of the act. In Parker-Washington Co. *v.* Industrial Board (p. 277) the same law was construed to cover the work of hauling crushed stone, classing it as a business or enterprise of carriage by land, this being one of the extrahazardous occupations covered by the law. It was also held, though with less definiteness, that such hauling was a part of the construction work also covered by the act, the stone hauled being used for the paving of streets.

The Massachusetts statute does not make use of the word "hazardous" or "extrahazardous," but a case arose under it similar to the Lyon case and the Sickles case under the New York law above, which may be noted here. Compensation was claimed for an injury to the manager of a retail shoe store, the employer being also a manufacturer. The employer had elected to accept the law for his factory, but claimed that this did not bring employees of the store within the act. This was rejected by the court (In re Cox, p. 266) on the ground that the law did not provide for partial insurance by employers.

*Public employees.*—Public employees are included under the laws of most States, but various questions have arisen as to the application of the laws to such persons. Mention has already been made of a challenge to the constitutionality of the Michigan law as applying to a municipality (Wood *v.* City of Detroit, p. 341). A like contention was made in Purdy *v.* Sault Ste. Marie (p. 345), with the added claim that the city charter provided for injuries to employees, and that these provisions had not been repealed by the compensation act. The supreme court of the State held the contrary. The Montana law was held (City of Butte *v.* Industrial Accident Board, p. 344) to be applicable to municipalities as a matter of compulsion over a contention of the city that it had the right to make an election.

What persons in public service come within the provisions of the acts was considered in several cases. The Connecticut law applies to employees working under a contract of service, and this definition was held not to cover an elected official, as a sheriff (Sibley *v.* State, p. 346). A city policeman holding office during good behavior was declared an employee under the Minnesota statute (State ex rel. City of Duluth *v.* District Court of St. Louis County, p. 345); so also of a city fireman in the same State (State ex rel. City of Duluth *v.* District Court of St. Louis County, p. 344). The Massachusetts law, on the other hand, was held not to include a hoseman in a city fire depart-

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ment, the law of that State applying to "laborers, workmen, and mechanics," terms said not to include "the trained and disciplined force comprising the defendant's fire department" (Devney *v.* City of Boston, p. 276). In the Wood case noted above, the Michigan law was held to apply to an employee of the public lighting commission of the city of Detroit.

*Extraterritoriality.*—Whether or not the laws apply to accidents occurring beyond State boundaries is a question whose answer depends in part upon the phraseology of the laws themselves, but seems also to be answered variously by reason of different constructions placed by the courts on language apparently identical. The two cases in this field noted in the present bulletin, however, agree in making the compensation principle a part of the contract of service, following the employee in his occupation without reference to State boundaries. (Grinnell *v.* Wilkinson, p. 279, a Rhode Island case; Gooding *v.* Ott, p. 280, decided in West Virginia.)

*Interstate commerce.*—The application of compensation laws to interstate employees is a subject that has been ruled upon diversely by the State courts considering it. The New Jersey law was held (Winfield *v.* Erie Railroad Co., p. 330) by the court of errors and appeals of that State to be applicable in a case where negligence of the employer was neither alleged nor proved, the court holding that as the Federal law did not cover such cases there was room for a State statute to operate. Where interstate commerce is by water, the Supreme Court of Minnesota held that Congress had not yet acted, so that the State law controls (Lindstrom *v.* Mutual S. S. Co., p. 327).

*Nonresident aliens.*—The rights of alien beneficiaries were passed upon in a case before the Supreme Court of California (Western Metal Supply Co. *v.* Pillsbury, p. 237), the court holding that there was no reasonable ground for limiting the benefits of the act to citizens; such also was the decision of the Supreme Court of Illinois as to the law of that State (Victor Chemical Works *v.* Industrial Board, p. 240).

### ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Most of the compensation laws limit their relief to cases in which the injury on which the claim is based is due to the employment as "arising out of and in course of" the same. In Stertz *v.* Industrial Insurance Commission (p. 284) the Supreme Court of Washington pointed out that under the law of that State, which omits this phrase, it was not necessary that an injury should arise out of the employment, and the question was ruled out in a case where a foreman was killed by a discharged employee. It does not seem necessary, however, that the act should not contain such words of limitation in a case of this particular kind, since if the employment exposed one to assaults compensation might still be allowable under the act. Thus

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in a Minnesota case (State ex rel. Anseth *v.* District Court of Koochiching County, p. 314) it was held that a bartender injured by a glass thrown by a drunken man, no altercation being involved, was entitled to compensation under the act. The Supreme Court of New Jersey, on the other hand, which awarded compensation where a night watchman was murdered and robbed by a fellow employee, on the ground that the conditions of employment of the two men were fundamentally involved in the event, was reversed by the court of errors and appeals, on the ground that the death did not arise out of the employment (Walther *v.* American Paper Co., p. 287).

The Supreme Court of Appeals of West Virginia reversed the State compensation commissioner in a case (Mercer *v.* Ott, p. 295) in which compensation had been denied, in part on the ground that the injury was not received in the course of and resulting from the employment. The injured man was employed by a brick company to unload coal and while at work was crushed by the negligence of railroad employees; the court held that it was "plain, indeed beyond controversy," that the injury resulted from the employment.

The Supreme Court of Massachusetts denied compensation in a case (In re Harbroe, p. 311) in which an employee was injured during employment, but not by reason of the same, the injury resulting from a mistake by officers in pursuit of a violator of the law. In a New Jersey case also an employee killed for unknown reasons while at work in a dangerous part of the city was held to be without the protection of the act (Schmoll *v.* Weisbrod & Hess Brewing Co., p. 313).

To what extent an employee may depart from his line of duty without losing the benefits of the act is a question that was passed upon in a number of cases. A New York decision (Martucci *v.* Hills Bros. Co., p. 288) was to the effect that an employee stepping aside to assist a fellow workman in temporary difficulty did not take himself out from under the act; while the Supreme Court of Michigan denied compensation to an employee who left his post to hasten some repair work on the machine which he was using (Bischoff *v.* American Car & Foundry Co., p. 303).

An act of personal convenience was considered in O'Neil *v.* Carley Heater Co. (p. 319), the case being one in which a workman took a poisonous substance by mistake for medicine, acting on supposed information as to where a certain drug could be obtained; as no act of the employer was involved, a claim for compensation was denied. Where, however, there was a customary supply of drinking water, and a workman drank poison from a similar vessel by mistake, the employer was held liable for accidental poisoning (Archibald *v.* Ott, p. 293). Compensation was also allowed under the Massachusetts law where a night workman left a heated room to go upon the roof for fresh air

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and fell (In re Von Ette, p. 291), and where an employee was injured while going to answer a telephone call, even though it appeared that the call was in his private interest, it being his duty to answer calls (In re Cox, p. 266). A claim was denied (Mann *v.* Glastonbury Knitting Co., p. 310) in a case in which a workman attempted to place a bottle of tea in a hot-water pipe and went to a different place from that customary or allowed, and was injured while doing so.

Injury received while going to rescue a fellow workman was held to be compensable in Waters *v.* Wm. J. Taylor Co. (p. 302), though a volunteer attempting to assist his employer, who was engaged in a fight, was denied benefits (Clark *v.* Clark, p. 289). Where an altercation arose over methods of work and injury followed, the New York court of appeals held that the act might apply (In re Heitz, p. 289). Injuries resulting from horseplay were denied compensation in two cases before the California supreme court (Coronado Beach Co. *v.* Pillsbury, p. 308, and Fishering *v.* Pillsbury, p. 308), as also by the Supreme Court of Wisconsin (Federal Rubber Co. *v.* Havolic, p. 319); and this is declared to be the correct rule, even though the injured workman attempted to avoid such conduct entirely (Pierce *v.* Boyer-Van Kuren Lumber & Coal Co., p. 309, a Nebraska case), such injuries not arising out of the employment.

Interruptions to active service do not necessarily suspend the relation of employer and employee, as appears from a decision of the Supreme Court of California in a case (W. R. Rideout Co. *v.* Pillsbury, p. 296) in which a barge laborer was drowned while on a trip between points of loading and unloading, he being required to perform no duties in the interim. A similar ruling was made in Kunze *v.* Detroit Shade Tree Co. (p. 300), where an employee acting as foreman was struck by an automobile while going from one job to another; and in a case where the driver of an express wagon, covered by the New York law as a driver, was held to be still within the act while delivering a package on foot, during which time he was fatally injured by an automobile (Miller *v.* Taylor, p. 315). Compensation was also allowed in the case of an insurance solicitor and rent collector who was injured by a street car while on his way to solicit business (Cameron *v.* Pillsbury, p. 269). A Massachusetts court, however (Hewitt *v.* Casualty Co. of America, p. 318), denied compensation where an insurance solicitor was injured in an automobile accident while engaged in canvassing a prospective customer. Compensation was also denied by the Supreme Court of California in a case (Ocean Accident & Guarantee Co., *v.* Industrial Accident Commission of California, p. 310) in which an employee had left a tug-boat for the night and in attempting to return to it in the morning was drowned.

Local conditions extraneous to the employment gave rise to a claim passed upon by the Supreme Court of California (Kimbol *v.* In-

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dustrial Accident Commission, p. 290), when an employee of a tenant of the ground floor of the building was injured by the collapse of an upper floor overloaded by another tenant. The court held that compensation was allowable under the circumstances. So also in a New York case, where a driver collecting dirt from the streets of a city was injured by stepping upon a rusty nail (Putnam *v.* Murray, p. 316), the court affirmed an award over the objection that the injury was the result merely of a common risk; and in Mahowald *v.* Thompson-Starrett Co. (p. 326), it was held that a teamster injured by material falling from a building under construction was in an employment which accentuated the street risks to which the public is exposed, so that the injury would be considered as arising out of his employment.

Exposure to the elements, resulting in a frostbite, was the basis of a claim allowed in a Connecticut case (Larke *v.* John Hancock Mutual Life Insurance Co., p. 302), where a solicitor was out of doors for several hours on an extremely cold day. Similarly favorable was the decision of the Supreme Court of Massachusetts (McManaman's Case, p. 301), in a case in which a longshoreman suffered from frozen hands; and of a New York court (Rist *v.* Larkin & Sangster, p. 292), where a man precipitated into cold water by the breaking of timbers contracted pleurisy and other disease.

Prior physical condition of a workman causing unusual susceptibility to injury has already been considered in the discussion of proximate cause (p. 37). A driver falling from his seat probably on account of dizziness produced by a combination of ailments and injured by the fall was held entitled to compensation by the Supreme Court of Rhode Island in Carroll *v.* What Cheer Stables Co. (p. 294); and a Massachusetts court made a similar favorable ruling where an employee aggravated a weak heart condition so as to cause disability while engaged in work requiring considerable exertion (In re Madden, p. 312), both courts holding that the injury could properly be said to arise out of and in the course of the employment.

### WILLFUL MISCONDUCT.

What constitutes such willful or intentional misconduct as to bar recovery was considered in Ramlow *v.* Moon Lake Ice Co. (p. 320), the Supreme Court of Michigan ruling that a negative reply to the question of whether the injured man was an alcoholic did not constitute such willful misconduct, though he developed delirium tremens. The same court also disallowed the defense of willful misconduct where a delivery boy was killed by reason of catching on to a motor truck while riding a bicycle (Beaudry *v.* Watkins, p. 303). In a California case, on the other hand (Fidelity & Deposit Co. of Maryland *v.* Industrial Accident Commission, p. 351), compensation was denied where an employee was killed in an automobile

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accident while running the machine at a rate of from 35 to 45 miles an hour, the court holding that exceeding the legal limit of 30 miles constituted willful misconduct.

### LIABILITY OF THIRD PARTIES.

Most laws contain provisions authorizing suits for damages where a third party is responsible for the injury, and provide for an adjustment of rights of recovery if the employer is called on to make payment in such cases. No provision of this nature exists, however, in the law of West Virginia, and it was held (Mercer *v.* Ott, p. 295) that the fact that recovery was had against the third party causing injury was no reason for denying compensation under the act. The Massachusetts law requires the injured man to elect his remedy, and taking benefits under the compensation act is held to bar the injured man's right to sue the third party charged with liability for his injury (Barry *v.* Bay State Street Railway Co., p. 324).

The provision of the Michigan law on this point declares that the employer having paid compensation may enforce the liability of the third party for his own benefit or that of his insurer. This was held (Grand Rapids Lumber Co. *v.* Blair, p. 322) to mean that the amount paid as compensation was only prima facie evidence of the plaintiff's damages and did not deprive the third party of his right to make legal proof of the facts involved.

In a Minnesota case (Mahowald *v.* Thompson-Starrett Co., p. 326), a judgment for damages was rendered in the lower court against a third party who had accepted the provisions of the compensation law. It was held that the amount of the judgment should be governed by those provisions rather than by the principles of liability, so that the amount of the verdict must be reduced to the amount allowable under the act, the ground being taken that this was the limit of the employer's responsibility, and it was therefore proper to fix the amount recoverable from the third party by the same standard.

The remaining cases under this head were decided under the New York law. In one (In re Cahill, p. 326), where the widow elected to sue the third party responsible for the injury, the mother, who was also a possible beneficiary under the compensation law, was held entitled to maintain her claim against the employer for compensation benefits, her rights not being barred by the widow's suit. The provisions of the New York law as to election are the same as in the Massachusetts law, and as in the Barry case above it was held (Miller *v.* New York Rys. Co., p. 325) that the fact that the plaintiff had received compensation from his employer precluded a suit for damages against the third party. The subrogation of the employer or his insurer to the rights of the injured man was held (United States Fidelity & Guaranty Co. *v.* New York Railways Co., p. 350) to be

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limited to the amount of benefits paid to the injured workman, so that a suit for damages in an amount which the workman himself might have claimed could not be brought by the insurer. In Woodward *v.* E. W. Conklin & Son, Inc. (p. 323), an employee executed a release to the third party causing the injury and afterwards proceeded against his employer for compensation. The release to the third party was claimed by the employer's insurance carrier to operate as a release of its own liability. The court held, however, that unless the party liable for compensation had agreed to the settlement the release was of no effect.

Suit as against a third party was not allowed in a case (Winter *v.* Peter Doelger Brewing Co., p. 348) in which the company's driver was injured while delivering beer at a saloon of which it was also the owner, the claim that the saloon ownership was a separate matter, so that the status of employer and employee did not exist, being rejected by the court.

### PRIOR INJURIES.

The Supreme Court of Michigan had before it a case (Winn *v.* Adjustable Table Co., p. 350) in which the question was involved as to the cumulative effect of an injury under the act. An accident antedating the law had partially incapacitated the workman, a carpenter, and the mutilation occasioned by the second accident resulted in the total disabling of his right hand, and an award was made as for the loss of an arm. The court held, however, that the injury was actually only the loss of a finger, and that the statutory provision for such an injury must prevail. On the other hand, the Supreme Judicial Court of Massachusetts (In re Braconnier, p. 228) made an allowance as for total incapacity where the loss of the second eye produced a condition defined by the statute as constituting such incapacity.

### DEPENDENCE.

The laws for the most part are specific in their definitions of classes of dependents, but questions of interpretation necessarily arise, even where the relationship is such as to give rise to a presumption of dependency. The dependency of the wife upon her husband with whom she resides is usually presumed; but where there was temporary separation of an indefinite period, though with the apparent intention to resume marital relations at some time, the wife being engaged in teaching, and supplied with some money by her husband, the facts were held not to be such as to support an award on the ground of a conclusive presumption of total dependence (Finn *v.* Detroit, Mt. Clemens & Marine City Railway, p. 262). A similar conclusion was reached where there was partial support during the period of separation, and occasional discussion of the reestablishment of a home, which, however, had not led to definite results (In re Newman's case,

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p. 263). Where a nonresident alien widow had received no support for eight years, though prior contributions had been made, it was held that no case of dependence was made out (In re Fierro's case, p. 264).

In a Michigan case (Roberts *v.* Whaley, p. 262), the death of a workman gave rise to claims in behalf of his wife, who was an inmate of a State asylum for the insane, of his daughter by this wife, who was living with another family and had been entirely cared for by it, of his housekeeper living with him as a common-law wife, and of two illegitimate children by her. An award in behalf of the wife and daughter was held unwarranted, since they were not dependents, the only beneficiaries under the law being the illegitimate children.

A technical difficulty arose under the phraseology of the Massachusetts law, which was held to bar the rights of actual dependents, the half brother of a boy with whom the latter had made his home not being next of kin, even though his earnings went into the family treasury, since the boy's father, whose home the lad had been compelled to leave, was still living (In re Kelley's case, p. 261). In Havey *v.* Erie Railroad Co. (p. 260), the New Jersey statute was held to limit the award on account of the death of a son to the amount payable under the statute to the father alone, minor brothers and sisters being regarded as dependents of the father and not of the deceased son.

A mother having small means outside of her son's contribution was held entitled to benefits as a dependent under a construction of the New York law (Rhyner *v.* Hueber Building Co., p. 261), the court saying that absolute want was not necessary to establish dependence.

The death of a dependent receiving benefits raised the question of a vested right to compensation under the Ohio statute (State ex rel. Munding *v.* Industrial Commission, p. 258). It was held that an award once made is so vested that subsequent events are immaterial, and that payment must be continued during the term of the award, whether to the original beneficiary or to the personal representative. On the other hand the Supreme Court of Massachusetts (In re Murphy, p. 259) ruled that an administrator could not prosecute the claim of a dependent dying before the award was completed, the ground being taken that questions of dependence must be decided as of the date of the injury, and no one could be subrogated to the status of the person then dependent, even though the death of that person left others of the family dependent.

### BASIS OF AWARDS.

The determination of the weekly wages of an employee working a part of the year and attending school a part of the year was passed upon in Gove *v.* Royal Indemnity Co. (p. 230). It was held that

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wages should be computed for the time actually worked, not averaged for the year. Where a workman was temporarily disabled for approximately two years, and at the time of resuming employment the weekly wage rate in his trade was reduced on account of business depression, it was held that such depression must be taken into account and the wage loss computed on the lowered earning capacity of a workman in that trade at the time (In re Durney, p. 228).

An unusual question arose in a Wisconsin case (Village of West Salem *v.* Industrial Commission, p. 229), where a plumber met his death while rendering service as aid to a town marshal. Compensation was awarded on the basis of his earnings as a plumber, but the court held that it should have been based on the usual pay of policemen. The effect of a minimum limitation on the award to a dependent sister was considered in State ex rel. Globe Indemnity Co. *v.* District Court of Ramsey Co. (p. 227), the court pointing out that the fact of dependence rather than the amount of support actually customarily given should have been made the basis of the award.

The power of the New York Industrial Commission to establish a blanket rule requiring the payment of lump-sum amounts into the State fund in all cases where self-insurers or mutual insurance companies are liable was denied in Adams *v.* New York, Ontario & Western Railway Co. (p. 331), the court holding that the intention of the statute on this point was to provide for exceptional cases only, and did not authorize a general rule.

### MEDICAL TREATMENT.

The New York statute makes the employer responsible for a certain amount of aid to injured workmen, and provides that physicians' charges for services rendered the employee where the employer has failed to make such provision shall be added to the award and be a lien thereon, payable therefrom in the manner fixed by the commission. In construing this provision it was held (Bloom *v.* Jaffe, p. 335), that this fixed the physician's only method of procedure, so that a suit directly against the employer must fail.

The duty of an injured man to submit to a surgical operation was considered in Kricinovich *v.* American Car & Foundry Co. (p. 336), the court holding that a slight operation not attended with danger must be submitted to where it was necessary to restore earning capacity, the alternative being the withdrawal of further benefits; and also so held in Lesh *v.* Illinois Steel Co. (p. 336).

The malpractice of a physician was held by a Wisconsin court (Pawlak *v.* Hayes, p. 333) to furnish a basis for suit against him for damages, where the claimant offered to waive his rights to compensation and surrender benefits received, the court holding that election had not been possible at the time of the accident, since the injury

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due to the malpractice was not then in being. Under the Washington law, on the other hand, it was held (Ross *v.* Erickson Construction Co., p. 333) that the statute withdraws "all phases of the premises from private controversy," so that a suit against the employer and his physician, the latter being paid from a hospital fund, was held not available for the benefit of a workman covered by the industrial insurance law of the State.

### PROCEDURE.

*Notice and claim.*—In Johansen *v.* Union Stockyards Co. (p. 340), an accident giving rise to a subsequently developing injury was considered, and the Supreme Court of Nebraska held that the date when the injury developed so as to cause disability should be considered as the starting point of the period of limitation for giving notice, and not the date of the happening of the accident, which at the time did not promise serious results. The Massachusetts law requires notice of an injury "as soon as practicable after the happening thereof," and it was held that filing a claim within four months could not operate as such notice (In re Bloom, p. 339). However, since want of notice is not to be a bar to proceedings if the employer had knowledge of the injury, and the injured man's foreman actually had been notified, and also the timekeeper, it was ruled that the employer's representative had such knowledge as to permit the prosecution of the claim.

The Michigan law requires notice to be given within three months and claim made within six months after the injury, though want of written notice does not bar action where the employer has notice or knowledge thereof otherwise. A letter informally stating the facts and asking for compensation was held to hold the case open for a valid ratification by a nonresident widow for a period exceeding the statutory provision (Matwiczuk *v.* American Car & Foundry Co., p. 341). Where failure to present notice within the statutory time was found chargeable to the injured man's detention in a hospital among strangers, at a distance from the employer's place of business, he being in a condition of great physical weakness, the circumstances were held to warrant a finding of accident or unforeseen cause such as under the law of Rhode Island excused delay in giving notice (Donahue *v.* R. A. Sherman's Sons Co., p. 339). Where delay in filing an application against the proper employer was due to a mistake as to who the employer was, the Supreme Court of Illinois held (Haiselden *v.* Industrial Board, p. 231) that the provision of the statute was mandatory, so that failure to proceed within the time set barred the claim.

*Review.*—The matter of appeals under the Illinois statute was before the court in a case, Lavin *v.* Wells Bros. Co. (p. 230), the question of whether an appeal would lie from the judgment of a court under the

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workmen's compensation act being involved. The decision turned on whether the proceeding is a suit or proceeding at law or in chancery, the court holding that it was of the nature of a proceeding at law, and subject to appeal in the same manner as any other claim for money in a court of law.

The power of the industrial accident board of Michigan to reopen a case and grant additional compensation after an original award and settlement was passed upon in Foley *v.* Detroit United Railway (p. 347), the court holding the board to have such right under the circumstances; and so where, under the same law, an agreement had been made under a mutual mistake of law by the parties, a settlement could be reviewed and a new award made on the basis determined to be proper according to the facts (Carpenter *v.* Detroit Forging Co., p. 349).

*Burden of proof.*—Where an employee was found dead at a place where his employment might properly cause him to be, and his presence at that place was apparently in the line of duty, the burden of proof to support a contrary conclusion was held to rest on the employer, the arbitration committee being entitled to draw inferences in the claimant's favor from the facts appearing (Papinaw *v.* Grand Trunk Railway Co. of Canada, p. 299). Quite similar was the conclusion reached by the Supreme Court of Iowa in Hunter *v.* Colfax Consolidated Coal Co. (p. 251). The claim was advanced that the employer was not responsible for the injury charged. The court held that the law did not absolutely preclude such defense, but that the burden of proof was on the employer to show his own nonliability and any willful negligence charged against the claimant. In an Illinois case, also (Chicago, Rock Island & Pacific Railway Co. *v.* Industrial Board, p. 329), it was held that an employer seeking to have a case decided under the Federal liability law was charged with the burden of proof of showing that the case properly came under that law where the claimant was proceeding under the State compensation law.

*Evidence.*—The nature of the evidence necessary to support a claim was considered in Carroll *v.* Knickerbocker Ice Co. (p. 282), the Court of Appeals of New York reversing in this case an award based on hearsay testimony of a doubtful nature. Similarly adverse was the ruling of the Supreme Court of Illinois in Chicago & Alton Railroad Co. *v.* Industrial Board (p. 296), in a case in which a locomotive engineer died following an operation for strangulated hernia, the only evidence in the claimant's favor being hearsay and not directly tending to prove injury in the course of employment. And where a workman was found unconscious under circumstances suggesting that he had fallen from a wagon due to the sudden starting of the horse he was driving, the court held that this inference could not be sustained



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where death was shown to be due to a hemorrhage in the ventricles of the heart (In re Sanderson's Case, p. 317); it was admitted that the claimant's theory of causation might be correct, but other theories and conjectures were quite as probable, so that the award could not be made. On the other hand, awards were sustained where a night watchman apparently met his death in a struggle of which there were marks, the body not being found (Western Grain & Sugar Products Co. *v.* Pillsbury, p. 298); and where it was inferred that a laborer found on a cement floor with a fractured skull had fallen on the floor after striking his head against a crossbeam, the position of which favored such a conclusion (De Mann *v.* Hydraulic Engineering Co., p. 297).

## EMPLOYERS' LIABILITY INSURANCE.

In Aetna Life Insurance Co. *v.* Portland Gas & Coke Co. (p. 129) the insurance company was held liable under its agreement to indemnify the employing company where damages are found payable on account of bodily injuries or death accidentally suffered, the damages in question having been recovered because of typhoid fever contracted by employees from drinking water furnished by the company. The insurance company maintained that the drinking of water was no accident, but it was decided that the result of the infection present was accidental. The right of the employee to seek direct awards from the insuring company was affirmed in Maryland Casualty Co. *v.* Peppard (p. 130), where the contract was not limited to making good losses actually paid. The court held that a judgment against the employer established a status as of a debt to the employer from the insuring company, which the claimant might reach by writ of garnishment.

## RELIEF ASSOCIATIONS.

Closely related to the laws providing compensation for injured workmen was an act of the Maryland legislature of 1910 establishing a cooperative relief fund for the benefit of miners in two counties of the State.[1] A coal company denied its liability to pay assessments provided for by the act, contending that it was unconstitutional, a contention which the court of appeals of the State rejected on much the same grounds that compensation laws have been sustained (American Coal Co. *v.* Allegany County Commissioners, p. 208).

The construction of a contract with a relief association reducing benefits where suit was brought against the company for damages was considered in Wilson *v.* Grand Trunk Railway Insurance & Provident Society (p. 211). It was claimed that the Federal statute forbade such reduction, but the court held that the reduction contracted for did not affect the suit under the statute, but only the benefits contemplated under the contract. In another case a tele-

[1] This act has been repealed and superseded by the compensation act of 1914.

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graph company had agreed to indemnify a railroad company for damages for injuries caused by the latter to employees of the former; the relief-fund system of the telegraph company also provided for a release of claims for damages against it where benefits from the fund were accepted, but it was held that this agreement did not obligate an injured person entitled to such benefits to release the railroad company from its liability in any suit for damages that the plaintiff might wish to bring against it (Western Union Telegraph Co. *v.* Hughes, p. 209).

A railroad hospital association was held not liable for the alleged neglect of the physicians in charge in Nicholson *v.* Atchison, Topeka & Santa Fe Hospital Association (p. 57). The duty of the association was held to be limited to the use of reasonable care in the selection of physicians and attendants, and nothing beyond this.

The right of an injured employee to claim benefits provided under a city charter for employees of the city was maintained in Engstrom *v.* City of Seattle (p. 202), in a case in which the workman had been injured by the negligence of a third party. Recovery was had against this third party, and the city maintained that nothing further should be paid, since the provision was not a pension, but compensatory, and should not be added to other relief—a contention which the supreme court of the State overruled.

Not coming within the scope of employers' relations to their employees, but involving the consideration of a pension system of a new type, is a case decided by the Supreme Court of Washington (In re Snyder, p. 201). An act of 1913 provided pensions for mothers in certain circumstances, including those abandoned by their husbands. An amendment of 1915 omitted the provision for abandoned mothers, and it was held that a beneficiary under the old law had no rights that could be maintained after the new law came into effect unless also embraced within its provisions.

## EMPLOYMENT OFFICES.

The only case coming up for consideration under this head is one in which the Supreme Court of the United States maintained the validity of a Michigan statute providing for the regulation of private employment offices, the court holding the business to be one properly subject to police regulation and control, and the regulations prescribed to be reasonable, in so far as they were before the court for consideration (Brazee *v.* People, p. 130).

## LABOR ORGANIZATIONS.

### STATUS AND POWERS.

An attempt of the Western Federation of Miners to compel a local union to carry out a contract to transfer its property to the Federation was unsuccessful (Moyer *v.* Butte Miners' Union, p. 190), because

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the court found that the local union, an independent corporation, had not the power under its charter to enter into a contract to abdicate its own authority, and subordinate itself to another association. And where a district council and its local unions were suspended in order to turn over their books and property to the president of a brotherhood, an injunction was held to lie against the president to prevent his taking action against the council and its locals, the court holding (Neal *v.* Hutcheson, p. 198) that certain rules of the union, confiscatory in nature, were against public policy, and pointing out that to permit the president to proceed under existing by-laws would work irreparable damage to the plaintiffs.

A judgment against members of a labor organization for damages was affirmed in Cisco *v.* Looper (p. 173), where it appeared that the defendants had instigated by their presence acts of violence and personal injuries, with conscious purpose so to do.

Perhaps the final chapter in the famous Danbury Hatters' Case, so far as the courts are concerned, was written in the opinion of the Supreme Court deciding that interest on savings-bank deposits of members of the union held liable for damages in this case could not be assigned to the union after judgment (Savings Bank of Danbury *v.* Loewe, p. 187).

### MEMBERSHIP.

The power of a court to secure to members rights claimed under the constitution and by-laws was considered in Robinson *v.* Dahm (p. 191). The court construed these regulations, and assumed a right to enforce them in the plaintiff's behalf, as against an adverse decision of the union officials. But where a member of a union was expelled and sued for damages and reinstatement, the court refused to intervene in his behalf where it was apparent that the plaintiff had violated rules of the union, and had been properly tried and expelled as a punishment (Drazen *v.* Curby, p. 175). In another case (People ex rel. Solomon *v.* Brotherhood of Painters, etc., p. 177), the court declined to assume jurisdiction of an action of similar intent as the above, on the ground that the defendant was a foreign corporation not authorized to do business within the State, and that the relation between the brotherhood and the local unions was not such as to sustain the present action. It was pointed out that an action for restoration to membership in the local union might be brought; also that action for damages would not lie against a voluntary association unless the facts would render all the members liable for the sum claimed.

Carrying the question of the rights to membership a step farther was the case of Frank *v.* National Alliance of Bill Posters (p. 189), in which it was sought to compel the association named to receive into

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membership the petitioner; as the association was a voluntary one, and membership therein depended entirely upon the choice and will of its members, no action to compel the acceptance of a party would lie. The court pointed out, however, that if acts of the association had resulted in damage to the relator's business, that was an independent question not decided in the present case.

### CONSPIRACIES.

Noted under this head because of the charges of conspiracy presented, but involving a number of other questions affecting labor organizations, is the decision of a United States circuit court of appeals in Dowd *v.* United Mine Workers of America (p. 168). The company named charged unlawful conspiracy and combination in restraint of trade and commerce in violation of the Federal antitrust law, the court holding the complaint good, reversing the lower court on this point. The case is of interest as presenting some consideration of the Clayton Act providing certain exemptions for labor organizations; as to this the court held that the actions charged against the defendants could be prosecuted notwithstanding such exemptions. Other points involved the status of voluntary associations and the mode of procedure against them, and what constitutes interference with interstate commerce.

Another case under the antitrust law is that of United States *v.* Associated Bill Posters (p. 58), where the association named was found guilty of violating the law against monopolies by refusing to do business with advertisers who would not confine themselves exclusively to the association as a means of placing such advertisements as it handled.

Quite unusual in the conditions surrounding it and in the purposes sought was a conspiracy for which an indictment was found and held sufficient on trial, in United States *v.* Rintelen (p. 60). The conspiracy charged was one seeking to restrain trade and commerce with foreign nations, relating specifically to foreign trade in war munitions, the means used being to foment strikes and otherwise interfere with labor. As in the Dowd case, the Clayton Act was referred to, but the court ruled that the exemptions of the act could not avail where there was a combination to effect an unlawful object through lawful means.

### INTERFERENCE WITH EMPLOYMENT.

The rights of employers to be protected against interference with their business and resultant damage were considered by a Massachusetts court in Martineau *v.* Foley (p. 186). The declarations of the plaintiffs had been held insufficient in the court below, but on appeal it was held that false and malicious statements circulated with

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the intention to injure business, there being no showing as to a justifiable motive for any form of interference, were a good ground for action.

The same court had before it a case involving the constitutionality of a statute undertaking to restrict the issue of injuctions in labor disputes, the statute declaring that the right to make contracts of employment is a personal and not a property right. Plaintiffs declared that their opportunity for employment had been interfered with by a rival union without justification, and to their detriment. The court held (Bogni *v.* Perotti, p. 181) that on proof of the charges the plaintiffs were entitled to the protection of the law, the statute being held unconstitutional.

### INJUNCTION.

The right of an employer to an injunction was upheld in Minnesota Stove Co. *v.* Cavanaugh (p. 196), where striking employees were shown to have picketed the plant, using abuse and violence to compel other employees to quit service. The injunction as issued by the court below was too broad, however, the court in the present instance affirming the right of peaceful picketing and persuasion, so that the injunction had to be modified. A similar conclusion as to the propriety of an injunction, but in a modified form, was reached in Grassi Contracting Co. *v.* Bennett (p. 194), where no strike had yet taken place, but had been threatened on grounds that appeared to the court to be for the injury of others and not primarily for the lawful benefit or advantage of those making the threat.

### CONTEMPT.

In Shaughnessy *v.* Jordan (p. 184), action was brought for contempt following the violation of an injunction, which the defendants contended was too broad. The court pointed out that conceding that certain provisions of the injunction were erroneous, the persons enjoined had neglected to take the proper steps to modify the decree, and that in any case the evidence showed unlawful threats and use of violence, so that proceedings might properly lie.

A United States circuit court of appeals (Oates *v.* United States, p. 179) had before it the question of the effect of a denial under oath of the offenses charged in proceedings in contempt for the violation of an injunction. Various questions of procedure were involved, but the elimination of incompetent testimony admitted by the lower court was held not to require a new trial where there was sufficient evidence remaining to sustain conviction; neither was it sufficient for the defendants to enter a sworn denial when personal and overt acts were sufficiently proven.

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## TEXT AND SUMMARIES OF DECISIONS OF COURTS AFFECTING LABOR.

ALIEN CONTRACT LABOR—SOLICITATION OR PERSUASION—PREPAYMENT OF TRANSPORTATION—*United States* v. *New York Central & Hudson River Railroad Co., United States District Court, Northern District, New York (May 1, 1916), 232 Federal Reporter, page 179.*—The railroad company named was prosecuted for alleged violation of the contract labor law. Fred W. Vincent, its supervisor of tracks, wrote to another employee, Enrico Canale, asking him to secure five men from Canada, and to use a pass which had been recently issued to Canale for the transportation of workmen over the line of the road, which extends into Canada. It was alleged that Canale went to Montreal and solicited five alien laborers to come to the United States to enter the employment of the railroad. An inquiry of the immigration officials resulted in refusal to admit the men to this country.

Judgment in this case was rendered in favor of the United States, a fine of $1,000 and costs being imposed upon the company. Judge Ray delivered the opinion of the court, and said in part:

It was clearly the intent and purpose of the defendant, acting through its agent, Vincent, to secure the immigration and importation into the United States of the five alien contract laborers, and it is clear that they were encouraged to come into the United States as contract laborers and employed as such, and encouraged and solicited to migrate into the United States as such. It is also clear that the pass was to be used by Canale in traveling back and forth, and that the pass for ten employees was delivered to Canale to be used by him in bringing such alien contract laborers into the United States.

The passage of these five alien contract laborers was as much prepaid by this defendant, by issuing and delivering the pass with intent that it be used for the purpose, as if the defendant had paid actual cash. By section 4 it is a misdemeanor "in any manner whatsoever to prepay the transportation" of "contract laborers into the United States," and in my judgment this is done when the corporation, owning and operating transportation lines reaching into the foreign country, furnishes free transportation over its own lines for alien contract laborers employed by it in such foreign country to come into the United States and perform manual work and labor for it here.

So under section 5 of the act the offense is committed by engaging and encouraging or soliciting the coming or immigration of alien contract laborers into the United States, and the offense is complete when the alien manual laborers are actually engaged and encouraged or solicited to come in, free transportation having been provided beforehand and delivered for use by the defendant in the United States.



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ALIENS—PREFERENCE OF CITIZENS IN EMPLOYMENT ON PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—*Lee et al.* v. *City of Lynn et al., Supreme Judicial Court of Massachusetts (March 2, 1916), 111 Northeastern Reporter, page 700.*—A. R. Lee and others brought a bill against the city of Lynn and others, seeking an injunction to prevent the carrying into effect of acts of the Massachusetts Legislature of 1914 relating to preferences to citizen labor on public works, the validity of these statutes being attacked on the ground that they conflict with the fourteenth amendment to the Federal Constitution and with corresponding provisions of that of the State. The case was reported to the supreme judicial court for final action, and the petition was dismissed, Judge Rugg delivering the opinion and saying in part:

In substance, these acts require that "in the employment of mechanics and laborers in the construction of public works by the commonwealth, any county, city or town, or by persons contracting therewith, preference shall be given to citizens of the Commonwealth"; and that, "in all work of any branch of the service of the commonwealth, or of any city or town," a like preference shall be given.

Since the argument of the case at bar, the Federal questions involved have been decided adversely to the contentions of the plaintiffs. (Heim *v.* McCall, 239 U. S. 175, 36 Sup. Ct. 78 [Bul. No. 189, p. 50]; Crane *v.* New York, 239 U. S. 195, 36 Sup. Ct. 85, affirming People *v.* Crane, 214 N. Y. 154, 108 N. E. 427 [Bul. No. 189, p. 52]; Elkan *v.* Maryland, 239 U. S. 634, 36 Sup. Ct. 221.)

While the provisions of our constitution are not in the same words as those of the United States Constitution upon this subject, the result must be reached that these statutes are not in conflict with the State constitution. [Authorities cited.] The cities and towns of the commonwealth are divisions of government established in the public interests. The legislature is supreme in the control of these governmental instrumentalities, subject to the provisions of the constitution.

The distinction between laws passed by the legislature regulating the conduct of the State and its departments and subdivisions as employer, which are within its right, and similar laws designed to control the conduct of the general public, is adverted to in Truax *v.* Raich, 239 U. S. 33, 36 Sup. Ct. 7 [Bul. No. 189, p. 53]. A law of the latter class there was held to fall under the condemnation of the fundamental law. But the instant statutes belong plainly to the former class.

At this point the contention that the statutes are void for indefiniteness is shown to be untenable.

There is no force in the contention that St. 1914, c. 600, applies only to cities and towns where the classified civil service prevails under the civil service law. Section 1 of the act is not thus restricted by subsequent sections.

It is not necessary to determine whether the present statutes are so retroactive as to require the discharge of faithful and efficient

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aliens in service at the time of its enactment, or whether they relate only to the future, for the plaintiffs on the allegations of the bill do not show themselves entitled to relief.

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BENEFIT ASSOCIATIONS—LIABILITY FOR NEGLIGENCE OF PHYSICIANS AND ATTENDANTS AT HOSPITAL—*Nicholson* v. *Atchison, Topeka & Santa Fe Hospital Association, Supreme Court of Kansas (Mar. 11, 1916), 155 Pacific Reporter, page 920.*—Joel S. Nicholson brought action against the hospital association named for damages for alleged neglect in the treatment of his son in the hospital conducted by it, resulting in his death. The association was maintained by the railroad company of the same name, for the benefit of its employees. It was alleged that when he became ill at his boarding house he was removed against his protest to the hospital, was not properly protected on the way, took cold, and contracted pneumonia; that on arrival he was placed in the convalescent ward, where the windows were open, and that no stethoscope was used to ascertain the condition of his lungs, and no attention given him until a few hours before his death. Judgment in favor of the plaintiff in the district court of Shawnee County was reversed by the supreme court. Judge Porter, who delivered the opinion, called attention to the law that charitable associations conducting hospitals without profit are not liable for the negligence of their physicians and attendants, but only for lack of proper care in the proper selection of such physicians and attendants. Continuing, he said in part:

In the present case the petition does not state that the hospital association failed to use reasonable care in this respect. Plaintiff seeks to avoid the necessity of such an allegation by insisting that it makes no difference how skilled or efficient the servants and physicians of defendant may have been, for the reason that he seeks only to recover for the failure of the physicians and servants to give his son treatment of any kind. It is said that plaintiff's son was taken there while sick, that the physicians and attendants in the employ of the defendant neglected him, and that from the neglect his death resulted.

Under the authorities cited, as well as by the weight of reason, the plaintiff is not entitled to recover on the facts stated. Suits of this nature against associations not established for profit, but for the purpose of mutual benefit, ought not, for reasons of sound public policy, to be encouraged. Employers of large numbers of workmen should be encouraged to establish institutions of this kind for the mutual benefit of their employees. It is well known that the employees of the railroad company are entitled to medical and surgical care in the hospital, regardless of the nature of their employment or the cause or occasion of their sickness. Doubtless in many instances employees are enabled to avail themselves of these benefits when otherwise, because of their financial condition, they would be unable to obtain necessary care and attention.

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CONSPIRACY IN RESTRAINT OF TRADE—MONOPOLIES—ANTITRUST LAW—*United States* v. *Associated Bill Posters et al., United States District Court, Northern District of Illinois, Eastern Division (Mar. 14, 1916), 235 Federal Reporter, page 540.*—The organization named was prosecuted for violation of the Sherman Antitrust Act, and the decree of the court was in favor of the complainant. Judge Landis delivered the opinion, as follows:

The defendant organization is composed of bill posters owning billboards in several thousand of the most desirable cities and towns throughout the United States. The object of the organization is to control the business of national poster advertising throughout the country, and to limit the display of national posters at prices fixed by the organization to the boards of members of the organization, there being but one member in each city or town.

To accomplish this, the members agreed to post and display on their boards the posters of only such advertisers as limit their patronage to members of this organization, and to refuse to post, and to exclude from their boards, the posters of such advertisers as should patronize the boards of a competing bill poster or nonorganization member in any locality where there are billboards of members of the organization.

As a means to this end the business of soliciting the poster advertising of national advertisers was, by agreement of the members, limited to seven or eight designated persons and corporations, called "official solicitors," such solicitors paying an annual fee to the organization. To secure to these solicitors a monopoly of the business of soliciting advertisements, it was agreed that the members should pay these solicitors as their compensation 16⅔ per cent of all moneys received by such members from advertisers for posting their advertisements, and that the member would pay no compensation for soliciting advertiser's business to any advertising solicitor who was not an official solicitor.

To secure obedience to the organization plan by members and official solicitors and advertisers, it was agreed that penalties should be inflicted upon such members, official solicitors, and advertisers as failed to observe and adhere to the plan. The result is that the members of this organization now have a practical control of the posting of national advertising in the several thousand cities and towns throughout the United States where boards of such members are located, and that such national advertising in those localities is practically excluded from independent boards.

Evidence was presented by the defendants of a general improvement in and development of the whole bill-posting business during the existence of the organization and its predecessor. But, granting to this evidence all that defendants claim for it, the court is of the opinion that the decree must go to the complainant, for the reason that the whole spirit and policy of our law is opposed to agreements among persons and corporations designated to exclude other persons from legitimate commerce. The Sherman law was expressly conceived and enacted to this end.

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The rule of "reasonable restraint" has no application here, for the reason that this is not a case of mere restraint, but of total exclusion. Even perfection in any line of business is not to be thus procured.

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CONSPIRACY TO INTERFERE WITH FOREIGN COMMERCE—STRIKES—INDICTMENT—*United States* v. *Rintelen et al., United States District Court, Southern District, New York (June 29, 1916), 233 Federal Reporter, page 793.*—Franz Rintelen and several others were indicted for conspiracy in violation of the Sherman Act. A motion was made to quash the indictment on the ground of insufficiency. The indictment set forth at some length the facts with reference to the foreign trade in war munitions, and with reference to the intent of the defendants to prevent such commerce by means of labor troubles among the employees at the manufactories. The indictment was held sufficient. The following quotations are from the opinion written by Judge Wolverton:

The purpose of the indictment in the present case is not to charge the commission of an offense against the United States, as might be done under section 37, but to charge a conspiracy in violation of the first section of the Sherman Act, namely, a conspiracy in restraint of trade and commerce with foreign nations; the very gist of the offense being the conspiracy. When the conspiracy is once entered into, as under the common law, the offense is complete. The conspiracy does not go to the restraint in trade of any particular individual or corporation, or combination of men, but to the restraint of all foreign trade where munitions of war are the subject of commerce. So what more could be essential, when the defendants are informed that many persons, corporations, and combinations of men are engaged in the manufacture of such articles constituting munitions of war, and are also engaged in transporting the same in foreign trade and commerce, the alleged purpose and object of the conspiracy being in restraint of such trade and commerce? Can it be said that the defendants are not informed of the nature and cause of the accusation?

The indictment specifies the means, or some of them, by which the objects of the conspiracy were intended to be accomplished, namely, by instigating and causing strikes and walkouts among the workmen employed at the plants and factories of the aforesaid manufacturers, so as to prevent and hinder the aforesaid manufacture; by instigating and causing strikes and walkouts among workmen and employees of said persons, partnerships, corporations, and organized bodies of men other than said manufacturers, engaged in foreign trade and commerce as aforesaid, employed in the shipping and transporting of said articles; by inducing by solicitation, persuasion, and exhortation, through the preparation, sending, mailing, and distributing of circulars, pamphlets, etc., the aforesaid workmen to quit the employment of the aforesaid manufacturers, and thereby to restrain, hinder, and prevent, in whole or in part, the operation of said plants; by the same method to cause the aforesaid workmen to leave the employ of the aforesaid persons, partnerships, etc., other than said manufacturers, engaged in said foreign trade and

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commerce as aforesaid, for the purpose of restraining, hindering, and preventing, in whole or in part, the shipping and transportation of said articles in the aforesaid foreign trade and commerce; by bribing and distributing money among divers officers and persons in charge and control of various labor organizations, to induce them to cause the members of said organizations who might be employed by said manufacturers, or by the said other persons, etc., engaged in foreign trade and commerce as aforesaid, to leave their employment, and to bring about strikes and walkouts among the members of said organizations, and thereby to restrain, prevent, and hinder, in whole or in part, the producing and manufacture, and the expected shipping and transportation in said foreign trade and commerce, of said articles; and by divers other means and methods not specifically determined upon by said defendants, but to be decided upon by them as occasion might arise, all calculated in furtherance of and to effect the object of said conspiracy. With these supporting the paper, my convictions are that it is sufficient.

It is suggested that some of the alleged means employed or to be employed are sanctioned as lawful by the Clayton Act. But this does not help the defendants, as a combination to effect an unlawful object through lawful means may constitute a conspiracy, nevertheless.

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CONVICT LABOR—ACTION FOR VALUE OF SERVICES—CONSTITUTIONALITY OF STATUTE—*Anderson* v. *Salant et al., Supreme Court of Rhode Island (Jan. 25, 1916), 96 Atlantic Reporter, page 425.*—William E. Anderson brought action against Gabriel Salant and others for the value of services rendered to them as contractors for the labor of convicts while he was under sentence involving hard labor. This suit was brought in a superior court, which found that the question of the constitutionality of an act providing for the letting of such labor by contract was brought in question, and therefore certified the case to the supreme court for determination of this constitutional question. It was first held that such constitutional point was involved, and since it is settled law that where the labor of a convict has been received by a contractor under a contract which was illegal, either through want of authority to make the contract, or void commitment, or holding to labor after a valid commitment had expired, the law will raise an implication of a promise to pay for the labor performed. In holding that the law under consideration was not invalid as providing for involuntary servitude, as was claimed, Judge Johnson, who delivered the opinion, said in part:

The plaintiff's inability to dispose of his person, property, and services is in no way due to the contract of which he complains, but is an incident of his condition as a convict.

It is not claimed that to cause a prisoner to work for the State is a violation of the constitutional provision forbidding slavery, but that to cause him to work upon the materials of another than the State, under a contract between such other person and the State, in

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the prison of the State, under the control of the State, the State receiving compensation for said work, and the convict not receiving compensation therefor, results in the transformation of the labor which is imposed upon the convict as a part of his sentence into that of a slave, and constitutes a condition of slavery.

The statute authorizes the board to "make such contract respecting the labor of prisoners and inmates of such institutions as it may deem proper." This can only mean a contract respecting such labor; and there can not be imported into the statute the authority on the part of the board to interfere with or to modify or to terminate the lawful control of the State over said prisoners and other inmates of the institutions. The discretion given to the board in the making of such contracts is a lawful discretion as to the subject matter of such contracts, and does not authorize the exercise of arbitrary power by the board in disposing of the control and custody of the prisoners and inmates of the State institutions. We find nothing in the statute which violates the constitutional provision forbidding slavery, or which in its necessary or natural operation tends to bring about such a result.

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EMPLOYER AND EMPLOYEE—BRIBERY—GRATUITY TO PURCHASING AGENT—CONSTITUTIONALITY OF STATUTE—*People* v. *Davis, Court of Special Sessions, New York County, New York (July, 1915), 160 New York Supplement, page 769.*—Albert Davis was charged with a violation of section 439 of the Penal Law of New York, committed by giving a sum of money to a purchasing agent of a concern to which he made a sale of sponges. By means of a demurrer to the information the defendant contested the constitutionality of the statute, but it was held valid and the demurrer disallowed. Judge Russell delivered the opinion, and after stating the facts and quoting the section, he said:

Section 439 of the Penal Law is divisible into two parts. The first forbids a gratuity to an employee of another in respect to his work or employment under certain conditions, "without the knowledge and consent of the employers." With this part of the statute we have nothing to do. The information was drawn under the wording of the second division, follows the words of the statute, and is therefore sufficient.

The second division of the statute flatly forbids a purchasing agent from receiving from a seller a commission on a sale made through the purchasing agent acting on behalf of his employer, and likewise unqualifiedly forbids such seller's giving or offering such commission to such purchasing agent. The matter of knowledge or consent of the employer is eliminated from the transaction, is not alleged in the information, and needs not be proved by the people.

The defendant's counsel urges that the statute in question is obnoxious to both the State and Federal constitutions, and is unconstitutional, in that: (1) It has singled out for an aggressive discrimination a certain class of citizens, viz, purchasing agents; (2) it curtails their right to contract and the right to contract of persons dealing with them and of their employers; and (3) no sufficient

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justification in the health, morals, or welfare of the community is discernible to justify the consequences imposed by the statute.

The judge then quoted the constitutional provisions, both Federal and State, with which the section is claimed to be in conflict, and saying, "Every presumption is in favor of the validity of a statutory enactment," quoted from opinions to that effect. The opinion of Mr. Justice Field in Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. 357, was quoted in explanation of the application of the fourteenth amendment, and was held to be adverse to the contention that the classification in the law under consideration is an "aggressive discrimination," since the law in question "affects alike all persons similarly situated."

In the course of the discussion of the second claim of the defendant Judge Russell said:

In the second place, the defendant's counsel urges that the statute in question is unconstitutional, because it curtails the right of purchasing agents or those employing labor for their employers to contract, and also the right to contract of persons dealing with them and of their employers.

There are many regulations respecting the pursuit of a lawful trade or business. The State in the exercise of its police power has the right to determine what these regulations shall be, and Federal interference is not warranted unless these regulations are utterly unreasonable and arbitrarily injure or destroy personal and property rights of citizens without due process of law.

The statute in question in no sense prohibits contracts from being made for the sale of goods. It only prohibits agents from considering their own personal welfare and from making contracts which are favorable to themselves regardless of the fact that such contracts are not favorable to their employers.

As to the third question Judge Russell said, for the most part:

In the third place, the counsel for the defendant urges that the statute in question is unconstitutional, in that no sufficient justification in the health, morals, or welfare of the community is discoverable to justify the wrongful consequences imposed by the statute. In Hearn *v.* Schuchman, 150 App. Div. 476, 135 N. Y. Supp. 52, there was an agreement between the plaintiff's employees and the defendant, with intent to defraud the plaintiff, that the plaintiff's employees would give orders to the defendant to furnish unnecessary supplies and material, and to do unnecessary work and labor for the plaintiff, and to charge excessive and extravagant prices for such materials and supplies and for such work, labor, and services, and to furnish defective and faulty labor and services for the plaintiff below the grade and quality of the supplies, materials, labor, and services desired and required by the plaintiff, and to make false charges against the plaintiffs for supplies and materials never furnished, and for labor and services never performed, and in divers other ways to cheat and defraud the plaintiffs. In this case all such acts agreed upon were actually done.

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By a study of the facts of the above case, it can readily be seen what dangerous practices would be likely to result in case the statute now in question should be declared to be unconstitutional.

The significance of section 439 of the Penal Law, taken as a whole, is this, namely, that secret commissions are to be condemned because they prompt a servant to betray his master, and thus prejudice the master's interests in consideration of pay received from others. Obviously the gravamen of this charge lies in the secrecy of such transactions. The master believes, and has reason to believe, that he is being served without stint or qualification by his employee, who is devoting the full measure of his time and attention without diminution to his employer's interests exclusively. The evil aimed at is in the service of two masters, whose interests are necessarily and forever antagonistic.

Business experience demonstrates the necessity for such a statutory bulwark of fidelity. Without such a statute, under the fierce competition of modern life, purchasing agents and agents to employ labor can be lured all too readily into the service of hopelessly conflicting interests. Nor is this a mere matter of metaphysical speculation. Adjudications like Hearn *v.* Schuchman, supra, illustrate all too clearly the need of such a statutory safeguard. Sound public policy, commercial honor, and the good faith of fiduciaries and trusted employees imperatively demand some such measure in the written law.

The statute was therefore held to be constitutional.

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EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—DISCHARGE—DAMAGES—ILLNESS—*Marx* v. *New York Ribbon Co., Supreme Court of New York, Appellate Division, First Department (June 26, 1916), 159 New York Supplement, page 853.*—Max Marx brought action against the company named for breach of a contract of employment, which had seven weeks to run at the time of discharge. Judgment in the municipal court where the case was tried was for the employee for the amount of three weeks' salary, it being shown that Marx was ill for a part of the seven weeks. On appeal by both parties it was held, however, that the employee was entitled to judgment for his salary for the entire seven weeks. Judge Guy delivered the opinion and said for the most part:

The employment of plaintiff and his unjustifiable discharge by the defendant is clearly proven. The employment was at a salary of $40 per week. At the time of the wrongful discharge, plaintiff became entitled to recover as damages for the breach of the contract such sum as it is reasonably certain actually might follow such breach determinable approximately by a jury upon reasonable conjecture and probable estimate. (Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. Supp. 787; Wakeman *v.* Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264.) Ordinarily such damages would presumptively be the amount of the employee's wages or salary due at the time of the trial, less his actual earnings up to that time, and those that

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would have become due after the trial being reduced by the amount of his future earnings. (Am. China Development Co. *v.* Boyd (C. C.), 148 Fed. 258.)

The fact that the employee after his discharge became ill furnishes no presumption in the absence of proof of the character of the illness that the illness would have arisen had he continued in his employment or that it would have been of such a character as, under the terms of his employment, would have justified a suspension of payment on the part of the employer. In the absence of competent evidence as to the nature and character of the illness and the circumstances under which it developed, it is reasonable to be inferred that the illness might result from the character of some new employment, which the employer's breach had compelled the employee to undertake, to lack of earnings sufficient to properly maintain health because of his wrongful discharge, or to various other causes which might not have existed had he been allowed to continue his employment under his contract. To permit an employer guilty of breach of his contract to thus derive advantage from the probable results of his wrongful act would be subversive of justice. In this case there is not a scintilla of proof which would justify the jury in finding that had plaintiff continued in defendant's employ he would have been unable to fully perform his contract. The presumption is that he would have been able to perform his contract and enjoy the full benefits thereof. The evidence shows that he made all reasonable effort to obtain other employment and failed to do so. The trial judge, acting without a jury, erred, therefore, in giving judgment only for the amount of salary he would have earned for three out of the seven weeks of the unexpired term of the contract broken by defendant. Plaintiff was entitled to judgment for the salary for the full unexpired term of seven weeks, at $40 per week, amounting to $280.

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EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—DISCHARGE—SATISFACTORY SERVICES—*American Music Stores* v. *Kussel, United States Circuit Court of Appeals, Sixth Circuit (Mar. 17, 1916), 232 Federal Reporter, page 306.*—Philip Kussel brought action against the American Music Stores for alleged breach of a contract, by which he was employed for a period of 2 years from August 3, 1908, as western manager of its music stores, at a salary of $1,800 for the first year and $2,000 for the second year. He was to perform the duties of the position to the satisfaction of the employer. He was discharged before the expiration of the term on the ground that his services were not satisfactory. On the trial of the case in the District Court for the Western Division of the Southern District of Ohio, the verdict and the judgment were in the plaintiff's favor, and objection was made by the defendant to the instructions under which the case was submitted to the jury. The court of appeals reversed the judgment and ordered a new trial. Judge Tuttle delivered the opinion, and after giving in detail the terms of the contract, the charge to the

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jury, and the reasons for the claim that the latter was incorrect, he said:

We are clearly of the opinion that the trial court erred in instructing the jury that in cases of this kind involving contracts of employment of an ordinary business or commercial nature, if an employer ought in reason to be satisfied with the services of his employees, he will be held to be satisfied with such services.

The statement, in Cyc., of the principles applicable to the question, is then quoted, and many cases discussed, largely those arising in New York, by the law of which State it was conceded the contract was governed, since it was entered into there. Judge Tuttle then said:

We think that the rule must be considered well settled to the effect that when an employer and an employee make a contract whereby the latter agrees to perform the services required of him to the satisfaction of the former, the failure of such employee to satisfy such employer is a breach of such contract.

Of course, if it appears, or if there is evidence fairly tending to prove, that the employer in such a case is really satisfied, but discharges the employee on some other ground, obviously the rule in question has no application. So, if the employer alleges dissatisfaction but there is evidence fairly tending to prove that such alleged dissatisfaction did not in fact exist, an entirely different question is presented. Thus, if A. has agreed to perform certain specific work to the satisfaction of B., proof that such work has been properly done and accepted by B. may be evidence tending to show that B. was really so satisfied, notwithstanding any statement by him to the contrary. In such a case we think that the question in fact is not whether B. ought, in reason, to be satisfied, because that was not what the parties agreed; but that the question is, "Was B. really satisfied?" We can not avoid the conviction that the language of the decisions apparently holding otherwise is pure dictum, and that such decisions, while correct in what they decide, are incorrect in the reason assigned for so deciding.

Cases were cited and conclusions drawn, and the court continued:

For the reasons stated it is clearly apparent, both on principle and on authority, that the right of defendant to discharge plaintiff depended, not upon the question whether it ought in reason to have been satisfied with his services, but upon the question whether it was, in fact, and therefore in good faith, satisfied with such services. It results that the trial court was in error in instructing the jury otherwise, and that for this reason the judgment must be reversed and a new trial granted.

We deem it proper, however, to add that while the defendant in this case had a right to terminate plaintiff's employment in case of actual, good-faith dissatisfaction with his services, no right existed to terminate it otherwise; and that it is open to plaintiff to question the fact of good-faith dissatisfaction, provided there is testimony reasonably tending to dispute defendant's assertion that it was dissatisfied.



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EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—DISCHARGE—SATISFACTORY SERVICES—*Hanaford v. Stevens & Co., Inc., Supreme Court of Rhode Island (July 6, 1916), 98 Atlantic Reporter, page 209.*—Frank Hanaford brought suit against the company named for the breach of a contract of employment as traveling salesman, entered into October 1, 1907, and ending December 31, 1910, the salary to be $15 per week for the balance of 1907, $1,800 for 1908, $2,400 for 1909, and $3,000 for 1910. He was discharged October 31, 1909, and upon the trial of the case in the Superior Court, Providence and Bristol Counties, the jury returned a verdict for the plaintiff for $3,550. The contract called for the performance of the services "in a faithful, efficient, and satisfactory manner to the party of the first part" (the company). In affirming the judgment the court, Judge Vincent delivering the opinion, referred to the decision in Pennington *v.* Howland (21 R. I., 465, 44 Atl., 591), as to the right of a party to be the sole judge in case of a contract involving personal taste or feeling. Judge Vincent said as to the classification made in that case and its application to the present matter:

The court, in considering the questions submitted, found it necessary, in arriving at a conclusion, to separate cases of this general character into two classes, one class in which the subject of the contract involves personal taste or feeling, and the other class where the subject matter is such that the satisfaction stipulated for applies to quality, workmanship, salability, and other like considerations; the court holding that as to the first class the buyer was the sole judge, and that in the second class the agreement that it shall be satisfactory must mean that it shall be "reasonably" satisfactory.

The cases cited as examples of the first class, when the subject of the contract involves personal taste or feeling, relate to a portrait, to a bust of a deceased husband, to a suit of clothes, and to a bookcase. We do not think that the contract now in question, relating to the services of a traveling salesman, is one involving matters of personal taste or feeling, which would place it in that class of cases. It seems to us that the personal element upon which the first class of cases must necessarily rest is lacking in the case at bar. Besides the alleged grounds of dissatisfaction do not relate to matters of personal taste or feeling, but to the manner in which the plaintiff performed his services under the contract.

In all of these cases, to whichever class they may be assigned, it seems to be conceded that the buyer or employer must act in good faith in rejecting the completed work in the one case, or in discharging the employee in the other.

Having reached the conclusion that the case at bar must be classified as one where the defendant undertook to act upon just and reasonable grounds, it necessarily follows that the adequacy of the grounds must be open to judicial investigation and determination.

An examination of the briefs and the transcript of testimony shows a number of alleged causes of dissatisfaction on the part of Mr. Stevens, representing the defendant company, with the acts and conduct of the plaintiff in the discharge of his duties under the con-

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tract. All of these matters were quite fully gone into at the trial, and the jury must have found that the defendant had no reasonable ground for dissatisfaction in any of the alleged causes.

The case was therefore remitted to the court below, with directions to enter judgment on the verdict.

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EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—MODIFICATION OF TERMS BY EMPLOYER—*Colloraff* v. *Hickson, Inc., Supreme Court of New York, Appellate Term, First Department (May 26, 1916), 159 New York Supplement, page 177.*—Bragio Colloraff was engaged by the company named as a ladies' tailor at $30 per week, commencing February 1, 1916, for the season ending June 30, 1916. Shortly after the employer required its employees to come under a piecework arrangement, and Colloraff left. The municipal court dismissed his complaint for damages for breach of the contract, but the supreme court reversed the judgment, and ordered a new trial, holding that the employee need not submit to such a modification of the terms of the contract. Judge Cohalan said, speaking for the court:

This was violative of the terms of the agreement—the subject matter of this suit—and on February 12, 1916, the plaintiff refused to continue under the changed conditions.

The defendant contends that, since the amount of the work had not been lessened and the earning capacity of the plaintiff had not been restricted, there was no breach of the contract. The court apparently adopted this view, and dismissed the complaint at the end of plaintiff's case. Even though a wider opportunity of more remunerative employment were opened to the plaintiff, yet he was justified in standing upon his written contract, and the defendant was bound to respect its terms. The plaintiff having been prevented from performing his contract, he was not required to accept the modification of the same, and, having refused to continue under the new arrangement, he has not defeated his right of action.

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EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—MODIFICATION OF TERMS BY EMPLOYER—PAYMENT ON DISCHARGE—*Burden* v. *Woodside Cotton Mills, Supreme Court of South Carolina (July 3, 1916), 89 Southeastern Reporter, page 474.*—Weston Burden brought action against the Woodside Cotton Mills for a penalty of $5 per day for 67 days during which his wages had remained unpaid. This suit was brought under a statute providing that when a corporation discharges a laborer, the wages earned shall immediately become due, and on failure of payment on demand the laborer shall recover, in addition, a penalty of $5 a day until they are paid. He had been engaged as a doffer on January 1, 1913, and continued at this employment until March 23, 1913. There was no specification as to what

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his exact duties were to be, but during that period each doffer had several spinning frames assigned to him to attend to, while another hand cleaned the frames. On the 23d of March the overseer ordered the doffers to work together, and to clean the frames. They worked in this manner until noon, but did not go to work after the noon hour, refusing to do what they claimed was extra work. The overseer told them to go to work or quit, and they quit, and Burden demanded his wages of the paymaster, and was told that he would be paid on Saturday, the regular pay day. At the trial of his suit a verdict was rendered for $167.50, one-half the amount sued for. The question whether there was a "discharge" under the statute referred to became important, and the supreme court, on the appeal, speaking through Judge Hydrick, said:

It will be noted that the statement of the overseer to plaintiff upon which the fact of discharge is predicated was not an absolute or peremptory discharge. It was conditional—either do the work as ordered or quit. Plaintiff was given the right to exercise his own volition. If it was his duty to do the work as ordered, he must be held to have voluntarily abandoned the service. On the contrary, if a servant is ordered to do something which by the terms of his contract he is not required to do, and the doing of it is made a condition of his being allowed to remain in the service, his refusal to do it, though voluntary in a sense, would nevertheless be a discharge, because he could remain in the service only upon a condition which the master had no right to impose.

At the trial evidence had been introduced that it was customary in other mills for the doffers to clean the frames. An instruction was given to the jury to the effect that the custom in other mills must not be considered. The employee claimed that he was employed with reference to the custom of this particular mill, while the company claimed that he was employed with reference to the general custom, and that it had no different custom, but only a temporary method of operation. As to the effect of these matters Judge Hydrick said:

It is well settled that the known usages of a trade, business, or calling are presumed to enter into and form a part of contracts made with respect thereto, unless they are excluded or modified by argeement.

If the parties contracted with reference to the practice in defendant's mill, defendant had no right to make the order and obedience to it a condition of plaintiff's being allowed to remain in the service, and it must be held that plaintiff was discharged. But if the parties contracted with reference to the custom in other mills, it was plaintiff's duty to obey the order, and his refusal to do what he contracted to do and the order required him to do as a condition of remaining in the service was a voluntary abandonment of the service, and not a discharge. If plaintiff contracted with reference to one alleged custom and defendant with reference to another, there was no meeting of their minds and no contract. In that event defendant had the right to make the order and make compliance with it a condition of remaining in the service, as the terms of a contract then to be made,

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and plaintiff's refusal to work accordingly would be merely a refusal to make such a contract, and, under those circumstances, his quitting would be a voluntary abandonment of the service, and not a discharge.

Because of the error in giving the instruction mentioned, and also because the amount of damages given did not conform to the statute and so could not be justified under any view of the case, the judgment in favor of the plaintiff was reversed.

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EMPLOYER AND EMPLOYEE—DISCHARGE—LIBEL IN PUBLICATION OF CLEARANCE CARD—*Chicago, Rock Island & Pacific Railway Co. et al.* v. *Medley, Supreme Court of Oklahoma (Feb. 1, 1916), 155 Pacific Reporter, page 211.*—H. N. Medley, who had been a car repairer for the company named, received from them subsequent to his discharge, and on his request, a service letter the text of which was as follows:

To whom it may concern: This is to certify that Mr. N. H. Medley has been employed at Enid, Okla., on the Chicago, Rock Island & Pacific Railway, as car repairer, from July 25, 1909 to January 17, 1910, when he was discharged for being an agitator and creating trouble in the ranks of our car men at Enid. Services unsatisfactory on this account. C. M. Taylor (L), Supt. Motive Power.

In the course of investigation of the charges by the master mechanic of the company on Medley's request, a copy of the letter was seen by some of the employees of the company. Medley brought suit against the company for damages, alleging libel in the publication. Judgment was in his favor in the superior court of Garfield County, the judge in that court instructing the jury as a matter of law that the language used in the letter was libelous per se. On appeal by the company this instruction was held to be erroneous, and the judgment reversed. Judge Dudley, in the opinion delivered by him for the supreme court, quoted the statutory definition of libel, and said in part:

We are concerned only with the words "to injure him in his occupation." Is the letter libelous per se within the meaning of this portion of the statute?

The plaintiff, in his petition, ascribes no peculiar or special meaning to the words used in the service letter. Considering them in their plain, natural, popular, and obvious sense, are they libelous per se, within the meaning of our statute? We think not. They do not impeach his skill or ability as a car repairer, neither do they impute any fraud, dishonesty, misconduct, or incapacity in his trade. They certainly do not subject him to public hatred, contempt, ridicule, or obloquy, or deprive him of public confidence. Considering the language of this letter, in connection with the facts and circumstances under which it was issued, and the occasion for its issuance, one would infer that the plaintiff was a labor agitator, and as such caused trouble among the company's men, with whom he worked; but, be this as it may, no special meaning is ascribed to the language used, and we are unable to see under what theory this letter could be

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regarded as libelous per se. We have had many agitators in the history of this country—not only labor agitators, but others. In fact, most of the modern legislation, both for the protection of the laboring man and the improvement and betterment of society, has been due largely to agitators. The potential force of labor unions and labor organizations is due to a great extent to labor agitators. We think it would be going too far to hold that the language used in this letter is libelous per se.

We have searched in vain for precedents, and the nearest one we find is that of the case of Wabash Railway Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003 [Bul. No. 53, p. 950], wherein it was held: "It is not libelous per se to accuse one of being a member of a labor union and a labor agitator."

The facts in this case are similar to the facts in the case at bar, and the rule thus announced is quite applicable. [Other cases cited.]

Said service letter not being libelous per se, there can be no recovery, even though it is false, without the allegation and proof of special damages. [Cases cited.]

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EMPLOYER AND EMPLOYEE—DISCHARGE—MISCONDUCT—*Board of Education of City of Lawton* v. *Gossett, Supreme Court of Oklahoma (Feb. 29, 1916), 155 Pacific Reporter, page 856.*—The school board named, in May, 1916, employed Henry A. Gossett as janitor of a school building for the school year 1911–12. He entered upon his duties, but on November 6 was notified of his discharge, to take effect November 15. He received pay up to November 15, and performed no duties after that date. He sued on claims filed with the board, but disallowed, for services up to February 5, 1912. It appears that the patrons of the school claimed that the building was unsafe and that the board determined to repair it and let a contract for that purpose. The janitor appeared before the board on various occasions and remonstrated with it as to matters connected with its duties but in no way connected with the janitor work. The board at the trial of the case also offered evidence that he talked with certain persons, making charges of graft against members of the board in connection with the contract, and stating that he would prevent the doing of the repairs by injunction or in any way possible. This evidence was rejected, and a judgment was rendered for the plaintiff. The supreme court granted to the board a new trial, holding that such evidence should have been admitted, and saying through Judge Roberts:

We can not agree with counsel here in the contention that the case involved only a question of insubordination. The question of misconduct inconsistent with the relation of master and servant is also involved, and, to our mind, is the controlling question. In Cyc. (vol. 26, p. 990), we find the rule which fully coincides with our views of the law, and which we think is fully sustained by authority, that "any misconduct inconsistent with the relation of master and servant will

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justify the master in terminating the contract of service at any time." This rule is especially and peculiarly applicable in cases of employment by such bodies as school boards. Such charges of dishonesty and corruption as that made by plaintiff, or which was tendered in evidence against members of the board, would certainly bring about such relations between the members, and especially the accused members, as to seriously affect the relations between the janitor and his employers, to such extent as to operate against the best interests of the school. No member so accused would feel free to consult with such an employee or advise or direct him in the performance of his duties. In volume 20, Am. & Eng. Enc. L. at page 27, the text is as follows: "The servant owes to the master respectful and decorous treatment. Unprovoked insolence and disrespect for him or his representative will usually justify the servant's discharge."

At this point quotations are made from the opinions in apposite cases, and the opinion concludes:

In cases like the one here the first thing to be considered is the public—the good of the public service. Where the relations between the employer and the employee are such that the public service is liable to suffer or become neglected thereby, and especially where such relations are brought about by the misconduct and insolence of the employee without any fault of the employer, it is the duty of the employer to discharge the employee at once. It follows that the court committed prejudicial error in excluding evidence of the defendant tending to show the language and conduct of the plaintiff in which he accused the board, or any member thereof, of dishonesty and corruption in connection with their duties as members of the board.

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EMPLOYER AND EMPLOYEE—ENTICING SERVANT—LIABILITY—*Poston et al.* v. *Lyerly, Supreme Court of South Carolina (June 28, 1916), 89 Southeastern Reporter, page 392.*—Walter Poston and another brought action against Arthur E. Lyerly. Judgment was for the defendants in the common pleas circuit court of Florence County, and the defendants appealed. The brief opinion by Judge Gary sets forth the circumstances and the decision, and is quoted in full below:

This is an action for actual and punitive damages, alleged to have been sustained by the plaintiffs through the wrongful acts of the defendant, in enticing a servant from their employment.

One of the plaintiffs testified as a witness, and at the conclusion of his testimony the defendant made a motion for a nonsuit, which was granted, on the ground "that the contract between the plaintiffs and the said servant was voidable, and, the servant having given notice of his intention to leave the plaintiffs' service before the evidence showed that defendant was enticing him, that no case was made against the defendant."

The contract was within the statute of frauds, and was therefore voidable. (Duckett *v.* Pool, 33 S. C. 238, 11 S. E. 689.) This is admitted by the appellant's attorney. The only reasonable inference from the testimony is that the notice given the plaintiffs by the

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servant terminated the contract before any act on the part of the defendant tending to show that he enticed the servant.

Appeal dismissed.

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EMPLOYER AND EMPLOYEE—STATUS—EMPLOYEE USING ELEVATOR IN BUILDING FOR OWN PURPOSES—*Ross v. John Hancock Mutual Life Insurance Co., Supreme Judicial Court of Massachusetts (Feb. 10, 1916), 111 Northeastern Reporter, page 390.*—Suit was brought by J. A. Ross for the death of Ella F. Ross, under the Massachusetts law imposing liability upon a person or corporation for causing the death of a person who is not in his or its employment or service. Miss Ross was an employee of the company, working on the tenth floor, and on December 23, 1913, at her usual lunch hour, she put on her street clothes and took the elevator to go to the ninth floor to deliver a Christmas present to another employee. While she was getting off the elevator it was started and she was fatally injured. It was admitted that there was evidence of negligence on the part of the elevator boy and due care on her part to support the verdict in the plaintiff's favor which was rendered in the superior court of Suffolk County, and the question arising in the supreme court was whether the decedent was or was not in the "employment or service" of the company at the time of her injury; such a verdict resting of course upon a finding that she was not. The court held that she might properly have been found not to be in such service, and affirmed the judgment. It stated that she would probably be held to be in the service if going directly to lunch in the usual manner, but pointed out that so far as appeared she was not at all under the control of the employer, and might be upon the elevator as a passenger the same as a stranger. It is said that "even considered as a mere deviation from her direct route to luncheon, her departure from the course that ordinarily was incident to her employment was obvious, intentional, and, as the event proved, material."

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EMPLOYERS' LIABILITY—EMPLOYEE—SUPERINTENDENT—*Deyo v. Arizona Grading & Construction Co., Supreme Court of Arizona (May 12, 1916), 157 Pacific Reporter, page 371.*—A. E. Deyo brought suit against the company named for damages for injuries suffered by him from a delayed blast. He was superintendent in charge of the construction of a tunnel, but testified that he did at times work of nearly all kinds, such as handling a drill and loading holes with powder. His compensation had been $200 per month. In the superior court of Pima County a verdict was directed for the defendant company, but this was reversed and the case remanded for a new trial. The court examined the language of the constitutional

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provision for the enactment of the liability law, and of the statute itself, and held that, though the word workman was used in some places interchangeably with employee, that there was a sufficiently clear intention to include such an employee as the plaintiff in this case.

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EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILD BELOW LEGAL AGE—CONSTRUCTION OF STATUTE—*Green* v. *Appleton Woolen Mills. Supreme Court of Wisconsin (Jan. 11, 1916), 155 Northwestern Reporter, page 958.*—Walter Green, a minor, brought action by his guardian ad litem against the company named, for damages for injuries received October 13, 1911, when he was 15 years old, in operating a carding machine. The law fixes 16 years as the minimum for such employment. His duty was to take care of the strands of wool as they traveled from a rack of spools to the rolls of the machine, and to feed them in when they became broken. While so engaged his left arm came in contact with the rolls and was drawn in and injured. Judgment was for the plaintiff in the circuit court of Outagamie County, and this was affirmed. The damages, which had been fixed at $4,500, were held not to be so excessive as to warrant interference on appeal. As to the construction of the act prohibiting the employment of minors under 16 at such work, the court said in part, through Judge Barnes:

> The fact of injury would seem, in a measure at least, to demonstrate the necessity for and wisdom of the law. Perhaps as many cases of injuries caused by live rolls have come before this court as can be charged up to any other one cause. If the statute had simply forbidden the employment of the minor at a dangerous machine, the question whether the machine was dangerous would ordinarily be for the jury. But legislators, bringing to bear their knowledge and experience, may very properly place machines having power-driven rolls so located that the operator may get caught in a class of machines which those under 16 years of age may not operate.

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EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILD BELOW LEGAL AGE—CONSTRUCTION OF WORKMEN'S COMPENSATION ACT—"EMPLOYEE"—*Stetz* v. *F. Mayer Boot & Shoe Co., Supreme Court of Wisconsin (Mar. 14, 1916), 156 Northwestern Reporter, page 971.*—Peter Stetz brought action by his guardian ad litem against the company named for damages for personal injuries suffered in its employ. He was a boy under 16 years of age and had no employment permit, as required by law. After the injury an agreement was made on his behalf with the insurance company for the payment of $287.84 as the maximum due under the compensation law, and his father signed a release. This settlement was approved by the industrial commission,

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but not by the county court, and a suit for damages was brought in the county court of Milwaukee County. The jury, to whom were submitted certain questions, rendered a special verdict, finding that the plaintiff was less than 16 years of age, but that he and his father had represented at the time of his employment that he was 16, and the company's foreman had been justified in relying on this representation; that there were no false representations made by the company or the insurer to induce the signing of the release and no gross negligence on the company's part contributing to the injury; that if the plaintiff was entitled to recovery, his damages were $985. The court rendered judgment dismissing the complaint, and the plaintiff appealed. The supreme court reversed this judgment and ordered judgment for the plaintiff for $985, Judge Siebecker delivering the opinion. He first determined that the rights of the parties were not governed by the provisions of the compensation law, since the plaintiff, not being a minor legally permitted to work, was not an "employee" under that law. On this point he said in part:

The legislative intent evidently is to enable any minor, who has the legal right to work, to make a contract for his employment the same as adults, and if he has the legal authority to exercise this right then he "shall be considered the same * * * as adult employees" for the purposes of section 2394-8 of the workmen's compensation law. The provisions of this statute can only apply to minors who are at the time of contracting to enter the service of another authorized and permitted under the law to engage in such service and employment the same as adults. It is urged that the workmen's compensation law applies to and includes all minors in the service of others who, under the law, may upon specified conditions and circumstances obtain a permit authorizing their employment without first obtaining the permit provided by law. This contention runs counter to the terms of the compensation law and the provisions of other statutes prohibiting the employment of children under certain ages.

The circumstances of this case are distinguished from those in Foth *v.* Rope Co., 161 Wis. 549, 154 N. W. 369 (Bul. No. 189, p. 239), so that the decision there is held not to govern the present case. It was further held that where the company had employed the minor in violation of the law making such act a misdemeanor, it could not defend on the ground that its foreman was justified in relying on representations that he was over 16 years of age; and that such offense of the company makes it liable in a civil action for injury resulting therefrom. It was also held that the misrepresentation did not estop the plaintiff from recovery and that the release was not binding.

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EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILD BELOW LEGAL AGE—EFFECT OF WORKMEN'S COMPENSATION ACT—*Hetzel* v. *Wesson Piston Ring Co., Court of Errors and Appeals of New Jersey* (*June 19,*

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*1916), 98 Atlantic Reporter, page 306.*—Charles Hetzel, Jr., brought action against the company named for damages for personal injuries in its employ. He was a minor 13 years of age, and therefore below the lawful age of employment of a child in a manufacturing establishment. Judgment in the circuit court of Hudson County was for the defendant, it being considered that the remedy was under the workmen's compensation statute. This was reversed by the court of appeals, Judge Gummere for that court saying in part:

It can hardly be doubted that the legislature, in providing for the ingrafting of these statutory provisions on contracts of hiring, had in mind contracts which were valid in law, or, at least, contracts the making of which was not prohibited by express legislative enactment; for it would be entirely unreasonable to attribute to the legislature the intention of adding terms to a contract of hiring which it had already prohibited the parties thereto from making.

Was, then, the contract in the present case a valid one? A mere reference to chapter 64 of the Laws of 1904 furnishes a complete answer to the query. This act says to the employer, "You shall not employ any child under the age of 14 years in your factory; you shall not allow or permit him to work there." It says to the parent of such a child, "You shall not allow or permit your boy or girl to work in such a place until he or she has reached the age of 14 years." Having declared this absolute prohibition, how can it logically be said that the legislature, by a subsequent enactment, recognized the right of the factory owner and the parent to disregard the mandate of this statute, and make a contract for the employment of the boy which might or might not have read into it the provisions of the Workmen's Compensation Act, as the master and the parent between them should elect.

We conclude that the common-law right of action of the plaintiff, arising out of the facts set out in his complaint, has not at all been affected by the provisions of the Workmen's Compensation Act, and that therefore the judgment under review must be reversed.

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EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILD BELOW LEGAL AGE—KNOWLEDGE OF EMPLOYER—*Tulsa Cotton Oil Co.* v. *Ratley Supreme Court of Oklahoma (May 23, 1916), 157 Pacific Reporter, page 1056.*—Clarence Ratley was injured while in the employ of the company named, and sued through his mother for damages. He was 15 years of age, and was employed in taking care of the cleaning room, being required to put on a certain belt whenever it came off. A statute of Oklahoma prohibits the employment of children under 16 in adjusting belts, or for more than 8 hours a day or 48 hours a week, or between 6 p. m. and 7 a. m. As a matter of fact the boy worked from 7 p. m. to 7 a. m., making 12 hours of night work. These violations of law were alleged as negligence contributing to the injury. The company in defense alleged that at the time of the boy's employment his mother stated that he was above 16, and it was misled

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by this statement. The company requested instructions to the jury to the effect that if the company was led to believe that the child was of lawful age in spite of the exercise of due care and caution, and was justified in this belief, the provisions of the child labor law mentioned must be dismissed from consideration. The trial court refused to give these instructions, and rendered judgment for the plaintiff, which was affirmed by the supreme court in an opinion by Judge Hooker, from which the following is quoted:

The statutes are plain and mandatory and must be complied with in this jurisdiction or the one violating the same must suffer the consequences.

The question has been before the courts of many jurisdictions, and while some of the States hold that the appearance of the infant and misrepresentations as to his age by parents constitute vigilance upon the part of the employer which will relieve the employer from the operation of the statute, yet, to our mind the better rule is the one expressed in a majority of the States to the effect that vigilance upon the part of the employer is not sufficient, and that the statutes prohibiting the act from being done must be complied with strictly, and if violated the same constitutes negligence upon the part of the employer. [Cases discussed.]

We must hold in this State that the employment of a child under the age of 16, in a factory or manufacturing plant to do the work for which the defendant in this case was employed, in violation of the provisions of the statute, is evidence of negligence in a suit by the child to recover for injuries inflicted by a machine in the factory, and that it is no defense upon the part of the employer that it attempted to ascertain the true age of the child and was misled by the representations of the child or its parents, but it must know that the party whom it employs is not within the prohibited class provided by the law of the State.

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EMPLOYERS' LIABILITY—FAILURE TO PROVIDE FIRE ESCAPES—CONSTITUTIONALITY OF STATUTE—*Greene et al.* v. *L. Fish Furniture Co., Supreme Court of Illinois (Feb. 16, 1916), 111 Northeastern Reporter, page 725.*—Mattie L. Greene and another, administrators, brought action against the company named for damages for the death of William L. Greene. The latter was a checking clerk of the company, who, with other employees, lost his life by fire on March 25, 1910. The building was 160 to 175 feet long and 50 feet wide, and the office, in which Greene worked, was on the 6th floor, was 12 or 15 feet wide, and extended along the front or east of the building and the greater part of the length of the south side. There was a passenger elevator within the office inclosure at the east end, and in case of fire this automatically locked, and trapdoors closed at each floor. In the southwest corner of the building were a freight elevator and a stairway, but there was evidence that at the time of the fire these were blocked by furniture which had been brought up on the eleva-

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tor. The fire escape was on the west end of the building, and it appeared that a workbench obstructed free access to the window on that floor which opened on the fire escape. The fire started on the fourth floor with the ignition of a can of benzine, spread to the furniture and to alcohol, shellac, benzine, and varnish kept there, causing explosions and the rapid spread of the fire to the fifth and sixth floors.

Objection was made by the defense to the constitutionality of the provision of the Factory Act requiring more than one means of escape in factories, mercantile establishments, etc., to be provided and kept unobstructed. It was contended that the classifications in this statute were arbitrary in making requirements of mercantile establishments not required of other establishments claimed to have similar conditions.

The court held that the classifications contained in the law were reasonable, Judge Carter, who delivered the opinion, saying in part:

Do the kinds of industry mentioned in said section 14 form a class by themselves with reference to the protection of employees, so as to justify the legislature in making provisions for furnishing means of escape from fire which do not apply to other branches of industry? Many statutes are passed with the special purpose of pointing out to willing employers, and enforcing against unwilling employers, methods by which to protect the health, safety, and morality of their employees which in no way refer to customers. We are of the opinion that the distinction between factories, mercantile establishments, mills, and workshops and such business or commercial establishments as are referred to by counsel for plaintiff in error is also reasonable and not an arbitrary classification. It is clearly based on the fact that the danger in such establishments as specified in section 14 is apt to be much greater than in the other establishments mentioned by counsel. The evidence in this case forcibly illustrated how conditions will differ in establishments of this character from what would be almost certain to exist in a large railroad office or commercial agency such as referred to by counsel. Under the reasoning of decisions on similar questions we think the classification here in question would be considered as reasonable and within the constitutional requirements. [Cases cited.]

The court held, following previous decisions, that the obligation to comply with the fire escape provisions of the law did not depend upon notice from the factory inspector. Other matters relating to pleading and to the admission of evidence were also decided in favor of the plaintiffs, and the judgment for them was affirmed.

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EMPLOYERS' LIABILITY—FELLOW SERVANTS—SUPERINTENDENCE—*Pelow* v. *Oswego Construction Co., Court of Appeals of New York (Apr. 11, 1916), 112 Northeastern Reporter, page 379.*—Adolphus Pelow brought action against the company named for damages for personal

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injuries suffered while in its employ. Judgment was in his favor in the trial term. The negligence charged was that of the superintendent, but it occurred while he was performing an act such as would naturally be performed by an ordinary fellow servant. The question accordingly arose whether section 200 of the labor law, as amended in 1910 and existing in 1912, when the injury took place, makes the employer responsible for negligence occurring under such circumstances. The amendment eliminated the expression "exercising superintendence," leaving the phrase, "intrusted with any superintendence." Judge Hiscock delivered the opinion affirming the judgment, in the course of which he said:

At the time the amendment was adopted not only was the general current of legislation in the direction of repealing the so-called "fellow-servant" rule, but a commission theretofore appointed by the legislature to "inquire into the question of employers' liability," etc., had just made a report to the legislature in substance stating that the statute making the employer liable for the negligence of a superintendent only when such negligence occured in the course of superintendence prescribed too narrow a rule, and that the employer ought to be responsible for all accidents caused by any person intrusted with any authority, and recommending that to that extent the fellow-servant rule should be modified. Especially when construed in the light of these circumstances we think that the plain purpose and meaning of the amendment were to accomplish the result thus recommended, and we are not able to find any other reasonable excuse for the legislation.

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EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—ACCIDENTAL MOVEMENT OF TREADLE—*Flynn* v. *McLoughlin, Supreme Court of New York (June 9, 1916), 159 New York Supplement, page 442.*—Sarah Flynn brought action against James G. McLoughlin for damages for personal injuries suffered by her in his employ. She operated a stamping machine used in the manufacture of paper valentines, and at the time of the accident put her fingers between the dies to clean out some paper which had become lodged there. The upper die descended, and caught and severed the ends of the fingers. She testified that she might have accidentally touched with her foot the treadle which actuated the die. This injury took place in Brooklyn, and evidence was introduced that in numerous instances in New York City devices were in use to guard machines similar to the one in question, which was not guarded. Judgment at the trial term, Kings County, was for the employee, and this was affirmed, Judge Carr delivering the opinion and commenting on the facts and the law applicable to them as follows:

That the machine was "unguarded" must be conceded. That it was practicable to guard it was undisputed by any testimony on behalf of the defendant. Whether it was necessary to guard it, in

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the view of its particular ordinary use, was a question for the jury, to be decided in the light of such dangers as should be reasonably foreseen by the master as likely to result from its ordinary use. [Cases cited.]

Among the dangers against which the statute attempts to provide are those which may arise from an inadvertent or accidental act of the operator. [Cases cited.]

The defendant gave evidence that in the use of this machine during a great number of years, no accident had happened upon it, but if such an accident was reasonably to be anticipated, the fact that there had been no former accident was not a defense, but was a subject only for the jury's consideration on the question of the master's duty. [Cases cited.]

The defendant produced its machine before the jury. They inspected it and saw it manipulated by various witnesses. In that respect they had a much better opportunity to determine the facts correctly than has this court. We can not say that their verdict was against the weight of evidence, and especially so in view of the sharp question of the credibility of witnesses presented in the conflict of testimony as it appears in this record.

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EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—"ESTABLISHMENT"—SELF-PROPELLING CONCRETE MIXER—*Plew* v. *James Horrabin & Co. et al., Supreme Court of Iowa (Apr. 4, 1916), 157 Northwestern Reporter, page 453.*—The employee who sued for damages for personal injuries in this case operated a concrete mixer, used for mixing the material for laying pavements. It moved from place to place under its own power, and as a preliminary to such moving it was necessary to throw the mixing drum out of gear by shifting a lever with the right hand, setting a pin with the left hand to hold the lever in place. In doing this Plew's left hand was caught in the gearing, which was unguarded, and injured. He claimed that failure to protect the machinery by guards in accordance with the statute was actionable negligence, and the district court of Polk County accepted this view and rendered judgment in his favor. The company, on the other hand, contended that it was not engaged in the operation of a "manufacturing or other establishment where machinery is used." The supreme court affirmed the judgment of the court below, Judge Weaver, who delivered the opinion, saying in part:

For appellants it is argued that the term "manufacturing or other establishments where machinery is used" necessarily means or implies a building in which machinery is installed and used, but this we think too narrowly restricts the intended scope of the statute. The danger to be guarded against is the exposed and unguarded machinery about which men are required to work, and the fact whether it is or is not housed under the roof of a building is a negligible incident. If machinery is used for the manufacture or preparation of a product to

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supply human demand therefor, and that machinery is set up and operated at some spot or place where men are employed to come and labor in and about its use and operation, we conceive of no reason why it should not be regarded as a "manufacturing establishment where machinery is used," within the letter and spirit of the statute.

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EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—"FACTORY"—ASPHALT MIXER—*Continental Public Works Co.* v. *Stein, United States Circuit Court of Appeals, Second Circuit (Apr. 18, 1916), 232 Federal Reporter, page 559.*—William U. Stein was injured by an asphalt mixer, and brought action against his employer, the company named, securing a verdict in a district court for $2,250. The mixer was part of a plant used in laying a public highway, and by means of it asphalt and stone were mixed and the stone covered with asphalt. The plaintiff was engaged in the supervision, installation and operation of the asphalt machinery, and found that the mixer was not working satisfactorily, as a chain rubbed against an angle iron. While consulting with a blacksmith as to remedying this defect, he stooped to point to the place where the rubbing occurred. His coat, which was thrown over his arm, was caught by an unguarded set screw, and he was pulled against the machine and suffered injury. The emphasis of the defense appeared to be placed upon a contention that the establishment was not a "factory," and hence that the provisions of the New York labor law, relating to the guarding of dangerous machinery and relied upon by the plaintiff, did not apply in the premises. The court affirmed the judgment, Judge Rogers saying upon the point mentioned:

We have no doubt that the business in which the defendant engaged in running asphalt and stone through its "mixer" and covering the stone with asphalt as it passed through the machine, thus producing a product to be used in constructing a street, was that of "manufacturing." And if a factory is a plant "where something is made or manufactured from raw or partly wrought materials into forms suitable for use," then this plant where the accident occurred was a "factory" under the act.

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EMPLOYERS' LIABILITY—INJURIES CAUSING DEATH—EFFECT OF WORKMEN'S COMPENSATION PROVISIONS—*Shanahan* v. *Monarch Engineering Co., Court of Appeals of New York (Dec. 28, 1916), 114 Northeastern Reporter, page 795.*—Michael Shanahan fell from a scaffold while in the employ of the company named and was killed, and Margaret Shanahan, his administratrix, alleging negligence, brought action for the benefit of his brother and sister, he having left no widow, parents, grandparents or descendants. The company made answer, denying negligence, and also relying on the language of the

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workmen's compensation law making its provisions exclusive, except in cases where the employer fails to secure compensation, when the employee is given an option to proceed for compensation or sue for damages. To the last-mentioned part of the answer the plaintiff demurred, as the compensation law does not provide for payments to adult brothers and sisters, even when next of kin and dependent. Since this is so, it was contended on the part of the plaintiff that the workmen's compensation act does not exclude a liability suit in behalf of brothers and sisters when there are no dependents of the classes entitled to compensation. In support of this view it was pointed out that the constitution adopted in 1895 includes a provision that the right of action to recover damages for injuries resulting in death shall never be abrogated, nor the amount be subject to statutory limitation. The statute in force at that time granting damages for death included brothers and sisters among those for whose benefit the action might be brought. The court of appeals, reversing decisions of two branches of the supreme court, held that there was no right of action in favor of brothers and sisters in such a case. Judge Pound delivered the opinion and said in part:

The constitutional amendment added in 1913 overrides all else in the State constitution. "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact" (employees' compensation laws) is the comprehensive language used and this excludes the limitations of section 18 of article 1 relative to damages for injuries causing death as well as the limitations of section 6 of article 1 relative to taking property without due process of law. It permits the legislature to fix the right to compensation to be paid by an employer for death resulting to an employee from injuries received in the course of his employment and to provide that "the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies * * * for death." It authorizes the legislature to adopt an employee's compensation system and to define who should be entitled to relief for damages without any State constitutional limitation whatever.

The statute which was adopted in pursuance of this constitutional amendment clearly provides that the liability provided shall be exclusive of all other rights and remedies except as in section 11 [which permits suits in cases of failure of employer to secure payment of compensation.]

A certain liability is imposed for death, and that liability exclusive. No other responsibility is left which springs from the occurrence upon which liability rests—death—and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances of the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. The conclusions which we draw from an examination of the language of the constitutional amendment and of the statute became irresistible when we consider the conditions and purposes which led to their adoption and enactment. While



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the right to maintain negligence actions to recover damages for the injury and death of employees was regarded of great importance and in death cases protected by the constitution this method of remedy had generally become economically unsatisfactory.

Under this [compensation] legislation both classes, employer and employee, gained benefits and made concessions. The liability of the employer is no longer bounded and limited by the rules of negligence, but is imposed upon him when he is without fault as well as when he is guilty of negligence. The employee and his dependents receive compensation which may be smaller than would have been the amount of a judgment in a negligence action, but on the other hand they are compensated for injuries resulting from risks heretofore assumed by them, the relief is summary, the practice simple, and they are not hampered or defeated by rules of negligence law or by technical defenses and procedure. It is not to be assumed that the legislature intended to provide rights and remedies for some of the dependent relatives and to leave the old form of remedy in force as to the others. A new system was substituted in its entirety for an outgrown and objectionable one.

The constitution permits the legislature to provide a remedy exclusive of all other rights or remedies for death of employees resulting from injuries; the legislature has provided the exclusive remedy. If the classes of persons benefited are unnecessarily restricted in death cases the remedy is not by a strained interpretation of the constitution by the courts, but by a mere amendment to the compensation law by the legislature.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—EFFECT OF WORKMEN'S COMPENSATION ACT—ELECTION—*Grand Trunk Railway Co.* v. *Knapp, United States Circuit Court of Appeals, Sixth Circuit (June 30, 1916), 233 Federal Reporter, page 950.*—The company named is a carrier engaged in both interstate and intrastate commerce. Albert E. Knapp was in its employ as a bridge carpenter, and was injured by a collision due to the company's negligence, while on a work train on the way to repair a bridge. In a district court he recovered damages under the Federal Employers' Liability Act, and the company appealed, raising questions as to whether he was at the time of the accident employed in interstate commerce, and whether, even if he was, the liability act had superseded the State compensation act as to his right of action. The court held that the employee was undoubtedly employed in interstate commerce, and decided the other point also against the railroad company, affirming the judgment below. Judge Knappen delivered the opinion, and the following are quotations from it on the subject of the application of the Federal and State statutes to such cases:

The Michigan act, with certain exceptions hereafter stated so far as important, applies to all persons, firms, and corporations (including public-service corporations) who elect to become subject to its provisions, such election to be effected by filing with the Industrial Accident Board a written statement of the acceptance of the act

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and the adoption of one of several methods provided for the payment of compensation. By failing to come under the act the employer is deprived of the defenses of contributory negligence, unless willful, negligence of fellow servants and assumption of the risk. Knowledge of the employer's election to come under the act is conclusively imputed to the employee, and the latter is conclusively presumed to have consented to come under the act unless he gives written notice to the contrary. (Compensation Act, pt. 1, sec. 8, and pt. 3, sec. 4; Mackin *v.* Detroit-Timkin Axle Co., 153 N. W. 49 [Bul. No. 189, p. 233].)

Recovery does not depend upon, and is not affected by, the employer's negligence. (Andrejwski *v.* Wolverine Coal Co., 182 Mich. 298, 302, 148 N. W. 684 [Bul. No. 169, p. 234].)

By section 4, part 6, of the act, its provisions are made to apply to employers and workmen engaged in intrastate commerce, but not to those engaged in interstate commerce, "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States," except to the extent that "their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce." There is also provision for express and voluntary acceptance of the act by "any such employer and any of his workmen working only in this State," if done with the approval of the Industrial Accident Board.

The defendant, previous to the accident, filed its election to come under the act. The plaintiff has never accepted it, unless his acceptance is conclusively presumed by his failure, previous to the accident, to give written notice of his nonassent.

Defendant being an interstate carrier by railroad and plaintiff having been employed in interstate commerce when his injuries occurred, the Federal Employers' Liability Act unquestionably prescribes a remedy. The jurisdiction of Congress over interstate commerce, and thus over remedies against employers therein for injuries sustained by employees while engaged in such commerce, is paramount; and so far as Congress has occupied the field of such liability, its jurisdiction is exclusive. [Cases cited.]

The defense that the employee was at the time of his injuries engaged in interstate transportation has been sustained as defeating recovery under the State laws. [Cases cited.]

The general doctrine that the paramount jurisdiction of Congress when actually exercised, is exclusive, has been applied to a variety of subjects. [Instances cited.] There can be no doubt that the Federal Employers' Liability Act provides exclusive remedy for at least negligent injuries to employees of interstate railroad carriers while actually engaged in interstate commerce.

It is urged, however, that Congress has not entered the field of liability for nonnegligent injuries to employees in interstate commerce. It was said in the Horton Case (233 U. S. 501, 34 Sup Ct. 635 [Bul. No. 169, p. 80]), that by the Employers' Liability Act it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence, and it is here urged that as under the Michigan Workmen's Compensation Act recovery does not depend upon, and is not affected by, the employer's negli-

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gence, that act, and the Federal Employers' Liability Act are not in pari materia, and therefore the State act is not superseded by the Federal act. It is of course true that, when the Federal and State Governments have jurisdiction in the same field, the State may legislate upon subjects within that field until Congress shall occupy it [cases cited]; and had plaintiff proceeded under the State statute, the question whether that statute was altogether superseded by the Federal act might become material. The decisions involving that question are not entirely harmonious. [Cases examined.] In the instant case we are not called upon to decide whether the State act would apply had plaintiff's injury occurred without defendant's negligence.

In the instant case recovery was and could have been had only for negligent injuries. Defendant contends that because the bridge plaintiff was on his way to help repair was used in both interstate and intrastate commerce plaintiff was, at the most, engaged in interstate commerce not "clearly separable and distinguishable from intrastate * * * commerce," and his employment was thus within the jurisdiction declared by section 4, part 6, of the State act, and not within the field covered by the Federal act. This contention may be briefly answered:

We think it clear not only that by the section invoked the legislature declared that "it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States" (Jensen *v.* Southern Pacific R. Co., 215 N. Y. at page 522, 109 N. E. 600 [Bul. No. 189, p. 221]); but that plaintiff's employment was directly within the Federal act, as authoritatively determined in the Pedersen case. This case does not belong to the class [cases cited] where the service in question, although affecting interstate transportation, was held to be too remote from it to be practically a part of it.

There has been no express agreement between plaintiff and defendant, approved by the Industrial Accident Board, whereby plaintiff voluntarily accepted and became bound by the provisions of the State act.

We therefore have no difficulty in holding that the Michigan act does not give (and was not intended to give) an action for the negligent injuries sustained by plaintiff in the instant case; and as the act did not apply to plaintiff's case, the provision for automatic acceptance falls to the ground.

The judgment of the district court is accordingly affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL AND STATE STATUTES—EFFECT OF WORKMEN'S COMPENSATION ACT—ELECTION—*Waters et al.* v. *Guile, United States Circuit Court of Appeals, Sixth Circuit (July 20, 1916), 234 Federal Reporter, page 532.*—Merlin E. Guile brought action under the Federal Employers' Liability Act against the receivers of the Pere Marquette Railroad Co., and judgment was in his favor in a United States district court. Guile was brakeman on a freight train running between two points in Michigan, carrying both interstate and intrastate freight. In the course of switching operations he received severe personal injuries,

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alleged to have been due to the negligence of another member of the train crew, and it was for damages for these injuries that he sued. The company insisted that his cause of action was under the Michigan Workmen's Compensation Act, the company having elected to come under that act. The court did not take this view, but affirmed the judgment below. Pointing out that under the facts proven the employee was undoubtedly engaged in interstate commerce at the time of injury, it applied as a precedent the case of Grand Trunk Railway Co. *v.* Knapp, 233 Fed. 950, above. The present case differs from the Knapp case, however, in that application had been made under the compensation act, and apparently there would have been a settlement under that act but for a dispute as to the amount of compensation. As to the effect of this Judge Knappen, who delivered the opinion, said:

Defendants insist that by this action plaintiff elected to come under the Michigan compensation act, and that the transaction amounted to an agreement to adjust all liability under the provisions of that statute, which provides for arbitration in case of disagreement between employer and employee, with right of review by the industrial accident board of the arbitrator's findings.

As between two inconsistent remedies, the deliberate choice of one ordinarily constitutes an election as against the right to claim under the other; and we assume that, had plaintiff had the option of proceeding under either the Michigan compensation act or the Federal Employers' Liability Act, what he did amounted to an election which would bar suit under the Federal act. But election presupposes a choice of remedies, and where there is but one remedy available there can be no choice of remedies, and an unsuccessful pursuit of an inapplicable remedy would not bar resort to a remedy that is applicable.

It is established by the verdict that plaintiff's injuries were occasioned by defendants' negligence, and the trial court properly held that those injuries were suffered during plaintiff's employment in interstate railroad transportation. The Federal act thus provided plaintiff's sole and exclusive remedy for his injuries. His mere claim under the Michigan act, not prosecuted to recovery, was thus not an effective election as against a remedy under the Federal act.

We have no doubt that it was competent for the parties to make a settlement, after the accident, upon the basis provided by the Michigan compensation act. Indeed, such adjustment, as eliminating the question of defendants' negligence might well have been regarded by both parties as desirable. The question comes, we think, to this: Whether what was done after the accident amounted to a settlement which would bar proceeding under the Federal statute.

No settlement was in fact reached. The proceeding in legal effect amounted, at the most, to an implied agreement (in case adjustment should not be reached between the parties) to arbitrate their differences, employing for the purpose the machinery of the act. But such voluntary agreement to arbitrate, not carried into effect, did not amount to a settlement, nor did it bar resort to applicable remedy at law.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—PROXIMATE CAUSE—*Seaboard Air Line v. Horton, Supreme Court of the United States (Jan. 10, 1916), 36 Supreme Court Reporter, page 180.*—James T. Horton brought action in a North Carolina court for damages for personal injuries, against the company named. The opinion of the Supreme Court of the United States on a former appeal, reversing a judgment in the plaintiff's favor, is reported in 34 Sup. Ct. 635, and noted in Bulletin No. 169, page 80. On the new trial there was again a judgment in favor of the plaintiff employee, and upon this occasion it was affirmed. Mr. Justice Pitney delivered the opinion, and it is so instructive as to the law regarding assumption of risk that the statement of the facts, and the part of the opinion relating to this point, are quoted fully:

Plaintiff was injured while in the employ of defendant in interstate commerce. He was an experienced locomotive engineer, and was so employed when injured. His engine was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame inclosing a glass tube 12 or 14 inches long, and one-half inch in diameter, the glass being about three-eighths inch thick. The tube was placed vertically, and was connected with the boiler above and below, so that it received water and steam direct from the boiler and under a pressure of 200 pounds. In order to protect the engineer and fireman from injury in case of the bursting of the tube, a thick piece of plain glass, known as a guard glass, should have been in position in slots arranged for the purpose in front of the water tube. Plaintiff took charge of the engine in question on July 27 or 28, 1910, and noticed at that time that the guard glass was missing. He reported this to a roundhouse foreman, to whom such report should properly be made, and asked for a new guard glass. The foreman replied that he had none in stock, but would send for one, and that plaintiff in the meantime should run the engine without one. He did so for about a week, and until August 4th, when the water tube exploded, and the flying glass struck him in the face, causing the injuries upon which the action was grounded.

The principal insistence of defendant (plaintiff in error) is that, upon all the evidence, plaintiff, as a matter of law, assumed the risk of injury arising from the absence of the guard glass. The rule applicable to the situation was expressed by this court upon the former review of the case, in the following terms (233 U. S. 504): "When the employee does know of the defect [arising from the employer's negligence], and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be

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so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

By motions for nonsuit and for dismissal of the action, and by various requests for instructions to the jury, all of which were refused, defendant raised the point that although plaintiff reported the absence of the guard glass to the defendant's foreman and received a promise of repair, yet the danger was so imminent that no ordinarily prudent man under the circumstances would have relied upon the promise, and hence plaintiff, as matter of law, assumed the risk of injury.

But we do not think it can be said as matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise. It was not the function of the guard glass to prevent the bursting of the water tube, but only to limit the effect of such an explosion in case it happened to occur. That there was a constant danger that the tube might explode was abundantly proved, and was admitted by plaintiff. But the tube was designed to withstand the pressure of 200 pounds, and ordinarily did so. It was its proper function to do so. One witness said: "They may last a day, a week, a month, or a year, or it may last an hour, or shorter." The jury might reasonably believe that such a water glass would probably not explode in the ordinary use of it unless it was imperfect or defective in some respect other than the absence of the guard glass, and that, since there was no evidence of this, Horton was justified in assuming that the danger of an explosion was not immediately threatening.

There is a substantial difference in the attitude of the employee toward the known dangers arising out of defects attributable to the employer's negligence, depending upon whether there has or has not been a promise of repair. It was clearly expressed in a well-reasoned opinion by the supreme court of New Jersey (Dowd *v.* Erie R. Co. 70 N. J. L. 451, 57 Atl. 248) thus: "To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues to work in reliance upon the promise.

* * * The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle 'volenti non fit injuria.' But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk."

To relieve the employer from responsibility for injuries that may befall the employee while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employee that danger confronts him, or that it is constant. The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise. The danger of the explosion of the water glass, which normally should withstand the pressure to which it was subjected, but which might probably explode at some time near or remote, can not be said, as matter of law, to have been

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so imminent as to import an assumption of the risk by Horton notwithstanding the employer's promise to replace the guard glass. It would require a much plainer case than this to justify taking the question from the jury.

The court held that the question of contributory negligence was not presented for decision, since the case was given to the jury on the question of assumption of risk, which was more favorable to the company, since assumption of risk would entirely bar the action, while contributory negligence would only modify the amount of damages. As to another point raised, Mr. Justice Pitney said, in conclusion:

It is further argued that Horton's own conduct in using the Buckner gauge without the guard glass, when he could have cut this off and used the guage cocks, said to be an entirely safe instrumentality, was unquestionably the proximate cause of his injury. But there was evidence to show that the gauge cocks themselves were not a safe instrumentality, because of their liability to become clogged. Hence, at the utmost, there was here no more than a question for the jury.

Other points are raised, but they are quite unsubstantial, and require no particular mention.

Judgment affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—COMPARATIVE NEGLIGENCE—PROXIMATE CAUSE—*Great Northern Railway Co.* v. *Wiles, Supreme Court of the United States* (*Mar. 20, 1916*), *36 Supreme Court Reporter, page 406.*—Dennis E. Wiles was killed while in the employ of the company named as freight brakeman in interstate commerce, and his father as administrator, received a verdict of $650 in the district court of Ottertail County, Minn. The judge, however, rendered judgment in the company's favor, on the ground that Wiles' negligence was the proximate cause of his death. The Minnesota Supreme Court reversed this judgment and ordered judgment on the verdict. The United States Supreme Court, on the other hand, reversed this latest decision, sustaining the company's defense and the opinion of the trial judge, that the employee's negligence was the proximate cause of the injury and that there was no room for the application of the rule of comparative negligence. Mr. Justice McKenna delivered the opinion, which stated the facts and the reasons for the decision as follows:

Deceased was a rear brakeman on a freight train of the railway company proceeding easterly between Grotto and Skykomish, Wash. After having passed a curve in the road the train broke in two by the drawbar pulling out of the sixth car from the engine, which caused the train to stop instantly. It was run into shortly after (from three to five minutes, it was testified) by a passenger train drawn by two engines. The night was pretty dark and the weather a little misty. At the place of collision the track was obstructed by a very sharp curve and a bluff on the right-hand side

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for about five box-car lengths, and the rear end of the train at that place could not be seen more than five box-car lengths away. On the left-hand side of the engine, which is the fireman's side, the track could not be seen more than a car length ahead because that would be on the outside of the curve. The engineer of the passenger train did not know of the existence of the freight train ahead and no negligence is attributed to him. The deceased and the conductor of the freight train were in the caboose and both were killed. What caused the pulling out of the drawbar was not shown, nor was there proof that it was defective, or that the company was negligent in the care or use of it.

The head brakeman of the freight train testified that the train stopped immediately upon the pulling out of the drawbar, that he descended from the train and hastened back to the caboose for a chain, and that he saw the headlight of the passenger train as it came around the curve. He further testified that it was Wiles' duty to have gone back to protect the rear end of his train at the time the passenger train was due out of the station in the rear, and that this applied whether the delayed inferior train which was ahead was running or standing still; that it was the duty of Wiles to have gone back a sufficient distance to guarantee full protection to the rear of his train, and that the engineer of the freight train, at the time the train broke in two, signaled the rear brakeman to go back and protect the rear end of his train. The same testimony as to the duty of Wiles was given by another witness. It appeared also from the testimony that the freight train was losing time by slipping, and that Wiles knew the time that the passenger train was due to leave Grotto station, and he should have dropped off or dropped fuses on the track to notify the engineer of the passenger train that the train was running slow. The fuses are of red and yellow lights; the red means to stop for 10 minutes, the yellow to bring the train under control and keep it under control until the next station is reached.

The supreme court applied the rule of res ipsa loquitur and justified a submission to the jury of the negligence of the railway company as a deduction from the pulling out of the drawbar, and the proportion of its causal relation to the death of Wiles to the amount of negligence attributable to him, and reversed the action of the trial court, entering judgment for the company notwithstanding the verdict.

The application of the doctrine to cases like that at bar is disputable. [Cases cited.] We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling.

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In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—CONTRACT EXEMPTING FROM LIABILITY—INDEPENDENT CONTRACTOR—*Chicago, Rock Island & Pacific Railway Co.* v. *Bond, Supreme Court of the United States (Mar. 20, 1916), 36 Supreme Court Reporter, page 403.*—Action was brought under the Federal Employers' Liability Act by A. P. Bond, as administrator of the estate of William L. Turner, against the company named, for Turner's death. In the Supreme Court of Oklahoma judgment was given to the plaintiff for $7,583, apportioned among the beneficiaries. The company's claim was that Turner had been not an employee, but an independent contractor under contracts with the company, which are set forth fully in the opinion. On the contrary, the plaintiff claimed that this contract was an attempt to exempt the company from its liability under the statute. The decision of the Supreme Court of the United States sustains the contention of the company, reversing the judgment of the State supreme court in an opinion by Mr. Justice McKenna, from the concluding portion of which the following is quoted:

We are unable to concur with the learned court in its conclusion. There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect.

The whole instrument shows system and particular care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results. And the covenants were suitable for the purpose, only consistent with it, not consistent with a temporary employment. This is manifest from the provision

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for payment, from the careful assignment of liabilities, and the explicit provision that Turner "shall be deemed and held as the original contractor, and the railroad company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done. [Cases cited.]

We do not think that the contract can be regarded as an evasion of section 5 of the Employers' Liability Act, which provides "that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: * * *"

Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly can not say that he was incompetent to assume such relation and incur its consequences.

Thus, being of the opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—IMMEDIATE DEATH—*Louisville & Nashville Railroad Co.* v. *Rhoda, Supreme Court of Florida (Apr. 15, 1916), 71 Southern Reporter, page 369.*—L. M. Rhoda brought action as administrator under the Federal Employers' Liability Act for the death of Clarence Rhoda while employed by the railroad company named in interstate commerce. The complaint alleged that the employee died from, and as a result of the injuries immediately upon their infliction. Judgment was rendered in the circuit court of Santa Rosa County in the sum of $5,000, and on appeal the company contended that no recovery could be had, as the death was alleged to have been immediate, and there would therefore be no cause of action accruing to the employee at any time, and none could survive to the personal representative The supreme court affirmed the judgment. Judge Cockrell, in the opinion, spoke in part as follows upon the point mentioned:

The plaintiff in error contends that as the death occurred "immediately" upon the infliction of the injury, no cause of action ever existed in the person suffering the injury, and therefore there was no cause of action to survive. The contention is not without authority in the decisions by certain State courts upon State statutes.

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The declaration alleges the death to have followed "immediately," which the Maine court differentiates from the conception of "instantaneous" death. (Sawyer *v.* Perry, 88 Me. 42, 33 Atl. 660.) Few, if any, deaths may be correctly denominated as instantaneous. The vital spark is so tenacious that it rarely, if ever, leaves the body the moment that a fatal blow is inflicted, and if it survive that blow but a mathematical moment, why may it not be logically said that the cause of action for that moment existed in the injured individual, and, if so, then the statute applies and the cause of action survives in the personal representative for the injury thus done. If this be technical reasoning, we are using it to reply to a technical argument, for surely no lawmaker intended to make the severity of a blow a defense to the evil aimed at.

The pleader's use of the word "immediately" may serve a two-fold purpose: First, to show that there was no intervening or mediate cause, and, secondly, to apprise the defendant that no claim would be made for physical suffering. We think the count stated a good cause of action.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CLEANING ASH PIT—*Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Clarke, Court of Appeals of Kentucky (Apr. 26, 1916), 185 Southwestern Reporter, page 94.*—Phillip Clarke had his foot badly injured while in the employ of the company named. He was an assistant to the hostler in the yards at Lexington, Ky., and among his duties was the cleaning of the ash pit. While he was attending to this duty on the night of September 7, 1913, he suddenly became aware that an engine was immediately upon him. He attempted to climb out of the pit, but was unable to get one foot over the rail before it was crushed by the wheel of the locomotive. He testified that he saw no light on the engine, and heard no warning signal. Judgment was in his favor in the circuit court of Boyle County. On appeal several questions were raised, among them whether he could properly sue under the Federal Employers' Liability Act. All these matters were decided in his favor, and the judgment was affirmed. In the opinion, holding that the employment was in interstate commerce, Judge Hurt said in part:

There is no contradiction in the evidence in regard to the use to which the ash pit was put. It was situated under one of the tracks of appellant, and was an instrumentality designed, constructed and used by the carrier for the purpose of ridding the engines used in its operations of the ashes produced by the materials used in the engines to make the power which was necessary to propel them. It was daily and at night used for that purpose by its engines, which were engaged in interstate commerce. The pit was a useful and necessary instrumentality in the operation of its engines engaged in interstate commerce. The ashes must necessarily be taken from the engines, and, when dropped into the pit, the ashes must be thrown from the pit to keep it in condition and repair to do the service for which it

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was used and designed. If appellee, when injured, had been employed in repairing the track of a railroad which was used for hauling cars containing freight from one State into another, no one would question the fact that he was then engaged in an act in aid and furtherance of interstate commerce, and that his case would properly be one under the provisions of the Federal act. The pit in question was a permanent structure and part of the equipment of appellant for the transportation of interstate commerce, just as the bridge was in the much-quoted case of Pederson *v.* Delaware, Lackawanna & Western Railroad Co. [Bul. No. 152, p. 85].

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EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE—INTERSTATE COMMERCE—CONDUCTOR OF TRAIN HAULING TIES—SAFE PLACE TO WORK—*Alexander* v. *Great Northern Railway Co., Supreme Court of Montana (Jan. 20, 1916), 154 Pacific Reporter, page 914.*—J. C. Alexander, administrator of the estate of John P. Hall, brought action against the company named for the death of Hall, and judgment was in his favor in the district court of Flathead County. This was affirmed by the supreme court in an opinion by Judge Sanner. The grounds of appeal are stated in this opinion as follows:

A reversal is sought upon four grounds, viz.: (1) The complaint alleges, but the proof does not establish, that Hall was employed in interstate commerce at the time of his death; (2) no actionable negligence on the part of the appellant is alleged or proved; (3) the evidence shows a clear case of assumed risk; and (4) substantial errors of law prejudicial to the appellant occurring at the trial.

The branch line upon which the accident happened was wholly within the State of Montana, though it was the source and destination of both interstate and intrastate traffic. The employee was a conductor, who was killed by the derailment of his caboose, resulting from the collision of the train with a cow. His duty at the time was to load ties at points along the branch and take the cars to convenient sidings, whence they were taken to the company's treating plant, also within the State. Eventually they would be used in constructing or repairing tracks both within and without the State. After quoting the criterion given in the Pedersen case as to what constitutes interstate commerce the court, holding that the present case did not come under the Federal Employers' Liability Act, but that that fact did not invalidate the judgment, said:

Interdependence to some extent pervades all activity, and it is true, for instance, that an interstate railroad can not perform its functions without fuel or without ties; but this does not justify the inference that persons hired by it to mine coal or to cut ties are employed in interstate commerce. (Delaware, Lackawanna & Western Railroad Co. *v.* Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902 [Bul. No. 189, p. 102]; Bravis *v.* Chicago, Milwaukee & St. Paul Railway Co.,

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217 Fed. 234 [Bul. No. 169, p. 87]). No case has been called to our attention which in its facts closely resembles the one at bar; but in Illinois Central Railway Co. *v.* Behrens (233 U. S. 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91]), it was held that employment in interstate commerce was not shown where the fireman of a switch engine operating within the city of New Orleans was killed while moving cars loaded with intrastate freight, notwithstanding that his general duties had to do with cars of all classes, often commingling those loaded with interstate freight and those empty or loaded with freight of an intrastate character, or rapidly passing from one class to the other. Accepting this as authoritative, we are impelled to the view that the decedent was not at the time of his death employed in interstate commerce, and therefore the action was not sustained under the Federal Employers' Liability Act.

It does not follow from this, however, that the appellant was or is entitled to a reversal. It is now settled that, where the complaint declares under the Federal law, failure to sustain it under such law is not fatal, but recovery may still be had under the State law, if the pleadings and proof are sufficient under the State law. [Cases cited.]

The negligence on the part of the railway company charged was failure to keep its track fenced, and thus prevent the presence of cattle upon the track. Speaking of the duty to furnish a safe place to work the court said:

Speaking broadly, the obligations of a railway to its employees are not different in principle from those of other masters to their servants, and when the place of work to which the servant is detailed is the track or roadway of the master, the duty to exercise reasonable diligence to keep it safe should and does arise. Indeed, little, if any, difficulty is found in the application of this rule where defects in the track or roadway or inanimate obstructions are involved, and we cannot see why any should arise from the mere fact that the obstruction is animate.

That the plaintiff assumed the risk was another contention of the company which was carefully examined and held not to be sustained by the facts, and the court concluded by saying that no reversible error was found in the record, and the judgment should be affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ERECTING TELEGRAPH POLE FOR RAILROAD USE—*Coal & Coke Railway Co.* v. *Deal, United States Circuit Court of Appeals, Fourth Circuit (Feb. 2, 1916), 231 Federal Reporter, page 604.*—David F. Deal, an employee of the company named, brought suit against it for damages for personal injuries. Judgment was rendered in his favor for $6,500 in the trial court, and this was affirmed on appeal. The employee was assisting in setting a telegraph pole, in the process of repairing a line used by the railroad company for transmission of train orders. That this employment was interstate commerce was held by the court in the opinion by Judge

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Pritchard, who after reviewing the Pedersen case (33 Sup. Ct. 648, Bul. No. 152, p. 85) said:

The Supreme Court having declared that one who is injured while carrying spikes to be used in repairing a bridge over which interstate commerce is transported is deemed to be engaged in interstate commerce within the meaning of the act, it necessarily follows that, as in this instance, where one is injured while attempting to erect a telegraph pole to be used for the purpose of supporting wires over which messages are to be sent in directing the operation of trains in order that a company engaged in interstate commerce may safely operate its trains, such person is engaged in interstate commerce within the meaning of the act.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—EXPRESS AGENT IN CHARGE ALSO, OF ELECTRIC PLANT—*Wesseler* v. *Great Northern Railway Co., Supreme Court of Washington (Mar. 11, 1916), 155 Pacific Reporter, page 1063.*—O. P. Wesseler brought action against the company named for damages for personal injuries. Judgment being in his favor in the trial court, the company appealed, and questioned the right of the plaintiff to maintain an action under the Federal Employers' Liability Act, as engaged in interstate commerce. He was an express agent, and also had charge for the railroad company of the train's electric plant. The court affirmed the judgment, Judge Bausman delivering the opinion and saying in part:

There is no evidence that the train had at the time of the injury interstate freight or passengers, that the express company then had interstate shipments, or that the train was carrying interstate passengers whom Wesseler could be serving by turning on, as he said he was then doing, the electric current to illuminate the train. On the other hand, there is no testimony that there was not interstate freight, express shipments, or passengers. It is accordingly argued that Wesseler, though he might at the next station have come into interstate service, was not in it just then.

The proper presumption need not be chosen. While there is no precise precedent, it is present apparent authority that Wesseler was part of the equipment of the interstate vehicle. This express car with its electric equipment had to go forward in charge of some one to receive if not to discharge interstate shipments as well as to maintain the electric plant, and Wesseler's obligation was to remain with it to Montana. He was as much in interstate commerce with it empty as full. [Cases cited.]

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INSPECTING TRACK—COMPARATIVE NEGLIGENCE—*Anest* v. *Columbia & Puget Sound Railroad Co., Supreme Court of Washington (Feb. 15, 1916), 154 Pacific Reporter, page 1100.*—Gust Anest brought action as administrator in the supe-

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rior court of King County for the death of Keneages Flengern. The latter was killed on December 15, 1912, while in the employ of the railroad company named. He was employed in inspecting the track, and was riding upon a "speeder," or handcar, when it came in collision upon a curve with an engine backing at the rate of about 20 miles an hour. There was no one stationed on the tender as a lookout. The fireman saw the speeder just as the engine was coming out of the curve, when it was about two car lengths away, and called out to the engineer to whistle. The engineer applied the emergency brakes, and the engine was brought to a stop within about 300 feet. The tender in the meantime struck the speeder and knocked the employee off, inflicting injuries from which he died. When seen he had his back to the engine, and on account of the inclement weather he had on a cap with flaps passing over his ears and fastened under his chin.

In holding that the employee was engaged in interstate commerce Judge Holcomb, who delivered the opinion, said:

> In the present case there could be no possible separation of decedent's inspection of appellant's track for the purpose of its intrastate commerce and of its interstate commerce. The two were obviously concomitant. His inspection was for the purpose of aiding and assisting the appellant in the operation of its trains, cars, and locomotives, and the carrying on of its business both of interstate and intrastate commerce.

The opinion discusses fully the other questions arising, holding that the evidence showed actionable negligence on the part of the company, and that the section man under such circumstances does not assume the risk of injury from trains negligently operated. It was held, however, that as the court below made no deduction from its verdict or judgment for the employee's contributory negligence, the supreme court could inquire into this matter de novo from the record. It held that the employee's negligence was equal to that of the company, and accordingly reduced the judgment in favor of the plaintiff for $3,700, apportioned between the widow and three minor children, to one-half that amount, and affirmed it as so modified.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—MEMBER OF TRAIN CREW ON CALL BUT NOT IN SERVICE—*Pryor* v. *Bishop, United States Circuit Court of Appeals, Seventh Circuit (Apr. 18, 1916), 234 Federal Reporter, page 9.*—James F. Bishop, administrator of Orville Bordner, brought action for the death of the latter by injury received while in the employ of the Wabash Railroad Co., and sued Pryor, receiver of that company. Bordner was a brakeman, a member of a train crew running between Montpelier, Ohio, and Chicago. The conductor

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and two brakemen lived at Montpelier, and when at Chicago used for their own convenience the caboose which was attached to the trains which the crew operated, cooking their meals and sleeping in it. After an eight hours' rest from a previous trip, they were subject to be called 1½ hours before a train to which they were assigned was to start, and must then report in an hour, or one-half hour before the leaving time. They reached the Seventy-fourth Street Station, Chicago, soon after noon on December 20, 1913. The trains sometimes started from this station and sometimes from Landers, 7 miles distant, and the caboose, with the men in it, was often, as was done on this occasion, placed with other cars in a transfer train and taken from one station to the other. They were to take out the next train, which actually was called at 6.15 on the morning of December 21. Shortly before midnight the caboose was taken into a transfer train, and at 12.50 a. m., while standing about a mile from Landers, this train was run into by another, through the negligence of employees of the road, and Bordner was killed in his bed. In the trial court, after motions to dismiss the action and to instruct the jury to find for the company had been overruled, a verdict allowing $18,000 in damages was brought in. Judgment entered on this verdict was reversed, the court holding that the employee was not engaged in interstate commerce, and could not recover under the Liability Act. Quotations are herewith reproduced from the opinion delivered by Judge Kohlsaat:

The deceased could as well have been at a city hotel; his only duty at the time was to be within call, either personal or telephonic. That he was on the company's property at the time of the injury was [illegible] not to an obligation, but to a privilege, a license; in being there, he was acting, not as an employee, but as a licensee.

If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the city of Chicago to respond to a call for service. That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the Federal act.

To hold that decedent was, at the time of the injury—some 4 or 5 hours before he was wanted by defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act. The statute was enacted only with reference to those railroad employees who, while in the actual discharge of their duties in interstate commerce, are injured.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—MOVING COUNTERSHAFT IN SHOP—*Shanks* v. *Delaware, Lackawanna & Western Railroad Co., Supreme*



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*Court of the United States (Jan. 10, 1916), 239 U. S. 556, 36 Supreme Court Reporter, page 188.*—Bruce Shanks brought action against the company named for damages for injuries suffered while in its employ. In the trial court a judgment in his favor was entered, but in the appellate division of the Supreme Court of New York this was reversed and the action dismissed, which decision was affirmed by the State court of appeals. The ground for the decisions adverse to the employee was that he was not engaged in interstate commerce at the time of the injury. The facts were that he was employed in the machine or repair shop of the company, which was engaged in both interstate and intrastate transportation. His usual work was in repairing certain parts of locomotives, but at the time of the injury he was engaged in taking down and putting into a new location an overhead countershaft, through which power was communicated to some of the machinery. The Supreme Court of the United States affirmed the judgment for the defendant company, Mr. Justice Van Devanter, who delivered the opinion, saying:

In so far as its words are material here, the employers' liability act declares that "every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce", if the injury results in whole or in part from the negligence of the carrier or of any of its officers, agents, or employees. Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce.

And so it results where the carrier is also engaged in intrastate commerce, or in what is not commerce at all, that one who, while employed therein by the carrier, suffers injury through its negligence, or that of some of its officers, agents, or employees, must look for redress to the laws of the State wherein the injury occurs, save where it results from the violation of some Federal statute, such as the safety appliance acts.

The question for decision is, Was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.

Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is, was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?

Applying this test, we have held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar

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in a car then in use in such commerce (Second Employers' Liability Cases [Walsh *v.* New York, New Haven & Hartford Railroad Co.] 223 U. S. 1, 32 Sup. Ct. 169); where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade (Norfolk & Western Railway Co. *v.* Earnest, 229 U. S. 114, 33 Sup. Ct. 654 [Bul. No. 152, p. 92]); where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work (Pedersen *v.* Delaware, Lackawanna & Western Railroad Co., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85]); where a clerk is on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so the switching crew will know what to do with them when breaking up the train (St. Louis, San Francisco & Texas Railway Co. *v.* Seale, 229 U. S. 156, 33 Sup. Ct. 651 [Bul. No. 152, p. 87]); where a fireman, having prepared his engine for a trip in interstate commerce, and being about to start on his run, is walking across adjacent tracks on an errand consistent with his duties (North Carolina Railroad Co. *v.* Zachary, 232 U. S. 248, 34 Sup. Ct. 305 [Bul. No. 169, p. 83]); and where a brakeman on a train carrying several cars of interstate and two of intrastate freight is assisting in securely placing the latter on a side track at an intermediate station to the end that they may not run back on the main track, and that the train may proceed on its journey with the interstate freight (New York Central & Hudson River Railroad Co. *v.* Carr, 238 U. S. 260, 35 Sup. Ct. 780 [Bul. No. 189, p. 92]).

Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another (Illinois Central Railroad Co. *v.* Behrens, 233 U. S. 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91]), and where an employee in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce (Delaware, Lackawanna & Western Railroad Co. *v.* Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902 [Bul. No. 189, p. 102]). In neither instance could the service indicated be said to be interstate transportation, or so closely related to it as to be practically a part of it.

Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the employers' liability act.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—PAINTING CARS—OCCUPATIONAL DISEASES—POISONING FROM MIST FROM PAINT GUN—*Baltimore & Ohio R.R. Co.* v. *Branson, Court of Appeals of Maryland (May 17, 1916), 98 Atlantic Reporter, page 225.*—David Branson brought action under the Federal Employers' Liability Act for damages for injuries suffered by him while in its employ as a painter. The gist of the complaint was that he worked for several months painting engines used in interstate commerce with a machine known as a "gun," by which painting materials were applied in the form of a spray or mist, which enveloped the operator; that he did not know the deleterious nature of this mist, but that the company did, and should have provided an appliance to protect him from breathing the same; and that on or about the 6th of September, 1913, by reason of this poisoning, he became sick and incapacitated. The circuit court of Allegany County rendered judgment for the employee, and on appeal this was affirmed. Judge Burke delivered the opinion, from which the following extracts are made:

The defendant demurred to the declaration and this demurrer, which was overruled by the trial court, raised the most important question in the case, as to which we have no precedent to guide us. It is this: Does the Federal Employers' Liability Act embrace such an injury as that sued for in this case? This involves a question of construction of the act. It is contended for the defendant [company] that the words, "suffering injury," occuring in the act, must be given a restricted meaning, and confined to injuries which are attended with force or violence. This contention, if sound, would limit the scope and effect of the act, and withdraw from its operation many recognized causes of action which injured persons may have against railroads engaged in interstate commerce. It is argued that to hold the defendant liable for such an act would multiply litigation and subject interstate carriers by rail to liability never contemplated by Congress. But we are not much impressed by the argument as to apprehended hardships and multiplied litigation which it is contended would result if an action of this character can be maintained. The declaration clearly states a cause of action under the principles of common law. (Dettering *v.* Levy, 114 Md. 273, 79 Atl. 476; Security Cement & Lime Co. *v.* Bowers, 124 Md. 11, 91 Atl. 834.) [And other cases cited.] And, if it should be held that such a suit cannot be sustained under the act, the effect would be merely to remit the plaintiff to his common-law action. But this would subject him to the defenses of contributory negligence and the assumption of the negligence of fellow servants. These harsh defenses have never been very potential in the prevention of suits for personal injuries. Thoughtful and humane men have long since recognized that the old law of employers' liability was not only unsuited to our changed condition, but in the method of its operation resulted in many cases in great injustice to the injured workman, and great harm both to the State and to the parties immediately concerned. It was to remedy, in a large measure, this evil condition in the field of interstate transportation by

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railroads that this act was passed. The act is a remedial one, and like all remedial legislation, should have a liberal construction to advance the remedy proposed and to correct the evils against which it was directed. It was designed to enlarge—not to restrict—the rights of the injured workman. In Michigan Central Railroad Co. *v.* Vreeland, 227 U. S. 59, 33 Sup. Ct. 192 [Bul. No. 152, p. 88], the court said that the act was intended "to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce."

The language of the act is broad enough to include the injury sued for. That is conceded, and the considerations to which we have referred show that it is within the reason and spirit of the act, and that the apprehension of increased litigation and hardship would not seem to be well founded.

The declaration states a case in which an employee of an interstate common carrier by rail suffered an injury as the result of the negligence of his employer, and we see no reason, upon grounds of public policy or otherwise, why the suit should not be maintained if the plaintiff was at the time engaged in interstate commerce work.

Was he so engaged at the time he suffered the injury? The declaration alleged that the plaintiff was engaged in the painting of cars and engines of the defendant company used by it in the transporting of commodities and commerce through and between the States, and that at the time of the injuries complained of, and for a period of 11 months prior thereto, he had been using the paint gun in painting the engines and cars of the defendant used in interstate transportation, and that while so engaged he suffered the injuries complained of as a result of the negligent omission of duty stated in the declaration. Engines and cars are necessary instrumentalities in the business of interstate commerce, and it is the duty of the carrier to keep them in safe condition and proper repair. Without paint the engines would corrode and the woodwork of the cars decay. The work of painting the engines and cars would seem to have a reasonable and substantial relation to interstate commerce.

Judgment affirmed with costs.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING BOLTS FROM BRIDGE TIMBERS—*Long* v. *Lusk et al., Supreme Court of Arkansas (May 22, 1916), 186 Southwestern Reporter, page 601.*—J. C. Long brought action against the receivers for a railroad company, to recover damages for the death of Lex Long in its employ. The employee was a member of a crew engaged in constructing new bridges and removing the old ones. As there was water under the bridge on which he was employed when the injury occurred, the timbers known as caps or bents were laid alongside the track, clear of the rails. They were sound enough to use in repairing other bridges, and the bolts were taken out so that they could be piled on cars. Long was engaged in removing bolts when, through the negligence of a fellow employee, timbers began to roll down the embankment. One of them

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struck him, and the resulting injury caused death. The railroad was admittedly engaged in interstate commerce. Long left no widow or children, parents or other next of kin dependent upon him, and so could not recover if the case was governed by the Federal Employers' Liability Act. The judge of the circuit court held that Long was engaged in interstate commerce at the time of the injury, and that therefore that act did apply; and judgment in that court was for the defendants. This was affirmed by the Supreme Court, Judge Hart, who delivered the opinion, saying in part:

Counsel point to the fact that the caps or bents had been removed from the bridge and were lying by the side of the dump far enough to be clear of passing trains. For this reason they insist that the employee was through with constructing the bridge, and that the work he was engaged in at the time of his injury was not a part of interstate commerce. It must be admitted that this is a border-line case, but when tested by the rule already laid down by the Supreme Court of the United States, we think the employee was employed in interstate commerce at the time he received his injuries. It will be remembered that when the timbers taken from the bridge are old and worthless they are piled up and burned. When they are sound enough to be used again the bolts are removed from them and they are piled up on the right of way and thereafter carried to the place where they are to be again used. It is not sufficient that they should be moved far enough away from the track so that they would not be struck by passing trains. The work of constructing and repairing the bridge would not be accomplished by removing the bridge timbers only this far. Their presence so near the track would be not only a constant source of danger to the employees engaged in operating trains, and the traveling public, but would also materially hinder the employees in operating the train. The engineer is required to keep a constant lookout, and would be frequently at a loss to know whether the logs lying so near the track were obstructions on the track or not. Again it will be readily seen that when the timbers became dry and rotten they would easily catch fire from passing trains and the fire would endanger the bridges and tracks near which they were piled. Many other reasons readily suggest themselves why it would be dangerous to leave these timbers so near the track. We think it was a part of the work of constructing the bridge to remove the timbers a safe distance away from the track after they were taken from the bridge, and that a part of this work consisted in drawing bolts out of the timber so that they might be more easily stacked and made ready for shipment.

Therefore we are of the opinion that the deceased was employed in interstate commerce at the time he was injured, and the plaintiff is not entitled to recover.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING OLD RAILS FROM BESIDE TRACK—*Illinois Central Railroad Co.* v. *Kelly, Court of Appeals of Kentucky (Jan. 14, 1916), 181 Southwestern Reporter, page 375.*—

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Melvin Kelly secured a verdict of $1,500 in the circuit court of Grayson County for damages for personal injuries received while in the employ of the railroad company named. The action was brought under the Federal Employers' Liability Act, and the company's appeal was based on the contention that the facts proved did not bring the case within that act, but that, on the contrary, it was governed by the State law. The importance of this was that the defense made by the company included assumption of risk, which would be valid under the State law, and contributory negligence, which would be a complete defense instead of merely going to mitigation of damages. The court of appeals held that this contention should be sustained, since the work in which the employee was engaged was not in interstate commerce, and the judgment was reversed and the case remanded for a new trial. Judge Settle, who delivered the opinion, said in part on the question of interstate commerce:

Under the interpretation given the Federal statute in the [Pedersen] case [Bul. No. 152, p. 85], it is manifest that if appellee had been injured while unloading rails that were to be used, and were later used, in repairing appellant's railroad track, there could have been no doubt of his right to maintain the action under the Federal Employers' Liability Act; but such was not the case. The rails, by one of which he was injured, had been removed from the track and new ones put in their places several days before he was injured. When taken from the track, the old rails were laid out on the ground or subgrade, outside of and parallel with the track, the space occupied by them being about 4 feet in width, and as thus placed they could not, even if allowed to permanently remain, have interfered with appellant's use of the track or its business as a carrier, and there was nothing in the evidence conducing to show that it was the intention of appellant to use these rails in its track elsewhere, or that they were so used, or even fit for such use. In view of this situation, we are unable to see how the later work of gathering up these old rails for the purpose of storing them elsewhere, or perhaps selling them as scrap steel, can in any sense be considered as a repairing of the track, or as necessary to appellant's engaging in interstate commerce. In other words, the evidence fails to show that there was any duty resting upon appellant as a carrier of interstate commerce to remove the rails.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING ENGINE OF WORK TRAIN—*Louisville & Nashville Railroad Co.* v. *Carter, Supreme Court of Alabama (Dec. 16, 1915), 70 Southern Reporter, page 655.*—Frank Carter brought action against the company named for damages for a permanent injury caused by being struck in the eye by a fragment of metal, chipped off with a cold chisel by another employee in a locomotive repair shop. Judgment was for the plaintiff in the circuit court of Escambia County. The complaint contained counts de-

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claring under the Federal law and others basing a cause of action on the State statute. The supreme court said that if the injury was proved to have been in either interstate or intrastate service, the defendant was entitled to have instructions in its favor regarding the counts relying on the law governing injuries occurring in the other service. It was held that the injury did not occur in interstate commerce, and the judgment was reversed. It was shown that the plaintiff was engaged in the repair of an engine used wholly in the State of Alabama to draw work trains for the repair of tracks used in both interstate and intrastate commerce. Judge McCracken, who delivered the opinion, said in part as to the nature of the employment:

The work in which the plaintiff was engaged when injury befell him was in the repair of an engine not in such use in or about interstate commerce as to allow it to be characterized as an instrumentality of that commerce or to be regarded as an immediately or directly applied means to the maintenance or repair of any indispensable feature of interstate transportation. The fact that the locomotive under repair was to be used, or even was being used, in the repair of the interstate track only brought it into a secondary relation to an interstate instrumentality, viz, the track. The work being done by the plaintiff was for the repair of the engine, and not in the repair of the track. This vital circumstance readily distinguishes Pedersen *v.* Delaware Lackawanna & Western Railroad [Bul. No. 152, p. 85]. There the injured employee's service was one in immediate direct relation to the maintenance or repair of an instrumentality of interstate commerce, viz, the railway itself. Here the service being performed was upon an agency that was not so immediately related to interstate commerce as to justify its characterization as a part of the interstate service.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING ENGINE USED INDISCRIMINATELY—WITHDRAWAL FROM USE FOR REPAIR—*Chicago, Kalamazoo & Saginaw Railway Co.* v. *Kindlesparker, United States Circuit Court of Appeals, Sixth Circuit (June 6, 1916), 234 Federal Reporter, page 1.*—Gale Kindelsparker was injured while in the employ of the company named, and engaged in repairing an engine. The road was wholly within the State of Michigan, but was a link in interstate commerce. The trains hauled and switched by its locomotives consisted indiscriminately of cars containing interstate and intrastate freight and passengers. The court affirmed a judgment in the plaintiff's favor, holding that the use of the engine made it an instrumentality of interstate commerce, even when temporarily withdrawn from such use for purposes of repair. Judge Warrington examined the precedents fully in the opinion delivered by him, from which brief quotations are made:

When the decisions are considered, which, on the one hand, allow recovery, and on the other disallow recovery, under the Federal act,

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a marked distinction is found concerning the responsibility of a carrier for injuries suffered by an employee engaged in repairing an instrument interstate in character, and injuries received by an employee using or operating the same kind of an instrument while handling only intrastate traffic. As to the repairer, his service partakes of the character of the instrumentality; as to the operative, his service partakes of the character of the traffic. The reason for this distinction is that the repair is so directly and vitally related to commerce between the States as to characterize the work of the employee engaged in the repair as an act of interstate commerce.

No evidence was offered tending to show any intention on the part of defendant to withdraw the engine from active use, except only for the purpose of necessary repairs. Within three days after completion of the repairs, the engine was placed in the same service as that in which it was used before; defendant's service on the road and in the yards comprised a constant double use—interstate and intrastate. Plainly, in view of the evidence actually introduced, the burden rested upon defendant affirmatively to show an intent on its part, if such was the fact, to make a permanent withdrawal of this engine from use in interstate commerce; in the absence of such proof, its admitted conduct in so quickly returning the engine to its former service can not be explained except upon the theory that the purpose of the withdrawal was to refit the engine for the same service and therefore but temporary in character.

We conclude upon the whole that the engine was at the time of the repair in question an instrument of the interstate commerce in which the defendant was engaged, and that the work of plaintiff thereon was a part of such commerce.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CARS OF COAL FOR INDISCRIMINATE RAILROAD USE—*Chicago, Burlington & Quincy Railroad Co. v. Harrington, Supreme Court of the United States (May 1, 1916), 36 Supreme Court Reporter, page 517.*—This case in the lower court was reported in 180 S. W. 443, and noted in Bulletin No. 189, p. 108. The Supreme Court affirmed the judgment in favor of the plaintiff widow, whose action was based on the State law, over the contention of the company that the deceased employee was engaged in interstate commerce. Mr. Justice Hughes delivered the opinion, and said in part:

With the movement of the coal to the storage tracks we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company, and "had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident." The question is with respect to the employment of the decedent at the time of the injury. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal act is that the coal thus placed was to be used by locomotives in interstate hauls.

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As we have pointed out, the Federal act speaks of interstate commerce in a practical sense suited to the occasion, and "the true test of employment in such commerce in the sense intended is, Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" (Shanks *v.* Delaware, Lackawanna & Western Railroad Co., 239 U. S. 556, 36 Sup. Ct. 188 [see p. 77], and cases there cited.) Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier, while he is mining coal in the carrier's colliery, intended to be used by its interstate locomotives, is not engaged in interstate commerce within the meaning of the Federal act (Delaware, Lackawanna & Western Railroad Co. *v.* Yurkonis, 238 U. S. 439, 36 Sup. Ct. 160), and there is no distinction in principle between the two cases.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—STATION AGENT ACTING AS EXPRESS AGENT—*Bogart* v. *New York Central & Hudson River Railroad Co., Supreme Court of New York, Appellate Division, Second Department (Feb. 11, 1916), 157 New York Supplement, page 420.*—Estella W. Bogart brought action as administratrix of Cyrus J. Bogart against the company named, for his death. He was agent of the company at a small station and was also employed as express agent and paid a percentage of the business done. He was in the act of removing some interstate express matter which had been brought in by a train and deposited between the tracks, when he was struck by an engine and killed. Judgment was for the plaintiff in the trial term, Rockland County, but this was reversed on the ground that the employee was not at the time employed by the railroad company in interstate commerce, Judge Thomas saying in the opinion:

There was no relation between the express company and the defendant, except that the latter carried the former's freight and allowed it to occupy its premises for its receipt and dispatch. The decedent, when he was injured, was handling the freight as the agent and custodian of the express company, and was responsible to it for fidelity in the discharge of the immediate duty, and it alone was obligated to pay him for the service, and alone was liable to respond for his dutiful performance of it.

The inquiry comes at once to this point: Was the injured servant doing an act in furtherance of interstate commerce in the course of employment by the defendant? The decedent was employed by the defendant to do all that falls to the duty of a station agent. He was employed by the express company to do all that falls within the usual employment of an express agent, but to such duties the defendant's responsibility did not extend. Therefore he was not employed by defendant in interstate commerce.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—STUDENT FIREMAN—*Findley* v. *Coal & Coke Railway Co., Supreme Court of Appeals of West Virginia (Dec. 17, 1915), 87 Southeastern Reporter, page 198.*—Judgment was rendered for Levi J. Findley, administrator of a deceased employee, for $5,300 by the circuit court of Randolph County. On the appeal of the company various matters were considered, a point of interest being the question whether as a "student fireman" the deceased was an employee engaged in interstate commerce. The court affirmed the judgment, Judge Poffenbarger, who delivered the opinion, saying on the point mentioned:

That the presence of interstate cars, in the train on which the decedent was killed, made it an interstate train, is admitted. Although the decedent was on the train as an employee of the defendant, at the time of the explosion which caused his death, his employment in interstate commerce is denied, because he was only a student fireman, and, it is said, as such, had no control or management of the train, in any respect, was charged with no duty respecting it or the interstate cars, and was probably ignorant of their presence in it. The amended declaration does not reveal the specific duties of a student fireman. It shows, however, that the decedent was an employee of the defendant on its train carrying, at the time, both intrastate and interstate cars. The designation of his rank, as a student fireman, does not imply lack of active duty for the company or service merely for himself as a student. The terms clearly imply practice in the form of service to his employer, as well as study by observation. His employment, his place on the pay roll of the company, implies service. Such as he performed, whatever it may have been, was service to his employer on a train engaged in interstate commerce, and therefore service in interstate commerce.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHING CAR ICED FOR INTERSTATE SHIPMENT—*Aldread* v. *Northern Pacific Railway Co., Supreme Court of Washington (Oct. 21, 1916), 160 Pacific Reporter, page 429.*—Al Aldread, brakeman in a switching crew of the railroad company named, brought suit under the Federal Employers' Liability Act for personal injuries. The crew did the switching between the Puyallup and Sumner yards during the berry season, the distance being about a mile. At the time of the injury the crew was moving two cars, a flat car loaded with wood consigned to Sumner and a refrigerator car, which had been iced at Puyallup and was being moved to the Fruit Growers' Association warehouse at Sumner for loading. The car was, as a matter of fact, loaded there and consigned to a point in another State. The engine was backing and pulling the two cars. The conductor, the plaintiff, and another brakeman rode on the footboard as the train came into Sumner. The air was not coupled between the engine and the cars, but the

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train was controlled by a direct application of the air to the engine. The plaintiff gave a signal to stop, the engine did stop, and the plaintiff stepped off; he testified that the engineer then instantly released the air and the momentum of the cars forced the engine forward about 3 feet, the footboard striking the back of his foot or ankle and doubling his leg over his foot and crushing and bruising it so that he received permanent injuries. The court held that the case was governed by the Federal Employers' Liability Act, Judge Chadwick saying upon this point:

We have recently examined that act and reviewed the cases. The icing of the car was an initial movement incident to its loading and billing to a point outside the State, and we hold, under the authority of Bolch *v.* Chicago, Milwaukee, etc., Railway Co., 90 Wash. 47, 155 Pac. 422 (see below), that it was engaged in interstate commerce at the time respondent was injured.

The court held that the plaintiff was not obliged to show a violation of the safety appliance act in the matter of not coupling the air, as any showing of negligence would make out a case under the Liability Act. The judgment was, however, reversed because of errors in the admission of evidence.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHING CAR WITH INTERSTATE SHIPMENT, ON REPAIR TRACK—*Bolch* v. *Chicago, Milwaukee & St. Paul Railway Co., Supreme Court of Washington (Feb. 29, 1916), 155 Pacific Reporter, page 422.*—John M. Bolch was injured while in the employ of the railroad company named as a member of a switching crew in the yards at Tacoma. The crew was engaged at the time of the injury in taking certain repaired cars off the repair track, so that other cars to be repaired might be placed thereon. Bolch brought action for damages, and judgment was for the company in the superior court, Pierce County. The employee appealed, objecting to certain instructions given to the jury at the trial. The supreme court reversed the judgment and remanded the case for a new trial. Judge Ellis, who delivered the opinion, said in part:

The court after defining interstate commerce and intrastate commerce in general terms and telling the jury that the appellant could not recover unless at the time of his injury he was employed in interstate commerce, gave an instruction as follows:

"If, on the other hand, you find that the movement of the cars at the time plaintiff was injured was not for the purpose of furthering or aiding in the forwarding of the car or cars so loaded for a destination outside the State on its journey toward such destination, but was merely for the purpose of moving said car or cars off one track to another in the same yard, or for the purpose of taking said car or cars out of the track in which they stood in order that the switching crew might take out other cars out of the same track, and afterwards

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put back the cars so loaded into the same or another track where they would remain for the same purpose for which they were originally placed in the yard, and that the real purpose of the movement of cars at that time was to enable the switching crew to keep certain empty cars then located on the repair tracks of the said company, that they might transfer them to another yard of the company where they would be subject to any use to which the company might later designate them, then I instruct you that the plaintiff was not at the time engaged in interstate commerce, and that the movement of the cars in which they were engaged was not for the purpose of furthering or aiding the operations of interstate commerce, and the plaintiff can not recover in this action for any injuries he may have received by falling from the car in the manner he alleges."

The giving of these instructions is assigned as the sole ground of error. Manifestly the last was tantamount to an instruction that upon the facts shown the appellant could not recover. The history of the Employers' Liability Act and its remedial purpose impel to the conclusion that it should be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose notwithstanding the fact that it is in derogation of the common law. [Cases cited.]

When the employer is engaged in interstate commerce by railroad, the specific labor in which the employee is engaged at a given time takes its character as a part of State or interstate commerce, not from the nature of his general employment nor from the nature of the specific work, but from the relation of that work to interstate commerce. The same specific act with one set of concomitants may be a part of interstate commerce and with another set a part of intrastate commerce. The same employee, without the slightest change in the intrinsic nature of his habitual tasks, may pass many times daily from employment in one kind of commerce to the other. (New York Central & Hudson River Railroad Co. *v.* Carr, 238 U. S. 260, 35 Sup. Ct. 780 [Bul. No. 189, p. 92].) Each case therefore must depend upon its peculiar facts. When these are conceded or established by proof so conclusive that there can be no reasonable difference of opinion, the question is one for the court. When not so conceded or conclusively established, the question is one for the jury under proper instructions. (North Carolina R. Co. *v.* Zachary, 232 U. S. 248, 34 Sup. Ct. 305 [Bul. No. 169, p. 83]; Pennsylvania Co. *v.* Donat, 239 U. S. 50, 36 Sup. Ct. 4 [Bul. No. 189, p. 105].)

In passing upon the sufficiency of the instructions, therefore, we must assume that one of the three unrepaired cars which were being replaced upon the repair track was loaded with lumber for South Dakota. There was competent evidence tending to establish that fact. The question of fact was for the jury. If so loaded, that fact fixed its status for the time as an interstate car. The interstate transportation to which it was then devoted was not ended merely because the car had become temporarily disabled and was placed upon the repair track where it was awaiting its turn for repairs. While so placed and waiting it was still in interstate commerce. [Cases cited.] The repairing of an interstate car, engine, or tender essential to its interstate progress is as much a part of interstate commerce as its subsequent progress. [Cases cited.]

The judgment is reversed, and the cause remanded for a new trial.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHING TO REPAIR TRACK—SAFETY APPLIANCES—*Great Northern Railway Co. v. Otos, Supreme Court of the United States (Dec. 13, 1915), 36 Supreme Court Reporter, page 124.*—H. W. Otos brought action for personal injuries, the application of the safety appliance act and the Employers' Liability Act being involved. The facts and the decision of the court are shown in the opinion by Mr. Justice Holmes, affirming a judgment of the Supreme Court of Minnesota (150 N. W. 922) in the employee's favor:

This is an action under the safety appliance act and employers' liability act. The plaintiff (defendant in error) was a switch foreman and was breaking up a train that had come into his State from the West. At the moment when he was hurt he had three cars attached to a switching engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The automatic coupler on the Minneapolis car was out of order, the pin lifter was missing, other repairs were needed, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going further. In the switching operation the plaintiff, being unable to uncouple the Duluth car from the side where the pin lifter was missing without going between the cars, did so while the cars were moving, and was badly hurt. The jury was instructed that if the injuries "were due directly to the absence and imperfect working condition of the coupler in question" the defendant would be liable. The plaintiff got a verdict and judgment was ordered for $30,000, which order was affirmed by the supreme court of the State.

The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the act of March 2, 1893, does not apply; that if it does apply, the defendant was required by that act and the supplementary act of April 14, 1910, to remove the car for repairs, and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was a person intrusted by it with the details of the removal, and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument can not prevail.

The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the act of Congress. (Delk *v.* St. Louis & San Francisco Railroad Co., 220 U. S. 580, 31 Sup. Ct. 617 [Bul. No. 96, p. 845].) As the safety appliance act governed the case, it imposed an absolute liability upon the carrier. (St. Louis, Iron Mountain & Southern Ry. Co. *v.* Taylor, 210 U. S. 281, 28 Sup. Ct. 616 [Bul. No. 78, p. 578]; Chicago, Burlington & Quincy R. R. Co. *v.* United States, 220 U. S. 559, 31 Sup. Ct. 612 [Bul. No. 96, p. 860].) The supplementary act of April 14, 1910, relieves the carrier

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from the statutory penalties while the car is being hauled to the nearest available point where it can be repaired, but expressly provides that it shall not be construed to relieve from liability for injury to an employee in connection with the hauling of the car. The next section recites that under section 4 the movement of a car with defective equipment may be made within the limits there specified without incurring the penalties, "but shall in all other respects be unlawful."

Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the act of 1910 imports, with unmistakable iteration, that the liability exists. Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense. (Grand Trunk Western Ry. Co. *v.* Lindsay, 233 U. S. 42, 34 Sup. Ct. 581 [Bul. No. 169, p. 99].) In view of the statutes, it is unnecessary to consider the limits to the plaintiff's authority by his instructions from above. In any view of the evidence he was not withdrawn from the protection of the acts.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHMAN DISTRIBUTING CARS FROM INTERSTATE TRAIN—ASSUMPTION OF RISK—*Seaboard Air Line Railway* v. *Koennecke, Supreme Court of the United States (Dec. 13, 1915), 36 Supreme Court Reporter, page 126.*—Action was brought against the railway company named by the administratrix of J. Y. Koennecke, who was killed while acting as switchman in its employ in its yards at Cayce, S. C. The declaration at first apparently contemplated the recovery of damages under the Lord Campbell's law of the State, but in view of certain testimony the plaintiff applied for leave to amend so as to bring the action specifically under the Federal Employers' Liability Act, and this was allowed. A verdict in favor of the plaintiff for $22,500 was sustained by the State supreme court, and appeal was taken to the Supreme Court of the United States. After holding that the continuation of the trial after allowing the amendment was not in violation of the due process of law provision of the fourteenth amendment, Mr. Justice Holmes, who delivered the opinion, settled the other points involved also in favor of the original plaintiff, the remaining portion of the opinion being as follows:

Next it is urged that there was no evidence that the deceased was employed in interstate commerce. The deceased was engaged in distributing the cars from an interstate train and clearing the track for another interstate train. We see no ground for dispute upon this point. (Illinois Central R. R. Co. *v.* Behrens, 233 U. S. 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91].)

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The suggestion that the train that had come in being a local train it might have dropped all the cars that came from outside the State and taken up others, appears to us to present too remote a possibility to warrant withdrawing the case from the jury. (See New York Central & Hudson River R. R. Co. *v.* Carr, 238 U. S. 260, 35 Sup. Ct. 780 [Bul. No. 189, p. 92].)

We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train and no warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its argument and in its briefs, we are of opinion that the judgment should be affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TAKING ENGINE TO REPAIR SHOP—*Chicago, Rock Island & Pacific Railway Co.* v. *Wright et al., Supreme Court of the United States (Jan. 10, 1916), 36 Supreme Court Report page 185.*—The facts in this case, and the reasons for the decision that they brought the case under the Federal Employers' Liability Act, are shown in the following quotation from the opinion delivered by Mr. Justice Van Devanter:

This was an action against a railroad company by personal representatives to recover for the death of their intestate, an employee of the company, resulting from a collision of two locomotives on the company's railroad at Lincoln, Nebr. One of the locomotives was a switch engine returning to the city from an adjacent transfer track, and the other a road engine on the way to a distant repair shop. The former was in charge of a switching crew, and the latter of an engine crew in which the intestate was the engineer. At the place of the collision the track is in a deep and curved cut which shortens the view along the track. The causal negligence set up in the petition included allegations that the defendant negligently failed to provide a suitable rule regulating the speed and movement of switch engines through the cut; that the switch engine was being run through the cut at a negligent, reckless, and dangerous rate of speed, and without its engineer having it under control, and that when the employees in charge of it came within view of the other engine they negligently jumped to the ground without reversing their engine or attempting to stop it, notwithstanding it reasonably and safely could have been stopped in time to avoid the collision. The answer denied all that was alleged in the petition, and charged the intestate with gross

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contributory negligence and an assumption of the risk. The petition described the road engine as moving from one point to another in Nebraska, and said nothing about interstate commerce, but the answer alleged that this engine was being taken to a point in another State, and that the defendant was engaged and the intestate was employed in interstate commerce. At the trial the evidence disclosed that the defendant was operating a railroad extending through Kansas, Nebraska, Iowa, and other States; that the road engine was on the way from Phillipsburg, Kans., to Council Bluffs, Iowa; that the train order under which the intestate was proceeding at the time read, "Engine 1486 will run extra Fairbury to Allbright," both points being in Nebraska, and that when Allbright was reached another order was to be given, covering the remainder of the trip. Notwithstanding the allegation in the answer and this evidence, the court submitted the case to the jury as if it were controlled by the employers' liability act of Nebraska, and not by the act of Congress. The plaintiff had a verdict and judgment, and the latter was affirmed by the supreme court of the State. (94 Nebr. 317, 143 N. W. 220, 96 Nebr. 87, 146 N. W. 1024.) The defendant prosecutes this writ of error.

It is entirely clear that taking the road engine from Phillipsburg, Kans., to Council Bluffs, Iowa, was an act of interstate commerce, and that the intestate, while participating in that act, was employed in such commerce. That the engine was not in commercial use, but merely on the way to a repair shop, is immaterial. It was being taken from one State to another, and this was the true test of whether it was moving in interstate commerce. (See North Carolina R. Co. *v.* Zachary, 232 U. S. 248, 34 Sup. Ct. 305 [Bul. No. 169, p. 33].) The courts of the State rested their decision to the contrary upon the train order under which the intestate was proceeding, and upon the decisions in Chicago & North Western Railway Co. *v.* United States, 168 Fed. 236, and United States *v.* Rio Grande Western Railroad Co., 174 Fed. 399. In this they misconceived the meaning of the train order and the effect of the decisions cited. The order was given by a division train dispatcher, and meant that between the points named therein the engine would have the status of an extra train, and not that it was going merely from one of these points to the other. The cases cited arose under the safety appliance acts of Congress, and what was decided was that those acts were not intended to penalize a carrier for hauling to an adjacent and convenient place of repair a car with defective appliances, when the sole purpose of the movement was to have the defect corrected, and the car was hauled alone, and not in connection with other cars in commercial use. It was not held or suggested that such a hauling from one State to another was not a movement in interstate commerce, but only that it was not penalized by those acts.

As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the employers' liability act of Congress; and as that act is exclusive and supersedes State laws upon the subject, it was error to submit the case to the jury as if the State act were controlling. (Wabash Railroad Co. *v.* Hayes, 234 U. S. 86, 34 Sup. Ct. 729 [Bul. No. 169, p. 77], and cases cited.)



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It was then pointed out that in the matter of contributory negligence, where lies the only real difference which might affect this case, the State act is more favorable to the company, and therefore the error was not prejudicial to it. The judgment was therefore affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WORKMAN ON EXCAVATION FOR NEW BRIDGE—*McKee* v. *Ohio Valley Electric Railway Co., Supreme Court of Appeals of West Virginia (April 4, 1916), 88 Southeastern Reporter, page 616.*—G. L. McKee brought action, as administrator, under the Federal Employers' Liability Act, for the death of Cecil C. Perdue. The latter was killed by a fall of earth, while working in an excavation for an abutment of a bridge being built to carry the tracks of the railway over a small stream, and to take the place of a trestle then in use. The circuit court of Cabell County gave judgment in the plaintiff's favor for $6,000, but the supreme court of appeals held that the plaintiff was not engaged in interstate commerce and therefore could not maintain an action under the Federal law, and reversed the judgment. In connection with a review of the leading decisions on the subject, Judge Poffenbarger said in part:

Perdue was not doing any work on any structure or other instrumentality in actual railway use at the time of his injury. Only in respect of its intended use and the status and character of the company by which it was performed did the work bear any relation to interstate commerce.

The act as we interpret it in the light of the precedents found in the decisions of the Federal courts, is not broad enough to bring an employee in such work as the evidence shows Perdue was doing, within its protection and benefits. Hence the court erroneously refused to give a peremptory instruction to find for the defendant.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—YARD CLERK—*Pecos & Northern Texas Railway Co.* v. *Rosenbloom, Supreme Court of the United States (Mar. 13, 1916), 36 Supreme Court Reporter, page 390.*—The Supreme Court of Texas affirmed a judgment in favor of the widow of M. A. Rosenbloom, who sued under the State law as administratrix for the benefit of herself and children and also of the surviving parents. That decision is reported in 177 S. W. 952, and noted in Bulletin No. 189, page 114. The United States Supreme Court reversed this decision, Mr. Justice McReynolds, who delivered the opinion, saying:

Among other things the amended petition alleges: That Rosenbloom was employed by the railway as ticket clerk and required to be in and at the switch yard in order to take and preserve a record

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of numbers on outgoing cars and to seal those which needed it. That when the accident occurred a long freight train was leaving the yard on its regular run along switch track No. 4; as required by his duties, Rosenbloom was walking between tracks 4 and 5, and near the train, observing and noting car numbers; while so engaged and exercising due care a ballast car, negligently pushed along track No. 5, struck him with great violence and caused his death.

It conclusively appears from the evidence that the freight train on track 4 consisted of thirty-odd cars moving, with one exception, in interstate commerce. The petition declares that, in pursuance of his duty, deceased was taking the numbers of these cars; there was some direct evidence to the same effect; and certainly enough had been shown to support a finding that when killed he was engaged in interstate commerce. The trial court refused the following instruction:

"If M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably carried on by defendant as a part of its business, transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues."

Upon a clearly erroneous assumption that there was nothing on which to base such request, the supreme court approved its refusal. The record discloses no proper reason for thus denying plaintiff in error a right claimed under the Federal Employers' Liability Act. If when struck deceased was employed in interstate commerce, the right of recovery depended upon that act; and it only permits suit by a personal representative for the benefit of surviving widow or husband and children if there be such. It is unnecessary to take up other points presented by counsel; the purpose and effect of the Federal legislation has been much discussed in our recent opinions. [Cases cited.]

The judgment below is reversed and the cause remanded to the Supreme Court of Texas for further proceedings not inconsistent with this opinion.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIMITATION—RIGHT OF ACTION FOR DEATH—*American Railroad Co. of Porto Rico* v. *Coronas, United States Circuit Court of Appeals, First Circuit (Mar. 1, 1916), 230 Federal Reporter, page 545.*—Coronas, as administrator of a deceased employee, brought action against the company named to secure damages for the death of the latter while engaged in interstate commerce. The death occurred December 8, 1908, from injuries sustained on November 30 of the same year. The administrator was appointed May 12, 1914, and he began the action December 17, 1914. Judgment was in his favor in the district court, in accordance with the verdict of a jury. A demurrer to the declaration, based on the fact that the action was

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not brought within two years after the death, had been overruled, and to this decision the company excepted. The court held that under the Federal Employers' Liability Act the period of limitation runs from the time the right of action accrues, and that the qualification of the representative fixes this time. The judgment was affirmed, Judge Bingham, who delivered the opinion, thoroughly examining the precedents and saying in conclusion:

In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—INSTALLATION OF NEW APPLIANCES—QUESTION FOR JURY—*Chicago & Northwestern Railway Co.* v. *Bower, Supreme Court of the United States (June 5, 1916), 36 Supreme Court Reporter, page 624.*—William Bower brought action against the company named for damages for personal injuries sustained by him while in its employ in interstate commerce. He was an engineer, and was injured by the breaking of a lubricator of a kind known as the Nathan lubricator. This type had been exclusively used up to three or four years previous to the accident, when a much safer kind, known as the Bull's Eye, came into use, and at the time of this accident had been installed upon the greater part of the engines, especially upon high-pressure engines such as was the one handled by Bower. Judgment in the district court for Holt County, Nebr., was in his favor, and was affirmed by the supreme court of that State. At the trial the question of the company's negligence in equipping the locomotive with a lubricator of that sort was submitted to the jury. The propriety of submitting this to their decision as a question of fact, and the question of assumption of risk, were discussed on the appeal to the United States Supreme Court, and the judgment was again affirmed. Mr. Justice Pitney delivered the opinion, and, after reviewing the trial and the evidence submitted, said as to the subject of negligence:

The principal controversy is as to whether the evidence was sufficient to go to the jury upon the question of defendant's negligence in furnishing the locomotive in question with a lubricator having tubular glasses as described.

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The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. (Washington & G. R. Co. *v.* McDade, 135 U. S. 554, 10 Sup. Ct. 1044; Patton *v.* Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275.) In our opinion, a correct application of this rule required the present case to be submitted to the jury. Properly limiting the inquiry (and, as we have seen, the trial court did so limit it), there was no question of attributing negligence to an employer for merely failing to promptly install the latest, best, and safest appliance; it was a question of keeping an older type of appliance in use after its insufficiency had been demonstrated by experience, and perhaps under conditions materially different from those which had obtained when its use began, in the face of notice that it was not reasonably safe and suitable. It was reasonably inferable from the evidence that the defendant's experience had shown that a glass tube capable of withstanding the lower pressures of 140 to 150 pounds could not be relied upon to withstand a pressure of 190 pounds, and that the difficulty could not be obviated, as was attempted, by using thicker glass for the tubes, because its very thickness increased the danger of bursting when steam was first admitted; there being evidence from a witness called by defendant that the older type of lubricator was a dangerous instrument to be used upon a high pressure boiler, and that they broke rather frequently; that it was for this reason, in part, that defendant had introduced the Bull's Eye, beginning three or four years before the accident, installing them first upon high-pressure engines of the Q and R classes, and having already placed them upon a majority of defendant's engines of all sizes. In this state of the evidence it could not be said, as matter of law, that defendant was free from negligence in delaying so long to install a Bull's Eye lubricator upon the engine in question.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—PROCEDURE—JURY—NONUNANIMOUS VERDICT—*Minneapolis & St. Louis R. R. Co.* v. *Bombolis, Supreme Court of the United States (May 22, 1916), 36 Supreme Court Reporter, page 595.*—The constitution and laws of Minnesota provide that when a jury does not reach a unanimous verdict within 12 hours in a civil case, five-sixths of the jury are authorized to reach a verdict with the same effect as a unanimous verdict at common law. In the second trial of the suit of George Bombolis against the company named under the Federal Employers' Liability Act, the judge instructed the jury as to their right to render a verdict under such circumstances, and the company objected on the ground of conflict with the seventh amendment to the Constitution of the United States, which provides for trials by jury, according to the course of the common law, i. e. by a unanimous

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verdict. The company excepted to the overruling of this objection, and the point thus raised was the only one remaining to be considered when the case reached the United States Supreme Court, on the company's appeal from a judgment in favor of the employee.

On this appeal the judgment of the court below was affirmed, the position being taken that the limitation does not extend to the State courts, which are governed as to mode of procedure by the State laws, even when enforcing rights conferred by a Federal statute.

The following quotation from the remarks of Mr. Chief Justice White, who delivered the opinion of the court, expresses the basis of the recognition of the provisions of the State law as valid:

> Lawful rights of the citizen, whether arising from a legitimate exercise of State or National power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the State or Nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, State or Nation, creating them.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—PROCEDURE—JURY—PENALTY FOR PROCURING SUPERSEDEAS—*Louisville & Nashville Railroad Co.* v. *Stewart, Supreme Court of the United States (May 22, 1916), 36 Supreme Court Reporter, page 586.*—Jeanette Stewart brought action under the Federal Employers' Liability Act against the company named, for the death of her husband. The verdict in the first trial, in her favor, was set aside by the Kentucky court of appeals, and on the second trial the verdict was again in her favor, but for a smaller amount. The United States Supreme Court held, when both parties appealed, that the claimant's contention that the first verdict should be reinstated could not be upheld, but also overruled the company's contention that the second should be set aside. Aside from the decision that the verdict was justified by the testimony, the point of interest is the sustaining of local procedure as applied to actions under the Federal law, first, as to the jurisdiction of a State court where nine or more of the twelve jurymen may agree upon a binding verdict, and second as to the addition of 10 per cent to a judgment where supersedeas or stay of proceedings is secured by a defendant and the judgment subsequently affirmed. Mr. Justice Holmes, who delivered the opinion, said upon these matters:

> The railroad company had for its principal object in bringing the case here to set up the seventh amendment, and to deny jurisdiction in any State court where a verdict of 9 or more out of the 12 men on the jury was allowed by the local law. The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least, as between the United States and

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a State, unless by procedure identical with that of the first, is disposed of in Minneapolis & St. Louis Railroad Co. *v.* Bombolis [241 U. S. 211, 36 Sup. Ct. 595; above].

The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the State to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So, the State may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as, but for such proceedings, interest would run as of course until the judgment was paid.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—RELEASE OF JOINT TORT FEASOR—BENEFIT ASSOCIATION—*Chicago & Alton Railroad Co.* v. *Wagner, Supreme Court of the United States (Dec. 20, 1915), 36 Supreme Court Reporter, page 135.*—Joseph M. Wagner brought action against the railroad company named for damages for personal injury. He was in the employ of the Chicago, Burlington & Quincy Railroad Co. as conductor in charge of a switching crew, and was engaged in moving cars over a track of the Alton company; the negligence of the latter company in placing a semaphore post too near the track was alleged. The employee had received benefits from the relief department of the Burlington company, and executed a release of all claims against that company and other companies associated with it in the administration of their relief departments; the Alton company was not such a company. It was insisted, however, that the two companies being joint wrongdoers, the release of one operated as a release of the other. Such a release of the employer is made void by the Federal Employers' Liability Act, and the employee relied upon this as making the release of no affect. This position was upheld by the Supreme Court, and the judgment of the Supreme Court of Illinois in the employee's favor (see Bul. No. 169, p. 100) was affirmed. The concluding portion of the opinion delivered by Mr. Justice Hughes is as follows:

The supreme court of the State said, after stating that there was no valid release to the plaintiff's employer: "If it" (the release) "was not valid so far as the Burlington company was concerned, it was clearly invalid as to the plaintiff in error, and constituted no defense to this action." This, as we view it, was but to say that the release could not aid the Alton company for the very plain reason that the alleged joint tort feasor had not been discharged. The State law did not recognize the discharge of the defendant by virtue of a release of a joint tort feasor which, under the law applicable thereto, was found to be without validity.

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The only Federal question which it can be said was decided was with respect to the validity of the release as between Wagner and the Burlington company. It is urged that section 5 was wholly inapplicable in an action against a third person to enforce a liability not created by the Federal act. The argument is, in substance, that in this action against the Alton company, inasmuch as it is not brought to enforce the liability imposed by the Federal statute, section 5 can not be considered for any purpose; that is, that under section 5 the release can be deemed to be invalid only so far as it is actually used to protect the Burlington company from liability in a suit against it under the act. This involves, we think, a fundamental misconception. It is, of course, impossible to determine whether a joint tort feasor is discharged except by asking what would happen if he were sued. The liability created by the act arose when the injury was received, and it is clear that if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. When, therefore, the Alton company sought to escape from liability, otherwise existing under the State law, by reason of a release to the Burlington company, it was entirely competent for the plaintiff to show the nature of his employment and that the asserted release was within the Federal statute, and could not operate as a discharge of the Burlington company with respect to the injury sustained. And the State court found upon abundant evidence that Wagner was engaged as an employee of that company in interstate commerce when he was hurt.

There was thus no misconstruction of the Federal act in holding that the contract between Wagner and the Burlington company, and his acceptance of benefits thereunder, did not release the latter from liability for the injury, and that under section 5 that company, assuming it to be a joint tort feasor, would merely have the right to set off any sum which it had contributed to the benefits received; and there was no denial by the State court of any Federal right in declining to treat the relief contract, and the acceptance of benefits, as a discharge of the Alton company.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—HOURS OF SERVICE ACT—EFFECT OF VIOLATION—*Atchison, Topeka & Santa Fe Railway Co. v. Swearingen, Supreme Court of the United States (Dec. 13, 1915), 36 Supreme Court Reporter, page 121.*—Claude Swearingen brought suit for personal injuries suffered by him while acting as fireman. He had been retained on duty for more than 16 hours in violation of the Hours of Service Act. Further facts, and the reasons for reversing a judgment of the court below in favor of the employee, are contained in the opinion delivered by Mr. Justice Holmes and quoted herewith:

While about to do some oiling according to directions, he fell from the running board of the pilot and his leg was cut off. There was evidence of negligence on the part of the railroad, but the defendant set up that the plaintiff was guilty of contributory negligence and

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assumed the risk. The only matter that we have to consider here is an instruction given to the jury touching the effect of keeping the plaintiff on duty overtime upon these matters alleged by the defense.

The delay that led to keeping the plaintiff on duty too long was caused by the breaking of a valve yoke, and a part of the charge was as follows: "If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of the plaintiff's injury, in requiring him to be on duty more than 16 hours. And if in the breaking of the valve yoke you find no such casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt."

The last half of this instruction was excepted to in the presence of the jury, but the charge was not modified. It was the one instruction specifically directed to the matter of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than 16 hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defenses of contributory negligence and assumption of risk in such a case is not the Hours of Labor Act itself, but the subsequent Employers' Liability Act of April 22, 1908. The latter has that operation only when the breach of the law contributes to the injury. St. Louis, Iron Mountain & Southern Railway Co. *v.* McWhirter, 229 U. S. 265, 33 Sup. Ct. 858 [Bul. No. 152, p. 104]. We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—NEGLIGENCE—RULES—OBSTRUCTIONS NEAR TRACK—*Humphfres* v. *Western Pacific Railway Co., Supreme Court of California (Nov. 2, 1916), 160 Pacific Reporter, page 415.*—Charles O. Humphfres was injured while in the employ of the company named, as a fireman, and brought action against the company. Judgment was in his favor in the superior court, Yuba County, and a motion for a new trial was denied, upon which the company appealed. The negligence alleged consisted in maintaining a signboard close to the track, while the company contended that the fireman was guilty of contributory negligence in protruding his body and head out of the locomotive so as to come in contact with the signboard. The fireman had been directed by the engineer to look after a hot box which had developed on the truck of the tank of the locomotive, on the left side. Water was allowed to run constantly

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through a hose into this box, and at times the fireman grasped the handholds of the cab and tender of the engine so as to look under the tender and see whether water was still running into the box. The signboard had been put up with the consent of the railroad company; it had been in place for a year, and was 55 inches from the rail, or 26 inches from the side of an engine standing on the track. In order to bring in a verdict for the plaintiff the jury must have found that while leaning from the engine as described, he was struck by this board, and that the severe injuries resulted from this and his fall from the train.

Judge Lawlor delivered the opinion of the court, and held that there was no error in giving certain instructions as to assumption of risk and contributory negligence, nor in admitting testimony to the effect that the fireman had not been warned as to the proximity of the signboard to the track. As to certain rules of the company, Judge Lawlor said, in part:

By instructions Nos. 7 and 8 the court charged the jury as follows:

"(7) You are hereby instructed that the violation by an employing company of a reasonable rule which it has made, where such violation results in an injury to an employee, is as much negligent conduct as a violation of the rule by the employee would be.

"(8) You are instructed that a system of rules adopted by a master for the conduct of a complicated business, such as operating a railroad, when brought to the knowledge of the employee, forms a part of the contract of hiring, and becomes binding on both master and servant. The violation thereof, to the injury of the servant by the master, is as much an act of negligence as if the servant violates them."

One of the rules imposed a duty upon the plaintiff to inform himself as to the proximity of the signboard to the track.

According to rule No. 383, the signboard should not have been as near as 55 inches from the track. The rule reads, in part:

"No building or structure should be allowed nearer than 8 feet of the rail of main track, nor nearer than 6 feet of the rail of any side track. Any violation of this regulation must be at once reported to the superintendent."

It is not contended that either of these rules is unreasonable, but it is claimed that the question whether a violation of a rule by an employer constitutes negligence is solely for the determination of the jury.

Examining these rules, we find that the jury could not have found against the defendant on the ground that the violation of the rules was negligence per se, except in the case of rule No. 383. Applying instructions Nos. 7 and 8 to this rule, it must be admitted that the jury was, in effect, instructed that the railroad company was negligent in permitting the signboard to be located just 55 inches from the track, instead of 8 feet, as provided in its rule. Had the company enforced the provisions of the rule the clearance between the signboard and the sides of a passing locomotive would have been at

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least 67 inches. The actual distance was 26 inches. This, in itself, is sufficient to constitute negligence on the part of the defendant. It is therefore our opinion that whatever error was committed by the instructions, was harmless under the facts of the case.

The judgment was therefore affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—APPLICATION OF PROVISIONS OF ACT—*Coleman* v. *Illinois Central Railroad Co., Supreme Court of Minnesota (Jan. 7, 1916), 155 Northwestern Reporter, page 763.*—Charles M. Coleman brought action against the company named for damages for personal injuries suffered by him on June 2, 1914, the negligence charged being violation of the supplemental safety appliance act approved April 14, 1910. He was a brakeman, and when he was attempting to climb upon a box car a rung of the ladder which was insecurely fastened pulled out, and he was thrown to the ground and injured.

Section 2 of the act in question provides that after July 1, 1911, it shall be unlawful for any common carrier subject to the provisions of the act to use upon its line any car not equipped with certain appliances, including ladders where required. Section 3 provides for a uniform equipment on all roads, the standard to be fixed by the Interstate Commerce Commission, that commission also to set the time when the uniform system must be installed. It was the contention of the company that section 2 also was suspended until such time as the commission should issue its order. The court held that section 2 imposed an absolute duty to maintain the appliances mentioned in safe condition for use, Judge Brown, who delivered the opinion, saying in part:

Congress had in mind that it would, as to some of the roads, be a practical impossibility to at once meet the demands of the new standard, and the commission was further authorized to extend to them such time as would afford full opportunity of compliance. But in so providing it clearly was not the intention that during the period taken for installing the standard equipment defective cars might be used and employed in the train service; nor was it intended that during that period section 2 of the act should remain inoperative.

Congress intended that section to be a part of the statute, and the clear language thereof can not be rejected, or held inoperative pending the installation of the standard of equipment to be ordered by the commission without running counter to the main purpose of the act. The section must therefore stand, as a part of the statute, and be construed as imposing the duty upon railroads of maintaining their car equipment in a secure and safe condition for use after July 1, 1911. Section 3 must be construed as a requirement of a uniform standard for such equipment, and that the extension of time within which to conform thereto has no reference to, and does not relieve from, the duty to maintain present equipment in secure and safe condition.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—BOILER ACT—BURDEN OF PROOF—*Virginian Railway Company* v. *Andrews, Supreme Court of Appeals of Virginia (Jan. 13, 1916), 87 Southeastern Reporter, page 577.*—Maude L. Andrews brought action against the railway company named for the death of A. W. Andrews. Judgment was in her favor in the supreme court of Montgomery County, but on appeal this was reversed. Judge Whittle, who delivered the opinion, thus differentiated the effect of the Boiler Act from other Federal acts applying to railroad operation:

It is insisted on behalf of the plaintiff that in legal intendment the Boiler Act is not to be distinguished from the original safety appliance act of March, 1893, and amendments, and the Employers' Liability Act of 1908. These latter acts have been construed by the Supreme Court of the United States to impose upon the carrier the absolute duty to provide and maintain proper couplers and other appliances therein mentioned at all times and under all circumstances. [Cases cited.]

It will be observed that the safety appliances considered in the foregoing and analogous cases, either work automatically, as couplers which operate by impact, or else are simple contrivances, as draw bars and the like, which are the objects rather than the subjects of action, and when once placed in position remain intact and discharge their functions until changed by some active agency. A locomotive engine, on the other hand, however perfect its condition may be, in its operation calls for the continuous exercise of a high degree of skill and experience, and the constant supervision and attention of the engineer. In other words, the two classes of instrumentalities are so inherently diverse in character and use that rules which would be reasonable and appropriate in respect to the one class would be impossible of practical application to the other. When the carrier has discharged his statutory duty to the engineer by turning over to him a locomotive engine and boiler and appurtenances in proper condition and safe to operate, it is not answerable to the engineer as an insurer of his safety throughout the run; and, in order for his personal representative to maintain an action for his death caused by the explosion of the boiler, the burden rests upon the plaintiff to show that the defendant has been guilty of the negligence charged in the declaration.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—COUPLERS—OPERATION—*Noel* v. *Quincy, Omaha, & Kansas City Railroad Co., Kansas City Court of Appeals, Missouri (Jan. 11, 1915), 182 Southwestern Reporter, page 787.*—Shelby P. Noel was injured while attempting to make a coupling between an engine and a car, and brought suit against the company for damages. A judgment in his favor was affirmed, Judge Ellison, in the opinion, speaking as follows as to the obligation of the railroad, under the Federal

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safety appliance act, to keep the mechanism in such condition that it will operate properly:

The mere fact that the carrier provides couplers proper in their material and construction, which are of standard make and are molded and constructed so as to be certainly capable of coupling by impact, will not alone be an entire performance of the duty which the Congress has imposed upon the carrier. Necessarily the couplers must be so attached to the cars, and kept attached, that they will perform the function required by the statute, viz, couple by impact.

In this case the couplers failed to perform by impact of the cars, and there was evidence tending to show that such failure was not due to a fault in their construction, but from the fact that the hole in the wood of the crossbeam of the car, through which the metal "neck" extended, had become worn and enlarged, so that it left too much room or "play," and permitted the couplers to pass by, instead of permitting the knuckles of the coupler to pass over each other and clasp, thus perfecting the coupling. We think a case was made against defendant.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—COUPLERS—OPERATION—*San Antonio & Aransas Pass Railway Co.* v. *Wagner, Supreme Court of the United States (June 5, 1916), 36 Supreme Court Reporter, page 626.*—William Wagner had his foot crushed in the coupling between an engine and a car. In attempting to couple the two he had made an impact once without success, and then, standing on the footboard of the engine, he started to push the drawhead into place with his left foot. As he did this the right foot slipped on the wet footboard and the left was injured. He brought suit against the company under the Federal Employers' Liability Act. Judgment was in his favor in the district court of Bexar County, and it was affirmed by the Court of Civil Appeals of Texas. This was again affirmed, Mr. Justice Pitney delivering the opinion, and saying as to matters of negligence by reason of defects in safety appliances, and of evidence:

There was sufficient evidence to warrant the jury in finding that the coupler upon the box car or that upon the engine, or both, were in bad repair, and that for this reason they did not measure up to the standard prescribed by the act of March 2, 1893, for such equipment, viz: "Couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." [Amendment of 1903 quoted.] As has been held repeatedly, this amendment enlarged the scope of the original act so as to embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles are at the time employed in interstate commerce or not. [Cases cited.]

That the act requires locomotives to be equipped with automatic couplers, and that its protection extends to men when coupling as

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well as when uncoupling cars, are points set at rest by Johnson *v.* Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158 [Bul. No. 56, p. 303].

It is insisted that neither the original act nor the amendment precludes adjustment of the coupler prior to or at the time of impact, or treats a drawbar out of alignment as a defect in the automatic coupler, or as evidence that the cars are not equipped with couplers measuring up to the statutory standard. The evidence of bad repair in the automatic equipment was not confined to the fact that the drawbar on the engine was out of line; the fact that the coupling pin on the box car failed to drop as it should have done at the first impact, and required manipulation in preparation for the second impact, together with the fact that the drawbar on the engine was so far out of line as to require adjustment in preparation for the second impact, and the opinion evidence being sufficient to sustain a finding that the equipment was defective. The jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided upon the engine as upon the car, and that there was none upon the engine. We need not in this case determine what was conceded in Chicago, Rock Island & Pacific Railway Co. *v.* Brown (229 U. S. 317, 33 Sup. Ct. 840), that the failure of a coupler to work at any time sustains a charge that the act has been violated.

It is argued that in actions based upon the Employers' Liability Act the defendant can not be held liable without evidence of negligence; Seaboard Air Line Railway Co. *v.* Horton, 233 U. S. 492, 34 Sup. Ct. 635 [Bul. No. 169, p. 80], being cited. But in that case, as the opinion shows (p. 507), there was no question of a violation of any provision of the safety appliance act; and in what was said (p. 501) respecting the necessity of showing negligence, reference was had to causes of action independent of that act. The Employers' Liability Act, as its fourth section very clearly shows, recognizes that rights of action may arise out of the violation of the Safety Appliance Act. As was stated in Texas & Pacific Railway Co. *v.* Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 484 (see p. 205), "A disregard of the command of the statute [safety appliance act] is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." If this act is violated, the question of negligence in the general sense of want of care is immaterial. (241 U. S. 43, and cases there cited.) But the two statutes are in pari materia, and where the Employers' Liability Act refers to "any defect or insufficiency, due to its negligence, in its cars, engines, appliances," etc., it clearly is the legislative intent to treat a violation of the safety appliance act as "negligence,"—what is sometimes called negligence per se.

In various forms plaintiff in error raises the contention that it was plaintiff's improper management of the coupling operation that was the proximate cause of his injury. But any misconduct on his part was no more than contributory negligence, which, as already shown, is, by the Employers' Liability Act, excluded from consideration in a case such as this.

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EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—CONSTITUTIONALITY OF STATUTE—LIABILITY OF OWNER—*Butera* v. *Mardis et al., Supreme Court of Nebraska (May 13, 1916), 157 Northwestern Reporter, page 1024.*—Giovanna Butera brought suit for the death of her husband against the J. C. Mardis Co. and the Sterling Realty Co. The Mardis company was contractor for the erection of a building on a lot owned by the realty company, and Butera was killed in the employ of the building company by the fall of a load of material suspended by a derrick over a walk along which he was passing. The realty company contested the constitutionality of the statute providing for the safety of employees on buildings, etc., in so far as it applies to the owner, but the court, affirming a judgment in favor of the plaintiff, held that it is valid and applicable. The portion of the statute objected to, and a part of the language used by Judge Sedgwick in upholding its validity and stating its proper interpretation, is herewith reproduced:

"The owner, contractor and subcontractor, if any, shall in all cases be held liable for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them, to comply with the provisions of this article."

When the owner of real estate makes a contract for building thereon, he can in that contract protect himself against any misconduct or neglect of the contractor and can require such guaranty as he deems necessary for his protection. If this statute affects the right of free contract, or if the public benefit that comes from protecting laboring men against the dangers of their employment will not justify such legislation, such questions of public policy, if doubtful in their application, are for the legislature and not for the courts. We conclude that this legislation does not violate our fundamental law.

It is suggested in the briefs that the word "owner" should be construed to apply to the contractor himself while he is in the exclusive possession and control of the building in process of construction, and not to the owner of the real estate until the completed building is delivered to him pursuant to the contract. The statute makes both the owner and contractor liable for the neglect of the subcontractor, and "for the failure or neglect of any superintendent, foreman, or other agent, employed by them, or either of them." It could not be intended that a subcontractor, for instance a plumber, who would contract to furnish the plumbing of the building should be considered the owner. The intention plainly was to make all those liable through whom the negligent party derived the right to perform the service; that is, all those who made his employment possible. This would include the owner of the real estate who originated and authorized the improvement.

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EMPLOYERS' LIABILITY—SUITS AGAINST COUNTIES—*Rapp* v. *Multnomah County, Supreme Court of Oregon (Oct. 19, 1915), 152 Pacific Reporter, page 243.*—Charles Rapp brought suit under the

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employers' liability act of Oregon enacted in 1911, for damages for injuries suffered by him while in its employ, in repairing the approach to a ferry across the Willamette River. Judgment in his favor in the sum of $100 was rendered in the circuit court of Multnomah County, but the county appealed, contending that a suit could not be maintained against the county for its wrong because the only authorization of suits against counties is that contained in section 358, Lord's Oregon Laws, which provides:

> An action may be maintained against any of the organized counties of this State upon a contract made by such county in its corporate character, and within the scope of its authority, and not otherwise.

Judge Burnett upheld this contention, saying in part:

> These are plain words, and exclude an action for tort, unless the right to maintain the same can be derived from the employers' liability act. It is the settled rule in this State that neither the State itself, nor one of its counties, which are but instrumentalities of the State in exercise of its sovereignty, can be sued, unless upon express permission given by the legislative power in the form of a statute permitting the same.
>
> Section 358, L. O. L., can not be held to be repealed or amended by mere inference under the employers' liability act, which does not explicitly mention counties as within its scope.
>
> Much was said at the argument to the effect that the county ought to provide for the safety of its employees like any other employer, but this constitutes only moral obligation, and until the legislative power grants permission to sue a county, which is one of the State's governmental instrumentalities, the mere ethical duty can not be recognized by the judiciary. The county was not amenable to this action.
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> The judgment of the circuit court is reversed.

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EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—WORKSHOP—OPERATING ELEVATOR IN OFFICE BUILDING—*Remsnider* v. *Union Savings & Trust Co., Supreme Court of Washington (Jan. 5, 1916), 154 Pacific Reporter, page 135.*—A. Remsnider brought a common-law action against the company named for personal injuries suffered by him while in its employ as janitor in a building owned by it. He was instructed by the head janitor to go into the elevator shaft beneath the cage and scrub the walls and doors. While he was so employed the cage was run down, and it crushed him between its bottom and the board across the shaft upon which he was. Judgment in the superior court of King County was in his favor for $5,000, and the company appealed, claiming that the employee was engaged in extrahazardous work under the workmen's compensation act, and that his remedy was therefore under that act. Section 2 of the act states that it shall apply to all inherently hazardous work,

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including factories, mills, and workshops where machinery is used. Section 3 defines a workshop as a room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise. The court affirmed the judgment, reviewing the case of Wendt *v.* Industrial Insurance Commission, 141 Pac. 311 (Bul. No. 169, p. 238), and holding that the place of this employee's work could not be considered a workshop; it also relied upon the case of Guerrieri *v.* Industrial Commission, 146 Pac. 608 (Bul. No. 189, p. 242), where an elevator operator was held not within the act. Judge Ellis, who delivered the opinion, used, in part, the following language:

Though the respondent was injured in a place where power-driven machinery was employed, it can not by the widest stretch of the meaning of the statute be termed a workshop. Though his regular employment was at times fraught with hazard, as are all employments, it was not one which, to use the language of section 2 of the act, has "come to be, and to be recognized as being inherently and constantly dangerous." Neither was it connected with any of the occupations enumerated as extrahazardous in section 2, nor is it mentioned in any of the schedules in section 3 or in any of the classifications in section 4.

Neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extrahazardous.

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EMPLOYERS' LIABILITY INSURANCE—ACCIDENTAL RISKS—TYPHOID FEVER FROM DRINKING WATER—*Aetna Life Insurance Co.* v. *Portland Gas & Coke Co., United States Circuit Court of Appeals, Ninth Circuit (Feb. 7, 1916), 229 Federal Reporter, page 552.*—The gas company named, being engaged in the construction of a gas plant, and employing a large number of men, secured insurance against claims for damages on account of bodily injuries or death accidentally suffered. Certain of the employees contracted typhoid fever from the water furnished by the company, and it was compelled to pay damages. This suit was brought to recover the amount from the insurance company. The gas company prevailed in the district court, whereupon the case was taken by the insurance company to the court of appeals. The contention made was that the disease did not constitute a bodily injury accidentally suffered, within the meaning of the policy. The judgment of the court below was affirmed, Judge Ross, who delivered the opinion, reasoning as follows, in addition to quoting from the opinions in previous cases:

Of course it is not and can not be doubted that the workmen were bodily injured by the drinking of the water in the course of the work, for it contained typhoid germs, which gave them typhoid fever; but it is insisted on the part of the plaintiff in error that in drinking the water they were but satisfying a natural want, and that in doing so there was no accident about it. It is readily conceded, of course,



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that there could be no accident in merely drinking water, but it is just as certain that the men would not have drunk it had they known that the water contained typhoid germs. The accident consisted in that unexpected happening. Among the definitions of the word "accidental," in most, if not in all, of the dictionaries, is the happening of "something unexpectedly, unintentionally." Suppose, instead of containing typhoid germs, as in the present case, the water that the employees of the assured consumed had contained some of the most virulent poisons, would anyone contend that the injuries resulting therefrom could not be properly held to have been accidentally inflicted? We think not, and yet, in our opinion, there is no substantial distinction between the case supposed and the case at bar.

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EMPLOYERS' LIABILITY INSURANCE — GARNISHMENT — *Maryland Casualty Co. v. Peppard, Supreme Court of Oklahoma (May 2, 1916), 157 Pacific Reporter, page 106.*—Onno Peppard recovered damages from the Oklahoma City Construction Co. and W. B. Skirvin for the death of an employee, the action being defended by the casualty company. The defendants being bankrupt and Peppard being unable to collect the judgment from them, he garnisheed the casualty company as being indebted to the employers. The company contended that it was not liable to pay the loss until it had been paid by the assured. The policy did not contain a provision that no action shall lie against the company except by the assured himself for loss actually paid, and the court held that in such a case the policy was one to indemnify against liability, and that the final judgment in the prior case became as between the three parties a debt owing by the company to the assured, which the plaintiff Peppard might reach by garnishment. A judgment of the lower court in favor of the plaintiff was allowed to stand, though modified as to its amount by other considerations.

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EMPLOYMENT OFFICES—LICENSING AND REGULATION—POWERS OF COMMISSIONER OF LABOR—CONSTITUTIONALITY OF STATUTE—*Brazee v. People, Supreme Court of the United States (May 22, 1916), 36 Supreme Court Reporter, page 561.*—Public act No. 301 of Michigan, 1913, for the regulation of private employment offices, was held valid by the supreme court of that State upon the appeal of one Brazee, who had been convicted of violation of its provisions (People *v.* Brazee, 149 N. W. 1053, Bul. No. 189, p. 123). On further appeal to the Supreme Court of the United States his contention was that the statute is inconsistent with the fourteenth amendment to the Constitution of the United States. The Supreme Court affirmed the judgment of the State court in an opinion by Mr. Justice McReynolds, from which the following is quoted:

The Supreme Court of Michigan held "the business is one properly subject to police regulation and control;" the prescribed license fee

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is not excessive; provisions of the State constitution in respect of local legislation are not infringed; and no arbitrary powers judicial in character are conferred on the commissioner of labor. But it did not specifically rule concerning the validity of limitations upon charges for services specified by section 5.

Considering our former opinions it seems clear that without violating the Federal Constitution a State, exercising its police power, may require licenses for employment agencies, and prescribe reasonable regulations in respect of them, to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them. [Cases cited.] In its general scope, and so far as now sought to be enforced against plaintiff in error, the act in question infringes no provision of the Federal Constitution. The charge relates only to the plainly mischievous action denounced by section 6 [relating to fraud, etc.]. Provisions of section 5 in respect of fees to be demanded or retained are severable from other portions of the act, and, we think, might be eliminated without destroying it. Their validity was not passed upon by the Supreme Court of the State, and has not been considered by us.

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EMPLOYMENT ON PUBLIC WORKS—PREFERENCE OF CITIZENS—CONSTITUTIONALITY OF STATUTE—*Lillard* v. *Melton et al., Supreme Court of South Carolina (Dec. 17, 1915), 87 Southeastern Reporter, page 421.*—The Legislature of South Carolina at its session of 1915 passed an act relative to the issue of bonds by Richland County for permanent highway improvement, providing also for a license tax on all vehicles and a property tax to pay the same. Suit was brought against the members of the county commission for permanent highways, to enjoin the issue of the bonds. Many objections were made to the validity of the law, but it was held constitutional, and a judgment for the defendants affirmed. The only matter of interest from a labor standpoint was with regard to the provision that laborers should be selected from among the citizens of the county. With reference to this, Judge Smith, who delivered the opinion, said:

It is provided in section 5 of the act that all laborers to be employed in the construction of the work contemplated therein, with an exception in favor of officers, superintendents, and skilled mechanics, who can not be obtained in the county, shall be actual residents of the county. It is contended that this provision is in contravention of section 5, article 1, of the State constitution and the fourteenth amendment to the Federal Constitution. The objection is clearly untenable. There is an absence of any penalty to enforce this provision, thereby indicating a legislative intent to make the same purely suggestive or directory. Conceding, however, that the provision was mandatory, the objection could not be sustained, as no citizen of one county has the legal right to demand that he shall be employed upon the public works of another, and certainly the legislature, in directing the use or disposition of the public property or funds of the State or

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county, raised by taxation upon the people of either, has the power to limit the benefits to be derived therefrom to the residents of either. Such is plainly the conclusion reached by the United States Supreme Court in the case of Truax *v.* Raich, 239 U. S. 33, 36 Sup. Ct. 7 (Bul. No. 189, p. 53), which is cited by the appellant.

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EXAMINATION AND LICENSING OF PLUMBERS—MASTER PLUMBERS—PRESCRIPTION OF PERIOD OF PREPARATION—*Commonwealth* v. *McCarthy, Supreme Judicial Court of Massachusetts (Nov. 28, 1916), 114 Northeastern Reporter, page 287.*—Eugene J. McCarthy was convicted of engaging in the business of a master plumber without being registered or licensed as such in conformity with the statutory provisions. He was licensed as a journeyman plumber, but under a rule adopted by the State examiners of plumbers and approved by the State board of health, he could not take an examination to qualify as a master plumber until three years after being licensed as a journeyman, or until March 25, 1917. He had a place of business and kept a stock of materials, and had employed journeymen to work with him, which facts brought him under the definition in the statute of master or employing plumber. The court held that the reasons for the decision in Commonwealth *v.* Beaulieu, 213 Mass. 138, 99 N. E. 955, holding the provisions as to journeymen constitutional, applied equally to the provisions respecting masters; and that while the board had erred in its attempt to fix a period within which the second examination could be taken, the defendant had not taken the proper method of procedure, so that his exceptions to the proceedings in which he was found guilty must be overruled. The following is quoted from the opinion delivered by Judge Rugg:

The statute does not provide that no one can be licensed as a master plumber until after he has held a license as a journeyman plumber for three years. It does not authorize the making of any rule to that effect.

The legislature has never conferred power upon a board to prescribe a period of preparatory study before an examination could be taken, without explicit words to that effect, even for professions requiring a high degree of skill. Since the statute neither makes any provision as to the time for preparation for an examination nor undertakes to authorize any subordinate board to make a rule governing that subject, it is unnecessary to consider the delicate and serious constitutional question whether a statute or rule, to the effect that no one could be licensed as a master plumber until he had been licensed as a journeyman plumber for three years, would be valid.

But the invalidity of the rule which unjustly prohibited the defendant from taking an examination for license as a master plumber does not justify him in carrying on the business of master plumber

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without a license. His remedy is to bring a petition for a writ of mandamus to compel the proper board to give him a reasonable examination as to his qualifications to be a master plumber. [Cases cited.] The fact that the examiners, who are amenable to the writ of mandamus, made a mistake of law as to their power to prescribe a period of experience before giving an examination does not warrant the defendant in proceeding, without resort to the courts, to violate the terms of the statute.

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FACTORY REGULATIONS—FIRE ESCAPES—CRIMINAL RESPONSIBILITY OF OWNER AND AGENT ON CHARGE OF MANSLAUGHTER—*People* v. *Diamond et al., Kings County Court, New York (April, 1916), 160 New York Supplement, page 603.*—Celia Diamond and others were indicted for manslaughter in the first degree and manslaughter in the second degree, and filed demurrers to the indictments. The charges grew out of a fire in a factory building in the Borough of Brooklyn, on November 6, 1915, which had fatal results. The court, Judge Dike delivering the opinion, held that the indictments were sufficient, and so overruled the demurrers. The various necessary allegations to show that the death was caused by the committing of a misdemeanor (violation of the labor law) were examined, and held to apprise the defendants sufficiently of the charges against them. It was alleged that the defendants failed to keep the doors in the factory unfastened, as required by that law, and specifically that they allowed the door at the head of the stairs leading from the fourth floor to the third floor "to be and remain locked, bolted, and fastened during working hours, and while the employees were at work in said building." As to the labor law and its application to the case Judge Dike said:

In the admirable opinion of Judge O'Sullivan in the case of People *v.* Harris (134 N. Y. Supp. 409), which case is compelling authority to sustain the counts of these indictments, he says:

"For the protection of employees the law has placed upon the employer an obligation to leave all doors leading to his factory unlocked during working hours. There is no question of the legislature's intention when it declared that all doors shall open outwardly. A locked door opens neither inwardly nor outwardly. If any door leading to the factory was locked and bolted during working hours, the law was violated."

A reading of the labor law convinces me that the conduct of one charged as in this indictment may be simply that of omission on the part of an owner or agent to do a certain prescribed thing.

The argument that, because the indictments fail to show criminal intent on the part of the defendants, they are insufficient, seems to me to be without merit.

The authorities would seem to clearly uphold the proposition that an owner who may not personally participate in the violation of the

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law, or may be without knowledge of its violation by his or her agent, may be guilty of a misdemeanor in failing to affirmatively see that the provisions of the labor law are complied with in respect to his or her property. That very contention has been upheld in the second department in the case of People *v.* J. Albert & Son (165 App. Div. 828, 150 N. Y. Supp. 1102). In that case the defendant, as owner and occupant of one of the floors of a factory building, was charged with having bolted and fastened, during working hours, a door leading from the factory where a certain number of people were employed. An appeal to the appellate division was taken from a judgment of conviction. A reargument was ordered by the court upon the sole question whether the master is liable criminally for the acts of the servant in locking the door in the master's absence without general or specific instructions upon his part that it should be done. The judgment of conviction was affirmed after the reargument.

Nor do I see that under the law of this State the point that this was a fault of omission rather than of commission can prevail. In some States such a distinction would be possible. It seems to me that under our statute there are no exceptions, but that any one would be guilty of manslaughter who, while engaged in the commission of a misdemeanor, brings about the death of another.

The obvious intent of the legislature, under the labor law, was to fix and determine the obligations of a property owner, and the power of the legislature was never more strongly shown than when it holds an owner of a building, although absent, and, indeed, without knowledge of the acts of omission or commission, responsible for that situation. Grievous and onerous as is the burden upon owners and agents of owners of property under this law, especially relating to acts of omission, as in this case, followed by the serious situation of a charge of manslaughter, still it is only by the enforcement of such laws that careless landlords and lessees would be stimulated to take such measures in following the law as to relieve them of such a liability. It is intended to, and did, prescribe in this law punishment for violations thereof, so as to hold an owner to the keen care of his property where human life is in danger. "Responsibility prevents crime" was said by Burke, and while, perhaps, the phrase is general, still it contains the spirit of laws which seek to spur owners and those in charge of property to greater care and to discourage them from dereliction of duty.

As to any arguments upon the degree of culpability between the owners' or agent's guilt and that of one actually in charge of the premises in occupation and management thereof, those arguments are rather to be addressed to a petit jury, who would after hearing all the evidence, be in a position to decide as to such degrees of guilt.

A reading of the various sections of the labor law which have been discussed in this case would indicate the evident intent of the legislature, in this very elaborately constructed law, to definitely and explicitly fix and determine the parties who should be held responsible for any infraction of the law. Parties are defined and penalties are provided for omissions of these parties to follow the law as laid down. It is a serious obligation that devolves upon the owner of property under this law, but it seems to me that the legislature

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intended to fix beyond all argument where the burden should be placed. The responsibility for jeopardizing human life should be fixed and that without vagueness or uncertainty. To hold that an owner of premises, because he was not at the same time an occupant thereof, is therefore free from responsibility for consequences where he had omitted a clearly prescribed condition, would be placing a premium upon careless landlords and rendering immune those who fail to adopt and provide those things required under the law.

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FACTORY REGULATIONS—FIRE ESCAPES—RESPONSIBILITY OF AGENT IN CHARGE OF BUILDING—*People v. Pease & Elliman, Inc., Supreme Court of New York, Appellate Division, First Department (July 10, 1916), 160 New York Supplement, page 318.*—The corporation named was convicted of a violation of section 79b of the labor law, which provides that no factory shall be conducted in any building theretofore erected unless such building, if over two stories in height, shall be provided on each floor with at least two means of exit or escape from fire, of the character described in the section. The company was agent for a building nine stories in height, which did not comply with the law, and in which a factory was conducted. The question in the case was whether the company could be held responsible for the violation of the law, under section 94, which provides that the owner shall be responsible for the observance and punishable for the nonobservance of the provisions of section 79b and that:

The term "owner" as used in this article shall be construed to mean the owner or owners of the freehold of the premises, or the lessee or joint lessees of the whole thereof, or his, her or their agent in charge of the property.

The court, speaking through Judge McLaughlin, held that it was the intention to make the law applicable to an agent such as the defendant company, and affirmed the conviction, the opinion for the most part being as follows:

The defendant was conceded to have been the agent in charge of the property, to the extent of collecting rents and negotiating and making minor repairs. But it had no authority to execute leases, nor to make any such repairs or alterations as would have been necessary to make the building conform to the requirements of section 79b. The claim is accordingly made that the defendant was not the agent in charge of the property, within the meaning of the statute, and that, if it were, the statute is unconstitutional as applied to it.

That the defendant in the present case was the agent in charge of the property, in the sense in which those words are used in the statute, can hardly be disputed. This was illustrated at the trial, when one of its managers, in answer to a question whether the defendant was

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in charge of the property at the time for the owner, replied that it was. And when the purpose of the statute is considered, it seems to me that the meaning ordinarily given to those words was unquestionably the meaning intended.

In a large city like New York, the owner of a building similar to the one in question rarely, if ever, resides in it and seldom personally undertakes its management. In the great majority of cases, the building is placed in the hands of an agent, to whom applications for renting space are made, and who conducts all dealings with the tenants. The owner may be, and frequently is, a nonresident, not subject to the jurisdiction of our courts. But the agent is necessarily familiar with the conditions existing in the building and available for complaints in connection therewith. In making the agent in charge of the property responsible for the observance of the provisions of the labor law, therefore, I think that the legislature had in mind the person who secured the tenants and to whom complaints respecting the building would naturally be made.

Under this construction, the statute is an effective weapon against nonresident owners; for, if agents refuse to take or continue in charge of buildings where such violations exist, the owners must either make the necessary alterations, or take charge of the buildings themselves and thus render themselves amenable to prosecution. Under any other construction, nonresident owners and their agents could permit violations of the statute to continue with impunity.

What has been said disposes of the constitutional question raised by the appellant, if that is properly before us. No one has any vested or constitutional right to act as agent for a building in which a violation of the law is being maintained. The appellant has not been found guilty because the owner failed to make the alterations directed by the bureau of inspection, but because it remained in charge of the building, knowing that the law was being violated there. It could have escaped liability, either by terminating the violation or by ceasing to act as agent; but it did neither. It was entirely competent for the legislature to say that, by voluntarily remaining as agent in charge of the building when it knew that the labor law was being violated there, it became particeps criminis and punishable, as well as the owner, for the existing violation.

Under the circumstances disclosed in the record, however, I think that the sentence was properly suspended.

The judgment of conviction is affirmed.

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FACTORY REGULATIONS—FOUNDRIES—SANITATION—CONSTITUTIONALITY OF STATUTE—*State* v. *Scullin-Gallagher Iron & Steel Co., Supreme Court of Missouri, Division No. 2 (May 31, 1916), 186 Southwestern Reporter, page 1007.*—The General Assembly of Missouri in 1913 enacted a statute requiring foundries to provide for their workmen suitable toilet, wash and dressing rooms, with prescribed conveniences. The company named, having violated this act, was convicted and fined $50. It appealed from the judgment of conviction, and assailed the constitutionality of the law. The judgment was

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affirmed in an opinion written by Judge Walker. He pointed out that, the statute being one whose purpose was commendable, and which was of beneficial effect, it was presumptively valid, and would not be set aside unless its unconstitutionality should appear beyond a reasonable doubt. Continuing, and taking up the matter of the limitation of the act to one class of industries, he said in part:

It is said the act contains an arbitrary classification, by which is meant one not based on such a difference in the situation and circumstances of the subjects classified as to render it necessary and proper to enact legislation in regard thereto.

We find that the conditions and circumstances under which foundrymen work are different from those of other workmen, and that such difference is sufficient to authorize the enactment of a law in the exercise of the State's police power to ameliorate their condition. The act, under this state of facts, can not be said to create an arbitrary classification, and is not subject to criticism as a special law.

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HOURS OF LABOR—CLOSING HOUR OF MERCANTILE ESTABLISHMENTS—CONSTITUTIONALITY OF ORDINANCE—CLASSIFICATION OF OCCUPATIONS—*Chan Sing et al.* v. *City of Astoria et al., Supreme Court of Oregon (Feb. 29, 1916), 155 Pacific Reporter, page 378.*—Chan Sing and others brought suit to enjoin the city and its officers from enforcing an ordinance requiring stores dealing in general merchandise, groceries, clothing, boots and shoes, dry goods, jewelry, meats, and hardware to be closed at 6 o'clock except Saturdays. It was alleged that other stores selling goods similar in part to those dealt in by the plaintiffs were kept open, and that if the ordinance was enforced there would be serious injury to the business of the small storekeepers complaining, who operated their stores almost entirely with the help of members of their families. The decree in a circuit court was in favor of the city, but this was reversed by the supreme court, and the ordinance held invalid, in an opinion delivered by Judge Burnett, from which the following is quoted:

We remember that the ordinance was directed against those who operate or conduct a store, selling and dealing in general merchandise, groceries, clothing, boots and shoes, dry goods, jewelry, meats, and hardware. It omits all reference to other occupations, the regulation of which is authorized by the city charter, such as dealers in tinware, crockery, glassware, millinery, cigars and tobacco, fruit and confectionery, furniture stores, tailoring establishments, and book and stationery stores, as well as others not necessary to be mentioned. It is a constitutional right, common to all citizens that: "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." (Sec. 20, art. 1, of the Oregon constitution.)

In our judgment the classification embraced in the ordinance is arbitrary and unfair and no substantial distinction exists between

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those mentioned and those omitted, having in view the object to be attained by the charter, "to secure the peace and good order of the city and the health of its inhabitants." It is difficult to conceive that any odor of sanctity hovers about a furniture store or makes it so impeccable that it would be exempt from the police power of the city while a hardware store should be subject to its scrutiny. The same may be said in respect to almost any comparison that might be made between the different occupations mentioned in the legislation in question and in the city charter. Practical justice demands that all who are in the same category should be treated alike in the exercise of authority for the good order of the community. The grouping must include all who have substantially the same relation to the end to be attained, namely, "the peace and good order of the city and the health of its inhabitants."

The ordinance is radically at fault in its classification. It is not necessary to consider whether it would be a reasonable manifestation of the police power to enact such an ordinance and make it apply to all the trades omitted from the measure here involved.

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HOURS OF LABOR—PUBLIC LAUNDRIES—CONSTITUTIONALITY OF ORDINANCE—*Yee Gee* v. *City and County of San Francisco et al., United States District Court, Northern District of California, Second Division (July 20, 1916), 235 Federal Reporter, page 757.*—The plaintiff named, a native-born citizen of the United States of the Chinese race, and proprietor of a public laundry in San Francisco, brought a bill in equity to restrain the enforcement of an ordinance of the board of supervisors of that city, regulating laundries. It was alleged that the ordinance was adopted for the sole purpose of injuring the laundry business of persons of the plaintiff's race, and of driving them out of the business. Objection was made, first, to provisions which, it was claimed, gave the board arbitrary discretion to grant or refuse licenses to carry on the laundry business, in excess of the powers of that board; and second, to the provision restricting the hours in which such work may be performed to the hours between 6 a. m. and 7 p. m., on week days only. The pleadings were such as to raise, without the hearing of evidence, the question whether the bill itself sufficiently set forth reasons for the granting of the injunction prayed for. Other objections to the ordinance having been found to be invalid, as no actual discrimination against the plaintiff was alleged, Judge Van Fleet, who delivered the opinion, came to the matter of the restriction of hours. On account of the very general interest in the subject of the regulation of the hours of labor of adult males, and the further fact that the court took an opposite view from that adopted by the supreme court of the State on the same ordinance, the opinion of Judge Van Fleet on this point is reproduced at considerable length. He quoted section 9, which contains the provision as to hours, and in reaching the conclusion that the limitation

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of the hours during week days was invalid used in part the following language:

The terms of section 9 apply to all laundries maintained in the entire territory embraced within the city limits, without regard to differing conditions existing in different sections or districts thereof, the density of population or character of buildings, or the situation or relation of the laundry to other structures or premises, as calculated to cause danger of fires, or other objectionable considerations.

It is claimed that this sweeping and all-inclusive nature of the restriction, with its limitation on the number of hours prescribed for carrying on the business, having regard to its intrinsic nature, renders the provision subject to the objection that it constitutes an undue and unreasonable restraint upon plaintiff's right to pursue his occupation, and as such is in violation of his rights under the Constitution. The defendants contend, on the other hand, that it is a perfectly reasonable and proper police regulation, and one within the power of the board of supervisors to enact; and in support of this contention they place their reliance upon the cases of Barbier *v.* Connolly, 113 U. S. 29, 5 Sup. Ct. 357; Soon Hing *v.* Crowley, 113 U. S. 707, 5 Sup. Ct. 730; and In re Wong Wing, 167 Cal. 109, 138 Pac. 695 [Bul. No. 169, p. 119].

The first two cases involved provisions couched in precisely similar terms in two different laundry ordinances of the city and county of San Francisco, whereby, within certain prescribed limits of the city, the washing and ironing of clothes in public laundries was prohibited between the hours of 10 o'clock at night and 6 o'clock in the morning. The court in Barbier *v.* Connolly held that the provision was not unreasonable or discriminatory, but was "purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies."

In re Wong Wing involved a provision in the then existing ordinance of San Francisco practically identical in its terms with the limitation under consideration in the present case. In response to the objection of unreasonableness here urged, its validity was sustained. [Opinion quoted; see Bul. No. 169, pp. 119, 120.]

It will be seen that the Supreme Court of California rested its ruling largely, if not entirely, upon the authority of the Barbier and Soon Hing Cases, under the assumption that the principles there announced had equal application to the regulation before them. With the greatest respect for the views of that court, I think its opinion fails to take note of the very material difference between the two measures. In the one instance, the regulation was restricted in its application to certain specified and defined districts of the city, and prescribed a period of cessation from labor well within the acceptation of what would at once be regarded as having reasonable relation to the object sought, that of the protection of the public from the danger of uncontrolled fires. In the other, the regulation is made to apply to the entire limits of a great city, embracing a territory some 10 miles wide by 15 miles long, without regard to differing physical conditions obtaining therein, and with a limitation of the hours of labor to a period which, to say the least, having regard to the nature of the business, at once gives rise to a question in the mind whether it bears

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any reasonable relation to any conceivable necessity for protection to the public from such dangers. It seems to me that this radical difference between the two regulations may not be ignored. That the Supreme Court of the United States did not ignore it will at once appear from their discussion of the subject. They repeatedly refer to the fact that in the cases before them the regulation as to hours of labor applied only to certain specified limits within the city, and they construe its purpose to have reference to the special conditions existing in those districts.

It is, of course, not questioned that the municipality, under the powers conferred upon it by the constitution and statutes of the State, has the right to regulate the business of a laundry and the manner in which it shall be carried on in all respects as to which it may be said to in any wise involve the public health, safety, or welfare, and this the present ordinance very fully undertakes to do.

And there is likewise no question as to the power to restrain the prosecution of such a business during certain hours of the 24, where by reason of the nature of the business, the instrumentalities employed, and the surrounding conditions its prosecution during those hours is calculated to endanger the public safety. So far there is no controversy. But the question here presented is whether, without regard to the existence of such conditions, a municipality may impose a general limitation or restriction upon the citizen as to the hours within which he may prosecute his chosen industry—a respect as to which, independently of particular conditions, there is obviously no natural or inherent menace to the public—without trenching upon that degree of freedom and liberty of action guaranteed him by the Constitution.

Is such a regulation within the rule of reason which must govern the courts in determining its validity? For that neither a municipality nor the legislature of a State may competently interfere under the guise of a police regulation with the liberty of the citizen in the conduct of his business—legitimate and harmless in its essential character—beyond a point reasonably required for the protection of the public, is too thoroughly settled to call for any extended citation of authority in its support.

While the provision in question is put in the guise of a laundry regulation, it would seem to partake more nearly of the nature of a labor law, since it undertakes to restrict and limit the hours which may be devoted to the work of the laundry, not only by the employees, but by the employer as well. In this aspect it is closely akin in the considerations to which it gives rise to the statute involved in Lochner *v.* New York [198 U. S. 45, 25 Sup. Ct. 539, Bul. No. 59, p. 340]. That was a statute attempting to limit the hours of labor in bakeries. The court, in construing the act, said:

"It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than 10 hours' work to be done in his establishment."

It was held that the act could not be sustained, either as a labor law or as a regulation for the protection of the health of those employed in the class of labor involved; the court saying:

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable

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ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. * * * The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker."

And finally it is said:

"It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, can not be prohibited or interfered with, without violating the Federal Constitution."

These considerations would seem to have close application to the regulation here sought to be enforced, and it is not readily to be perceived why the principles there stated should not be given controlling effect to render it void. Obviously the only menace intended to be met by this particular regulation is danger from fires. But to say that to obviate that danger it is reasonably necessary that the hours of labor in such an industry be curtailed to the narrow limits prescribed, and the business necessarily closed down, and that throughout the entire territory within the corporate limits of a city as large as San Francisco, with its not infrequent districts of partially or wholly unoccupied blocks and lots, where the maintenance of a laundry could give rise to no conceivable danger to the public from such source, is, on the face of it, to state an absurdity. It would be quite as reasonable to enact that by reason of the same danger all factories and industries within the city limits employing fires in their operation should be subjected to the same restrictions.

I think we may aptly quote the language of the Supreme Court in Lochner *v.* New York, supra, where, with reference to the kindred regulation there under consideration, it is said:

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power, for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law."

And I am of opinion, as there said, that "the limit of the police power has been reached and passed in this case," that the regulation under consideration has no such just or reasonable relation to the ostensible purpose for which it was put forth as will sustain it, and that it must therefore be held void. I have reached this conclusion with great reluctance, in deference to the contrary views expressed by the Supreme Court of the State in In re Wong Wing, supra, as to the validity of the similar provision there involved; but, these courts being clothed with concurrent jurisdiction with those of the State

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in the adjudication of questions involving the enforcement of rights guaranteed by the Federal Constitution, I have nevertheless felt constrained, by the considerations stated above, to adhere to my own ultimate convictions.

It may be suggested that this conclusion will not affect the validity of the ordinance as a whole, nor the clause of section 9 relating to Sunday, which is not attacked.

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HOURS OF LABOR—PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—PERSONS LIABLE—*Bradford et al.* v. *State, Court of Criminal Appeals of Texas (Dec. 15, 1915), 180 Southwestern Reporter, page 702.*—G. H. Bradford and another were convicted in the Bexar County court of a misdemeanor in violating the eight-hour labor law of 1913. This act is made applicable to contractors on behalf of the State and its subdivisions as well as to those bodies themselves, and officers and agents are made liable with the contractors. Provision is made for "emergency arising in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements."

The opinion of the court of civil appeals, which affirmed the conviction, is written by Judge Prendergast. After holding that the complaint and information were sufficient, he took up the objections to the act on the ground of unconstitutionality, most of which, on the first consideration, he disposed of by noting that the act is in the same terms as that of Kansas, which was upheld in the case Atkin *v.* Kansas, 195 U. S. 207, 24 Sup. Ct. 124 (Bul. No. 50, p. 177). The title of the act was held not to be violative of the constitution. On a rehearing the constitutional questions were taken up somewhat more fully, showing that the act as a whole is clearly within the police power of the State, and that it is not void because of uncertainty of the provisions as to emergencies: the complaint and information were again reviewed, and it was shown that the two persons convicted were agents of the contractors, who had employed laborers more than the specified eight hours per day, and that one of them was also a member of those associated as contractors.

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HOURS OF LABOR—PUBLIC WORKS—MUNICIPAL ORDINANCE—*City of Milwaukee* v. *Raulf, Supreme Court of Wisconsin (Oct. 24, 1916), 159 Northwestern Reporter, page 819.*—Con Raulf, jr., was found guilty of violation of section 562 of an ordinance of the city of Milwaukee, passed May 25, 1914, in that he, as a contractor upon public works of the city, employed laborers for more than eight hours per day. In defense he alleged that the ordinance was void, but the

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judgment of the municipal court of Milwaukee County was affirmed by the supreme court. Judge Rosenberry delivered the opinion, and spoke of the powers of the city in its governmental and proprietary capacities, and of the breadth of those powers with reference to the providing of public works, in respect to which cities are "limited only by the object and purpose of their creation." The statute is quoted by which the State of Wisconsin has limited hours of labor upon public works where the State or an officer or agent thereof is a party, and it is remarked that since its enactment in 1909 its validity has never been challenged, and that the Kansas statute upheld by the decision Atkin *v.* Kansas, 191 U. S. 207, 24 Sup. Ct. 124 (Bul. No. 50, p. 177) was very similar. Referring also to the holding valid of an act of Congress of like purport, applying to public works of the United States and the District of Columbia, and quoting from the decision, Ellis *v.* United States, 206 U. S. 246, 27 Sup. Ct. 600 (Bul. No. 71, p. 361), Judge Rosenberry continues:

It being established that the State has the power to limit the hours of labor on public works including public works for its municipalities, has the city of Milwaukee such power?

The power to prescribe the conditions upon which public work shall be carried on is undoubtedly primarily in the State. When the State speaks its voice is law. The city is simply an agency of the State, and as such has only such powers as are conferred upon it expressly or by implication. The State of Wisconsin has not attempted to prescribe the conditions under which public work shall be carried on within the cities of this State. Cities are charged with the power and duty of determining the necessity for public works, their extent and character, and subject to the constitutional limitation as to indebtedness and certain prescribed rules of procedure, the whole subject of providing for public works within a city is committed to the common council of the city. The whole matter of providing public works being delegated to the city, the city has, as an incident to its power to contract for the erection and construction of public works, the same inherent power to prescribe the conditions under which the work shall be carried on within the city, in the absence of any restriction by the State, that the State has, and it may exercise this inherent power unless and until it is restricted by legislative enactment.

Upon the adoption of an ordinance it has by the general welfare clause the force and effect of a law and becomes therefore a part of every contract relating to public works within the corporate limits of the city of Milwaukee. The existing law of the land is a part of every contract and must be read into it.

The city may by the express terms of its charter enforce the ordinance by the imposition of a penalty. The penalty is imposed not for the breach of a contractual obligation, but for the violation of the terms of the ordinance.

In conclusion, the opinion is expressed that the ordinance is not in conflict with the charter provision that work shall be let to the lowest bidder, and that it is not unreasonable as contended by the defendant.

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HOURS OF LABOR—RAILROADS—EIGHT-HOUR STANDARD WORK DAY—CONSTITUTIONALITY OF STATUTE— *Wilson* v. *New et al., Supreme Court of the United States (Mar. 19, 1917), 37 Supreme Court Reporter, page 298.*—This case was before the Supreme Court on appeal from the District Court for the Western District of Missouri to determine the constitutionality of the so-called Adamson law. This law (act of Sept. 3, 5, 1916, 39 Stat. 721), provides in its first section that, beginning with January 1, 1917, "Eight hours shall, in contracts for labor and services, be deemed a day's work, for the purpose of reckoning the compensation for services of all employees * * * who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads" in interstate commerce.

The second section provides for the appointment of a commission of three to observe the operation and effects of the provisions of the first section for a period of not less than six nor more than nine months, the findings to be reported to the President and Congress.

The third section provides that pending the report of this commission and for a period of 30 days thereafter "the compensation of railway employees subject to this act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday."

In the court below the law had been held unconstitutional, and an injunction granted to suspend its operation pending an appeal to the Supreme Court. The Supreme Court, however, sustained the law as constitutional by a majority of one, four justices dissenting. There were five opinions written, Mr. Chief Justice White delivering the opinion of the court, and Mr. Justice McKenna writing a short concurring opinion. Dissenting opinions were written by Mr. Justice Day, Mr. Justice McReynolds, and Mr. Justice Pitney; Mr. Justice Van Devanter concurred with Mr. Justice Pitney in his dissent.

Mr. Chief Justice White, in announcing the decision, gave some account of the circumstances surrounding the enactment of the law, the demands of the organizations of trainmen upon the companies, the movement for a strike, the conferences that followed, and the request of the President that Congress fix by law an eight-hour standard of work and wages, and that "an official body be created to observe during a reasonable time the operation of the legislation, and that an explicit assurance be given that if the result of such observation established such an increased cost to the employers as justified an increased rate, the power would be given to the Interstate Commerce Commission to authorize it." The steps taken to expedite judicial action were also noted, after which it was pointed out that "all the propo-

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sitions relied upon and arguments advanced ultimately come to two questions: First, the entire want of constitutional power to deal with the subjects embraced by the statute, and, second, such abuse of the power if possessed, as rendered its exercise unconstitutional." The contentions of the two parties to the dispute were then stated to be on the one hand, that only an eight-hour standard for work and wages was provided, while the other claimed that in substance only a scale of wages was provided. It was then said that in the opinion of the majority, "Both are right and in a sense both wrong in so far as it is assumed that the one excludes the other." Continuing, the court said:

The provision of section 1 that "eight hours shall * * * be deemed a day's work and the measure or standard of a day's work," leaves no doubt about the first proposition. As to the second, this is equally true because of the provision of section 3, forbidding any lowering of wages as a result of applying the eight-hour standard established by section 1 during the limited period prescribed in section 2. Both provisions are equally mandatory. If it be said that the second, the depriving of all power to change the wages during the fixed period, is but ancillary to the first command, the standard of eight hours, that would not make the prohibition as to any change of wages any the less a fixing of wages. It certainly would not change the question of power unless it could be assumed that the legislative power to fix one thing, the standard of hours, could be enforced by exerting the power to do another, fix the wages, although there was no legislative authority to exert the latter power. The doing of one thing which is authorized can not be made the source of an authority to do another thing which there is no power to do. If to deprive employer and employee of the right to contract for wages and to provide that a particular rate of wages shall be paid for a specified time is not a fixing of wages, it is difficult to see what would be.

The very broad difference between the two powers exercised was then pointed out, in that the eight-hour standard is permanently fixed, while the fixing of the wage standard is limited to the period named in the law. At the end of this time, therefore, employers and employees would be free to determine wages as before. The question was then stated to be whether Congress had the power, under the circumstances stated, to fix such a permanent eight-hour standard, and to create a wage standard to be operative for a reasonable time such as Congress might deem necessary to afford employers and employees to make an agreement on the subject of wages; "or, in other words, did it have the power, in order to prevent the interruption of interstate commerce, to exert its will to supply the absence of a wage scale resulting from a disagreement as to wages between employers and employees, and to make its will on that subject controlling for the limited period provided for?"



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The question as to the eight-hour standard was disposed of by saying that "The authority to permanently establish it is so clearly sustained as to render the subject not disputable," citing Baltimore & Ohio Railroad Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621; see Bul. No. 96, p. 857 (a case in which the power of the Interstate Commerce Commission to enforce monthly reports as to the hours of service of employees was sustained); and Missouri, Kansas & Texas Railway Co. *v.* United States, 231 U. S. 112, 34 Sup. Ct. 26, Bul. No. 152, p. 128 (a case in which penalties for violations of the 16-hour law of 1907 were enforced). Continuing, the court said:

That common carriers by rail in interstate commerce are within the legislative power of Congress to regulate commerce is not subject to dispute. It is equally certain that where a particular subject is within such authority the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, State and Federal, and is illustrated by such a continuous exertion of State and Federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority. But, taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view—that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent—it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency and that emergency can not be made the source of power. (Ex parte Milligan, 4 Wall. 2.) The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a

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living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.

The Chief Justice then indicated the extent of previous regulation by referring to the laws granting authority to fix reasonable rates for the carriage of interstate commerce, those relating to bills of lading, tariffs, hours of service, safety appliances, and employers' liability, and added, "Clear also is it that an obligation rests upon a carrier to carry on its business, and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that Government possesses the full regulatory power to compel the performance of such duty." (Atlantic Coast Line *v.* South Carolina Corporation Commission, 206 U. S. 1, 26; Missouri Pacific Ry. *v.* Kansas, 216 U. S. 262, 278.) Continuing he said:

In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages caused by the failure to exercise the private right as a result of the dispute between the parties—that is, to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which the statute dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in Government to prevent all service from being destroyed? Further yet what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident and giving efficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which, if not remedied, would leave

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the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that Government had power to enforce the duty of operation, if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?

We are of opinion that the reasons stated conclusively establish that from the point of view of inherent power, the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where by reason of the dispute there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.

And this leaves only to be generally considered whether the right to exercise such a power under the conditions which existed was limited or restrained by the private rights of the carriers or their employees.

(*a*) As to the carrier.—As engaging in the business of interstate commerce carriage subjects the carrier to the lawful power of Congress to regulate irrespective of the source whence the carrier draws its existence, and as also, by engaging in a business charged with a public interest, all the vast property and every right of the carrier become subject to the authority to regulate possessed by Congress to the extent that regulation may be exerted considering the subject regulated and what is appropriate and relevant thereto, it follows that the very absence of the scale of wages by agreement and the impediment and destruction of interstate commerce which was threatened, called for the appropriate and relevant remedy—the creation of a standard by operation of law binding upon the carrier.

(*b*) As to the employee.—Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce

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possessed by Congress applied, and the resulting right to fix, in case of disagreement and dispute, a standard of wages as we have seen necessarily obtained.

In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged, and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. This results from the considerations which we have previously pointed out and which we repeat, since conceding that, from the point of view of the private right and private interest, as contradistinguished from the public interest, the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the lawmaking power to protect the public right and create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. In saying this, of course, it is always to be borne in mind that, as to both carrier and employee, the beneficent and ever-present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power which, if given effect to, would amount to a denial of due process, or would be repugnant to any other constitutional right. And this emphasizes that there is no question here of purely private right, since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business, and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated.

The remaining question as to whether there was an abuse of the power found to rest in Congress, so that its present exercise was unconstitutional, was then considered. One contention was based on the fact that the statute exempts from its operation certain short line and electric railroads. This was dismissed on the authority of previous decisions sustaining such classifications. There was also said to be an unlawful inequality because the statute does not deal with all employees, but only with such as are engaged in the movement of trains. To this the court answered that "Such employees were those concerning whom the dispute as to wages existed, growing out of which the threat of interruption of interstate commerce arose—a consideration which establishes an adequate basis for the statutory classification."

The alleged violation of the provision of the Constitution as to due process of law was then considered, the contention being that even if Congress had the power to fix the standard of wages, it did

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not have authority to act without consideration and regard to the reasonableness of its action from an economic standpoint, and in acting as it had it amounted "to a decision without a hearing and to a mere arbitrary bestowal of millions by way of wages to the employees, to the injury not only of the employer but also of the public on whom the burden must necessarily fall." The ground of the dispute was then again briefly reviewed, and the fact pointed out that the employees did not obtain in full the demands that were made, and that in establishing the eight-hour standard the law did not fix the amount of the task to be done during those hours, thus leaving that to the will of the parties.

It [the act] yielded in part to the objections of the employers by permitting overtime only if "necessary," and it also absolutely rejected in favor of the employers and against the employees, the demand for an increased rate of pay during overtime, if there was any, and confined it to the regular rate, and it moreover rejected the option in favor of the employees by making the law obligatory upon both parties. In addition, by the provision prohibiting a lower rate of wages under the new system than was previously paid, it fixed the wages for such period. But this was not a permanent fixing, but in the nature of things a temporary one which left the will of the employers and employees to control at the end of the period, if their dispute had then ceased.

From these considerations it was concluded that the private right of contract was not taken away from the parties "since the power which the act exerted was only exercised because of the failure of the parties to agree, and the resulting necessity for the law-making will to supply the standard rendered necessary by such failure of the parties to exercise their private right." The modifications of the demands were pointed out as manifesting an exertion of legislative discretion and judgment. Continuing, the court said:

Conceding that there would necessarily result from the enforcement of the statute an increase of pay during the period for which the statute forbade a reduction, such concession would not bring the statute within the grounds stated. The right to meet the situation caused by the dispute and to fix a standard which should be binding upon both parties included, of course, the legislative authority to take into consideration the elements of difference, and, in giving heed to them all to express such legislative judgment as was deemed best under the circumstances.

From this it also follows that there is no foundation for the proposition that arbitrary action in total disregard of the private rights concerned was taken, because the right to change or lower the wages was left to be provided for by agreement between the parties after a reasonable period which the statute fixed. This must be unless it can be said that to afford an opportunity for the exertion of the private right of agreement as to the standard of wages was in conflict with such right.

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The opinion concluded as follows:

Finally, we say that the contention that the act was void and could not be made operative because of the unworkability of its provisions is without merit, since we see no reason to doubt that if the standard fixed by the act were made applicable and a candid effort followed to carry it out, the result would be without difficulty accomplished. It is true that it might follow that in some cases, because of particular terms of employment or exceptional surroundings, some change might be necessary, but these exceptions afford no ground for holding the act void because its provisions are not susceptible in practice of being carried out.

Being of the opinion that Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject, resulting from the dispute between the parties, or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it—we conclude that the court below erred in holding the statute was not within the power of Congress to enact, and in restraining its enforcement, and its decree, therefore, must be and it is reversed and the cause remanded, with directions to dismiss the bill.

The concurring opinion of Mr. Justice McKenna was devoted to the proposition that the act is an hours of labor act and not a wage law, but he expressed himself as satisfied with the opinion as far as it deals with the power of Congress to pass the act. As to this, he said in part:

The title of the act (and to the title of an act we may resort to resolve ambiguity or to confirm its words) expresses its purpose to be "to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes."

The description of the title was repeated in the House of Representatives by the chairman of the committee who reported the bill and from whom it has received its designation. Among other things, he said: "The law fixes an eight-hour day. We had previously a sixteen-hour day and a nine-hour day. We now have an eight-hour day. The only reference to wages is in the language used to hold in statu quo until the workings of the eight-hour law could be observed and all other features of the surface adjusted to the eight-hour law." Explanations of like import were made in the Senate.

The words of the act, I think, support this characterization, and, it may be assumed, were accepted by Congress as expressing and securing it; and I think they do so with fair directness. Whatever involution there may be in them was caused by the situation to which they were addressed, derangement of which was sought to be avoided; the situation indeed made use of "features of the service adjusted" to the law.

Nothing is fixed but the time of service—the hours which shall be deemed a day's work—the number to be eight. All else—compensation and conditions—is left to contract; only, whatever the compensation, it shall be for a service of eight hours reckoned (computed) or

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measured by such time as its determining factor. Except as so determined the compensation may be whatever the carriers and employees may agree upon. Their power of convention has no other limitation.

It was conceded that in a sense the provisions of section 3 "may be considered as a prescription of wages." The records showed that 85 per cent of the roads had a 10-hour day, while 15 per cent observed an 8-hour standard, and as to the former it was admitted that application of the law may be said to be a change of compensation.

But even if section 3 be given a broader effect, it would not give character to the whole act and make it the exertion of power to establish permanently a rate of wages. To so consider it would, I think, be contrary to the intention of Congress, and convert the expediency for a particular occasion and condition into the rule for all occasions and conditions.

As to the point that permission might be necessary to effect a change in transportation rates, Mr. Justice McKenna expressed his belief that such permission would be given "if necessary to fulfill the command of the law. Indeed, if not given, the law might encounter constitutional restriction." He also pointed out that there might be hesitation to displace the judgment and opinion of the employee by a determination of law, but added:

I speak only of intention; of the power I have no doubt. When one enters into interstate commerce, one enters into a service in which the public has an interest, and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made, and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest.

The opinion concluded with an expression of concurrence in the expressions of the Chief Justice as to the contentions on the subject of the inequality of the law and the deprivation of the carriers of due process.

The first opinion in dissent was read by Mr. Justice Day. After stating his dissent the Justice said:

I am not prepared to deny to Congress, in view of its constitutional authority to regulate commerce among the States, the right to fix by lawful enactment the wages to be paid to those engaged in such commerce in the operation of trains carrying passengers and freight. While the railroads of the country are privately owned, they are engaged in a public service, and because of that fact are subject in a large measure to governmental control.

Admitting the regulatory power of Congress to be broad, and agreeing with the reasoning that sustained its power to regulate hours of service, conditions of safety, transportation rates, and the

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like, he insisted that, "This regulatory power is subject to any applicable constitutional limitation." The provisions of the fifth amendment of the Constitution, preventing deprivation of life, liberty, or property without due process of law were then considered, and the fact was pointed out that bills of rights in this country made specific the provisions of Magna Charta that they might act as bulwarks against arbitrary legislation. It was then pointed out that the enactment inevitably increased the amount of wages to be paid during the period of its experimental operation, in an amount of many millions of dollars, and that this must be paid entirely by the companies without provision for compensation if there should be established by the investigation any injustice or impropriety of the temporary increase. It was said further that Congress, by securing the appointment of an investigating commission, had confessed its inability to fix in advance of such investigation a just and proper wage for the employees concerned; also that the President, in submitting the matter to Congress, recommended that there be an explicit understanding that increased freight rates should be allowed if necessary to meet the increased costs of operation. Mr. Justice Day then said:

Conceding that every presumption exists in favor of the legitimate exercise of legislative power, and that there is no authority in the courts to inquire into the motives which may have influenced legislators, and that every such enactment presupposes the possession of proper motives and sufficient information and knowledge to warrant the action taken, nevertheless Congress has in this act itself declared the lack of the requisite information for definite action, and has directed an experiment to determine what it should do, imposing in the meantime an increase of wages peremptorily declared, the expense of which is to be borne entirely by the carrier, without recompense if the investigation proves the injustice or impropriety of the increase.

Such legislation, it seems to me, amounts to the taking of the property of one and giving it to another, in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action—the taking of the property of A and giving it to B by legislative fiat. (Davidson *v.* New Orleans, 96 U. S. 97, 104.)

Considering the point made that the legislation prevented a disastrous strike, it was maintained that, notwithstanding this, "No emergency and no consequences, whatever their character, could justify the violation of constitutional rights." (Ex parte Milligan, 4 Wall. 2.) Concluding Mr. Justice Day said:

There are certain matters in the opinion of the majority which I am unable to approve by silent acquiescence. I am not prepared to admit that Congress may, when deemed necessary for the public interest, coerce employees against their will, to continue in service

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in interstate commerce. Nor do I think it necessary to decide, as declared in the majority opinion, that in matters of this kind Congress can enact a compulsory arbitration law. These questions are not involved in this case, and their decision need not be anticipated until they actually arise.

The reasons which I have outlined impel me to the conclusion that the enactment under consideration necessarily deprives the complaining railroad companies of rights secured to them, as well as to others, by one of the most essential of the protections guaranteed by the Federal Constitution. In this view I am constrained to dissent from the opinion and judgment in this case.

The dissent of Mr. Justice McReynolds was briefly expressed opening with the words:

Whatever else the act of September 5, 1916, may do, it certainly commands that during a minimum period of seven months interstate common carriers by railroads shall pay their employees engaged in operating trains for 8 hours' work a wage not less than the one then established for a standard day—generally 10 hours.

Stating that he could not agree in the conclusion that it was within the power of Congress to enact such a statute, he took the ground that, assuming such a doctrine now to be established—

It follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and indirectly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers.

Mr. Justice Pitney was more detailed in his expression of dissent than either of his colleagues, though he adopted Mr. Justice Day's dissent based on the ground of the repugnancy of the statute to the fifth amendment, and devoted his argument practically exclusively to the proposition that the act in question is not an act in regulation of commerce. After quoting the main provisions of the act Mr. Justice Pitney said:

It is, I think, too plain for argument that the act departs from its title, in that it does not establish eight hours as the limit of a day's work. There is no prohibition of service in excess of eight hours per day, nor any penalty for overtime work, for this is to be paid for only pro rata. There is no language evincing an intent to repeal or modify the Sixteen Hour Act of March 4, 1907 (c. 2939, 34 Stat. 1415). It is a matter of common knowledge that railroad-train service must be arranged according to the distances between terminals or "division points," and a change from a 16-hour limit to an 8-hour limit would be so revolutionary that a purpose to make such a change is not to be lightly inferred. This act affords no basis for such an inference. What it prescribes is that "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services." It defines the terms of contracts for

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service and prescribes a measure only for the purpose of reckoning compensation. This is the whole effect of the first section. To shorten the discussion, I will concede, arguendo, that this section of itself is not in conflict with the Constitution. This being assumed, the second section evidently is unexceptionable.

The discussion therefore turned upon the operation and effect of the third section in connection with the first and second, the outcome of which is "that during a period of from 7 to 11 months the carriers shall pay as much for 8 hours' work as previously was paid for 10 hours' work." The Justice agreed with the majority opinion that the act must be sustained, if at all, as an exercise of the power of Congress to regulate interstate and foreign commerce, and continuing said:

If, therefore, the act be not, in a real and substantial sense a regulation of commerce, it is in excess of the constitutional power of Congress. "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated." (Adair *v.* United States, 208 U. S. 161, 178, 28 Sup. Ct. 277 [Bul. No. 75, p. 634].) And, though it be a regulation of commerce, it is void if it conflicts with the provisions of the fifth amendment, that no person shall be "deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

I am convinced, in the first place, that the act can not be sustained as a regulation of commerce, because it has no such object, operation, or effect. It removes no impediment or obstruction from the way of traffic or intercourse, prescribes no service to the public, lays down no rule respecting the mode in which service is to be performed, or the safeguards to be placed about it, or the qualifications or conduct of those who are to perform it. In short, it has no substantial relation to or connection with commerce—no closer relation than has the price which the carrier pays for its engines and cars or for the coal used in propelling them.

The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact, is immaterial in law. It amounts to no more than saying that it was enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government. (Ex parte Milligan, 4 Wall. 2, 121).

The simple effect of section 3 is to increase, during the period of its operation, the rate of wages of railroad trainmen employed in interstate commerce. It comes to this,—that whereas the owners of the railroads have devoted their property to the movement of interstate as well as intrastate commerce, and whereas the trainmen have accepted employment in such commerce, and thus employers and employees are engaged together in a quasi public service, the act steps in and prescribes how the money earned in the public service shall be divided between the owners of the railroads

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and these particular employees. This, in my view, is a regulation not of commerce, but of the internal affairs of the commerce carriers,—precisely as if an act were to provide that the rate of interest payable to the bondholders must be increased and the dividend payments to the stockholders correspondingly decreased—and is not only without support in the commerce clause of the Constitution, but, as I shall endeavor to show, transgresses the limitations of the fifth amendment.

The distinction between this act and regulatory acts previously passed was then dwelt upon, with quotations from opinions showing the grounds on which the Supreme Court had sustained Hours of Service and Employers' Liability Acts. Nothing analogous to the statute under consideration was discovered from the point of view of Mr. Justice Pitney, the present act standing "wholly without precedent in either State or National legislation." He then said:

The suggestion that an increase in the wages of trainmen will increase their contentment, encourage prompt and efficient service, and thus facilitate the movement of commerce, is altogether fanciful. The increase effected is not at all conditioned upon contented or efficient service. It benefits alike those who are efficient and those who are not. It does not equalize wages, but applies proportionately in all cases; making the least increase upon railroads whose rates of pay are the lowest, the greatest where wages are the highest. As a measure for improving the quality of railroad locomotives, a law requiring the companies to pay 25 per cent more than before for each locomotive, without stipulating for any improvement in the quality, would be absurdly ineffective. Equally futile, as a measure for improvement of the quality of railway supplies, would be a provision of law compelling the roads to pay 25 per cent more than formerly for rails, crossties, fuel, and the like, irrespective of the question of quality. In each of these instances the natural effect of the regulation as an aid to commerce would be precisely the same as that of the act under consideration—that is, nil.

The attempt is made to sustain the act as analogous to the exercise of the power to fix rates of freight and fare for the carriage of commodities and passengers, or as a branch of that power. This, in my judgment, is a false analogy. The origin and basis of the governmental power to regulate rates are in the right of the public to demand and secure the services of the common carrier on reasonable and equal terms, and without haggling as to rates or other terms. Every member of the public is entitled to be served, and rates are established by public authority in order to protect the public against oppression and discrimination. But there is no common or other right on the part of the trainmen to demand employment from the carriers, nor any right on the part of the carriers to compel the trainmen to serve them. The employment is a matter of private bargaining between the parties, in which each has a constitutional right to exact such terms as he may deem proper. (Adair *v.* United States, 208 U. S. 161, 172–3; Coppage *v.* Kansas, 236 U. S. 1, 20; 35 Sup. Ct. 240 [Bul. No. 169, p. 147].) Thus the sole foundation of the governmental power to fix rates is absent in the case of wages, and

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the asserted power to fix the latter is inconsistent with the constitutional rights of employer and employee to agree between themselves respecting the terms of the employment.

But, further, the interest of the public in the regulation of rates lies in limiting the carrier to a reasonable compensation for his services. The present act has for its purpose and necessary effect the raising of wages; and, whatever may be its justification from the humanitarian standpoint, it can not seriously be regarded as a regulation of commerce because incidental to a regulation of rates. It is, indeed, the very antithesis of such a regulation. If it reduced wages, it would be much more easily supportable on this theory.

The primary and fundamental constitutional defect that I find in the act now under consideration is precisely this: That it undertakes to regulate the relations of common carriers by railroad to their employees in respect to a particular matter—an increase of wages—that has no real and substantial connection with the interstate commerce in which the carriers and their employees are engaged. Certainly the amount of wages that shall be paid to a trainman has no more substantial relation to commerce than the matter which was under consideration in Adair *v.* United States, 208 U. S. 161, that is, the right of an employee to retain his employment notwithstanding his membership in a labor organization. In that case this court, by Mr. Justice Harlan, used the following language (p. 178): "But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization can not have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services."

The fact of an emergency was considered in much the same way in which Mr. Justice Day dealt with it, the power of Congress to impose a burden upon the railroads under the circumstances being denied, even if Congress might, in a case of necessity, "have appropriated public moneys to satisfy the demands of the trainmen." As to the necessity by which railroads are bound to maintain operation, Justice Pitney said:

I am unable to find in the Constitution any authority on the part of Congress to commandeer the railroads, or the services of the trainmen. The cases that are referred to as sustaining the supposed obligation of the carrier to carry on its business regardless of cost, and the authority of government to compel performance of that obligation (Atlantic Coast Line R. Co. *v.* North Carolina Corp. Com'n, 206 U. S. 1, 27; Missouri Pacific Railway Co. *v.* Kansas, 216 U. S. 262, 279; see, also, Wisconsin, etc., Railroad Co. *v.* Jacobson, 179 U. S. 287, 302), were decisions sustaining the power of State governments to enforce obligations arising out of the grant by the *State* to the railroad company of the right of existence and the franchise to operate its road; and they were decided upon the authority of a line of decisions in the State courts. [Cases cited.] That based the right of control upon the power of the State to enforce the charter obligation and the reserved power to alter or amend the charter in the public interest.

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The relation of the Federal Government to railroad companies not chartered by it is altogether different, being dependent entirely upon the fact that the companies have seen fit to engage in interstate transportation—a branch of business from which, in my opinion, they are at liberty to withdraw at any time, so far as any authority of the Federal Government to prevent it is concerned, however impracticable such withdrawal may be.

A distinction was then drawn between the use of property and the property itself, and it was pointed out on the authority of Munn *v.* Illinois, 94 U. S. 113, 126, that "the interest of the public was not in the property, but in the use of it; that not its management or disposition in general, but only the manner of its use in the service of the public was subject to control." Other cases were also cited in which the opinion stated that "it must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public the general manager." (Interstate Commerce Commission *v.* Chicago & Great Western Railway, 209 U. S. 108, 118.) The remainder of the opinion is for the most part as follows:

The right to control, to manage, and to dispose of it, the right to put it at risk in business, and by legitimate skill and enterprise to make gains beyond the fixed rates of interest, the right to hire employees, to bargain freely with them about the rate of wages, and from their labors to make lawful gains—these are among the essential rights of property, that pertain to owners of railroads as to others. The devotion of their property to the public use does not give to the public an interest in the property, but only in its use.

This act, in my judgment, usurps the right of the owners of the railroads to manage their own properties, and is an attempt to control and manage the properties rather than to regulate their use in commerce. In particular, it deprives the carriers of their right to agree with their employees as to the terms of employment. Without amplifying the point, I need only refer again to Adair *v.* United States, 208 U. S. 161, 174, 178.

I wholly dissent from the suggestion, upon which great stress is laid in the opinion of the majority of the court, that the admittedly private right of the carriers and their employees to fix by agreement between themselves the standard of wages to control their relations—a right guaranteed by the "due process of law" clause, as this court repeatedly has held—can be set at naught or treated as waived in the present instance because the parties have failed to agree, or that legislative interference can be justified on that ground. The right to contract is the right to say by what terms one will be bound. It is of the very essence of the right that the parties may remain in disagreement if either party is not content with any term proposed by the other. A failure to agree is not a waiver but an exercise of the right—as much so as the making of an agreement.

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To say that the United States has such a relation to interstate traffic and the transportation of the mails that it may interfere directly by force, or indirectly through the courts, to remove obstructions placed by wrongdoers in the way of such transportation (In re Debs, 158 U. S. 564, 582, 586), is not to say that, when obstruction is threatened, Congress, without taking over the railroads and paying just compensation to the owners, may exercise control of the revenues and dispose of them for the purpose of buying peace, either by direct intervention or through coercive legislation. To do this is to ignore the distinction between meum and tuum, to safeguard which was one of the objects of the fifth amendment.

The logical consequences of the doctrine now announced are sufficient to condemn it. If Congress may fix wages of trainmen in interstate commerce during a term of months, it may do so during a term of years, or indefinitely. If it may increase wages, much more certainly it may reduce them. If it may establish a minimum, it may establish a maximum. If it may impose its arbitral award upon the parties in a dispute about wages, it may do the same in the event of a dispute between the railroads and the coal miners, the car builders, or the producers of any other commodity essential to the proper movement of traffic.

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HOURS OF LABOR—"RUNNING AND MANAGEMENT OF MILLS"—WATCHMAN—*State* v. *Arkansas Lumber Co., Supreme Court of Arkansas (Nov. 20, 1916), 189 Southwestern Reporter, page 671.*—The Arkansas Lumber Co. was indicted for violation of act 49 of the acts of 1905, prescribing a 10-hour day for working men and laborers employed by operators of saw and planing mills "in any department relating to the running and management of said mills." A special demurrer to the indictment was sustained by the circuit court of Bradley County after the evidence had been heard, that court holding that the night watchman, who had been employed 12 hours per day, was not shown by the evidence to be one of those employees who come within the scope of the act. It appeared that the watchman Reddin was on duty from 6 p. m. to 6 a. m., making a round of the premises hourly, with an interval of 20 minutes between the tours. The supreme court held that the ruling was correct, this watchman not being covered by the act. Judge Wood, for the court, said in part:

The duties of the night watchman, as set forth, have no relation to the operating and management departments of such companies. There are many employees about mill plants that have duties to perform, such as bookkeepers, night watchmen, auditors, etc., that have no relation to the operating and managing departments. The purpose of the law was to protect those doing dangerous and laborious work connected with the operating department, and also arduous, and perhaps in some cases dangerous, duties connected with the management of the plants.

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HOURS OF LABOR—TEN-HOUR DAY IN FACTORIES—CONSTITUTIONALITY OF STATUTE—*Bunting v. Oregon, Supreme Court of the United States (Apr. 9, 1917), 37 Supreme Court Reporter, page 435.* This case was before the Supreme Court on a writ of error to review a decision of the Supreme Court of Oregon upholding as constitutional the law of that State fixing a 10-hour day for employees in "any mill, factory, or manufacturing establishment" in the State. Certain employees are excepted, provision is made for emergency, and not to exceed three hours per day overtime may be allowed, payment therefor to be made "at the rate of time and one-half of the regular wage." F. O. Bunting had been found guilty of violating the law, and his conviction was upheld by the Supreme Court of Oregon. (State *v.* Bunting, 139 Pac. 731 [Bul. No. 169, p. 120].)

On this hearing the contention was made that the act in question is a wage law and not a health regulation, and that it takes the property of the plaintiff in error without due process of law. The act itself recites in its first section that the State has an interest in the well-being of its citizens, and that it is injurious to their health for them to work in the establishments named more than 10 hours per day, while the second section forbids such employment. Mr. Justice McKenna, who delivered the opinion of the court, recited these facts as indicating the purpose of the legislature, confirmed by the decision of the supreme court of the State. While pointing out that "mere declaration can not give character to a law, nor turn illegal into legal operation," the court was unwilling to ascribe to the legislature an intention of doing one thing while professing to do another.

The fact that excess payment was required where overtime work was performed was insisted upon by the plaintiff in error as showing a purpose to require payment at a rate in excess of the market value of the labor of the employee, being a wage law in this respect, and a health law only by fixing an absolute 13-hour limit. Mr. Justice McKenna admitted a certain verbal plausibility in these contentions, but adopted the view that as the three hours' overtime could be worked only under an increased rate of pay, this provision should be construed as penalty rather than permission, saying on this point:

It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided, occasions not of such imperative necessity, and yet which should have some accommodation; abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

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We can not know all of the conditions that impelled the law or its particular form. The supreme court, nearer to them, describes the law as follows: "It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions for permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause."

It was then said that it was not necessary to cast about for reasons for the legislative judgment, the question before the court being only whether or not the act was passed in the exercise of an admitted power of government. Admitting that future changes might be made in legislation of this sort, tentative in a field not fully developed, the conclusion was reached that the act "does not transcend constitutional limits."

As to the contention that the act was neither necessary nor useful as a regulation of the hours of service "for the preservation of the health of employees in mills, factories, and manufacturing establishments," it is pointed out that there were no facts presented in the record to sustain this contention. The decision of the State court was again quoted from to the effect that the hours in some other countries were somewhat less than those prescribed by the act under consideration, and that a 10-hour day was sanctioned by custom in local industries, so that "it can not be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor."

The claim that the law discriminated against mills, factories, etc., by requiring them to pay more for labor than in other employments was disposed of by referring to the fact that the law is regarded as an hours-of-labor act and not a wages act. It is of interest to note that no decision was cited as upholding the position taken by the court, two justices dissenting, nor was any reference made to the 10-hour bakery law of New York, held unconstitutional in 1905 by the same court (Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539), though obviously the two opinions are in conflict, so that the earlier one must be held to be overruled.

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HOURS OF LABOR OF WOMEN—DAYWORK AND NIGHTWORK—DELEGATION OF POWER TO INDUSTRIAL COMMISSION—CONSTITUTIONALITY OF STATUTE—*State* v. *Lange Canning Co., Supreme Court of Wisconsin (May 2, 1916), 157 Northwestern Reporter, page 777;*



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(*November 14, 1916*), *160 Northwestern Reporter, page 57.*—The State of Wisconsin brought action to recover a forfeiture from the company named for violations of the statute enacted in 1915 regulating the hours of labor of women. The circuit court of Eau Claire County entered an order sustaining a demurrer to the complaint, and the State took an appeal. The complaint alleged 30 causes of action, each consisting of the employment of a woman from 14 hours to 17½ hours, exclusive of meal periods, in its canning factory. The statute, after laying down the principle that no female should be allowed to work for such periods of time as would be dangerous or prejudicial to her health, safety, or welfare, made it the duty of the industrial commission to make investigations and classifications of employments and places of employment, and to issue orders regulating the hours of labor of women therein. It further provided that until such orders were issued, work should not be required at daywork, defined to be work between 6 a. m. and 8 p. m., for more than 10 hours in a day or 55 in a week; or at nightwork (between 8 p. m. and 6 a. m.) for more than 8 hours in a day or 48 in a week.

Judge Rosenberry delivered the opinion of the supreme court in this case, and first stated the questions involved as follows:

Three questions are presented for determination upon this appeal:

(1) Does the statute limit the number of hours women may be employed in any one calendar day where the work is done partly before and partly after 8 o'clock p. m. of that day?

(2) Is the statute void for the reason that it unlawfully delegates legislative power to the industrial commission?

(3) If it is held that the provision delegating powers to the industrial commission is unconstitutional and therefore void, can the remainder of the act stand as a valid enactment?

The women on whose excessive employment the prosecution was based were employed partly before and partly after 8 p. m. It was the contention of the company that the statutory limitations did not apply to such cases. The opinion disposes of this contention in the following language:

There is no doubt in our minds that the limitation as to the amount of work which may be done in any one day, meaning thereby the period from midnight to midnight, is limited to 10 hours. The complaint therefore states a cause of action.

So construed, the law is reasonable, and the intent of the legislature is given effect. Construed in accordance with the contention of the defendant, it would permit a female to work 14 or more hours in one calendar day. Such a construction would be subversive of the purpose of the law, and would lead to the absurd result of permitting women to work more hours per day when the service is rendered partly in the nighttime than would be permitted if the work were all done in the daytime, and that in the face of a declaration by the legislature that nightwork is more detrimental to the health of women than daywork. Such a construction should be avoided.

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As to this point, therefore, the contention of the company was overruled, and the law was held to be a valid one in respect of such regulations even if other portions of it were void.

Taking up then the question of the unlawful delegation of legislative power, the conclusion was reached that this had been attempted in leaving to the commission "power and authority to declare those rules and principles of conduct which shall be enforced in this State as regulating or limiting the conduct of the citizens thereof in relation to the employment of women and protecting women employed in certain occupations." It was held that the duty of classification and determination of these points belonged to the legislature alone, and this portion of the law was declared void.

Motion was made for a rehearing on the ground that the matter of the delegation of the legislative authority had not been fairly before the court, a dissenting justice saying that the point was not necessarily involved in the case. The rehearing was not allowed, but the court withdrew that portion of its opinion declaring the invalidity of the provision as to the power of the industrial commission to act in the premises. As to this Judge Rosenberry said:

Since the opinion in this case was filed, the matter has been fully reargued by brief, and upon further study and reflection we are of the opinion that the statute may properly be construed as laying down the general rule that women shall not be permitted to work in any place for such a period of time as shall be prejudicial to their health, and authorizing the industrial commission upon investigation to determine as a fact what class or classes of employment are dangerous or prejudicial to the life, health, safety, or welfare of females, and to determine as a fact how long females may be engaged in the several classes of employment reasonably without danger or prejudice to the life, health, safety, or welfare of such females, and to establish by general orders such classification and the time which females may labor therein, so found; and we are of the opinion that as so construed and to that extent the law should be upheld, for the reason that:

"The authority thus conferred invests the commission with no arbitrary and uncontrolled discretion, but directs them to ascertain the facts and to apply the rules of law thereto under the prescribed terms and conditions. Such action is not legislative in character, but is the performance of an executive and ministerial duty within the regulations provided for in the act." (State ex rel. Buell *v.* Frear, 146 Wis. 305, 306, 131 N. W. 832, 34 L. R. A. (N. S.) 480.)

So much of our former opinion as is inconsistent with the views here expressed is withdrawn. We shall not attempt at this time to mark the boundaries of the commission's authority under the act as here construed, no order of the commission being before us in this action, but determination of that matter will be postponed until the action of the commission is in some way directly called in question. The modification of our views results in no modification of the mandate.

The motion for a rehearing is denied.

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HOURS OF SERVICE—RAILROADS—"CASUALTY"—DERAILMENT—PROOF OF CAUSE—*Denver & Rio Grande Railroad Co.* v. *United States, United States Circuit Court of Appeals, Eighth Circuit (May 1, 1916), 233 Federal Reporter, page 62.*—Prosecution was instituted against the company named for several alleged violations of the Hours of Service Act. Five counts were based on the employment of a crew of five men overtime on a run from Salt Lake City to Park City and return. The train was derailed, and the crew went to a farmhouse, where they partook of a lunch and rested until the smoke of the derrick, which was sent to assist them, became visible. If the time they were away from the train was taken out, there was no overtime work. The company was convicted in the district court, but on appeal it was held that it was not guilty, the circumstances bringing the matter under the proviso relating to casualties, etc.

Judge Amidon, who prepared the opinion, disposed of the contention that the crew released themselves, by observing that there was no officer or agent of the company with authority to release them; he also said that, as there were no extra men at Park City who could have taken the places of the crew, the journey should be treated as a continuous one. He pointed out that the stipulated facts upon which the decisions were rendered did not show what was the cause of the derailment, and that the contention of the counsel for the Government, which the trial court accepted, was that the company, in order to excuse itself under the proviso, was obliged to prove that the derailment was not due to its negligence or that of its employees. After showing by an examination of the cases that the exercise of diligence to prevent such delays as are incidental to the ordinary running of trains must be proved by the company, he pointed out that the present cause of delay was not of that character, and further said:

We do not think it was the intent of Congress in case of such serious matters as derailments and collisions to take from the company the protection of the proviso even if such events were caused by the negligence of the company or its employees. On the other hand, it was the intent of the statute in case of such an event to leave the company free to deal with the situation and to retain employees in the service if that result could not be avoided by the exercise of reasonable diligence after the occurrence of the accident. As was pointed out by this court in United States *v.* Missouri Pacific Railway Co. (213 Fed. 169), in case of such an accident the first duty of the company is to protect the traveling public and other employees, and if keeping employees on duty overtime is necessary in order to meet the situation the carrier is permitted to do so under the proviso. In the presence of such an event the law does not look to the question how it was brought about; on the other hand, it is chiefly concerned with the protection of those whose lives may be imperiled. The penalties prescribed in the statute are not a punishment for negligence, but for keeping men on duty for excessive periods. The

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statute clearly recognizes that there may be emergencies justifying such longer period of service. Not to permit it would imperil the traveling public and other employees of the carrier. "The usual causes incidental to operation" do not come within this class, for the reason that they can usually be anticipated, or their consequences avoided, by the exercise of diligence after they occur.

We are of the opinion, therefore, that the derailment involved in these counts brought the company within the scope of the proviso. This would be true, whether it was caused by negligence or was a pure accident. The stipulation of facts clearly shows that the keeping of the men on duty for the excessive time was caused wholly by the derailment, and could not have been avoided by the exercise of diligence on the part of the company after the derailment occurred. We are of the opinion, therefore, that the trial court erred in directing a verdict in favor of the Government as to these counts, and its judgment must be reversed.

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HOURS OF SERVICE—RAILROADS—EMERGENCY—*United States* v. *Missouri Pacific Railway Co., United States District Court, District of Colorado (June 19, 1916), 235 Federal Reporter, page 944.*—Prosecution was instituted against the railroad company named in 12 counts for alleged violations of the Hours of Service Act by employing telegraph operators transmitting orders relative to the movement of trains for a longer time than permitted by the act. Some cases occurred in offices operated only during the daytime, others in day and night offices. In every case the amount of overtime charged did not exceed the lawful hours, 9 and 13, respectively, by more than the 4 hours additional allowed in cases of emergency. The company filed an answer which, in addition to a general denial, set up special pleas to all the counts except the fourth and ninth. A demurrer was filed by the prosecution to these pleas, which raised the question whether they, if testimony were submitted to sustain them, were sufficient as defenses. The pleas were upheld in only one instance. The discussion of these specific cases of alleged emergency by Judge Lewis in the opinion is as follows:

The first count charges a violation in retaining the operator on duty at the defendant's office and station at Arlington, operated only during the daytime, for a longer period than 13 hours on August 22, 1914, to wit, from 8 a. m. to 11.10 p. m., a total of 15 hours and 10 minutes within the 24-hour period beginning at 8 a. m.

The defendant in its special plea to this count sets up what it claims constitutes an emergency under the second section of the act, by reason of which it asserts that it had the right under the act, to retain the employee for an additional 4 hours. The emergency, as alleged, consisted in the fact that three carloads of live stock were delivered to defendant at Arlington that morning for transportation to Denver. Defendant's dispatcher intended to have the three cars taken into a train passing through Arlington about 10 a. m., but he forgot and failed to order the cars picked up by that train, and in order to avoid

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holding the live stock until the following day, the dispatcher ordered another train to pick up the cars of live stock, and in consequence the operator could not leave his duties until that train had taken the cars out, which was about 11.10 p. m. on said day.

The demurrer attacks the sufficiency of these facts to constitute an emergency within the meaning of the act. The defendant's counsel points out that the conditions which constitute an emergency within the meaning of the act are necessarily of far less import and seriousness to the railroad than "any case of casualty or unavoidable accident" named in the third section of the act, which latter would entirely exempt defendant from the act and relieve it from the penalty. And thus proceeding with the two provisos in hand, one emergency and the other casualty or unavoidable accident, and matching one against the other, coupled with the definitions that he chooses to apply, he easily reaches the conclusion that it does not require much to constitute an emergency.

Such a conclusion would bring within its scope a vast multitude of unexpected and unanticipated minor predicaments and contingencies constantly arising. The term emergency as here used is of greater moment than this, though of less significance than the terms used in the third section. A definition that would override and defeat the plain purpose of the act must be rejected. It is believed that the facts pleaded do not show such an unusual and extraordinary condition in railroad operation as to constitute an emergency within the meaning of the act. [Cases cited.]

The special plea to the second cause of action admits that the operator was employed at a day and night station, and that he was detained in service more than nine hours, but it sets up as an emergency the fact that there was a trainload of silk delivered to the defendant by a connecting carrier at Pueblo; that the time of delivery at the connecting point had been erroneously reported to the defendant's dispatcher; that the transportation of silk is very profitable to the carrier; that it is of great value, is an easy subject of theft and can not be permitted to stand on sidings; and that these facts brought about a contingency which required the holding of the operator over the permitted time.

The special plea to the third count setting up a claimed emergency is based on the fact that a train pulled loose from the tender a drawbar which delayed it in reaching the station where the operator was engaged, and it is claimed that that rendered it necessary to hold the operator overtime until the train had reached his station.

The special plea to the sixth count alleges that the emergency consisted in the fact that a train was delayed on account of broken packing rings in one of the cylinders of the engine which was hauling the train, which in turn required the holding of the operator at the particular station named in that count until the delayed train reached his station.

The special plea to the seventh count sets up as a claimed emergency facts showing that a passenger train carrying mail was delayed in reaching the station at which the operator was held overtime on account of various and sundry reasons at different stations en route, and that the operator was held until it arrived to handle mail and care for passengers.

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The special plea to the eighth count sets up facts showing another delayed passenger train assigned as an emergency for holding the operator overtime. The delay was caused by the failure of an air pump on the engine hauling the train.

The special plea to the tenth count sets up facts showing the holding of the operator overtime on account of a delayed train due to the fact that the coal chutes at the station in question were nearly out of coal, that the train dispatcher forgot and overlooked his duty in ordering the chutes filled, and that this neglect on the part of the dispatcher brought about the delay which required the holding of the operator overtime.

The special plea to the eleventh count discloses another delayed train as the claimed emergency for holding the operator. The delay was caused by losing the relief valve of the superheater on the engine, and also by heavy wind, snow, and cold weather and badly clinkered fire.

The special plea to the twelfth count discloses another delayed mail and passenger train due to various causes, to wit, bad working of steam heating connections, thawing out steam heating connections, thawing out ash pan, meeting another delayed train, cold, snow, and wind and badly clinkered fire due to weather conditions.

All of these pleas are likewise held to be bad as not stating facts showing in either instance an emergency.

The special plea to the fifth count of the complaint sets up as a claimed emergency for holding the operator overtime a delayed train in reaching his station on account of a wreck which it could not pass until the track had been cleared. This plea is believed to be good as stating facts which entirely relieve the defendant from the penalties denounced in the act.

The demurrer of complaint to the special pleas set up in the answer to the first, second, third, sixth, seventh, eighth, tenth, eleventh, and twelfth counts will therefore be sustained, and overruled as to the special plea set up against the fifth count.

A further matter of interest relates to the point of starting to reckon a 24-hour period. With regard to this Judge Lewis said in part:

Though this point was not in controversy in United States *v.* Atchison, Topeka & Santa Fe Railway Co., 220 U. S. 37, 31 Sup. Ct. 362 [Bul. No. 95, p. 311], no one appears to have challenged the proposition that the 24-hour period must be counted from the time the operator goes on duty. It was only determined in that case that the hours of service within the statutory limit need not be continuous. To now hold that the prosecution may arbitrarily select any point during the regular hours of service for the purpose of reckoning time of employment appears to me to have the necessary effect in many instances of indirectly evading the rule there announced. For instance, it is permissible under the holding in that case for an operator to enter on his duties every day at 6 a. m. and work to noon, then go on duty again at 3 p. m. and work to 6 p. m., but on every other day instead of beginning at 3 p. m. and working to 6 p. m. he might begin at 4 p. m. and work to 7 p. m. Under the ruling of the Supreme Court there would be no violation of the act. But if the prosecution can

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arbitrarily select the initial point it can bring the railroad company within the act on every alternate day, thus: Four p. m. to 7 p. m. is 3 hours; 6 a. m. to noon is 6 hours, and 3 p. m. to 4 p. m. is 1 hour, making 10 hours.

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HOURS OF SERVICE—RAILROADS—NOON HOUR—*United States* v. *Atchison, Topeka & Santa Fe Railway Co., United States District Court, District of New Mexico (Feb. 21, 1916), 232 Federal Reporter, page 196.*—Prosecution was instituted against the company named for alleged violation of the Hours of Service Act in eight instances. The principle involved was the same in each, and was illustrated by the first count, which charged the employment of one H. H. Edwards, a telegraph operator in a night and day office, from 8 a. m. to 6 p. m., or 10 hours. He was allowed, in fact required, to leave the office during the time from 12 noon to 1 p. m., and was not subject to call except in case of emergency, the time being entirely his own. It was held that this did not constitute a violation of law, and judgment was rendered for the company, Judge Pollock, who delivered the opinion, after citing pertinent cases, saying in part:

From a reading of the above-cited cases it appears, in those relied upon by the plaintiff, the release of the employee from duty was but temporary, he all the while remained subject to recall; whereas, in the case relied upon by defendant, the release from duty was absolute, except in case an emergency arose. Under the stipulated facts, although the station at Las Cruces was one continuously operated day and night, yet, as the operator was not by the company permitted to remain on duty more than 9 hours out of the 24, constituting a day, I am of the opinion that the principle involved and determined in the case of United States *v.* Atchison, Topeka & Santa Fe Railway Co. [220 U. S. 37, 31 Sup. Ct. 362, Bul. No. 95, p. 311], is not only determinable of the case at bar, but, having in mind the purpose of Congress in the enactment of the law, that purpose is better subserved by permitting an operator to work 9 hours out of 10, with 1 hour absolutely his own, except in cases of emergency, that he may take his meals, relax, and have recreation, than would be the case where he is permitted to work 9 continuous consecutive hours.

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LABOR ORGANIZATIONS—CONSPIRACY IN RESTRAINT OF TRADE—ANTITRUST ACTS—SUIT AGAINST VOLUNTARY ASSOCIATION—*Dowd* v. *United Mine Workers of America et al., United States Circuit Court of Appeals, Eighth Circuit (July 21, 1916), 235 Federal Reporter, page 1.*—A. S. Dowd, receiver for the Coronado Coal Co., and eight other coal companies, commenced action to recover damages resulting from an alleged unlawful conspiracy and combination in restraint of interstate trade and commerce. The defendants were the United Mine Workers of America, 27 local unions of the same, the president and other officers of the United Mine Workers of America, and the

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presidents and other officers of district branches and local unions of the same. The local unions were all affiliated with and subject to the laws of union district 21 and were located in the State of Arkansas. The defendants demurred to the complaint, setting forth a number of reasons for holding the complaint insufficient. In the district court, several grounds of demurrer were overruled, but the demurrers themselves were sustained on the following specific ground:

That the complaint fails to disclose that this court has any jurisdiction of the cause of action therein set forth, for the reason that the acts of defendants complained of were not an interference with interstate commerce, or a violation of the Federal statute upon which the complaint is predicated.

The circuit court of appeals held, however, that the whole matter was open to its review, to decide whether the judgment was right or wrong, irrespective of the reason given for it. It also denied the motion made by the defendant unions and individuals to dismiss the writ of error on the ground that it should have issued from the Supreme Court of the United States. The court then came to the questions remaining for consideration by it, and stated them as follows:

The questions then for consideration are: (1) May the United Mine Workers of America and the different local unions be sued in the name of the association? (2) Does the complaint state a cause of action?

The judgment of the court below was reversed, the court of appeals answering both of the above questions in the affirmative. Judge Carland delivered the opinion, the major portion of which is quoted herewith:

The complaint was filed September 1, 1914, and the acts of which complaint is made are alleged to have occurred early the same year. Taking up the first question suggested, we find that section 7 of the act of July 2, 1890, reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the same act provides:

"The word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 of the act of Congress of October 15, 1914 (38 Stat. 731, c. 323), provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the

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defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It will be noticed that section 4 of the act of October 15, 1914, eliminates any description of the persons or corporation by whom the injury shall be committed, leaving the party injured free to pursue anyone who causes the injury. It is claimed by the defendants the United Mine Workers of America and the several local unions that the word "associations" found in section 8, above quoted, means associations which have a legal entity by reason of having been organized under the laws of the United States, their territories, the States, or the laws of a foreign country; that the words "existing under" or "authorized by" mean that the word "association" refers only to an association having a legal entity by force of law; and that the United Mine Workers of America and the local unions, not having been shown in this case to be organized under any particular law, may not be held liable under section 7, above quoted, in the name of the association. Such a construction of the law would relieve labor organizations generally from all liability.

The United States Supreme Court in Loewe *v.* Lawlor, 208 U. S. 274, 301, 28 Sup. Ct. 301, 310 [Bul. No. 75, p. 622], said:

"The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed so that the act remained as we have it before us."

We are of the opinion that it was clearly not the intention of Congress to exempt anyone from liability for injuries caused by combinations and conspiracies in restraint of interstate trade. We therefore decide that the word "associations," in section 8, includes unincorporated associations, such as the defendants are shown to be. The defendants, of course, will not take the position that the associations are outlaws, for they are continually recognized in the legislation of Congress and of the several States as lawful associations. A notable instance of this is contained in section 6 of the act of Congress of October 15, 1914, where it is said:

"Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

The defendants, composing an organization of 400,000 miners, capable of doing great good or wrong, claim they are not liable to be sued in the name of the association, but that the injured plaintiff must pursue the individual members who he can show were liable for the injury, leaving the powerful organization to go free. We do not think it can be said that the defendants United Mine Workers of America and the local unions are not associations existing under or authorized by law within the meaning of section 8, above quoted.

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But, if defendants are associations within the meaning of the law, it is next insisted that an unincorporated association can not be sued in the name of the association. It is true that, in the absence of a specific statute to the contrary, the rule at common law, and under the codes, is that an unincorporated association is not recognized as having a legal existence apart from its members. The action lies against the members individually, but not against the unincorporated association in its collective capacity and name. In many of the States statutes have been passed changing this rule, so that unincorporated associations not having corporate powers may be sued in the name of the association. It has also been ruled that the common-law rule, that only entities known to the law are capable of being sued, may not only be modified by express enactment, but also by statutory implication.

If we are correct in our view that voluntary unincorporated associations are included in the word "associations" as used in section 8, above quoted, then we are of the opinion that there is a clear and necessary implication that the association may be sued in its own name; otherwise the provision in the law that the association should be liable could not be enforced, and the law would fail as against all such associations, the remedy of the injured party being confined to an action against the mere agents and employees of the association, in most cases unable to respond in damages. The question as to the liability of an unincorporated labor organization to be sued under the act of July 2, 1890, in the name of the association, does not seem to have been discussed in any reported case which we have been able to find. The fact that labor organizations were before Congress seeking to be exempted from the act is of course conclusive evidence that Congress knew of such organizations, and did not intend to exempt them, while by Clayton Act, October 15, 1914, section 4, a remedy is given to one injured in his business or property by reason of anything forbidden in the antitrust laws, regardless of who shall commit the injury.

The case of Loewe *v.* Lawlor [supra], and Lawlor *v.* Loewe, 235 U. S. 522, 35 Sup. Ct. 170 [Bul. No. 169, p. 140], known as the Danbury Hatters' Case, was twice before the United States Supreme Court. In this case the defendants were members of the United Hatters of North America and also of the American Federation of Labor. The association by name was not a party defendant, but a large verdict in damages was recovered, and the recovery sustained on appeal. The case of Eastern States Retail Lumber Dealers' Association *v.* United States, 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53], was a case brought by the United States for a violation of the act of July 2, 1890, against various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations. No objection to suing the defendants in the name of the association was made in this case. The case of the United States *v.* Workingmen's Amalgamated Council (C. C.), 54 Fed. 994, was cited with approval by the Supreme Court of the United States in Loewe *v.* Lawlor. No objection was made that this suit was against the association by name. The result of what has been said is that the United Mine

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Workers of America and the local unions were properly sued in the name of the association. Whether they are in fact liable in this action is another question, not now to be considered.

We now come to the question as to whether the complaint states a cause of action. A careful consideration of the same has led to the conclusion that it sufficiently alleges a combination and conspiracy in restraint of interstate trade and commerce between the defendants, that the acts alleged to have been committed by them in pursuance of said combination or conspiracy resulted in damage to some or all of the coal companies, and that when these acts were committed the operating coal companies were engaged in interstate trade and commerce in the mining and shipment of coal. It is objected that the complaint fails to show that the plaintiffs were engaged in interstate trade or commerce at the time of the commission of the alleged wrongs, or that the plaintiffs have suffered damages to interstate trade or commerce by reason of defendants' acts. The complaint alleges that at the time the receiver was appointed and for many years prior thereto certain of the coal companies were engaged in the production, loading, and shipment of coal for interstate trade and commerce from coal lands located in Sebastian County, Ark. It is claimed that, as the complaint does not allege the date when the receiver was appointed, it is impossible to determine when the coal companies were engaged in interstate commerce in relation to the mining and shipment of coal. This contention is without merit.

It is not claimed that the causes of action have been barred by the statute of limitations, and the complaint fully shows that 75 per cent of all coal mined and shipped was shipped to customers outside of the State of Arkansas. It is alleged in the complaint that by reason of the combination and conspiracy pleaded, and the acts done in pursuance thereof, such companies have suffered great loss and injury to their business and property, in the sum of $427,820.77. This allegation is followed by an itemized statement of the character and amount of damage. Whether they have been damaged as alleged only a trial can determine. Certainly on general demurrer the complaint must be held to allege some damage.

Some of the coal companies were not actually engaged in interstate commerce at the time the alleged acts were committed by the defendants; but they were preparing to do so, and were prevented from so doing as they alleged by the wrongs of the defendants.

It is next objected that the alleged wrongs of the defendants do not constitute an interference with interstate trade or commerce. We do not think, since the cases of Loewe *v.* Lawlor and Lawlor *v.* Loewe, it can be said that this can be considered an open question.

The Sherman Act has been so frequently and recently construed by the Supreme Court as to require no extended discussion now. [Cases cited.] As was said in the last case cited [Eastern States Lumber Assn. *v.* U. S., supra]:

"It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce."

It is next contended that, if plaintiffs have suffered damage to their interstate commerce or trade, such damage is indirect, incidental, and too remote to entitle them to recover in this action. The law pro-

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vides that any person who shall be injured in his business or property rights by reason of anything forbidden or declared unlawful by the act shall recover threefold the damages by him sustained. It is the source of the injury, and not the character of the property injured, which constitutes the test of recovery. Assuming that an unlawful conspiracy or combination in restraint of interstate commerce exists, then, if any person is injured by it in his business or property rights, he may recover. (Chattanooga Foundry & Pipe Works *v.* City of Atlanta, 203 U. S. 390, 27 Sup. Ct. 65.) The complaint alleges actual interference with and destruction of cars of common carriers to be used in interstate commerce for the transportation of coal. This fact alone would show an interference with interstate commerce. [Cases cited and quoted.]

After considering the complaint and the decisions of the Supreme Court and other courts, we can come to no other conclusion than that the case made by the complaint falls within that class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade, except on conditions that the combination imposes, and therefore violates the act of July 2, 1890.

In United States *v.* Patten (226 U. S. 525, 33 Sup. Ct. 141), it was said:

"Section 1 of the act is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce and restrict the common liberty to engage therein."

Judgment below reversed, and the case remanded, with instructions to overrule the demurrer, and allow defendants to answer the complaint, if they shall be so advised.

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LABOR ORGANIZATIONS—ENCOURAGEMENT OF ASSAULT AND BATTERY—CIVIL LIABILITY—*Cisco* v. *Looper, United States Circuit Court of Appeals, Eighth Circuit (Sept. 18, 1916), 236 Federal Reporter, page 336.*—O. T. Looper brought action against Mike Cisco and others for damages for an assault and battery. Looper was foreman of a coal mine of the Bache-Denman Coal Co. in Sebastian County, Ark., and the defendants were engaged in an effort to compel the unionizing of the mine. On the 6th day of April, 1914, according to evidence produced at the trial, several hundred men and women, including the defendants, assembled and marched to the mine, and amid much noise and confusion some of them compelled the plaintiff to draw the fire from under the boilers and thus stop the operation of the mine, and beat him and the other employees. He was obliged to rely at the trial largely on the testimony of the defendants and those associated with them, but even thus, it is stated in the opinion, there was abundant testimony that the crowd in general joined in encourag-

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ing the assault. During the trial the suit was dismissed as against five defendants. The court declined to instruct a verdict in favor of any of the remaining defendants, but did instruct the jury, among other things, that mere presence without participation was not enough to prove guilt, but that there must have been a "conscious purpose that their presence would inspire confidence in those who made the assault." A verdict against the defendants, and judgment for $1,250, was the result of the trial, and this judgment was affirmed by the court of appeals. Besides holding that the action was not barred by the statute of limitations, it was held that there was no error, as claimed, in denying the motions to order a verdict in the defendant's favor, nor in giving the instructions mentioned—which was said to present practically the same question. Judge Adams said in the opinion delivered by him:

We have carefully read the evidence, and agree with counsel for defendants that there is no direct evidence to the effect that either of the defendants actually assaulted the plaintiff. But we find beyond any reasonable doubt that the defendants were with the body of men and women who accompanied the persons who did commit the assault to the mine, and remained with them while the assault was being made. In addition to this, we are advised by the necessary intendment of the verdict of the jury, in the light of the charge of the court, that the defendants themselves "encouraged and incited the assault upon the plaintiff," by whomsoever made.

But counsel say that the finding of the jury in this particular was brought about by an erroneous charge of the court to the effect, as already appears in the part of the charge quoted, that a person present at the commitment of an assault and battery, encouraging its commission by words, gestures, looks, or signs, is an aider and abettor, and liable as a principal. Was this charge erroneous?

We can not read the record of this case without feeling a deep indignation at the method adopted by those who proposed to unionize the mine in question. No one now doubts the right of any organized or unorganized body of men to seek to persuade in a peaceful and orderly way their fellow men to join their ranks; but violence and lawlessness, as arguments to that end or as means of coercing others, can not be tolerated. Any persons who resort to violence to accomplish their purposes fall under the condemnation of the law, and can not escape responsibility therefor by any subterfuge adopted to conceal or mystify their identity. To make the law effectual as against any such practices, it must, in our opinion, be held that anyone who consciously participates in the creation of a state of confusion, intended to prevent identification of the wrongdoer, or to safeguard him from detection or screen him from the consequences of his act, is an aider and abettor in the accomplishment of the wrong, and should be held as a principal in its perpetration. Such, we think, is the substance of the charge complained of. A careful reading of it, with its modifications and limitations, shows that it is fully as favorable to the defendants as they were entitled to.

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LABOR ORGANIZATIONS—EXPULSION OF MEMBER—LEGALITY OF ACTION—*Drazen v. Curby et al., Supreme Court of New York, Appellate Division, First Department (Apr. 20, 1916), 158 New York Supplement, page 507.*—Morris Drazen brought action against James Curby, president of the United Brotherhood of Carpenters and Joiners of America, and another, to compel his reinstatement as a member of the organization, and for damages resulting from his expulsion. At the trial his reinstatement was ordered, and he was awarded $900 as damages. The organization appealed from this judgment, and the plaintiff also appealed as to the amount of damages. His claim was that his trial and expulsion from the union were contrary to its constitution, and that the tribunal which tried him was without jurisdiction. The court reversed the judgment and ordered the complaint dismissed. Judge Davis delivered the opinion, and his statements of the facts as to the constitution and rules of the brotherhood and the subordinate bodies and the member's trial, as well as of the court's views, are quoted, with slight omissions:

The United Brotherhood of Carpenters and Joiners of America is a voluntary association of journeymen carpenters, with a membership of about 200,000. It embraces many local unions in different parts of the country, to one of which, No. 774, the plaintiff belonged at the time of his expulsion. Besides the local unions, there is a body known as a "Joint district council," made up of representatives from the local unions. It is a body subsidiary to the general organization, and is formed in localities where there are several local unions. It has power to adopt by-laws and trade rules, which, when approved by the local unions, govern the conduct of members within the territory under the jurisdiction of the council. The trade laws are therefore local in their application.

The brotherhood has a complete and effective system of tribunals before which charges against members are brought for trial. There are also certain appellate tribunals to which appeals are taken from the decisions of the trial court. Through these courts the discipline and integrity of the organization are maintained. Under the system thus established, complaints against members are divided into two classes: First, those involving a violation of the general constitution; and, second, those charging a violation of trade rules.

As stated above, the trade rules are established by the joint district council, whose jurisdiction is local. A member charged with a violation of trade rules must be tried before a trial court appointed by his district council. From the decision of the district council, he has the right of appeal to the general president, and thence to the general executive board, whose decision is final. Charges other than those involving a violation of trade rules are tried exclusively by a trial committee of the local union. The charges must be in writing, and must specify the offense or offenses and the section of the constitution or by-laws violated, and be signed by the member or members making the charges. The decision of the trial committee, with the

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evidence taken, must be submitted in writing to the local union, and a two-thirds vote of the local union is necessary to convict. Appeals lie from the decision of the local union to the general president, thence to the general executive board, and thence to the biennial convention of the order. We thus see that violations of trade rules are tried in the district council the body creating them, while violations of the constitution are tried in the local unions.

The plaintiff was tried before the trial committee of his local union. The verdict of that committee was approved by the local union and plaintiff was found guilty. On appeal to the general president the action of the local union was sustained. On appeal to the executive board the decision was reversed. The local union then appealed to the general convention, which reversed the executive board and affirmed the conviction of the plaintiff. In all these proceedings the plaintiff was represented by counsel, a member of the union. From the outset he objected to the jurisdiction of the local union to try him. He claimed that the written complaint against him charged him with a violation of a trade rule and that the offense was triable only before the district council.

If the offense charged against the plaintiff was a violation of trade rules, the local union had no jurisdiction to try him, and the expulsion was illegal, and the judgment reinstating him was right. The charge is as follows: [Charge quoted.]

The gist of these charges is that the plaintiff interfered with members of his union who tried to get work on a building at One hundred and thirty-ninth Street and Riverside Drive, and that he acted for the employer in obtaining workmen to work on the job at less than the prevailing rate of wages, all in violation of sections 190, 191, of the general constitution. The charges are quite specific and leave the plaintiff in no doubt as to their import. Section 190 of the constitution is as follows:

"Any * * * member who endeavors to create dissension among the members, or who works against the interest and harmony of the United Brotherhood * * * shall be expelled," etc.

It would seem clear that if the plaintiff, in the interest of the employer, deliberately prevented his fellow members of the brotherhood from getting work unless they accepted less than the prevailing rate of wages, he would be guilty of violating the organic law of his organization. Among the objects of the brotherhood, as stated in section 3 of the constitution, are the cultivation of feelings of friendship among the craft and the assisting of each other to secure employment. If the charges against the plaintiff are true, he violated the spirit and letter of the constitution as expressed in this section.

A reference to the report of proceedings at the trial before the local union discloses evidence tending to support the specific charges.

The evidence tended to show that the plaintiff tried to gain an advantage for his employer over the members of his union by the use of means condemned alike by law and good morals, and in violation of the constitution of his union. An examination of the by-laws of the joint district council and of the trade rules set forth therein will not show any trade rule the violation of which can be said to be included within the purview of the charges as preferred or the evidence adduced before the trial committee.

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After the conviction of the plaintiff by his local union, the case took the regular course as prescribed in the constitution of the brotherhood through various appeals to the general president, thence to the general executive board, and finally to the general convention of the brotherhood, where the conviction was finally approved. It is quite evident that the proceedings down to the appeal to the general convention were fair and just, and unless some right of the plaintiff was infringed by the procedure before the general convention we must conclude that the action of the organization in expelling the plaintiff ought to be upheld as substantially in accord with the law of the order.

Taking up the contention that the action of the general convention was illegal and void, the court found that all technicalities had been properly complied with, and concluded as follows:

Our conclusions are that plaintiff was charged with a violation of the constitution, that the local union had jurisdiction to try those charges, that the various appeals were conducted fairly and with a due regard to plaintiff's rights, and that the court ought not to disturb the decision of the brotherhood expelling the plaintiff.

The judgment of the special term should be reversed, new findings made in accordance with these views, and the complaint dismissed.

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LABOR ORGANIZATIONS—EXPULSION OF MEMBER—MANDAMUS—DAMAGES—*People ex rel. Solomon* v. *Brotherhood of Painters, Decorators and Paper Hangers of America et al., Court of Appeals of New York (May 2, 1916), 112 Northeastern Reporter, page 752.*—Meyer Solomon was expelled from a local union affiliated with the brotherhood named, and on his appeal the order of expulsion was affirmed by the general executive board of the brotherhood and its general assembly. Application was then made for a mandamus against the organizations, requiring his reinstatement, and this was granted by the appellate division of the supreme court, which also awarded damages to Solomon for loss of wages resulting from his expulsion. The decision in the appellate division is reported in 155 N. Y. Supp. 438, and noted in Bulletin No. 189, p. 169. The court of appeals reversed the order, first pointing out that the brotherhood was a foreign corporation which had not been authorized to do business in the State, and in its opinion had not subjected itself to the jurisdiction of the State so as to permit control of its internal affairs by injunction: The greater part of the opinion is reproduced below:

Not only is the brotherhood a foreign corporation organized under the laws of Indiana, and not authorized by this State to do business within its borders, but the claim that it has subjected itself to the jurisdiction of this State rests upon the fact that it is affiliated with local unions which exist in this State as voluntary unincorporated associations. This single fact will not sustain the claim that



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is sought to be predicated upon it. The voluntary unincorporated associations and the foreign corporation are separate and distinct legal entities. The fact that each cooperated with the other in the carrying out of their several purposes does not justify disregarding their separate existence and different place of origin and activity and authorize the courts to hold that the Indiana corporation is to be deemed constructively present and doing business in every State where voluntary unincorporated associations are affiliated with it. An attempt is made to sustain the order appealed from on the ground that, although the brotherhood is a foreign corporation, it has assumed to come within this State to pursue the object of its incorporation, and therefore can not deny the jurisdiction of our courts to scrutinize its action and afford redress for a wrong done to a resident within the State. The fallacy underlying this argument has already been indicated to rest upon the assumption that the local unions are to be deemed the agents of the foreign corporation and the presence of the locals in this State equivalent to the constructive presence here of the foreign corporation. This assumption ignores the true relationship existing between the brotherhood and the local unions. The brotherhood is governed by the laws applicable to a corporation organized under the laws of the State of Indiana. It is governed also under a federated system defined in its constitution which places its management in the hands of those selected by the representatives of the local unions. The brotherhood has no jurisdiction over the admission or reinstatement of members in the local unions. Its membership is composed of the members of the local unions. The writ was, therefore, improperly granted against the foreign corporation called the brotherhood.

The district council and the local union are both voluntary, unincorporated associations, and it is well settled that mandamus, in the absence of some statutory duty imposed upon such associations, will not lie against a voluntary unincorporated association. The correctness of this last proposition was recognized by the learned appellate division, but effect was not given to it upon the theory that, because the unincorporated associations were existing in this State, and were affiliated with the brotherhood, therefore the writ would run against the brotherhood, notwithstanding that it was a foreign corporation not authorized to do business in this State. Although it is conceded that the writ could not issue against the foreign corporation except for the existence of the voluntary, unincorporated associations, the existence of these associations is made the basis for issuing the writ not only against the foreign corporation, but also against the local associations, notwithstanding that it is also conceded that mandamus will not lie against a voluntary, unincorporated association. Under this theory the existence of the unincorporated associations in this State is made the basis for issuing the writ not only against these associations, but also against the foreign corporation, which neither transacted nor was authorized to transact business in this State, and which had done no act which subjected it to the jurisdiction of this State. The attempt of the relator to sustain this theory requires him to disregard the separate existence of the foreign corporation and the local voluntary, unincorporated associations, and to indulge the hypothesis that these three entities are, in fact, one. Thus it is claimed that the writ may

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issue against the foreign corporation because the local unincorporated associations exist in this State, and may issue against the local unincorporated associations because they are to be deemed agents of a foreign corporation. The argument urged in support of this theory starts with the concession that the writ will not lie against either the foreign corporation or the unincorporated associations, and ends with the conclusion that it may properly run against both the foreign corporation and the unincorporated associations. Not only is the conclusion reached inconsistent with the premise, but the hypothesis that these three respondents are to be considered as a single entity is negatived by the allegations of the petition of the relator which clearly sets forth the separate existence of each, and prayed that a mandamus should issue against each of the respondents.

No hardship or injustice results to the relator by adhering to the established rules governing the remedy by mandamus. If the relator has been improperly expelled, he may by an action be reinstated in his membership in the local union, and restoration to membership in the local union operates to confer upon him all the rights and privileges which the members of that union possess in the district council and in the brotherhood.

The award of damages that was made in favor of the relator in this proceeding was improper. This award was made to compensate the relator for the earnings alleged to have been lost by reason of his expulsion. In so far as the foreign corporation called the brotherhood is concerned, it acted as an appellate body to review the order of expulsion which was entered against the relator by the district council. Its only action in the case was the exercise of its function to hear the appeal and review the action of the local body. Even if the court below had jurisdiction to issue the writ of mandamus against the foreign corporation, that corporation could not be held liable in damages to the relator because it affirmed the order of expulsion in the absence of fraud or bad faith. (Schouten *v.* Alpine, 215 N. Y. 225, 109 N. E. 244 [Bul. No. 189, p. 323].) In the case under consideration neither fraud nor bad faith on the part of the brotherhood was alleged or proved. There is therefore no basis in the record for that part of the order which required the foreign corporation to pay damages to the relator.

In so far as the district council and the local union are concerned, both being voluntary, unincorporated associations, this proceeding is brought against them only by virtue of section 1919 of the Code of Civil Procedure. It is well established that in a proceeding or action against a voluntary, unincorporated association to recover damages, facts must be alleged and proved which render all the members of such association liable for the sum claimed. (McCave *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728; Schouten *v.* Alpine, supra.) In the present proceeding there was neither allegation nor proof to meet the requirements of this rule.

It follows that the order of the appellate division should be reversed, and the proceeding should be dismissed.

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LABOR ORGANIZATIONS — INJUNCTION — CONTEMPT — EVIDENCE — EFFECT OF OATH DENYING ACTS—*Oates* v. *United States, United States Circuit Court of Appeals, Fourth Circuit* (*May 2, 1916*), *233*

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*Federal Reporter, page 201.*—James Oates and three other persons were convicted in separate actions of contempt in the violation of an injunction issued in the case of West Virginia-Pittsburgh Coal Co. *v.* John P. White et al., enjoining acts of intimidation, etc., in the labor disputes between that company and its striking employees. A conviction in the District Court for the Northern District of West Virginia was set aside for reasons given in the report of the case (223 Fed. 1013), reviewed in Bulletin No. 189, page 314. Afterwards the judge of the district court indicated the testimony stricken out as incompetent, and made definite findings as to the violations of the order of which the several defendants were guilty. On the present appeal the defendants contended that they should have been granted a jury trial, on account of the change in the evidence, but the court did not accept this view of the matter, Judge Woods saying in part:

The only valid ground of complaint was the failure of the district judge to indicate the particular testimony rejected. A new trial was not necessary to correct that error, for the only purpose of the correction was to enable this court to review the findings of the district court more intelligently.

The action of this court in directing that the district judge indicate the testimony designated as incompetent was taken in abundance, if not excess, of consideration for the rights of the defendants, because the liberty of citizens was involved, and because there were findings of fact requiring reconsideration and restatement by the district judge before passing sentence. There was no reason for a new trial, and no principle of law would have justified it.

With regard to some of the other important points at issue, Judge Woods said, in the opinion affirming the conviction of the defendants, and their sentence to imprisonment for six months each, and payment of the costs of the court:

To convict 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 district court can not be reviewed by this court. [Cases cited.] While there was conflict of evidence, there could be no serious claim of absence of evidence supporting the specific findings against James Oates, Fanny Sullens, and Frank Ledvinski.

The contention was seriously made, however, that there was no proof of the first finding against Hiram Stephens. The testimony was that Stephens and several other strikers went on the ferryboat on which a number of the employees of the coal company were to cross the Ohio River, with the intention of persuading them to quit, and, if that failed, to fight them, and that on this demonstration of the strikers, but before they had commenced to persuade or threaten by words, the foreman called his men off the boat. The demonstration was made as a method of persuasion or intimidation of the company's employees to induce them to quit work, and it was clearly

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so understood by at least one of the company's employees, the foreman in charge of its men. The participation of Stephens in this expedition and demonstration was therefore a violation of the terms of the injunction.

The ground upon which the defendants mainly rely for reversal is that they purged themselves of the contempt by a sworn denial of the essential elements of the offenses charged. Numerous authorities, commencing with Blackstone, are cited in support of the position. According to these authorities, in criminal contempt the defendant was first to be interrogated or allowed to put in his formal answer denying the contempt charged. The denial under oath purged the contempt, and if the oath turned out to be false the only remedy was an indictment for perjury. The defendants did not bring themselves within this ancient rule, since they did not put in answers denying the contempt charged, but, on the contrary, merely put in the plea of not guilty and went to trial on that. [Cases cited.]

But, waiving all that, the Supreme Court of the United States has expressly held that the rule contended for has no application where the charge, as in these cases, is one of personal and overt acts. [Cases cited.]

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LABOR ORGANIZATIONS—INJUNCTION—LABOR AS PROPERTY—CONSTITUTIONALITY OF STATUTE—*Bogni et al.* v. *Perotti et al., Supreme Judicial Court of Massachusetts (May 19, 1916), 112 Northeastern Reporter, page 853.*—John Bogni and others brought a bill for injunction against Giovanni Perotti and others. The bill was dismissed by the superior court of Suffolk County, but the supreme judicial court reversed the decision. The constitutionality of St. 1914, c. 778, relating to injunctions in labor disputes, etc., was the point at issue in this case. This statute is entitled "An act to make lawful certain agreements between employees and laborers, and to limit the issuing of injunctions in certain cases," and appears in full in Bulletin No. 166, page 142.

In brief, it declared labor combinations lawful, and provided against the issue of any injunction in labor disputes "unless such order or injunction be necessary to prevent irreparable injury to property or to a property right of the party making the application for which there is no adequate remedy at law; and such property or property right shall be particularly described in the application, which shall be sworn to by the applicant or by his agent or attorney."

The right to make contracts of employment, or to do work and labor as an employee, is declared to be a personal and not a property right, and in cases involving the violation of the contract of employment by either party, where no irreparable damage is about to be committed upon property or a property right, no injunction might be granted, but the parties left to their remedy at law.

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Judge Rugg, stating the facts and the opinion of the court declaring the act unconstitutional, said for the most part:

This is a contest between two labor unions seeking similar employment as laborers in the building trades. The plaintiffs are members of the General Laborers' Industrial Union No. 324, a voluntary unincorporated association which is a branch of the national organization known as the Industrial Workers of the World. The defendants are members of the Hod Carriers', Building and Common Laborers' Union, Local 200, a like association, affiliated with a national organization known as the American Federation of Labor. The plaintiffs in their bill allege that there have been, are now and will be numerous buildings under construction in Boston and its vicinity, in connection with which they have been, are now and will be engaged and ready to offer their services, in profitable, useful and pleasant employment, and that they all have no means of supporting themselves except through such employment; but the defendants, well aware of the plaintiffs' conditions in respect of such employment, have conspired to deprive the plaintiffs of their employment, have threatened that if they did not desert their own organization and cease to be members thereof and join the organization of the defendants, the latter would cause them to be discharged from their employment, and that the defendants have used unlawful pressure upon and have intimidated certain owners of property not to employ the plaintiffs by threats of sympathetic strikes and otherwise, and in some instances by these means have caused the discharge of the plaintiffs from employment.

The conduct thus described plainly was calculated to harm the rights of the plaintiffs. Under general principles of the common law, which now have become well settled, the plaintiffs' bill sets out a wrong against their rights committed by the defendants, for which ordinarily relief would be afforded in equity by injunction. [Cases cited.]

But the defendants justify their conduct as legal under St. 1914, c. 778.

The words of section 2 declare unmistakably that the right to labor and to make and to modify contracts to work shall no longer be a property right, so far as that question arises "in construing this act." These last four words are not a limitation upon the broad enactment that the right to labor and to contract respecting labor shall not be property, for the right to work, if it can not be protected as are other rights of property, ceases to have the attributes of other property in all their fullness and ceases to that extent to be property. A declaration of a right coupled with a prohibition against its protection by ordinary means renders the right a vain and insubstantial shadow.

That the right to work is property can not be regarded longer an open question. It was held in Cornellier *v.* Haverhill Shoe Manufacturers' Association, 221 Mass. 554, at page 560, 109 N. E. 643, at page 645 [Bul. No. 189, p. 318], that:

"The right to labor and to its protection from unlawful interference is a constitutional as well as a common-law right."

It was said in State *v.* Stewart (59 Vt. 273, 289, 9 Atl. 559, 568):

"The labor and skill of the workmen, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property."

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In the Slaughterhouse Cases (16 Wall. 36, 127), in the dissenting opinion of Mr. Justice Swayne, but respecting a subject as to which there was no controversy, occur these words:

"Labor is property and as such merits protection. The right to make it available is next in importance to the rights of life and liberty."

It was settled that the right to labor and to make contracts to work is a property right by Adair *v.* U. S., 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]. Controversy on that subject before this court must be regarded as put at rest by those decisions. The right to work, therefore, is property. One cannot be deprived of it by simple mandate of the legislature. That it may be also a part of the liberty of the citizen does not affect its character as property. It was said in Coppage *v.* Kansas (236 U. S. 1, at page 14, 35 Sup. Ct. 240, at page 243):

"Included in the right of personal liberty, and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

No discussion is required to show that it is beyond the power of the legislature under constitutions which guard the individual against being deprived of property without due process of law, to declare without any process at all that a well recognized kind of property shall no longer be property. "Lawful property cannot be confiscated" under the guise of a statute.

A further effect of the present statute is to deprive the plaintiffs of the equal protection of the laws. The statute provides in substance that the property right to labor of any individual or number of individuals associated together shall not be recognized in equity as property when assailed by a labor combination, unless irreparable damage is about to be committed and that no relief by injunction shall be granted save in like cases for which there is no relief at law. That a man cannot resort to equity respecting his property right to work in the ordinary case simply because he is a laboring man, and that he cannot have the benefit of an injunction when such remedies are open freely to owners of other kinds of property, needs scarcely more than a statement to demonstrate that such a man is not guarded in his property rights under the law to the same extent as others.

If as much protection is not given by the laws to this property, which often may be the owner's only substantial asset, as is given other kinds of property, the laborer stands on a plane inferior to that of other property owners. To the extent that the laborer is not given the same security to his property by the law that is granted to the landowner or capitalist, to that extent discrimination is exercised against him. The courts must be open to all upon the same terms.

It has been argued that since the equitable jurisdiction of the court is largely statutory, it may be curtailed by the legislature in respect of the power to grant injunctions. It is one thing to affect the scope of equity by extending or restricting the branches of that jurispru-

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dence which courts may administer; it is a quite different matter to enact that some citizens may resort to it, while others may not. Without discussing other aspects of this proposition, it is enough to say that the power of courts to afford injunctive relief cannot be impaired by the legislature in such a way as to prevent its use in favor of one property owner, when it is preserved for the benefit of other property owners. It is an elementary principle of equity that an injunction never is issued except to prevent irreparable injury. If the statute means anything more than this, there would be other difficulties about its construction which need not now be elaborated.

Associations of laborers, to accomplish lawful objects by legal means, have been recognized and protected in this commonwealth, at least since the decision of Commonwealth *v.* Hunt (4 Metc. 111), 1842, now nearly 75 years ago. But it is not necessary to consider whether the preference attempted to be conferred upon combinations of laborers by the act means anything more than that, and if it does, whether it comes within the condemnation of the principles expounded at length in Adair *v.* United States [supra], and Coppage *v.* Kansas [supra], where statutes designed to secure to members of labor unions immunity from discharge on that ground were held to violate the Federal Constitution. [Other cases cited.]

It has been urged, also, that the plaintiffs being laborers and the statute having been passed for the benefit of laborers, the plaintiffs are such as are not in a position to question its constitutionality. The plaintiffs by their bill set forth a plain wrong done to themselves by the defendants. The invasion of their constitutional right is direct and substantial. They have an indubitable standing to raise the constitutionality of a statute which shelters such conduct.

Recognizing every presumption in favor of the validity of statutes enacted by the legislature, we are all of opinion that the instant statute cannot be sustained.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKE—LIABILITY FOR VIOLENCE—*Shaughnessey et al.* v. *Jordan et al., Supreme Court of Indiana (Feb. 25, 1916), 111 Northeastern Reporter, page 622.*—Arthur Jordan and others, partners doing business as the Keyless Lock Co., brought action against Peter J. Shaughnessey and others, members of labor unions, for an injunction and damages. The circuit court of Marion County decreed injunction, and rendered judgment for damages in the amount of $6,000, from which the union members appealed. The first question discussed by the court was that of the effect of the injunction upon the members of the International Molders' Union of America and two local iron molders' unions, which members were not made parties by name or in the names of representatives. It was held that in such cases any persons who have actual knowledge may be punished for contempt consisting of violation of the injunction.

The facts of the industrial dispute are then outlined. The complaint alleges that previous to October 31, 1913, the firm had con-

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ducted its business of manufacturing locks as an open shop, employing both union and nonunion molders, about 60 in number. Conspiracy to unionize the foundry, threats to bring about a strike, and the causing of the strike on November 12, 1913, are alleged, also picketing, threats and violence after the strike began, and damage to the extent of $10,000; and that an action at law would not bring adequate relief on account of the insolvency of the defendants. The acts forbidden by the injunction granted by the circuit court are enumerated. As to the objection to the injunction on the ground that its terms were too broad and on other grounds, it was held that the points named could not be raised at this stage in the proceedings, Judge Morris, who delivered the opinion, saying:

It is earnestly contended by appellants that the decision of the court is contrary to law and unsupported by sufficient evidence. They rely especially on Karges Furniture Co. *v.* Amalgamated, etc., Union (1905), 165 Ind. 421, 75 N. E. 877 [Bul. No. 63, p. 564], and claim that under that decision laborers have a right to combine and strike and picket the employer's factory even though damage does result to the employer, provided that peaceable means only are used, and force, intimidation, fraud, and malice are absent, where, as here, the employment is at will and no breach of contract of service is involved; that what one may lawfully do may be done by any number of persons in combination. On the other hand, appellees controvert this latter proposition, and say that an act harmless when done by one, like quitting employment, when done by many acting in concert for the purpose of compelling the employer to employ only union men, becomes a public wrong and takes on the form of a conspiracy, which, if hurtful to the employer, should be prohibited. On this latter question American courts are sharply divided. See National Protective Association *v.* Cumming, (1902) 170 N. Y. 315, 63 N. E. 369 [Bul. No. 42, p. 1118]. [Other cases cited.]

In the Karges case, supra, it was declared that:

"Whatever one man may do all men may do, and what all may do singly they may do in concert, if the sole purpose of the combination is to advance the proper interests of the members, and it is conducted in a lawful manner. * * * It may therefore be said that employees, under no contractual restraint, may lawfully combine, and by prearrangement quit their employment in a body, for the purpose of securing from their employers an advance in wages, shorter hours, or any other legitimate benefit, even though they know at the time that such action will be attended with injury and damage to the business of their employer, provided the strike is carried on in a lawful manner—that is, in a manner free from force, intimidation, and false representation. * * * The law, having granted the workmen the right to strike to secure better conditions, * * * grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest by argument, persuasion, and such favors and accommodations as they have within their control."

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The decree here, among other things, enjoins appellants from peaceably or otherwise continuing the strike for the purpose of unionizing the shop, from peaceably persuading anyone from entering or continuing in appellees' service, and from peacefully congregating on the sidewalks and streets adjoining or adjacent to appellees' place of business, and from picketing in any manner the place or the residence of employees. Conceding that these provisions, and possibly others, are erroneous, the fact remains that appellants made no motion to modify the decree and eliminate therefrom the erroneous provisions. There was evidence on behalf of appellees that appellants resorted to assaults and violence in the picketing of the shop, and while appellants testified that any force on their part was exerted in self-defense, it was for the trial court to weigh the evidence. It is not contended by appellants that a strike pursued by violence, or threats thereof, can be lawful. There was evidence from which the court was warranted in finding that appellants resorted to such methods. Consequently we can not say that the decision of the trial court is without support in the evidence. If certain provisions of the decree were erroneous, appellants should have moved for its modification.

Several matters relating to the admission of evidence were then taken up, and the conclusion reached that the judgment must be reversed and a new trial granted on account of errors regarding such admission.

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LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYEES—*Martineau et al. v. Foley et al., Supreme Judicial Court of Massachusetts (Oct. 19, 1916), 113 Northeastern Reporter, page 1038.*—F. Martineau and others, employers, brought action against Dan Foley and others, members of Bricklayers' and Plasterers' Union No. 36, of Greenfield, Mass., charging interference with their business, and that great damages have resulted therefrom. The defendants by demurrer raised the question whether the declaration, which consisted of two counts, stated a good cause of action. Judgment in the superior court, Suffolk County, was for the defendants, but on appeal the first count, alleging the malicious and unjustifiable circulation of an "unfair" notice, was held to be good, so that the trial might be proceeded with. Judge Pierce, in delivering the opinion, said:

The allegations of the amended first count disclose a good cause of action; they are sufficient in form and substance to warrant the introduction of testimony to prove that the defendants, without justifiable cause and maliciously intending and designing to injure the plaintiffs in their business, circulated a notice among masons and journeymen masons that the plaintiffs as a firm "has been working nonunion masons," that they knew that the statement was untrue, that it was calculated in the ordinary course of events to prevent the plaintiffs from employing or contracting with master masons, that in fact such result followed upon the publication and that therefrom actual damage resulted to the plaintiffs. The charge otherwise

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stated is, that the defendants intended to cause damage to the plaintiffs, and used the notice as a means to that end, well knowing that the class of persons to whom the notice was directed would be induced thereby to refuse to have business relations with a firm that employed nonunion workmen.

There is nothing in the allegations to the effect that the plaintiffs were in dispute with employees or with the union, and so far as may be inferred, the action of the defendants as members of their union, was taken with a purpose to cause damage to the plaintiffs because of their relation to unionism, with the motive to thereby strengthen the local union and place it in a better position to assert its demands for a union shop.

This motive, if it existed, affords no justification or excuse for their conduct. [Cases cited.]

The second count alleged certain acts of the organization of which the defendants were members, but did not connect the defendants with said acts, and was therefore held to be defective, but the first count being valid, the judgment of the lower court, in favor of the defendants, was reversed.

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LABOR ORGANIZATIONS—LIABILITY OF MEMBERS FOR DAMAGES—DIVIDENDS ON SAVINGS ATTACHED IN SUIT—*Savings Bank of Danbury* v. *Loewe, Supreme Court of the United States (Jan. 8, 1917), 37 Supreme Court Reporter, page 172.*—In Bulletin No. 189, page 167, a decision relating to the proceedings to collect the damages assessed against members of the United Hatters of North America as the result of injury to the business of Loewe & Co. was noted. The present decision relates to the question whether the interest or dividends on deposits of such members in savings banks, which deposits had been attached in the suit, could be held by the plaintiffs, Loewe & Co., or by the United Hatters, to which organization they had been assigned by the depositors. It was held that the plaintiffs were entitled to collect these dividends in addition to the small balance of the principal which had not been turned over. Mr. Justice Holmes delivered the opinion, saying for the most part:

It was admitted at the argument that in the case of an interest-bearing debt the subsequently accruing interest was held as well as the principal. The obligation to pay the one stands on the same footing as the obligation to pay the other; the two are one; they are limbs of the same contract; and there is no reason for splitting them up.

The minimum amount of the [savings bank] dividends generally is as fixed in practice as if it were written in a bond. The practical certainty that a savings bank will pay is greater, in short, than that an average debtor will pay 6 per cent according to his promise in a note. The only element of uncertainty other than that conditioning all future conduct is the possibility that the dividend may be greater than that which experience has led the depositor to expect. He has a vested right to the dividends—a vested right that the corporation

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should take the most prudent steps to secure them, with an identified fund devoted to the result. We do not perceive why the possibility of there being no earnings because of fraud or a cataclysm, or a possibility of the earnings being greater than was expected, should make the right less a present one, subject to and covered by the attachment, than the right to the capital, which runs the same risks, or than that arising from the promise of a debtor, who may fail or abscond, or, if a corporation, may have no assets.

The case certainly is not weakened, it rather seems to us to be strengthened, by the fact that the statutes of Connecticut provide that the levy of attachments and executions upon even the shares of a corporation shall include dividends growing due thereon. The provision indicates a policy, and although, of course, the words do not include dividends from savings banks, as, in our opinion, they did not need to, it is only by imagining unreal distinctions that the policy embodied in the statute, and extending by the common law to interest due upon contract, can be held to exclude the claim to subsequently earned income of ordinary savings banks, when that claim, as we have tried to show, is a vested right.

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LABOR ORGANIZATIONS—LIBEL IN STATING THAT THEATER NOT ABLE TO SHOW UNION CARDS WAS DANGEROUS—*Cyclohomo Amusement Co. v. Hayward-Larkin Co., Supreme Court of Washington (Nov. 17, 1916), 160 Pacific Reporter, page 1051.*—The amusement company named had some trouble with the moving-picture operators' union prior to February 11, 1913, and at that date was not employing union men in its theater, the Majestic. The Hayward-Larkin Co. was an advertising company. About the date mentioned certain members of the union caused to be printed and delivered to the company for display a number of posters about 2 feet wide and 3 feet long, printed in red ink, and as to the contents and publication of which the opinion in this case says:

At the top in large letters is the word "Danger." Following this in smaller letters are the words:

"Do you know that a theater that employs incompetent operators endangers your life? Do you know that the theaters that employ competent help display this card in the box office?"

Then follows a copy of a union card. Following the card are these words:

"Do you know that the Arcade and Majestic Theaters can not show this card?"

These posters were posted upon defendant's billboards and were distributed about the city of Spokane. There is no dispute as to the fact of posting. Upon the trial of a suit brought by the amusement company the superior court of Spokane County held that this was a libelous publication and awarded damages in the sum of $300. This judgment was affirmed, the supreme court holding that since there

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was proof of a loss of patronage following the publication, the amount of damages assessed was not excessive. As to the libelous nature of the posters, Judge Mount, who delivered the opinion, said:

The poster upon its face very clearly states that theaters which employ incompetent help endanger the lives of the patrons of such theaters; that theaters which employ competent help display a union card; and then the poster says:

"Do you know that the Arcade and Majestic Theaters can not show this card?"

Here is a direct and positive declaration that the Majestic Theater is a dangerous place because of incompetent help. Nothing else can be made of this poster. It is printed in red ink upon a white background, indicative of danger. There can be no doubt that the object of displaying these posters upon the billboards in the city of Spokane was to prevent people from attending the theaters named. It had no other object. [Statute relating to libel quoted.]

There can be no doubt that the purpose of displaying these posters in the public places of Spokane was to injure the Majestic Theater in its business. These posters were clearly libelous per se within the terms of the statute.

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LABOR ORGANIZATIONS—MEMBERSHIP—MANDAMUS TO COMPEL ADMISSION—*Frank* v. *National Alliance of Bill Posters, Supreme Court of New Jersey (Nov. 9, 1916), 99 Atlantic Reporter, page 134.*—Louis Frank petitioned for a writ of mandamus to compel the union named to admit him as a member. This was denied, Judge Swayze delivering the opinion, and first saying as to the question involved:

The defendants are an unincorporated organization, a trade-union. They are not shown to have any property, and the plain question is whether the court will interfere by mandamus to compel the other members to receive the relator as a member. The question seems never to have been directly decided in this court.

Certain New Jersey cases, whose circumstances bear some relation to those in the present instance, are mentioned, and the following is quoted from an English case cited in one of them:

"The courts as such never dream of enforcing what I may call personal agreements, that is, agreements strictly personal in their nature, whether they are agreements of hiring and service, whether they are agreements of master and servant, or whether they are agreements for the purpose of pleasure or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy. No court of justice can interfere, so long as there is no property the right to which is taken away from the person complaining."

Continuing, Judge Swayze says:

He [the judge in the above case] instances the case of a number of gentlemen meeting at each other's houses to play cards, or a number of scientific men meeting from time to time by agreement for scientific purposes.

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It would be quite impracticable for the courts to undertake to compel men to receive into their social relationships one who was personally disagreeable whether for a good or a bad reason. Property rights the courts can deal with; rights in an incorporated company are of that character, and the right of membership is ordinarily assignable. Voluntary associations are quite different. The courts can deal with property rights of such associations if there are any, while they can not, by a mandatory writ, intrude one man's companionship on another. The attempt to do so would be unavailing, as it would lead only to the disintegration of the association. We do not mean to deny the present relator's right to recover damages if his right to labor has been illegally interfered with. (Brennan *v.* United Hatters, 73 N. J. Law, 729, 65 Atl. 165 [Bul. No. 70, p. 746].) All we now decide is that mandamus is not a proper remedy.

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LABOR ORGANIZATIONS—POWERS—FORFEITURE OF PROPERTY ON WITHDRAWAL FROM ASSOCIATION—*Moyer et al.* v. *Butte Miners' Union, United States District Court, District of Montana (May 13, 1916), 232 Federal Reporter, page 788.*—Charles H. Moyer, as trustee for the Western Federation of Miners, and others brought action in equity to compel the Butte Miners' Union to carry out the terms of a contract to transfer all its property to the Federation. The union was incorporated in 1881 under the law of Montana providing for the incorporation of churches, secret societies, and the like. In 1893 delegates from the Butte union and other unions organized the Federation, giving it power over the unions and their members. A form of charter for the unions was adopted, which provided that if a union should withdraw or be dissolved, suspended, or forfeit its charter, all property should be the property of the Federation. The Butte union received a charter from the Federation in 1893, but at this trial it denied that the charter contained the property forfeiture clause. This charter having been destroyed in the Butte riots in 1914, the union sought its reissuance. The Federation issued a charter which the union finally refused because of its containing the forfeiture clause, and withdrew from the Federation. Thereupon the Federation brought this suit. The complaint set forth only the 1914 charter, and alleged it and its acceptance as the contract of which the specific performance was sought.

The decree of the court was for the defendant union, Judge Bourquin delivering the opinion and saying in part:

It is observed that the situation is not that of a subordinate union association lawfully created by, deriving its powers from, and subject to the control of, a superior union organization, seceding therefrom, but is that of an independent corporation, created by the State, with powers conferred and duties imposed upon it by the State, and subject to no control save its own and that of the State, repudiating an arrangement by which it had surrendered those powers and duties to

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an organization created by defendant, and assuming to exercise its powers and perform its duties itself.

With that in mind, the defense of ultra vires is made out. Defendant derived all its powers from the State, and could do nothing, enter into no contracts, not within the powers so granted. By the law of its incorporation and its articles, defendant was vested with certain powers. It was created an independent body, subordinate to none other, but with authority to establish branches subordinate, and not superior, to itself. All its powers were to be exercised by itself—by its members, officers, and trustees. Their judgment, discretion, and policy were to control in all that concerned defendant. No power was given it to abdicate the authority conferred upon it by the State, and to subordinate itself and its interests to any other persons or associations. It was given no power to relinquish self-control and management, and to bind itself to accept the judgment, discretion, and policy of others. Any contract or agreement assuming to do these latter would be beyond its powers, and so invalid.

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LABOR ORGANIZATIONS—RIGHTS OF MEMBERS—POSITION ON PRIORITY LIST—*Robinson* v. *Dahm et al., Supreme Court of New York, Trial Term, New York County (April, 1916), 159 New York Supplement, page 1053.*—Fred J. Robinson brought action against two unincorporated associations of which he was a member—the New York American and Journal chapel of Typographical Union No. 6, and Typographical Union No. 6. He alleges that these associations violated the constitution and by-laws of the union in laying him off and depriving him of his position on the "priority list" of his chapel. The priority lists govern the order in which members should be laid off when the force is reduced, and are made up according to the date of employment of the workmen. Shops are divided into departmental and nondepartmental, the New York American shop being of the latter class. In such shops the laws of the union provide for transfer of a workman from one department of the work to another in which he is competent to do the work, in a case where he would be laid off from the department in which he is already working, but where at the same time his position on the priority list entitles him to preference over some of the workmen remaining in the other department. When it was proposed to lay Robinson off from the hand composition division, a conversation took place between him and the foreman as to which there is dispute, the foreman testifying that the workman refused to designate a division to which he might be transferred, while the workman claimed that he designated the proof and machine rooms, and left it to the foreman to decide between these. It appeared that he was competent to work in at least one division in which he had priority. He was laid off, and thus, according to the rules, deprived of his priority as far as men retained were

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concerned. The chapel chairman and the president of the union decided adversely to him on appeal. Later he was reemployed in the shop, but given a standing on the priority list corresponding to the date of this later employment. His action was in equity for reinstatement to his old place on the list, and for damages for loss of wages. The decision was in his favor, Judge Hotchkiss delivering the opinion for the court, and saying after stating the facts:

Plaintiff's claim for loss of wages rests in part upon or is confirmed by the undisputed "law" of the organization as appears from the evidence and as applied in the "Langlois-McCauley Case" [ decided by the president of the union], the substance of which is that, when wages have been lost to a member by an improper construction of the rules or by-laws, the member is entitled to the payment of such wages by the union, "which may in its turn fix the responsibility for payment on (sic) the source from which reimbursement shall come." The following questions are presented: First, to what extent is plaintiff bound by the decisions within the organization? and, second, assuming that a right of plaintiff has been violated, is he entitled to equitable relief?

As to the law covering the first question, much confusion exists in the cases in this country, apparently due to the various interpretations and applications of certain frequently stated rules, namely: (*a*) That the courts will not interfere with the internal affairs of a voluntary association; (*b*) that the courts will not interfere in disputes between such an association and a member unless a property right is involved; (*c*) that a member can not appeal to the courts for relief until he has exhausted the remedies within the organization; and (*d*) that the relation between an association and a member is a contract relation. The correct rule would seem to be that the principles of contract are applicable, and that the first three of the enumerated rules have validity only in so far as they are particular applications of contract principles or of the elementary principle that courts will not take jurisdiction of matters involving no property or civil rights. In other words, voluntary associations have no peculiar sovereignty relieving them from the application of the general law of contracts.

So far as their provisions purport to give rights of a civil nature, the constitution and by-laws of an association by which members have agreed to be bound constitute a contract between the members themselves and between the association and the individual members. [Cases cited.] The cases involving the question of the nature of a member's right arise in most instances from expulsion, fines, and claims for benefits. The New York cases have never narrowly restricted the jurisdiction of the courts to explicit property rights or rights in property owned by the association. So long as a civil right is involved, the court has jurisdiction, as in any other case. Contract rights arising between members as members, and between members and the association, are protected equally with the rights of members in property owned by the association. [Cases cited.]

My conclusion from the foregoing is that plaintiff's right to relief is to be determined by principles governing actions for breach of contract where specific performance is sought.

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Under the contract in this case: (1) The plaintiff must be taken to have agreed (*a*) to submit disputes to the organization tribunals, and (*b*) to support the decision of the tribunals; and (2) the union agreed, with reasonable care and effort, to protect plaintiff's priority rights in accordance with the union laws. The agreement to submit disputes implies an agreement to exhaust the remedies available under organization procedure. The plaintiff must be held to have exhausted all such remedies. The complaint so alleges, and there is no denial.

The organization having rendered a final decision, the situation is analogous to that arising when, according to contract, parties have submitted a matter in dispute to arbitration. So long as the arbitrators act according to the stipulated procedure and correctly apply the terms of the contract to the matter in dispute, they are within their authority, and the courts will review their action only to ascertain whether they have acted in good faith and in accordance with the stipulated procedure. When, however, the arbitrators attempt to pass upon the construction of the very instrument which grants and defines their authority, they act beyond the proper scope of their authority, and a provision of the contract purporting to give them such power is void, as aiming to oust the courts of jurisdiction. [Cases cited.] While, therefore, the courts will not overrule the decision of association tribunals merely because of a difference of opinion as to the merits, they will review the action taken sufficiently to ascertain whether the tribunals (*a*) followed the procedural terms of the agreement and (*b*) correctly construed and applied the substantive terms of the agreement. [Cases cited.]

It is therefore necessary to determine whether in this case the union tribunals acted within and properly applied the constitution and laws which equally defined their authority and the plaintiff's rights. As I have stated, the organization laid plaintiff off and thereby deprived him of his priority position on two grounds: First, that "the union never intended that one union man should take the position of another to save himself from a 'lay-off' "; and, second, that the plaintiff, when informed of the impending lay-off, should have designated the specific division to which he desired to be transferred, and, further, that it was immaterial whether he was given an opportunity to so designate, inasmuch as, after having been laid off, he could still have tendered his services for any work to which he considered himself entitled.

The first ground would seem to be in obvious disregard of the established fact that the Journal shop was a nondepartmental shop, and that therefore priorities were to prevail without regard for divisions of work in accordance with section 125 of the union's general laws. As to the second ground, it may be conceded that the plaintiff would be barred of relief if the foreman of the shop had been ignorant of plaintiff's competence in other divisions of work, and if plaintiff has actually obstructed or refused to aid the efforts of the foreman to determine his competence in such other divisions. Not only has the evidence failed to establish that such was the case, but evidence as to such facts was ruled to be immaterial by the final decision, which held that plaintiff, after being laid off, might have tendered his services in some other division. But section 125



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definitely provides that "no employee shall be discharged" under conditions shown to have obtained at the time of plaintiff's lay-off. The final decision of the union is therefore reduced to a holding that no rights of the plaintiff were violated, for the reason that after his rights were violated he could have applied to the union to restore them.

It is further argued that under section 125 it was insufficient for plaintiff to offer to work anywhere the foreman placed him, and that it was obligatory upon him to make a specific designation of the division to which he desired to be transferred, for the reason that otherwise the foreman, upon transferring him, would be barred from discharging him thereafter for incompetence. I see no merit in this argument. Plaintiff's competence to work in at least one of the other divisions seems not to have been questioned, and the plaintiff after authorizing the foreman to place him in any division, would clearly not be in a position to invoke the rule, as if the foreman had transferred him without his consent. I conclude, therefore, that the plaintiff is not bound by the adverse decisions within the organization, as the tribunals incorrectly construed the laws which constituted the contract between plaintiff and the organization.

Judge Hotchkiss, in concluding the opinion, decided that the right of the plaintiff having been violated, there was ground for equitable relief by the court, there being no remedy at law for the principal wrong in question—the deprivation of his priority position. This relief was therefore granted, with incidental payment of his damages for loss of wages.

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LABOR ORGANIZATIONS—STRIKES—CONSPIRACY—INJUNCTION—*Grassi Contracting Co.* v. *Bennett, Supreme Court of New York, Appellate Division, First Department (July 10, 1916), 160 New York Supplement, page 279.*—The company named brought action for an injunction against Thomas Bennett, as president of a union of plasterers, to restrain him from placing a foreman upon the jobs being carried on by the company, at heavy expense to the company, or as an alternative calling its employees out on strike. The complaint set forth alleged facts as to the jobs of plastering and cement work on new buildings for which the company had contracts, delay in the performance of which was heavily penalized by those contracts; as to the employees at work for it, the labor supply in the trades being controlled by the unions; as to the finding of two workmen engaged in work after noon on a certain Saturday in violation of the rules of the union, which work, it was testified by the workmen themselves, was done inadvertently, they not knowing that the closing time had passed; as to this occurrence having been made the basis upon which it was decided to place a foreman on the company's jobs, with instructions to discharge all of the force in its employ at the time of the violation of the rule; as to the greatly increased expense which this

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would cause; and as to the workmen being anxious to continue in its employ. The special term, New York County, granted an injunction, and the appellate division in the present decision held that the company was entitled to an injunction, though not in such broad terms as had been granted. Judge Laughlin delivered the opinion, from which the following is quoted:

Although the plaintiff does not show the terms of its contracts with its employees, it does appear that they were willing to continue on the work where they were employed, and it is a fair inference that there was at least an implied contract with them that they would so continue, for it is not reasonable to suppose that there was a special hiring each day. The plaintiff does not set forth the contract between the union and the employers' association, which it alleges the union threatens to violate; nor is it alleged or shown that the plaintiff was a party thereto. It is inferentially alleged that the employees are hired through the union, but the plaintiff does not show any contract with the union.

Where a strike, or other action, is threatened by a labor union in violation of its contract, or of the contract of its members with their employers, the jurisdiction of a court of equity to issue an injunction is well recognized. [Cases cited.] But in the case at bar no violation of a contract is threatened, unless a contract between the plaintiff and its employees for their continuance in its employ is to be inferred. The law with respect to many points arising between employers and employees and their unions has been settled in this jurisdiction. An employer may lawfully discharge or refuse to employ one because he is or is not a member of a labor union, and may lawfully contract with his employees to employ only union labor, and to discharge others, or vice versa; but it has been held that employers may not combine and agree to employ either only union or nonunion labor when, owing to the fact that such employers control the trade in any community, or control it to such an extent that it would be practically impossible for those thus discriminated against to obtain employment, for in such case the agreement would be oppressive and contrary to public policy. [Cases cited.] And members of a labor union may refuse employment with nonmembers, or quit if nonunion labor is continued, and vice versa, so long as this is done for their own interests, and not through a conspiracy to injure others. [Cases cited.]

Employees, who are not bound by contract, acting in concert or through a labor union with which they are affiliated, may quit or strike at will for any lawful reason, or purpose, and doubtless they may do so for no reason or purpose, and they may endeavor by lawful persuasion, without violence or intimidation, to induce others to join them, or to refrain from taking their places. [Cases cited.] But where a labor organization calls or threatens to call a strike of its members, not primarily for the lawful benefit or advantage of the union, or of its members, but for an unlawful purpose—that is, one prohibited by law, or which contravenes public policy—to the injury of another or others, then its action or threatened action, if consummated, will render it liable in damages [cases cited], and, if not consummated, may be enjoined.

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It is sought to justify the threatened action of the union by the violation of its regulations by two of its members in working overtime while in the plaintiff's employ. It may be assumed that it was within the jurisdiction of the union to prescribe the hours of labor for its members and to enforce such regulations against them by any proper discipline. [Cases cited.] But it is manifest that the action which it threatens to take can not be justified on any theory of necessity to prevent further violations of its regulations with respect to hours of labor, and it is a reasonable inference that the violation of the rule has been taken advantage of, and is to be made a pretext for the unlawful action threatened, and although thereby future violations may be prevented, that is not the purpose for which resort to such drastic action is to be had.

The threatened action is not designed solely, if at all, to prevent a repetition of the violation of the regulations with respect to the hours of labor, but is conceded by the authorized representative of the union to have been taken to inflict a penalty upon the plaintiff as a punishment, and doubtless it was intended also as a warning to others, and this is shown by the fact that plaintiff is not to be permitted to retain any of its present employees, and that the union is, in effect, to take charge of all its work for a year. This threatened action is unlawful, and, I think, in view of the other material facts, which presumably were known to the officers and members of the union, constitutes prima facie evidence of a conspiracy to injure the plaintiff by preventing it from exercising its constitutional right to continue its business and to hire such employees as it requires to perform its contracts, and to have the work performed under its own direction, or under the supervision or direction of others selected by it. Penal Law, sec. 580, subd. 5. [Cases cited.]

The plaintiff, therefore, presented a case for injunctive relief.

The injunction granted, however, is altogether too broad, and is neither warranted by the facts nor the law. Among other things, it in effect enjoins the defendant generally from soliciting or inducing plaintiff's employees, by any species of threats, abuses, offers or promises of money, or by any unlawful "or other means" to leave the employ of the plaintiff, and from publishing in any manner that plaintiff's business has been blacklisted, or placed on any unfair list, and from threatening others with injury or loss to their business, should they continue to deal with or be employed by the plaintiff. There is no evidence that the defendant has threatened or intends to do any of these things. The defendant is further enjoined, in effect, from calling a strike for any reason, by a general provision enjoining him from directing the members of his union "to refuse to work for the plaintiff."

The injunction order should therefore be modified and, as so modified, affirmed.

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LABOR ORGANIZATIONS—STRIKES—INJUNCTION—PICKETING—*Minnesota Stove Co.* v. *Cavanaugh, Supreme Court of Minnesota (Dec. 24, 1915), 155 Northwestern Reporter, page 638.*—The company named, a manufacturer of stoves, ranges, and heaters in Shakopee, Minn., brought action for an injunction against John Cavanaugh and others,

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striking molders. The strike occurred in March, 1915, after which the strikers picketed the plant. Other molders were secured to fill the places, and in the complaint it is alleged that threats, abuse, and violence were being used to compel the company's employees to quit its service, and an injunction was asked to prevent the defendants entering the premises for the purpose of interfering with the business and from using threats, etc., to force its employees to leave. The defendants answered, admitting the picketing, but denying all charges as to threats, abuse, coercion, intimidation, and violence. The trial court found that the facts charged in the complaint were true, and granted the temporary injunction as prayed for. The supreme court held that the finding as to the facts was justified by the evidence, Judge Taylor saying:

Defendants contend that the evidence is not sufficient to sustain the findings of fact nor to justify the issuance of the injunction. The claim that defendants were acting jointly and in concert is not controverted, but in effect admitted. Three of defendants entered a plea of guilty in the municipal court to a charge of using abusive language tending to provoke an assault, to and concerning certain of plaintiff's employees. Another defendant was convicted by a jury of an assault in the third degree upon another of plaintiff's employees. The evidence also shows that defendants are accustomed to congregate at the entrance to plaintiff's works whenever plaintiff's employees are about to leave for their meals and to apply abusive language and vile epithets to such employees, and threaten them with bodily injury; that at other times and places defendants repeatedly have threatened injury to such employees and have used vile and abusive language not only to them but also to members of their families; and that defendants have intimidated certain of such employees to such an extent, that they are about to quit plaintiff's service for fear of suffering bodily harm if they do not do so. The evidence is sufficient to sustain the findings of the trial court, and such findings are sufficient to justify the issuance of the injunction.

A portion of the injunction is quoted, and the court, affirming the right of peaceful picketing and persuasion, and ordering a modification of the injunction, comments as follows:

Defendants had the right to unite in a strike, and to use legitimate means to induce other workmen to join them, or to refrain from taking the positions vacated by them, but this right does not permit them to go to the extent of intimidating, coercing, or terrorizing such other workmen. In so far as the injunction forbids compulsion or coercion it is proper enough; but in so far as it forbids defendants from attempting at proper times and places, by peaceful and legitimate persuasion, to induce other workmen to quit plaintiff's service, it infringes upon the privilege which the law accords to defendants. That portion of the paragraph complained of, which forbids defendants "from * * * inducing or attempting to * * * induce employees of the plaintiff to refuse or fail to perform their duties as such employees," is too broad.

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LABOR ORGANIZATIONS—SUSPENSION OF DISTRICT AND LOCAL UNIONS—INJUNCTION—*Neal v. Hutcheson et al., Supreme Court of New York, Special Term, Bronx County (July 7, 1916), 160 New York Supplement, page 1007.*—One Neal, treasurer of an unincorporated association, a branch of the United Brotherhood of Carpenters and Joiners of America, sued for an injunction against Hutcheson, president of that brotherhood, and others. The district council of the organization for Greater New York consisted of over 60 associations, having about 18,000 members. The council applied for permission to strike, which was refused, but the strike was nevertheless called and took place. Hutcheson then made a settlement with the employers which the district council and the men decided not to accept. The council and the local unions were thereupon summarily suspended and a demand made that all their books, papers, and property be turned over, the intention being to organize new subordinate bodies. The present decision was on the motion to continue a temporary injunction which had been ordered, and this motion was granted. Judge Mullan, in delivering the opinion, said:

The preliminary injunction restrains the enforcement of the suspension, the interference with the property, the reorganization of the unions and district council, and the disciplining of the members.

A preliminary objection that the defendant association is a foreign voluntary association and as such can not be sued in this jurisdiction is untenable. The objection might be good if the association were incorporated. (People ex rel. Solomon *v.* Painters, 218 N. Y. 115, 112 N. E. 752 [See p. 177].)

The defendant association here is composed of individuals, all of whom are ultimately individually liable. The injunction is binding on all the members, though only the officers be served.

It seems to me that, while many points were raised upon the argument and discussed in the briefs, only one is properly before me for decision—that relating to the validity of the suspensions. The portion of section 10 of the constitution and laws of the association pertinent here reads as follows:

"He (the president) shall * * * have power to suspend any local union, district council * * * for violation of the constitution. * * * Any local * * * union, district council, * * * which willfully or directly violates the constitution, laws or principles of this United Brotherhood or acts in antagonism to its welfare can be suspended by the general president, with the consent of the general executive board. * * * Whenever, in the judgment of the general president, subordinate bodies or the members thereof are working against the best interests of the United Brotherhood, or are not in harmony with the constitution and laws of the United Brotherhood, the general president shall have power to order said body to disband under penalty of suspension."

Section 30 provides that:

"If at any time a local union should * * * be suspended or expelled all property * * * and funds held by * * * said local union must be forwarded immediately by express to the general

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secretary, to be held in safe-keeping for the United Brotherhood as trustees for the carpenters in that locality until such time as they shall reorganize."

It is not disputed that the district council and the local unions own considerable property. Their title to this would be destroyed or impaired if these sections are valid. The rule that a member of an organization can not be suspended or expelled without charges and due trial where property rights are involved is well settled. No distinction may be drawn in this respect between individuals and associations. The taking of the property of the plaintiff is not any the less illegal because it may be held for some other carpenters and not appropriated to their own use by the persons taking it. Confiscatory by-laws have always been held to be against public policy. I approve of the decision of the Missouri court of appeals construing this very section 10 and holding it to be void. (Swaine *v.* Miller, 72 Mo. App. 446.) Since that case was decided, some amendments have been made to the constitution, but the essential fault persists. The effect of this constitution, if valid, would be to create a tribunal having power to adjudicate upon the rights of property of all the members and to transfer that property to others, and this the law will not permit despite the contractual obligations that may have been undertaken by means of assent to the offending constitutional provisions upon the acquirement of membership. Section 56 of the constitution provides a right of appeal, first to the president, then to the general executive body, and lastly to the convention of the whole association. It is urged by the defendants that these appeals would, if prosecuted, constitute a trial. The trial referred to in the adjudicated cases, however, is a due trial upon charges before judgment, without the added burden of the presumption of correctness of a decision. And it is to be noted that the first two appeals would be to the defendant Hutcheson and to the board that has already ratified his acts. As no man may properly sit in judgment on his own quarrel, and participation in the trial disqualifies a judge from sitting on an appeal, it would be mere folly to go through the form of appeals in succession to two disqualified tribunals. Furthermore, section 56 provides that "in no case shall an appeal act as a stay of proceedings."

While these appeals were being heard, the "irreparable damage" might be done. The injunction will be continued.

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MECHANICS' LIENS—CONTRACTORS' BONDS—CONSTITUTIONALITY OF STATUTE—*Roystone Co.* v. *Darling et al., Supreme Court of California (Jan. 13, 1916), 154 Pacific Reporter, page 15.*—The American Surety Co. appealed from judgment against itself, Thomas Darling, and others, in a suit by the Roystone Co. The suit grew out of the construction of a building for Darling by one Thomas as contractor. In accordance with section 1187 of the Code of Civil Procedure, as amended in 1911, the contractor and the surety company executed a bond to Darling in the sum of $6,640, or one-half the contract price, for the protection of laborers and materialmen. Prior to completion, installments were paid on the contract price, leaving $5,167.50

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unpaid. The claims of lien amounted to more than $6,000 in excess of the unpaid balance. The surety company contended that the provision requiring a bond was invalid as in conflict with the constitutional provision of section 1, article 1, guaranteeing the right to contract, and that the bond was therefore void. Judge Shaw, in delivering the opinion of the court holding the statute valid, thoroughly discussed the history of mechanics' lien legislation in the State and the decisions relating thereto. The following is quoted from this opinion:

The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden, it is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power.

We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of the contractor while, at the same time, lien claimants are afforded a security for the payment of their claims.

The judgment of the superior court was affirmed.

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MECHANICS' LIENS—LOGS—*Bryson & Bryson* v. *Gennett Lumber Co., Supreme Court of North Carolina (May 31, 1916), 89 Southeastern Reporter, page 26.*—A statute of North Carolina enacted in 1913 provides that where a laborer's wages for 30 days or less are unpaid, he shall file notice of his claim and deliver to the owner a copy of the same, or if he can not be found attach the notice to the lumber upon which the labor was performed. The plaintiffs in this case cut certain logs for Frank Bailey, who had contracted to do the work for the lumber company, a partnership. They received an order on the company for $75 earned by them, and the company paid $20 upon this. Suit was brought for the balance, relying upon the statute referred to. The judge charged that if the jury should find that Bailey was indebted to the plaintiffs as alleged, and the proper notice had been given, it should find for the plaintiffs, and the jury did render such a verdict. The supreme court granted a new trial, holding that the statute applies only where the owner is indebted to the contractor. The following is from the opinion delivered by Judge Walker, who after reviewing previous decisions said:

It appears from these two cases that plaintiff can not recover, unless he is able to show that the defendant, at the time plaintiffs'

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lien was filed, was indebted to his employer, Frank Bailey, and if he succeeds in doing so, he may have judgment only to the extent of that indebtedness. This would seem to be a reasonable construction of the statute, as under the other construction, the owner might in good faith and without any notice of outstanding claims against his contractor settle with him and be subjected to a double payment without any fault on his part. The notice and lien were intended to protect the laborer against any transfer of the lumber by the owner, who, while indebted to the contractor and insolvent, might without this safeguard pass the title to a bona fide purchaser for value and without notice of the laborer's claim, and thereby defeat it.

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MOTHERS' PENSIONS—MOTHERS ABANDONED BY HUSBANDS—VESTED RIGHTS—CONSTITUTIONALITY OF AMENDMENT—*In re Snyder, Supreme Court of Washington (Sept. 26, 1916), 160 Pacific Reporter, page 12.*—The mothers' pension law of Washington enacted in 1913 provided pensions for mothers whose husbands were dead or confined in penal institutions or insane hospitals, or who had been abandoned by their husbands and such abandonment had continued for a period of more than one year. By an act of 1915, page 644, this was amended so as to make allowances in cases where the husband through total disability is unable to support his family; but the amendment omitted the provision for abandoned mothers. Rose Snyder was such an abandoned mother eligible for pension under the 1913 statute. A claim made by her while that law was in force was allowed, and she received payments until the later act went into effect. She then made a new application, which was dismissed. On this appeal to the supreme court she attacked the constitutionality of the act of 1915, on the grounds of inequality of privileges granted to citizens, and denial of equal protection of the laws. The court held the act valid, and affirmed the judgment dismissing the application, Judge Fullerton, for the court, saying in part:

The act of 1913 did not provide pensions for all classes of indigent mothers, and is in consequence as susceptible to the constitutional objection of class legislation as is the act of 1915. Any rule of law, therefore, which would destroy the act of 1915 on this ground would destroy all previous legislation on the subject, thus leaving the applicant utterly without remedy in any event.

In the second place, the State may care for its indigent and poor in any manner it pleases. What scheme will be adopted is wholly within the discretion of the legislature. Indeed, the State is under no legal obligation to care for its poor at all.

In the case before us the legislature probably discontinued pensions to indigent mothers whose husbands had abandoned them because it concluded that to grant such pensions was not in accord with sound public policy. But whatever may have been its motive, there is no question as to its right and power to discontinue such pensions, and no former beneficiary can legally complain.

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PENSIONS FOR EMPLOYEES—INJURY IN THE DISCHARGE OF DUTY—EFFECT OF RECOVERY AGAINST THIRD PERSON—*Engstrom* v. *City of Seattle, Supreme Court of Washington (Aug. 21, 1916), 159 Pacific Reporter, page 816.*—On August 27, 1913, Oscar Engstrom was an employee of the city of Seattle at a wage of $2.75 per day. He was injured on that date while engaged in his work, through the negligence of the Puget Sound Electric Railway Co. He brought suit against the company, and recovered a judgment of $4,000, which was paid. A provision of the city charter gives full pay for 30 days and half pay not to exceed six months to any person in the service of the city under civil service who is disabled in the discharge of his duties. This action was brought to compel the payment of such amount, the city contesting on the ground that this provision was not intended to be a pension, but was compensatory and not cumulative. The superior court of King County took this view, and gave judgment for the defendant. This, however, was reversed on appeal, Judge Mount delivering the opinion, from which the following is quoted:

> The fact that he collected damages from the persons injuring him while he was in the employment of the city and in the line of his duty, did not relieve the city from complying with its contract of employment with Mr. Engstrom.
>
> In this case the provision is that any person in the service of the city who shall be disabled in the discharge of his duties shall be entitled to the benefits under the charter provision. It is conceded here that the respondent was in the service of the city and in the discharge of his duties when he was injured. It is true he was injured by the negligence of some other agency than that of the city. But no exception is made in the charter provision; and, conceding that in the discharge of duty means in the line of duty, he was so injured in this case.

The provision was also held to be of the nature of a pension, and the remedy afforded cumulative, and not dependent on the question of recovery from any other source.

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RAILROAD COMPANIES—LIABILITY TO EMPLOYEE OF CIRCUS—CONTRACT OF EXEMPTION FROM LIABILITY—*Maucher* v. *Chicago, Rock Island & Pacific Railway Co., Supreme Court of Nebraska (Sept. 22, 1916), 159 Northwestern Reporter, page 422.*—Joseph Maucher was an employee of the owners of a circus, and was severely injured while traveling on the road of the railroad company named, through negligence, as he alleged, of its servants on a train which collided with the circus train. The railroad and the circus owners had entered into an agreement by which the employees of the circus were to be carried without any liability on the part of the railroad company to them as passengers; and in the contract between himself and the circus owners the employee expressly released any railroad company

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from all rights resulting from its negligence. These contracts were set up in the pleadings as a defense for the railroad company. Judgment was for the plaintiff in the sum of $10,000, a verdict of $12,500 having been reduced to that amount by the judge of the circuit court of Douglas County, in which his action for damages was tried, and on appeal this was affirmed, the court holding that the contracts did not relieve the company from liability under the facts shown. The following quotations are from the opinion delivered by Judge Morrissey:

Independently of plaintiff's rights as a passenger, if any he had, he was lawfully upon defendant's tracks and was injured by its negligence. The trial court gave the contract full force in that it recognized defendant's claim to the private character of the transportation and plaintiff's renunciation of his rights as a passenger, and limited the recovery to an affirmative showing of negligence upon the part of the passenger crew.

Contracts whereby an employee is induced to waive or sign away his rights under the law should always be strictly construed. Under the construction placed upon it by the trial court, plaintiff waived his rights as a passenger and consented that the train on which he rode might be considered as a private conveyance.

The jury were told that unless the train crew in charge of passenger train No. 6 were guilty of negligence in running that train into the circus train, plaintiff could not recover. It will be seen that while the contract was not held void in toto, the court did hold, and we think properly so, that the contract did not give the defendant company the right to wantonly maim the plaintiff. He was lawfully on its right of way, if not as a passenger, he was at least a licensee.

Whether plaintiff were a passenger within the common acceptation of that term or not, one thing is clear, he was in a place where he had a right to be. Defendant was a common carrier and was rendering the service usually rendered by a common carrier in his transportation, and the contracts pleaded will not avail to exempt it from liability for its negligence.

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RAILROADS—SAFETY APPLIANCES—INTERSTATE ELECTRIC RAILROADS—*Spokane & Inland Empire R. Co.* v. *United States, Supreme Court of the United States (June 5, 1916), 36 Supreme Court Reporter, page 668.*—The United States brought suit against the railroad company named to recover penalties for alleged violations of the safety appliance act. It was alleged that 12 cars were used in interstate commerce on October 23, 1911, which were not provided with grab irons or handholds, and three which did not have automatic couplers. The company admitted that the three cars were not equipped with automatic couplers, but denied that the others did not have grab irons and handholds as required by the act. It also denied that it had violated the act, because all 15 cars were used on the line of its street railway, and were therefore, as it claimed, excepted from the operation of the act. Judgment against the company on all 15

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charges was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

The company operates a street railway system in Spokane, Wash., and several interurban lines, the one in question running from Spokane to Coeur d'Alene, Idaho. This line was of standard gauge and had rails of standard weight. The method of operation conformed closely to the usual railroad practice. The cars ran for 1¼ miles over the street railway tracks, then over a private right of way.

As to the 12 cars alleged to be deficient as to handholds, the fact was that they had radial couplers to enable the trains to make sharp turns. The swinging of these couplers would break off ordinary grab irons, but it was asserted that an equivalent appliance was supplied by openings in the top of the buffers or sills of the cars, extending across the ends just above the couplers. The company offered expert testimony as to the sufficiency of this arrangement to protect the men, and accomplish the purposes intended by the provisions for handholds in the Safety Appliance Act. On objection to this evidence it was excluded. The three cars without automatic couplers were ordinarily used only on the local street railway, but on the day in question, on account of heavy traffic, they were made into a train on the interurban line by means of link and pin couplers.

The Supreme Court affirmed the judgment against the company, Mr. Chief Justice White delivering the opinion. It was held that the testimony mentioned was properly ruled out, the question being one not for experts, but for the determination of the jury. As to the application of the statute to the interstate electric railroad, notwithstanding the amendment incorporated in 1896 and excepting street railways, he said, after quoting the original form and the amendments:

The argument is that the word "used" in the amendment of 1903, excepting cars, etc., "used upon street railways," must be construed as having the same significance as the same word in the amendment making the act applicable to all cars, etc., "used on any railroad engaged in interstate commerce." From this premise it is insisted that as the latter provision has been construed as enlarging the scope of the act by causing it to embrace all cars used on interstate commerce railroads, although at the particular time the cars are employed in intrastate commerce (Southern R. Co. *v.* United States, 222 U. S. 20, 32 Sup. Ct. 2 [Bul. No. 98, p. 485]), it must follow that the word "used" in the street railway excepting clause under consideration must have the same construction, and therefore exclude from the operation of the act all cars used upon street railways, however temporary such use, and however frequent or material may be their use in interstate commerce on other than street railways.

But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished

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by the enactment. That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad, by operating a train for a trifling distance over tracks within the exception, to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling.

The suggestion is made in argument that in any event the railroad company was not liable for the penalties because of the difficulty of equipping the 12 cars with grab irons which would not interfere with the lateral movement of the radial couplers, and because the other 3 cars were so constructed that they could not be provided with automatic couplers, and were used only on the one day because of unusually heavy traffic. But this merely asserts that the statute may be violated with impunity if only the railroad finds its provisions onerous, or deems it expedient to do so.

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RAILROADS—SAFETY APPLIANCE LAWS—APPLICATION TO EMPLOYEE NOT ENGAGED IN INTERSTATE COMMERCE—LIABILITY IN CIVIL SUIT—*Texas & Pacific Ry. Co.* v. *Rigsby, Supreme Court of the United States (Apr. 17, 1916), 36 Supreme Court Reporter, page 482.*—A. R. Rigsby brought action against the company named for damages for personal injuries received while employed as a switchman in its yard at Marshall, Tex. He and others of the yard crew were engaged in getting out some "bad-order" cars from a spur track, in order to take them to the shops for repair. After setting the brakes on one of the cars, a box car, he started to climb down, when a defective grab iron forming a rung of the ladder caused him to fall, resulting in the injury of which he complained. The judge of the district court before whom the trial took place directed a verdict in the plaintiff's favor, and refused contrary instructions requested by the defendant, to which rulings exceptions were taken. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the district court, and this was in turn affirmed by the Supreme Court. Mr. Justice Pitney delivered the opinion, which shows the untenability of the company's contention that because the employee was not engaged in interstate commerce he was not under the protection of the safety appliance acts. Attention is called to the decision in Southern R. Co. *v.* United States, 222 U. S. 20, 32 Sup. Ct. 2 (Bul. No. 98, p. 485), holding that the act is valid in its provisions covering employees on a railroad which is a highway of interstate commerce, even though engaged in intrastate work. Continuing, the opinion reads in part:

It is argued that the authority of that case goes no further than to sustain the penal provisions of the act, and does not uphold a right of action by an employee injured through a violation of its provisions, unless he was engaged in interstate commerce. That the scope of the

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legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged, is plain. The title of the act, repeated in that of each supplement, is general: "An act to promote the safety of employees and travelers," etc.; and in the proviso to section 4 of the supplement of 1910 there is a reservation as to "liability in any remedial action for the death or injury of any railroad employee." None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted. [Cases cited.] A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. The inference of a private right of action in the present instance is rendered irresistible by the provision of section 8 of the act of 1893 that an employee injured by any car, etc., in use contrary to the act, shall not be deemed to have assumed the risk, and by the language above cited from the proviso in section 4 of the 1910 act.

Plaintiff's injury was directly attributable to a defect in an appliance which, by the 1910 amendment, was required to be secure, and the act must therefore be deemed to create a liability in its favor, unless it be beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce. In Illinois C. R. Co. *v.* Behrens, 233 U. S. 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91], the court said, arguendo, with reference to this topic: "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

The doing of plaintiff's work, and his security while doing it, can not be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the "bad-order" cars in place on that track would have been obviously dangerous to through traffic; while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track, plaintiff's right of action might be sustained.

But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the act in its remedial aspect as broad an application as was accorded to its penal provisions in Southern Railway Co. *v.* United States, supra. In addition to what has been quoted from the opinions in that case and the Behrens case the following considerations are pertinent. In the exercise of its plenary power to

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regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the exclusive nature of its authority that State regulation of the subject matter is excluded. Southern Railway Co. *v.* Railroad Commission, 236 U. S. 439, 35 Sup. Ct. 304 [Bul. No. 189, p. 186]. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the States is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several States, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject.

It is argued that the statute does not apply except where the car is in use in transportation at the time of the injury to the employee, and that since it does not appear that the car in question was in bad order because of any negligence on the part of the railway company, and it was being taken to the shop for repairs at the time of the accident, there is no liability for injuries to an employee who had notice of its bad condition, and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in Great Northern Railway Co. *v.* Otos (239 U. S. 349, 36 Sup. Ct. 124 [see p. 110]), where it was pointed out that although section 4 of the act of 1910 relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier

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from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment. The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition. [Cases cited.]

Of course, the employee's knowledge of the defect does not bar his suit, for by section 8 of the act of 1893 an employee injured by any car in use contrary to the provisions of the act is not to be deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge; and by section 5 of the act of 1910 the provisions of the 1893 act are made applicable to it, with a qualification that does not affect remedial actions by employees.

The circuit court of appeals correctly disposed of the case, and its judgment is affirmed.

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RELIEF FUNDS—CONSTITUTIONALITY OF LAW ESTABLISHING FUND FOR MINERS—POLICE POWER—CLASSIFICATION—LOCAL LAW—*American Coal Co.* v. *Allegany County Commissioners, Court of Appeals of Maryland (May 4, 1916), 98 Atlantic Reporter, page 143.*—The commissioners of Allegany County brought suit against the company named to recover certain assessments for which it was claimed the company was liable under the provisions of acts creating a miners' and operators' cooperative relief fund[1] for the benefit of miners injured in coal and clay mining in Allegany and Garrett counties, and the dependents of employees killed in those occupations there. The circuit court of the county entered judgment against the company, which appealed and contested the constitutionality of the acts. The court, however, held that the acts were valid, saying through Judge Burke:

There can be no doubt that the legislature intended by Acts 1910, c. 153, to change the rules of the common law, in the classes of industry referred to in the act, theretofore prevailing in this State governing the recovery for work accidents. It may be said that it is now generally recognized that the application of the old rules governing the relation of master and servant in certain classes of occupation are unsuitable to our changed industrial and corporate condition. The application of the principles of the common law to suits for personal injuries sustained in hazardous employments resulted in many cases in injustice to the parties concerned, as well as to the State. It filled the courts with litigation, it became the fruitful source of perjury, it engendered bitterness between employer and employee, it resulted in great economic waste, and it turned out an army of maimed and helpless people as dependents upon the charity of friends or the public. The operation of these rules came to be regarded as "foolish, wasteful, inefficient, and barbarous," and the National Government and a number of the States have now replaced them by efficient and humane laws.

[1] Repealed and superseded by the compensation act of 1914.

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The development of our mighty corporate and industrial enterprises has been attended by much human misery and suffering; the toll of human life has been appalling, and the loss has fallen upon those least able to bear it. No one who has studied the results of the application of the common-law rules to work accidents in the great industrial centers of the country, can doubt that laws such as those under consideration, which afford a certain and speedy remedy to injured workmen, and which tend to the promotion of peace between the employer and employee and the observance of greater care for the safety of the employee by his employer, have a direct relation to the general interests of the public; that they are in fact a real blessing to humanity.

The considerations to which we have adverted are sufficient to show that the legislation assailed is well within the police power.

As to the questions regarding classification of industries and of localities, the court adopted and quoted the opinion of the judge of the superior court, in part as follows:

Applying these doctrines [of decisions holding certain statutes valid] to the law questioned in this case, there would seem to be no serious objection to the classification of those engaged in mining coal and clay in a group by themselves, although there are other dangerous occupations to which the law does not apply. The provisions of the law are applicable to all alike in the business, whether operators or miners (and these terms are made all-inclusive by the definition in the law), within the two counties of Allegany and Garrett. There seems to be no reason, in law or in fact, why coal and clay miners can not be specially provided for by themselves, if railroad men can be, as we have seen may be done in the above cases. The special risks of this employment, as compared with others, give a legal basis for special classification, and within the class all are treated alike "in respect both of the privileges conferred and the liabilities imposed." The restriction of the law to Allegany and Garrett counties can prove no stumbling block, for such local limitations are recognized as legal and proper, if all within the selected locality are treated alike and the locality itself is broad enough to work no harmful discrimination. * * * The classification, therefore, is in fact all-inclusive; it rests upon a natural, reasonable, and essential basis of difference between this and other industries, and is therefore sound.

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RELIEF FUNDS—CONTRACT EXEMPTING CARRIER—CONSTRUCTION OF AGREEMENT—*Western Union Telegraph Co.* v. *Hughes, United States Circuit Court of Appeals, Fourth Circuit (Nov. 4, 1915), 228 Federal Reporter, page 885.*—Mrs. Sophia Hughes brought action against the company named for benefits due her under a plan maintained by it for the payment of pensions and accident and sickness disability benefits to employees, and life insurance to their beneficiaries in case of death. In this plan was the following provision:

The acceptance of any benefits from the Employees' Benefit Fund by an employee or his beneficiary or beneficiaries on account of



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injury or death, shall operate as a release and satisfaction of all claims against the company for damages arising from or growing out of such injury or death, and further, in the event of the death of an employee no part of the death benefit or unpaid disability shall be due or payable unless and until good and sufficient release shall be delivered to the committee, of all claims against the Employees' Benefit Fund as well as against the company, arising from or growing out of the death of the employee, said release having been duly executed by all who might legally assert such claims.

J. W. Hughes, the plaintiff's husband, was a lineman in the company's employ, and was killed in February, 1914, in an accident on the Atlantic Coast Line Railroad. The circuit court in which the case was tried gave judgment in her favor for $2,160 and interest; the only defense set up was her refusal to release the Atlantic Coast Line Railroad. The telegraph company had agreed to indemnify the railroad company "against all loss or damage of any kind arising from any injury to persons in the employ of the telegraph company, while being carried free or at half rates over said railroads under this agreement," and it insisted that Mrs. Hughes release the railroad company before receiving the money awarded on the judgment against it as employer. Mrs. Hughes offered to release all claims against the benefit fund and the telegraph company, but claimed that she was not bound to release the railroad company, and was entitled to retain any right of action she might have against it, in addition to the award against the telegraph company. Her contention was upheld in this regard, the court of appeals affirming the judgment of the district court. Judge Knapp, who delivered the opinion, said in part:

We are of the opinion that the question presented was correctly decided and deem it sufficient to merely outline our reasons for affirming the judgment. In the first place, it does not appear that Hughes was ever aware of this contract that defendant had with the Coast Line, or was chargeable with knowledge of any agreement between the two companies which related to or affected the rights of employees under the provisions of the benefit plan. The language of the section above quoted calls for a release against the benefit fund and telegraph company only, and carries no suggestion that the release of a third party could in any case be required. The fact that defendant might be liable to a third party, in this case the Coast Line, under a contract of indemnity unknown to the insured, did not serve to make such liability a claim against the defendant "arising from or growing out of the death of the employee," within the meaning of that phrase as used in the plan, and the defendant therefore could not exact a release of the Coast Line as the condition of paying the amount to which the plaintiff was otherwise entitled. In other words, the release of the benefit fund and the defendant company, which the plaintiff concededly offered, was the only release that the plaintiff could be required to give.

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RELIEF FUNDS—REDUCTION OF BENEFITS IF SUIT IS BROUGHT—*Wilson v. Grand Trunk Ry. Ins. & Provident Soc., Supreme Court of New Hampshire (June 6, 1916), 98 Atlantic Reporter, page 478.*—Delia Wilson brought action against the company named to recover $1,000 as beneficiary under a certificate of railway insurance. The case was transferred from the superior court without action there. The company claimed that only $500 was due under the terms of the policy, which recited that in consideration of the contribution of the railway company to the funds of the society (of an amount equal to that paid in by the men), only one-half of the face of the policy should be payable in cases where suit was brought against the company by reason of the injury or death of a member. The court held this provision valid and rendered judgment for $500. Judge Peaslee delivered the opinion, in the course of which he said:

The Federal Employers' Liability Act provides that:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

This provision applies only to the exemption of the interstate carrier from the liability imposed by the act. It does not attempt to regulate contracts between the employee and the insurance company, by the terms of which insurance is forfeited.

The agreement between the society and the employee of the railway was that if he or his representative brought suit against the railway such action would work a forfeiture of the insurance. No good reason appears why the parties might not make such an agreement. The employee still retained all his rights to pursue his remedy against the railway under the Federal statute. The right to the insurance was not one created by the statute. It arose from the agreement of the parties; and there is neither justice nor logic in the proposition that the employee or his beneficiary may claim the benefits of the contract and at the same time repudiate its burdens.

If, instead of calling this an insurance contract, it were denominated an agreement for a release of the employee's claim for damages, the case would seem entirely clear. If the society had agreed to pay any injured employee $500 for a release of his claim against the railway, no one would think that payment could be enforced without giving the release stipulated for. The present contract does not differ in substance from the one supposed.

If the incorporation of the society is to be treated merely as a device of the railway, so that the two corporations are to be treated as one, the plaintiff is no better off. The contract is then no more than an agreement by the railway to pay the beneficiary $500 as a return for the premium paid by the employee, and also to pay from its own funds an additional $500 if the employee and his representatives refrain from bringing suit. The right to sue is left intact, and Congress has not attempted to deal with agreements which stop at that point.

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SEAMEN—IMPRISONMENT FOR DESERTION—FEDERAL CONTROL—*Ex parte Larsen et al., United States District Court, Eastern District of Virginia (June 10, 1916), 233 Federal Reporter, page 708.*—John Larsen and others sought by a writ of habeas corpus to be discharged from the custody of S. S. Curtis, sheriff of Warwick County, Va. They had been convicted of desertion from the Russian bark *Procyon*, and were held for the purpose of delivering them to the captain of that vessel, under sections 2004 and 2005 of the statutes of Virginia. The writ was granted and the petitioners discharged, the statute being held to be repugnant to certain Federal laws. In delivering the opinion Judge Woods called attention to the repeal of Federal laws providing for imprisonment, and said:

There is now no statute of the United States authorizing imprisonment of seamen deserting from vessels owned by citizens of the United States. In repealing these sections the Congress provided by the amendments to section 4596 of March 4, 1915, other punishments for desertion. It thus appears that the Federal statutes, if not expressly, certainly by strong implication, prohibit the punishment by imprisonment for deserting seamen.

The arrest and imprisonment of seamen deserting from foreign vessels was provided for by section 5280 of the Revised Statutes, but that provision of the section was repealed, except where the subject was controlled by treaty or convention with foreign governments, by section 17 of the Seamen's Act of March 4, 1915. The terms of this repeal indicate plainly the purpose of Federal Government to control the subject, and to prevent imprisonment of deserting seamen of foreign-owned vessels. Thus Congress, having acted on a subject within its province—imprisonment of deserting seamen of foreign-owned vessels found in the United States—and having in substance enacted that such seamen are not subject to arrest and imprisonment, except under convention or treaty, the State law, even if it be held to provide for such imprisonment, can not be effective. "Undoubtedly the courts of the United States have the power, under existing legislation, by writ of habeas corpus to discharge from custody any person held by State authorities under criminal proceedings instituted under State enactments, if such enactments are void for repugnancy to the Constitution, laws, or treaty of the United States." (Fitts *v.* McGhee, 172 U. S. 516, 19 Sup. Ct. 269.) There is no convention or treaty with Russia authorizing imprisonment of seamen of a Russian vessel in this country, and there is therefore no authority for the arrest and imprisonment of the petitioners.

I think, however, that the Virginia law was not intended to apply to foreign seamen.

My conclusion, therefore, is that there is no authority either in the State or Federal statutes for the arrest and imprisonment of the petitioners, seamen of a vessel owned in Russia, and they are discharged.

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SEAMEN—LIABILITY FOR FAILURE TO CALL PHYSICIAN AT EARLIEST OPPORTUNITY—*The Governor, United States District Court, Northern District of California, First Division (Oct. 19, 1915), 230 Federal*

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*Reporter, page 857.*—Thomas Morgan was injured by a fall, upon the vessel named, about an hour before it arrived at Victoria. The steamship remained in that port 3 hours, but a physician was not called until it arrived at Seattle, 11 hours after the accident. It was not claimed that the ship was responsible for the original injury, but action was brought for damages for the additional injury caused by the delay of the treatment. It was held that damages should be awarded to the seaman in the sum of $1,200 for this negligence, Judge Dooling, who delivered the opinion, saying in part:

I have no doubt from the testimony that the injury was aggravated and rendered more difficult of treatment by the delay ensuing between the time of the accident and the time that libelant reached the hospital in Seattle.

I know the rule is that the ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to the conditions existing at the time. But I do not believe that, when the real conditions may be so easily ascertained as they could have been at Victoria in the present case, the officers should rely upon their own unskilled judgment to the detriment of the seaman under their care.

I think that due care requires that the judgment of the officers when dealing with injured seamen should be exercised, not only with such knowledge as they possess, but also with such as they can readily acquire. I am firmly of the opinion that a due regard for the rights of seamen should require, and does require that in a case like the present, when an early opportunity is presented of easily ascertaining the nature and extent of an injury, the location and external appearance of which shows that it may be serious, that the officers should take advantage of such opportunity, and failing to do so, they fail to accord to the seaman the care to which he is entitled.

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SEAMEN—RECOVERY FOR ASSAULT BY OFFICER OF VESSEL—CITIZENSHIP—*The Blakeley, United States District Court, Western District of Washington, Northern Division (May 3, 1916), 234 Federal Reporter, page 959.*—Avgot Sjorberg brought suit in admiralty against the American schooner *Blakeley* and J. M. Manka, its master. The defendants excepted to the libel, which alleged that while on a voyage from Newcastle, Australia, to Puget Sound, on the high seas, on January 19, 1916, the seaman was unlawfully beaten by the second mate, one Denver, and suffered $1,000 damages; and that the master had actual knowledge of the assault soon after it occurred, but negligently failed to surrender Denver on the arrival in port, allowing him to escape. The ninth section of the Seaman's Act of March 4, 1915, provides:

* * * Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages. * * *

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Judge Neterer delivered the opinion of the court overruling the exceptions, and sustaining the right to proceed against both the vessel and the master. It is pointed out that "or" is often interpreted as interchangeable with "and." The following is quoted from this opinion:

The intent of the act was to give the assaulted seaman a right of recovery for the injury. That separate recovery can not be had against each, but one recovery against one or all, I think clearly expresses the intent of the lawmakers.

In the instant case the purpose of the statute was to promote the welfare of American seamen, and against certain abuses gave them a right of recovery, and since this recovery can be obtained from the vessel, the master, or the owner, each being liable and their liability being created by the act, giving the benefit to the seamen, I think the word "or" must be held to mean "and." Since all are liable, there certainly could not have been any purpose or intention on the part of Congress to compel the seaman to elect as to which to pursue, and thereby exempt the others from liability. The purpose was to give him a right of recovery for the damages sustained, and this may be obtained from all of the parties.

The fact that libelant is not a citizen of the United States does not change his relation to the act, as engaging in the service as one of the crew of the American ship *Blakeley* brought him within the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all of their obligations and liabilities.

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SUNDAY LABOR—CONDUCTING SHOE FACTORY—OBSERVANCE OF SATURDAY—*People* v. *Adler, Supreme Court of New York, Appellate Division, Second Department (July 28, 1916), 160 New York Supplement, page 539.*—Joseph Adler was convicted of violation of the penal law relating to Sunday observance, in the court of special sessions of the city of New York. He was proprietor of a shoe factory in the Borough of Brooklyn, and the alleged violation occurred on April 9, 1916, the information stating that on that date he publicly conducted "a shoe factory by having the machines in operation, and the operators working, thereby making a loud noise, so as to interfere with the repose and religious liberty of the community, contrary to and in violation of the statute in such case made and provided, in violation of section 2143, Penal Law." The opinion of the appellate division states that "upon his trial all of the elements constituting a violation of section 2143 of the Penal Law were proved without contradiction." The conviction was affirmed, Judge Rich delivering the opinion, which sets forth the defenses made, and their insufficiency:

The defendant testified that he never operated his factory on Saturday, which day he observed as his Sabbath, but kept his factory open and running on Sundays. He was convicted, and now contends that it was not proven that he personally "labored" on Sunday,

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April 9. This contention is without merit. Concededly he was present at the factory and engaged in overseeing and carrying on his business, exactly the same as on week days, and this is sufficient to bring him within the prohibition of the statute. Conducting, overseeing, and carrying on of his business, in all its details, was engaging in and performance of "labor," within the meaning of that word as used in section 2143 of the Penal Law.

He further contends that, inasmuch as he uniformly kept Saturdays as holy time, and closed his factory and did not labor on Saturdays, he could not, because of the provisions of section 2144 of the Penal Law, be legally convicted of the offense with which he was charged; there being no proof "that the noises complained of caused a 'serious interruption of the repose and religious liberty of the community.'" Section 2144 provides:

"It is a sufficient defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time."

The answer to that contention is that two witnesses living in the immediate vicinity of the factory testified that they were disturbed and annoyed by the manner in which the work is done on Sundays, because of the noise arising therefrom, and that there was a Sunday school in the immediate vicinity. It was incumbent on the defendant, in order to bring himself within the exception contained in section 2144, not only to show that he uniformly keeps another day of the week as holy time and does not labor on such days, but he must go further and prove that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

There is another reason why the appellant can not succeed on this appeal. The information does not charge the defendant with performing servile labor on Sunday. On the contrary, it charges him with having publicly conducted a shoe factory on Sunday, using in the operation both machinery and individual labor, which is a violation of section 2146 of the Penal Law, which prohibits "all trades, manufactures, agricultural or mechanical employments upon the first day of the week," except works of necessity.

The acts prohibited by section 2146, as charged in the information, were proven, and the provisions of section 2144 have no application to such offense. They have reference only to the servile labor specified in section 2143, and constitute no defense to the offense of conducting on Sunday "trades, manufactures, agricultural or mechanical employments," prohibited by section 2146. [Cases cited.]

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SUNDAY LABOR—MOVING-PICTURE SHOWS—*People ex rel. Bender* v. *Joyce et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 22, 1916), 161 New York Supplement, page 771.*—Le Roy H. Bender was arrested on the charge of violating section

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2145 of the Penal Law of New York, relating to Sunday observance, and was committed pending trial to the custody of the sheriff of Albany County. He applied for a writ of habeas corpus, on the ground that the imprisonment was unlawful, for the reason that the giving of a moving-picture show is not prohibited by the Penal Law. The section under which the charge was made is as follows:

"All shooting, hunting, fishing, playing, horse racing, gaming or other public sports, exercises or shows, upon the first day of the week, and all noise disturbing the peace of the day are prohibited."

At the original hearing the judge granted the writ and discharged the relator on the authority of the case of People *v.* Hemleb, 111 N. Y. Supp. 690, in which it was held that the expression "or other public sports, exercises or shows," referred only to those conducted out of doors. The appellate division disagreed with this view, dismissed the writ, and remanded the relator to custody. Judge Lyon delivered the opinion, in the course of which he said:

The trend of recent legislation has been to so far as possible protect the employee in his right to rest from labor on Sunday. No good reason is apparent for denying that privilege to the ticket seller, the ushers, the operators and the other employees in the thousands of picture shows in the State, while granting it to the employees in various other lines of employment throughout the State. It will not be claimed that such exhibitions fall within the exemption of section 2143 as works of charity or necessity. If they do not, and if included in the term "other shows," in section 2145, the giving of such shows constitutes "Sabbath breaking" as defined in section 2141, and subjects the violator of the law to the penalty provided by section 2142, above quoted. The relator further contends that a moving-picture exhibition is not prohibited unless it creates a noise disturbing the peace of the day. No such exemption is found in the law, but, upon the other hand, sections 2140 and 2145 negative its existence.

The legislature alone can decide how Sunday shall be kept, and is the sole judge of acts proper to be prohibited. If the existing law is in any way unsatisfactory or unjust, the remedy is by application to the legislature to modify or annul it, not by application to the court, whose sole duty is to construe it and say what the legislature meant by passing it.

The words "or other public sports, exercises or shows" are presumed to have been used by the legislature in their ordinary and familiar sense and meaning, and are to be so understood and construed.

The vital question to be decided upon this appeal is: What did the legislature mean when it wrote into the statute relating to the observance of Sunday, following the prohibition against shooting, hunting, fishing, playing, horse racing, gaming, the words "other public sports, exercises or shows"? Did it intend to prohibit exhibitions in the nature of the ordinary moving-picture show? It would seem clear that the answer to that question must be in the affirmative.

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SUNDAY LABOR—WORKS OF NECESSITY—*State* v. *Lavoie, Supreme Court of New Hampshire (Jan. 4, 1916), 97 Atlantic Reporter, page 566.*—Wilfrid Lavoie and Alfred Morin were convicted of violating the Sunday law enacted in 1891. Both were employed by one Fossa, the proprietor of a laundry in Nashua. On certain Sundays they drove the laundry team through the streets, collecting bundles of dirty clothes, and carried them to the laundry to be washed and returned on Monday. At the trial defendants moved to dismiss, on the ground that the work was a work of necessity, and excepted to the ruling of the court refusing this motion. The Supreme Court overruled the exceptions, sustaining the conviction, as shown by the opinion delivered by Judge Peaslee:

In Hamilton *v.* Austin (62 N. H. 575) the strict limitation of the right to labor on Sunday was upheld, apparently as matter of law, for the reason that otherwise much confusion and uncertainty would follow from trying the question of necessity as one of fact in every case. The suggestion is there made that if a relaxation of the rule is desirable it should be effected by legislative exemption of specific cases. Shortly thereafter the legislature exempted one class of labor (Laws 1883, c. 93), and in 1891 reenacted the statute as amended.

In view of this history it must be concluded that the word "necessity" as used in this statute has the same limiting effect that it did in earlier times, and that the construction of the statute is not to be modified by the changed ideas of people in general upon the subject of the observance of Sunday as a day set apart from secular labor.

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SUNDAY LABOR—WORKS OF NECESSITY—*Wilson et al.* v. *State, Supreme Court of Arkansas (July 10, 1916), 187 Southwestern Reporter, page 937.*—Will Wilson and others were convicted of unlawfully working on the Sabbath day. They were employees of Lee Wilson & Co., a corporation operating a steam sawmill in the town of Wilson, a place of about 1,000 inhabitants. The light and water for the town were supplied by the power from this plant, and for this purpose it was necessary to keep up steam by the employment of several men on Sunday. This was not complained of, but the persons convicted were others engaged in logging. The two grounds urged in defense were, first, that it was necessary to furnish logs on Sunday in order to have enough sawdust and refuse for fuel for running the seven days; and second, that without this Sunday labor in getting logs the mill could not run continuously on week days. The court affirmed the judgment, Judge McCulloch delivering the opinion and saying in part:

The contention that it was necessary for the men to work on Sunday to secure enough logs to keep the mill going on Monday is

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untenable, for if that be true, it would justify almost any kind of Sabbath work. The policy of the law is to stop all kinds of labor on the Sabbath day except things of real necessity, and all men are expected to conform their business arrangements accordingly. If it was reasonable to provide means to keep the work going on without laboring on the Sabbath, the duty rested upon every one to do so, as it is only in case of extreme emergency that one is justified in disregarding the Sabbath in order to make preparations for work or to continue work begun on other days of the week.

It was the duty of Lee Wilson & Co., if it expected to operate its mill six days in the week, to make reasonable provision for supplying logs in emergencies of this kind so as not to require the members of the logging crew to work on Sunday in order that the other men could be given employment on week days.

Nor is it any excuse that it was necessary to furnish fuel, for the appellants have not shown that it would have been unreasonably expensive to procure additional fuel to run the boilers on Sunday so as to keep enough steam to furnish water and light to the town. It is true it is stipulated that other fuel could not be used without "extensive and expensive alterations," but it does not appear from this that the company could not, at reasonable expense, have procured other fuel of the same kind as that which was ordinarily used. Sawdust and slabs were used for fuel, according to the stipulation, and for aught that appears to the contrary other wood fuel might have been obtained at reasonable expense. The burden was, as before stated, on the appellants to show that there was a real necessity for the Sunday work, and we can not say that the trial court was not warranted in drawing an inference from the agreed statement of facts that no real necessity for the work was proved.

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VOTING BY EMPLOYEES OF RAILROADS, ETC., ABSENT FROM HOME—REQUIREMENTS—CONSTITUTIONALITY OF STATUTE—*Straughan* v. *Meyers, Supreme Court of Missouri (July 18, 1916), 187 Southwestern Reporter, page 1159.*—The parties in this case contested the election for county judge of Ste. Genevieve County, for which they were candidates. The validity and construction of a statute enacted in 1913 for the purpose of allowing railroad employees, traveling salesmen, and others, to vote at other places in the State when absent from their own precincts, were involved. The court held that the statute was constitutional, and that the requirements as to the making of affidavits by the voters, etc., were mandatory and not merely directory. The votes of those complying strictly with those requirements were, therefore, counted, while the others were rejected.

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WAGES—FORFEITURE ON QUITTING WORK—EFFECT OF WEEKLY PAYMENT STATUTE—*Veitkunas* v. *Morrison et al., Supreme Judicial Court of Maine (Dec. 14, 1915), 95 Atlantic Reporter, page 947.*—Emelia Veitkunas was employed by the defendants, a manufacturing

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concern, under a contract in which she agreed to give one week's notice of intention to quit, under penalty of forfeiture of one week's wages. She left without notice or reasonable cause, and sued for the last week's earnings. The contract of employment was entered into under the following provision of the Revised Statutes:

Any person, firm or corporation engaged in any manufacturing or mechanical business, may contract with adult or minor employees to give one week's notice of intention on such employee's part, to quit such employment under penalty of forfeiture of one week's wages.

The employee claimed that the statute quoted was repealed by implication by chapter 39, Acts of 1911, which provides that every corporation, etc., engaged in manufacturing "shall pay weekly each employee engaged in his or its business the wages earned by him to within eight days of the date of said payment, but any employee leaving his or her employment shall be paid in full on the following regular pay day."

The supreme judicial court held that the former statute is still a valid law, and, the case having been certified to it by the lower court for decision, rendered judgment for the defendants. Judge Savage, who delivered the opinion, said in part:

We think that chapter 39 of the Laws of 1911 is not necessarily inconsistent with, and repugnant to, the forfeiture clause in chapter 40, section 51, of the Revised Statutes. It is obvious that the apparent purposes of the two statutes are unlike. They do not touch each other. Though both relate to wages, they relate to entirely distinctive features of the wage question. The earlier statute, which includes also a provision requiring an employer, having a forfeiture contract with his employee, to pay him an extra week's wages, if he discharges him without notice, is evidently intended to prevent the injurious consequences which might result to the one or the other, if the employer discharged the servant, or the servant left the employer, without notice. It has nothing to do with the time of the payment of wages. On the other hand, the act of 1911 relates solely to the time of payment. It entitles every employee to payment weekly, and to payment of all wages earned up to within eight days at the time of payment. But the statute further provides that if the servant leaves, he need not wait for his pay for the last eight days' work until the next pay day, or until eight days have elapsed, but that he is entitled to his pay in full on leaving. That is the significance of the clause in question. It assumes that the employee leaves rightfully. He is entitled at once on leaving to payment in full of the wages that are due him, but not, we think, to the wages he has forfeited. If he has not contracted to give notice of leaving, or if he has so contracted and has given notice, he is entitled to all his unpaid wages at once. If he has so contracted, but has failed to give notice of leaving, and has left without cause, nothing is due him. And in such case the act of 1911 dees not apply. Thus construed, the statute is not repugnant to the former.

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The further provision in the act of 1911 that "no corporation, contractor, person or partnership shall by a special contract with an employee or by any other means exempt himself or itself from the provisions of this act" relates only to the weekly payment of wages to which the employee is entitled. It follows that this action is not maintainable.

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WAGES—MINIMUM WAGE LAW—CONSTITUTIONALITY—*Stettler* v *O'Hara, Simpson* v. *O'Hara, Supreme Court of the United States (Apr. 9, 1917), 37 Supreme Court Reporter, page 475.*—These cases were before the Supreme Court to determine the constitutionality of a law of Oregon providing for the establishment of an industrial welfare commission with authority to establish minimum wages for women and minors, the latter term including persons of both sexes under the age of 18 years. Mr. Justice Brandeis, prior to his elevation to the bench, had assisted in the preparation of the brief in favor of the constitutionality of this act, so that he took no part in the decision at this time. The remainder of the justices were evenly divided, leaving undisturbed the decision of the Supreme Court of Oregon sustaining the statute. (See 139 Pac. 743, 141 Pac. 158 [Bul. No. 169, pp. 172–177].)

As the supreme court of course presented no opinion, it may be briefly stated that the act in question declares the evils which it is desired to remedy, i. e., the pernicious effect on the health and morals of women employed at inadequate wages, for unduly long hours, and in unsanitary conditions. It is declared that the welfare of the State requires the protection of women and minors from the injurious effects following the employment of women under such circumstances, and such employment is declared unlawful, as is the employment of minors in any occupation for unreasonably low wages. The court took the position that this being the belief of the legislature acting for the people, it should not intervene unless the steps taken were so utterly unreasonable and extravagant as to amount to a mere arbitrary interference with the right to contract. Laws limiting the hours of labor have been upheld as a protection to the public health, morals, and welfare, and it was claimed that every argument which sustained such laws was equally favorable to the constitutionality of a minimum wage law. The act was therefore sustained as within the police power of the State. As to the contention that the act abridged the privileges and immunities of citizens, in contravention of the provisions of the fourteenth amendment, it was said that employment "for such hours and at such wages as would reasonably seem to be detrimental to the health or welfare of the community is not a privilege or immunity of any citizen."

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WAGES—MONTHLY PAYMENT—ATTORNEY'S FEE—CONSTITUTIONALITY OF STATUTE—*Sorenson* v. *Webb, Supreme Court of Mississippi (Mar. 27, 1916), 71 Southern Reporter, page 273.*—B. W. Webb brought action against C. Sorenson, a sawmill operator, for $313.52 alleged to be due him for hauling logs to the mill. Judgment was given in the circuit court of Rankin County in his favor in the amount named, plus an allowance of $50 for an attorney's fee. This was in accordance with chapter 141 of the Acts of 1912, which requires all persons, etc., engaged in manufacturing to pay employees at least monthly, and provides on failure to make such payment, for the allowance of an attorney's fee if suit is brought within 10 days after demand, and recovery is had. The supreme court reversed the judgment as far as the allowance for attorney's fee was concerned, holding that part of the act to be unconstitutional. Judge Holden delivered the opinion. He cited as an authority the case of Gulf, Colorado & Santa Fe Railway Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. 255 (Bul. No. 11, p. 504), and said in part:

This is a penalty or a burden imposed upon manufacturers for their failure to pay employees, wages at a certain time, and is imposed upon no other class of individuals or corporations. The act singles out a certain class of debtors, to wit, manufacturers, and punishes them, when, for like delinquencies, it punishes no others. Thus they are not treated equally with other debtors.

We see no good reasons justifying the imposition of the extra burden and penalty of attorneys' fees upon a sawmill manufacturer, as the business is not such as to warrant the discrimination against it, while other persons and corporations are not penalized for like delinquencies. We do not think that the classification made by the State statute here is based upon a reasonable ground. There is no difference which bears a just and proper relation to the attempted classification, but it is a mere arbitrary selection. Therefore, in view of these conclusions, we hold that the State legislature was without power to impose attorney's fees in the act here in question.

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WAGES—PAYMENT IN SCRIP—TRANSFER OF COUPONS—*Pond Creek Coal Co.* v. *Riley Lester & Bros., Court of Appeals of Kentucky (Oct. 31, 1916), 188 Southwestern Reporter, page 907.*—The coal company named operates a number of mines in Pike County, Ky., and has a large number of employees. Another corporation, the Pond Creek Stores Co., in reality owned by the coal company, operates several stores, from which the miners may buy food and family supplies. This company issued coupon books, redeemable only at the stores of the company, and in merchandise, the amounts so issued being taken out of the pay of the employees on pay days. Riley Lester & Bros., storekeepers, bought up unused portions of such books, demanded cash for them from the coal company, and on refusal brought suits

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for the amounts represented. Judgment was in their favor in the circuit court of Pike County. The company contended that as the wages were not due at the time of the issue of the books, it had a right, notwithstanding the statutes requiring payment of wages semimonthly and in lawful money, to issue the books as they did, and to prescribe that they should be nontransferable and payable only in merchandise at the stores by which they were issued. In this it relied upon the case of Avent Beattyville Coal Co. *v.* Commonwealth, 96 Ky. 218, 28 S. W. 502. While the judgment was reversed on technical grounds regarding the method of assignment and of bringing suit, the court held that the case cited only decided that such issue did not make the employer criminally liable; but that after the wages actually became due, redemption in money was required by the law, and the right to such payment in money was transferable.

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WAGES—PAYMENT ON DISCHARGE—CONSTITUTIONALITY OF STATUTE—*Olson et al.* v. *Idora Hill Mining Co., Supreme Court of Idaho (Feb. 5, 1916), 155 Pacific Reporter, page 291.*—A suit by Harry Olson and others, and two other suits against the company named were considered together. In each instance the employee or employees had been discharged, and had received judgment in a lien suit in the district court of Shoshone County for wages due, also for a penalty equal to 30 days' wages and for attorney's fees, all under a statute providing for such recovery if wages due at the time of discharge or becoming due thereafter are not paid by the employer on demand. The company appealed on the ground, among others, that this statute was invalid as in conflict with the provisions of the Federal and State constitutions forbidding the impairment of the obligation of contracts and the taking of property without due process of law. The statute was held valid, and the judgments affirmed, after modifying one mistakenly entered for an excessive amount. The following is quoted from the opinion by Judge Budge:

The object of such legislation is to require employers of labor to pay their men promptly and in lawful money when they are discharged or quit, and this object is grounded on the broad principle that labor is property for which due compensation is to be paid upon the performance thereof, and that the laborer is worthy of his hire and should not be required to wait beyond a reasonable time for money he has earned, or for which he has sold his labor. A laborer's economic condition is usually such that to deprive him of his earnings for any considerable period of time brings into his home poverty and privation.

In cases where such statutes have been attacked and upheld, the courts have, as a rule, taken the position that the statutes are subject to a reasonable construction, and that the intention is not to be gathered from a statute of this nature that the employer shall be

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penalized for the failure to pay what is not a just debt, nor for the failure to pay when the discharged laborer, after demanding payment, prevents compliance with the demand by his own conduct, nor to deny nor preclude the right of the employer to interpose any valid counterclaim or defense to the claim of such laborer. Nor, under such interpretation, can an action be maintained for a penalty alone after a settlement for loss or damage before suit. The statute, being penal in its nature, should receive such construction as would not defeat the obvious intent of the legislature.

Viewed in this light, chapter 170, Session Laws 1911, can not be assailed on the ground that it in any manner interferes with the right of the employer to agree in advance with the employee upon the terms and conditions of the contract of employment, or the date of payment, or the equivalent that he will receive in lieu of lawful money of the United States; that it affords the employee the right to maintain an action for wages or salary until the same becomes due and owing under the terms of the contract, express or implied; or that it singles out any particular class of debtors and punishes it for failure to perform certain duties—duties which are equally obligatory upon all debtors—as it applies to all employers of labor, whether corporations, partnerships, associations, or individuals.

We feel justified in holding that chapter 170, page 565, Session Laws 1911, is a legitimate exercise of the police powers of the State; that it is not a violation of the liberty of contract in respect of labor; that it does not deprive the employer or the employee of the liberty or right to enter into any contract, nor take property from the employer without due process of law; and therefore that it is not unconstitutional.

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WAGES—PREFERENCE IN RECEIVERSHIPS—PRIORITY OF WAGES AND MORTGAGE—*Schmidtman* v. *Atlantic Phosphate & Oil Corporation et al., United States Circuit Court of Appeals, Second Circuit (Jan. 11, 1916), 230 Federal Reporter, page 769.*—Receivers were appointed for the company named on petition of one Schmidtman, a general creditor. Later the trustee of a mortgage sued to foreclose on and sell the property. The bill of the creditors and the foreclosure suit were consolidated. There were many claims for wages of laborers, etc., which under the New York labor law have a preference. The question arose whether these claims should be paid out of the proceeds of a foreclosure sale before satisfying the mortgage debt, or whether they are simply preferred to the unsecured debts. The circuit court of appeals, reversing a decision of the district court, took the latter view. Judge Lacombe delivered the opinion, reviewing the decisions of the United States Supreme Court construing the Federal statute, and saying, "The Supreme Court has never yet decided that the priority the statute gives divests a specific lien."

It was pointed out in the opinion, however, that in some State laws there was a specific declaration to the effect that the preferences established by the law should be "superior to the lien of any mortgage

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or other encumbrance," or "prior to all other liens," in which case the rule would necessarily be different from that adopted as to the Federal and New York laws, which do not contain such provisions.

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WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—CLASSIFICATION—*State* v. *Cullom, Supreme Court of Louisiana (Dec. 13, 1915), 70 Southern Reporter, page 338.*—Edward T. Cullom, president of the Springfield Lumber Co., was indicted for violating the Louisiana statute, Act No. 25, 1914, requiring manufactories employing 10 or more persons to pay them in full every two weeks. The lower court sustained a motion to quash the indictment as based on an unconstitutional law, and the State appealed. The objection raised to the validity of the law was based on the classification of employers, which made the law applicable only to those employing 10 or more, and the case of State *v.* Barba, 132 La. 768, 61 So. 784 (Bul. No. 152, p. 124), was relied upon to support this, that case holding invalid a distinction based only on the fact that some factories operated both night and day, and others only during the night or day. In the present case, however, the court held that it could not say that the classification was not based upon any real distinction, nor that the line should have been drawn at some other point, and the law was sustained accordingly, and the case remanded for further proceedings.

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WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—IMPRISONMENT FOR DEBT—*State* v. *McCarroll; Supreme Court of Louisiana (Dec. 13, 1915), 70 Southern Reporter, page 448.*—James F. McCarroll, manager of the McCarroll Lumber Co., was indicted for violation of the semimonthly payment statute of Louisiana. As in the case of State *v.* Cullom, above, arising under the same statute, and in the same district court, the indictment was quashed. The same reason was assigned for claiming the statute unconstitutional, with the additional one that the statute might cause imprisonment for debt, which it was claimed would violate an "unwritten article of the constitution." On this question Judge Land, who delivered the opinion, said:

Counsel for defendant argue that freedom from imprisonment for debt is one of the reserved rights of the people under article 15 of the State constitution, reading:

"This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed."

This article is meaningless, as the people of this State retain all rights the exercise of which is not prohibited by the constitution of the State or of the United States.

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No constitution of this State has ever prohibited imprisonment for debt.

In other States statutes regulating the right of imprisonment for debt in civil actions have repeatedly been held to be constitutional.

Therefore there is no basis for the contention that the act in question violates the constitution of this State. "There is no provision in the Federal Constitution relating to imprisonment for debt." Rev. Stat. U. S. sec. 990 (U. S. Comp. St. 1913, sec. 1636), adopts the laws of the respective States on the subject matter.

The constitutions of many of the States contain provisions prohibiting imprisonment for debt. Under such constitutions it has been held that:

"A statute providing indirectly for the imprisonment of a debtor by creating a crime for the nonpayment of debts and prescribing punishment therefor by imprisonment is unconstitutional."

Even under such constitutions, the penalty of a fine might be sustainable, in a case like this, where the imprisonment is at the discretion of the court.

If, as we have already held, act No. 25 of 1914 is constitutional, the legislative power to impose the penalty of imprisonment necessarily follows.

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WEEKLY DAY OF REST—CONSTITUTIONALITY OF STATUTE—*People v. Eberhart, Supreme Court of New York, Appellate Division, Second Department (Jan. 28, 1916), 157 New York Supplement, page 133.*—William V. Eberhart was convicted of a violation of subdivision 3 of section 8a of the labor law of New York, requiring that before an establishment shall be operated on Sunday, a complete list of Sunday employees shall be posted, designating a day of rest for each, and a copy filed with the commissioner of labor. The testimony of the factory inspector showed that on August 16, 1914, no such list was posted in Eberhart's laundry, in which 15 women were working. The conviction was affirmed, the regulation being held valid in an opinion by Judge Putnam, from which the following is quoted:

Appellant questions this requirement as unconstitutional. While the validity of this "one day of rest in seven" law is settled (People *v.* Klinck Packing Co., 214 N. Y. 121, 108 N. E. 278 [Bul. No. 189, p. 197]), appellant urges that its details of administration are overburdensome, arbitrary, and unreasonable. The employer has not only to post this list or schedule, but (by section 4) he has also to keep a time book of his employees, wherein are the names, addresses, and hours worked by each, which book is to be open to the commissioner of labor. But the posting of a list and the time book are not cumulative. Each Sunday worker has an advance assurance of his appointed rest day by the list of such workers being posted. But, lest this provision should fail by the list having been defaced or lost, the worker is further secured by a copy being on file with the commissioner of labor. Hence posting and the filed copy are together needed to



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protect the worker, and as means to expose evasions of this statute. Such requirements, therefore, are no breach of constitutional guaranties.

It was for an entire omission to post and file such a list that appellant was fined. He urges that it is a hardship to compel such lists also to be filed with the commissioner of labor; but the legislature deemed this a part of the worker's protection.

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WORKMEN'S COMPENSATION—ACCIDENT—HERNIA FROM UNUSUAL STRAIN—*Robbins* v. *Original Gas Engine Co., Supreme Court of Michigan (Mar. 31, 1916), 157 Northwestern Reporter, page 437.*—James F. Robbins was employed by the company named in painting gas engines. It was necessary for him and another man to move the engines, after washing off the grease, up a slope to another point where the painting was done. On January 22, 1915, while they were moving an engine weighing about 600 pounds, the engine stuck and he exerted extra force, and felt a sudden pain in his groin. It proved that a rupture had occurred. The Michigan statute allows compensation only for accidental injuries, but the court, affirming an award to the injured man, decided that this was such an injury. After stating the definition of accident applied in cases of insurance, etc., Judge Ostrander states that it appears to have been the intention to modify this in the compensation statute, and says further on this point:

The statute seems to contemplate that an accidental injury may result by mere mischance; that accidental injuries may be due to carelessness, not willful, to fatigue, and to miscalculation of the effects of voluntary action. There is testimony in the record, although it is not very conclusive, to support a finding that claimant was suddenly, and accidentally, put at disadvantage by the act of his fellow workman and the sticking of the engine on the concrete floor, and that the rupture was caused by his efforts to retrieve his position and do his work. If it is also assumed that there was a certain lack of physical integrity in the parts where the injury was manifested, still I think claimant may have compensation for the injury he suffered. I decide only the particular case, and in doing so decline to hold, upon this record, that claimant suffered from disease and not from accidental injury.

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WORKMEN'S COMPENSATION—ACCIDENT—RUPTURE OF BLOOD VESSEL—*La Veck* v. *Parke, Davis & Co., Supreme Court of Michigan (Mar. 30, 1916), 157 Northwestern Reporter, page 72.*—Michael La Veck made claim for compensation for injuries sustained in the employ of the company named. The employee was affected with arterial sclerosis, and the accident board found that on account of excessive heat in the room where he worked, and of overexertion, a small blood vessel was ruptured in his brain, causing the paralysis which was the "accident"

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alleged. The court affirmed the award to him, Judge Moore saying in the opinion delivered by him for the court:

In the instant case Mr. La Veck intended to do the prolonged work which the situation demanded, but he did not anticipate that because of doing so his blood pressure would be so increased as to result in the rupture of a cerebral blood vessel. According to the testimony of some of the physicians that result could be traced to the unusual hours of work and the unusual conditions. It was an unexpected consequence from the continued work in the excessively warm room.

Where there is testimony upon which the accident board can base its conclusion, we will not review its action.

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WORKMEN'S COMPENSATION—ACCIDENT—STRAIN OF MUSCLES BY LIFTING—*Bystrom Bros.* v. *Jacobson et al., Supreme Court of Wisconsin (Jan. 11, 1916), 155 Northwestern Reporter, page 919.*—The industrial commission awarded compensation to Eric Jacobson, and the employer brought this proceeding to test the validity of the award, claiming that the injury was not "proximately caused by accident." The commission found that while laying cement blocks, and at work in a sitting position under the porch of a house, the employee attempted to lift a block weighing approximately 80 pounds, and strained the muscles of his right side. The physician who attended him pronounced the injury a muscular spasm, and the employee was disabled and suffered pain from May 16, 1914, the date of the injury, until July 6, 1914. There was no external evidence of the injury. The court affirmed the award, Judge Marshall delivering the opinion and citing authorities which give definitions of the word "accident" and examples of the injuries held to have resulted from accident. A brief quotation is given from this opinion:

The thing which occurred was somewhat unusual. It was unexpected and undesigned. There was an external occurrence. The lifting of the heavy block while the workman was not in an advantageous position to do so, required him to unduly strain the muscles of his right side. The undue strain was not foreseen or expected. A mishap resulted—muscular spasm and consequent disability. There was, plainly, the physical causation spoken of in Milwaukee *v.* Industrial Com., 160 Wis. 238–240, 151 N. W. 247 [Bul. No. 189, p. 280]—the effort to handle the block while the workman was so circumstanced as to cause a perilous strain on the muscles of his right side.

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WORKMEN'S COMPENSATION—AMOUNT OF BENEFITS—EFFECT OF MINIMUM LIMITATION—*State ex rel. Globe Indemnity Co.* v. *District Court of Ramsey County, Supreme Court of Minnesota (Feb. 4, 1916), 156 Northwestern Reporter, page 120.*—Compensation in the sum of $3 weekly was awarded by the district court named to the sister of a

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deceased workman, she having been found to be dependent upon him for support to the extent of receiving $156 per year. The insurance company took the matter up on certiorari. It was held that the evidence, though unsatisfactory, was sufficient so that the finding of the claimant's dependency would not be disturbed. The deceased earned $13 or $14 a week, and not more than a total of $704 a year. It is provided in the act that a sister fully dependent shall receive 25 per cent of the wages of the deceased, and this would give such a dependent the minimum fixed, $6 per week. The company's contention was that the present claimant was entitled only to 156/704 of $6. The court pointed out that there is no limitation of the minimum provision to those wholly dependent, thus indicating its view that the award should have been for $6 weekly. It said, however, that no relief could be given to a party other than the one securing the writ of certiorari, and as the award should have been larger rather than smaller, it simply affirmed the award made.

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WORKMEN'S COMPENSATION—AMOUNT OF BENEFITS—TOTAL INCAPACITY—LOSS OF SECOND EYE—*In re Braconnier, Supreme Judicial Court of Massachusetts (Mar. 4, 1916), 111 Northeastern Reporter, page 792.*—In this case the question presented itself whether the loss of the remaining eye in 1915 in course of employment, by a workman who had lost one eye in 1910 (before the enactment of the law), constituted total incapacity under the statute. The court affirmed a decree for total incapacity, and, speaking through Judge Rugg, said in part:

The act affords a fixed compensation for a limited time "while the incapacity for the work resulting from the injury is total." It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to some preexisting condition, and it gives no indication that the legislature intended any such division. The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of a normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury. In principle this case is concluded by the reasoning and the decision of Madden's Case [111 N. E. 379; see p. 312], where the subject of preexisting infirmities of the employee as bearing upon the right and extent of compensation under the act, was discussed at large. (Brightman's Case, 220 Mass. 17, 107 N. E. 527 [Bul. No. 189, p. 274].)

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WORKMEN'S COMPENSATION—AMOUNT OF BENEFITS—WAGE LOSS—BUSINESS DEPRESSION—*In re Durney, Supreme Judicial Court of Massachusetts (Jan. 24, 1916), 111 Northeastern Reporter, page 166.*—William Durney proceeded against his employer, the Revere

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Rubber Co., and its insurer, for compensation for injury occurring September 28, 1912. His average weekly wages were $22. He was paid the maximum compensation until September 7, 1914. On September 8, 1914, he returned to work, and the industrial accident board found that his wages after that time were $13.20 per week, but that except for business depression he would have received $15 a week; also that if not injured, he would probably have been able to earn $19.40 per week in the state of business then existing. He was granted by it compensation based on one-half the difference between $22 and $13.20. The court held that the proper method would have been to take one-half the difference between $22 and $15. Judge Carroll, who delivered the opinion, said that "His weekly wages before he was injured were $22 and not a less amount," and as to the effect of the business depression he said in part:

The statute contemplates compensation for diminished capacity to earn wages, and the injured employee, in common with others, must bear the loss resulting entirely from business depression.

In the case at bar there is a specific finding that the employee is now earning $13.20, instead of $15, because of dullness in trade. This is equivalent to a finding that his inability to earn $15 a week is caused not by his incapacity or his injury, but solely because of business conditions.

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WORKMEN'S COMPENSATION—AMOUNT OF BENEFITS—WAGES—MAN CALLED TO ASSIST MARSHAL—*Village of West Salem* v. *Industrial Commission of Wisconsin, Supreme Court of Wisconsin (Jan. 11, 1916), 155 Northwestern Reporter, page 929.*—The industrial commission made an award requiring the village named to pay $3,000 to Alice Voeck as compensation for the death of her husband, William, who was a resident of the village at the time of his death. A man named Jones had left the village a year before to escape criminal prosecution, and been arrested by Deputy Sheriff Weingarten, who held a warrant for such arrest. Mr. Wilcox, the village marshal, met them just after the arrest, and was informed by the deputy that the prisoner did not wish to go to the lockup. On the suggestion of the marshal they visited two justices, but both disclaimed authority to release Jones on bail. The latter became angry and drew a revolver and threatened to shoot the second justice, and after the door was closed broke the glass and made further threats. The marshal then started to get assistance, met Voeck and sent him to the deputy's aid, and went for others. When Voeck approached the sheriff and prisoner the latter suddenly drew the revolver and shot him, and he died as a result of the injury. Voeck was a plumber, whose usual earnings were $18 per week, and the award of $3,000 was based on these earnings. The court held that, as no compensation was agreed

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upon for his services as aid to the marshal, compensation should be based on the usual pay of policemen, and remanded the case to the commission for revision of the amount of damages on that basis.

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WORKMEN'S COMPENSATION—AMOUNT OF BENEFITS—WEEKLY WAGES—*Gove v. Royal Indemnity Co., Supreme Judicial Court of Massachusetts (Mar. 3, 1916), 111 Northeastern Reporter, page 702.*—Catherine M. Gove, whose son 23 years of age had been killed, instituted proceedings for compensation as his dependent against Morris Brooker as employer and his insurer. The committee on arbitration found that the young man, who had been engaged in study at a college a part of the time, had worked six months during the preceding year, earning $550, or an average of $21.15 per week; that out of this money $150 went for his clothing, tuition, and incidentals, and that the balance, or $15.38 per week, was turned over to the mother. It was found that he lived at home and his board was worth $5 a week, but no deduction was made for this, and compensation was awarded to the mother at the rate of $7.27 a week for 300 weeks. It was found that the average weekly wages in the same class of employment (carpenter work), was $21.15 per week.

It appeared that the young man went to work with his father for Brooker on the stairways of a house for the construction of which the latter was a subcontractor. There was a claim that the work was to have been by the job, but the court overruled this contention of the defense. It held that the 26 weeks during which the deceased did not work during the preceding year could properly be taken as time "lost," and the average wages computed for the remainder, and that in any event, if computation could not be made from the man's own wages, the average wages for similar employment would be considered, giving the same result. The committee was held to have acted properly in not deducting from the weekly wages the value of the board furnished by the mother. The method of computing the compensation was approved, and the award affirmed.

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WORKMEN'S COMPENSATION—APPEAL—*Lavin v. Wells Bros. Co., Supreme Court of Illinois (Apr. 20, 1916), 112 Northeastern Reporter, page 271.*—Thomas Lavin died from injuries which he suffered on January 16, 1913, while in the employ of the company named. The administrator, Martin Lavin, secured according to law the appointment of a third arbitrator by the superior court of Cook County, for the purpose of determining the amount of compensation. On appeal from the arbitrators the court tried the matter before a jury, and ordered that the company pay the administrator $3,500

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in weekly installments of $8.61 each. The company appealed to the appellate court of the first district, but the appeal was dismissed on the ground that that court had no jurisdiction. The record having come to the supreme court on certiorari, it was held that appeal lies under the statutes in such cases, Judge Cartwright, who delivered the opinion, saying in part:

The Appellate Court Act and the Practice Act provide for appeals from final judgments, orders, or decrees in any suit or proceeding at law or in chancery, and the question whether an appeal will lie from the judgment of a court under the workmen's compensation act depends upon whether the proceeding in the court is a suit or proceeding at law or in chancery. The term "suit or proceeding at law or in chancery" includes every claim or demand in a court of justice which was known at the adoption of our constitution as an action at law or a suit in chancery, and also all actions since provided for in which personal or property rights are involved of the same nature as those previously enforced by actions at law or in chancery, but does not include special statutory proceedings involving rights and providing remedies which are not of the kind previously enforced either at law or in chancery. There was previous to the enactment of the statute in question a liability of the employer to his employee for negligence of the employer resulting in injury and damage which could be enforced by an action at law. The statute provides that upon acceptance its provisions shall be regarded as a part of the contract of hiring, and that the measure of liability of the employer for the injury shall be determined according to the provisions of the act.

A method is provided for the determination by arbitrators whether an injured employee suffered his injury while engaged in the line of his duty in his employment and determining the measure of liability of the employer. That is not a judicial proceeding, but the statute provides for an appeal and a trial de novo in a court, and that provision is for a judicial remedy, which begins with the appeal to the court. The proceeding is of the same nature as any suit or proceeding at law for the purpose of fixing a liability and recovering money, and the result is either an order for the payment of money or the defeat of the claimant. The nature of the right, the method of proceeding, and the judgment are of the same kind as in any other claim for money in a court of law.

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WORKMEN'S COMPENSATION—CLAIM—FAILURE TO PRESENT THROUGH MISTAKE AS TO EMPLOYER—*Haiselden et al.* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Oct. 24, 1916), 113 Northeastern Reporter, page 877.*—Charles Milbrandt was injured on February 25, 1914, while engaged in painting a building known as the German-American Hospital. He had been employed by a Dr. Haiselden as agent of the owners. A sliver of wood was run into his finger while he was sandpapering a window sash. On June 19, 1914, he filed a claim with the industrial board against the German-American Hospital, a corporation. In October, after a hearing, the

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committee of arbitration found that the applicant was not entitled to compensation from the hospital, it not being his employer. He then filed an application against the true owners of the building, the mother and sister of Dr. Haiselden, and an award of $300 was made to him. This judgment the court reversed, because of the failure to give notice within the six months period fixed by the statute. Judge Duncan delivered the opinion, which concludes as follows:

The provision of the statute is mandatory, and the evidence in the record clearly and positively discloses that this claim was barred because not made within the time provided by the statute.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—COMPULSORY SYSTEM—INTERSTATE COMMERCE—*New York Central Railroad Company* v. *White, Supreme Court of the United States (Mar. 6, 1917), 37 Supreme Court Reporter, page 247.*—The constitutionality of the New York compensation law was before the Supreme Court of the United States on a writ of error to the Supreme Court, Appellate Division, of the State of New York. Sarah White had procured from the workmen's compensation commission of the State an award of benefits under the law, for the death of her husband. The company objected that its liability, if any, was determined by the Federal liability law of 1908, and further, that an award under the compensation law would deprive it of its property without due process of law and deny to it the equal protection of the laws.

As to the first point it appears that the deceased was a watchman guarding tools and materials for use in constructing a new station and new tracks upon a line of interstate railroad, and on the basis of these facts it was decided that the employment was not either "in interstate transportation or in work so closely related to it as to be practically a part of it." Shanks *v.* Delaware, L. & W. R. Co. (see p. 97). The question of interstate commerce was therefore held not to be involved. Mr. Justice Pitney, who delivered the opinion of the court, then summarized the provisions of the act, noting the principal contentions raised against such legislation, and concluded by pointing out that—

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and can not succeed without showing that its rights as such are infringed (Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531, 544, 34 Sup. Ct. 359 [Bul. No. 169, p. 170]; Jeffrey Mfg. Co. *v.* Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167 [Bul. No. 169, p. 203]); yet, as pointed out by the court of appeals in the Jensen case (215 N. Y. 526, 109 N. E. 600 [Bul. No. 189, p. 221]), the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.

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The question of legislative power to alter the rules governing responsibility as between employer and employee was then discussed, and the principle announced that—

The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence.

The development of the common-law defenses of fellow service, assumption of risks and contributory negligence was briefly noted, and it was pointed out that the authority of the States to establish departures from these rules had been repeatedly upheld by the Supreme Court. The question of an abrogation of these defenses without a reasonable substitution was touched upon, and it was observed that—

No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place.

The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the fourteenth amendment beyond the reach of the law-making power of the State; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible State action.

The opinion then briefly presented the method provided by the act of certain and graduated compensation for disability based on the loss of earning power, and referred to the inherent probability of accidental injury to employees, the physical suffering of which must be borne by them alone. The remainder of the opinion is as follows:

But, besides, there is a loss of earning power—a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by the common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the

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employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. (St. Louis & San Francisco Railway *v.* Mathews, 165 U. S. 1, 22; Chicago, Rock Island, & P. R. Co. *v.* Zernecke, 183 U. S. 582, 586.)

We have referred to the maxim respondeat superior. In a well-known English case (Hall *v.* Smith, 2 Bing. 156, 160), this maxim was said by Best, C. J., to be "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And this view has been adopted in New York. (Cardot *v.* Barney, 63 N. Y. 281, 287.) The provision for compulsory compensation, in the act under consideration, can not be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it can not be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

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This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind must be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." (Coppage *v.* Kansas, 236 U. S. 1, 14, 35 Sup. Ct. 240 [Bul. No. 169, p. 147].) And this is the other: "It required 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 [14th] amendment to secure." (Truax *v.* Raich, 239 U. S. 33, 41, 36 Sup. Ct. 7 [Bul. No. 189, p. 53].)

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it can not be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer." (Holden *v.* Hardy, 169 U. S. 366, 397, 18 Sup. Ct. 383 [Bul. No. 17, p. 625].) It can not be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable"; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear. (Chicago, B. & Quincy R. R. Co. *v.* McGuire, 219 U. S. 549, 571, 31 Sup. Ct. Rep. 259 [Bul. No. 93, p. 644]; Second Employers' Liability Cases, 223 U. S. 1, 52, 32 Sup. Ct. 169 [Bul. No. 98, p. 470].)

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not

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confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. (Sherlock *v.* Alling, 93 U. S. 99, 103, Missouri Pacific Ry. Co. *v.* Castle, 224 U. S. 541, 545.)

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the fourteenth amendment. The denial of a trial by jury is not inconsistent with "due process." (Walker *v.* Sauvinet, 92 U. S. 90; Frank *v.* Mangum, 237 U. S. 309, 340.)

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this can not be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the fourteenth amendment, and are brought to consider, next, the manner in which the employer is required to secure the payment of the compensation. By section 50, this may be done in one of three ways: (*a*) State insurance; (*b*) insurance with an authorized insurance corporation or association; or (*c*) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of $300,000, under section 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under section 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the State, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about $50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the State might, consistently with the fourteenth amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is

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open to all employers on reasonable terms that it is within the power of the State to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provision giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—DEATH BENEFITS—ALIEN DEPENDENTS—WATCHMAN FOR SEVERAL FIRMS—ACCIDENT—*Western Metal Supply Co.* v. *Pillsbury et al., Supreme Court of California (Apr. 20, 1916), 156 Pacific Reporter, page 491.*—James Mason, a watchman, who made regular trips over the premises of six firms employing him, was found by the industrial accident commission to have been killed in the course of his employment upon the premises of the company named, and compensation was awarded to his widow. Although the compensation statute as a whole was held constitutional in the case of Western Indemnity Co. *v.* Pillsbury, 151 Pac. 398 (Bul. No. 189, p. 229), the company questioned whether the amendment to the constitution providing for the enactment of the compensation act authorized compensation to dependents in case of the death of the injured employee. The amendment, section 21 of article 20 of the constitution, speaks of the creation of a liability on the part of employers to compensate their employees, but makes no mention in so many words of compensation to dependents. Judge Sloss delivered the opinion of the court, and first expressed the view that the functions given to the board are truly judicial, so that under the terms of the constitution conferring judicial powers upon the senate and courts exclusively the delegation of powers to the board was not valid unless justified by the amendment referred to. The opinion, however, holds that the amendment reasonably covers cases of compensation for death, as is shown by the following quotation:

That the constitutional amendment was designed to authorize the establishment of the new system can not be doubted. In view of the general trend of legislation on this subject, we think the language of the constitutional amendment was not inapt to describe a scheme of liability which should include the entire field embraced within the prior laws. Compensation means more than a mere cash payment to an individual. Compensation to employees for injuries incurred by them may fairly be said to mean, not only a money payment to the employee himself, but provision or indemnification for the various elements of loss which may be the direct result of his injury. It includes, for example, the obligation to provide medical and surgical treatment (section 15, subd. a)—an obligation which does not neces-

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sarily involve payment in cash to the employee himself. It may equally be said to cover some provision for those who had been entitled to look to the employee for their support and who by his death are deprived of that support. If the law provided that while an injured workman was disabled payments should be made to his family during the period of the disability, this would be one form of compensation to the workman. It would hardly be claimed that such a provision was beyond the scope of the constitutional authorization. On similar reasoning, it may fairly be said that, where a workman is killed, the requirement that a payment shall, for a given period, be made to his dependents for their support, is also a provision for compensation to the workmen within the meaning of section 21 of article 20.

Next the question of payments to beneficiaries who are nonresidents of the State and Nation is taken up, and it is held that provisions for such compensation are not invalid, there being "no constitutional or rational ground for limiting the benefits" of the act to citizens.

It is further held that the watchman was an employee of the company on whose premises he was killed; that though he was intentionally shot by a third person, the killing was nevertheless "accidental"; that the six employers did not constitute a "voluntary association" by which the watchman was employed; and, finally, that the correct wage basis was the total amount which he received from all the employers rather than the amount which the single company paid him, the statute basing the compensation on the "average annual earnings" of the employee. The award of the commission was accordingly affirmed.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—DUE PROCESS OF LAW—*Evanhoff* v. *State Industrial Accident Commission et al., Supreme Court of Oregon (Dec. 28, 1915), 154 Pacific Reporter, page 106.*—George Evanhoff brought suit in the circuit court of Marion County to enjoin the enforcement of the workmen's compensation act. He alleged that but for it he had a good cause of action for damages against the Bridal Veil Lumber Co. for personal injuries sustained by him while in its employ, and that the act was unconstitutional. The commission raised the objection that the complaint was insufficient, which objection was sustained, and the plaintiff appealed. A large number of violations of the constitution of the State and that of the United States were alleged. These objections were all shown to be untenable in the opinion delivered by Judge McBride, in the course of which he said:

It is contended that the act is void in that it violates section 10, article 1, of the constitution of this State, and that also it is in violation of section 1 of the fourteenth amendment to the Federal Constitution, as it deprives a person of property without due process of law. Neither of these positions is well taken. The act leaves the

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employer free to accept the provisions of the act or to reject them as he may see fit. If he gives notice that he rejects them, he is left to protect himself from actions for personal injury by litigation in the courts. It is true that the act has swept away certain defenses heretofore available; but, as this could have been done in any case, he has no legal reason to complain. If he sees fit not to avail himself of the provisions of the act, he may still protect himself by giving notice that he rejects its provisions. It is not compulsory, and the arguments that apply with greater or less force to compulsory acts are here inapplicable.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—DUE PROCESS OF LAW—TRIAL BY JURY—*Anderson* v. *Carnegie Steel Co., Supreme Court of Pennsylvania (July 1, 1916), 99 Atlantic Reporter, page 215.*—William Anderson sued the company named for damages for injury suffered by him in its employ. In defense the company alleged that the case was within the scope of the workmen's compensation act. The plaintiff did not deny this, but questioned the constitutionality of the act, which thus became the sole question at issue. The court of common pleas of Allegheny County rendered judgment for the company, and the plaintiff appealed. The judgment was affirmed in an opinion delivered by Judge Brown, of the supreme court, who said in part:

It is first contended that section 201, article 2, of the act of 1915, is unconstitutional, because (1) it is violative of article 1, section 9, of our constitution, which provides that one cannot be deprived of his property "unless by the judgment of his peers, or the law of the land," and (2) because it is in contravention of the fourteenth amendment to the Constitution of the United States, which declares that no one shall be deprived of his property "without due process of law." Section 201 is as follows: [Section quoted.]

It is urged that the taking away of these [common-law] defenses is deprivation of property without due process of law. Section 201 applies only to actions at law for damages resulting from the negligence of employers, and by it they may no longer set up certain defenses available under the common law; but no one has property in any rule of that law.

It is next contended that section 204, of article 2 of the act of 1915, is unconstitutional, because it is an unreasonable interference with the right of an individual to make his own contract. That section [forbidding waivers] is as follows: [Section quoted.]

At the time the act of 1915 was passed the settled law of this State was that a contract limiting or releasing damages for future negligence was against public policy. [Cases cited.] The foregoing section is but a statutory extension of the same principle.

It is further urged that sections 301, 302, and 303, of article 3, of the act of 1915, are unconstitutional, because they are violative of article 1, section 6, of our constitution, which declares that "trial by jury shall be as heretofore, and the right thereof remain inviolate." If the foregoing sections are to be binding on an employer or employee in any

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case, they will be so only after both have agreed they shall be so bound. Neither of them is deprived of a trial by jury except by his own consent, conclusively presumed to have been given, unless withheld in the manner prescribed by the act. Nothing is to be found in the said three sections depriving employer or employee of the constitutional right of a trial by jury. They merely permit a waiver of the same, if both so agree, and neither the Federal nor State constitution precludes such waiver.

Finally, it is contended that article 3, of the act of 1915 is unconstitutional, because it is violative of section 21 of article 3 of our constitution, which provides:

"No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted."

It need only be said of this contention that the amount to be recovered for injuries to an employee is limited only when the parties to the contract of employment so agree.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ELECTION—NONRESIDENT ALIENS—DEPENDENCY—CLAIM—*Victor Chemical Works* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (June 22, 1916), 113 Northeastern Reporter, page 173.*—Casimo Landolina, administrator of Filippo Landolina, filed an application with the industrial board for adjustment of his claim against the company named, claiming that the deceased, his brother, was killed on September 6, 1913, in the course of his employment with the company. An arbitration committee entered an award of $6 per week for 416 weeks from the date of the death, for the benefit of his parents, resident in Italy. The industrial board and the circuit court of Cook County affirmed the award, and the supreme court took similar action. The company contested the constitutionality of the act and made other objections to the award, which are stated and answered in the opinion delivered by Judge Craig, from which the following is quoted:

It is assigned as error that the circuit court of Cook County erred in quashing the writ of certiorari and awarding the writ of procedendo for the reasons: (1) That the workmen's compensation act of 1913 is unconstitutional; (2) that said act of 1913 does not apply to nonresident alien dependents; (3) that the evidence produced before the arbitrators, which was passed upon by the industrial board and is contained in the record, did not show that the deceased had contributed to the support of his parents; (4) that it was not affirmatively shown that the deceased was not a casual employee; and (5) that it was not shown that a proper claim for compensation had been made. These contentions will be considered in their order.

First. As to the constitutionality of the act, this court has held the workmen's compensation act of 1911, which is similar to and of the

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same general effect as the act of 1913, to be constitutional. [Cases cited.] Plaintiff in error claims, however, that the act of 1911 was held constitutional by this court because it was elective, and not compulsory; that the act of 1913, while in terms elective, the same as the act of 1911, is in effect compulsory, for the reason that the time given for election by employees as to whether or not they would accept or reject the provisions of said act is unreasonably short.

It is a familiar maxim that ignorance of the law excuses no one, and in this case plaintiff in error had over a month in which to learn the law and to file notice of its election prior to the accident, and it has made no claim that this was not sufficient time. As we do not think the act was mandatory or compulsory any more than the act of 1911, its constitutionality must be considered as settled by the cases heretofore cited in which the act of 1911 was construed.

Second. Plaintiff in error contends, conceding the parents of the deceased were dependent upon him for support, that the said parents were aliens and nonresidents of the United States, and were citizens of and residing in Italy, and the act has no application to nonresident alien dependents claiming as beneficiaries under the act.

The words in the title "to promote the general welfare of the people of the State" do not necessarily mean that it is the intent and purpose of the act to limit compensation that may be paid for accidental injuries or death suffered in the course of employment to citizens of the State. Moreover, the title alone is not the sole criterion, but the terms of the act itself must be considered. [Definition of "employee" in section 5 quoted.]

By the terms of the act we think that alien dependents are included.

Third. We think there was sufficient competent evidence to sustain the finding of the industrial board that the deceased left parents, and that he had within five years contributed to their support.

Fourth. It is claimed that it was not shown by the defendant in error that the deceased was not a casual employee.

Under the terms of the act it would seem to be the duty of the employer to allege and prove, as a matter of defense, that the employment of the employee was but casual. We do not think the plaintiff in error can raise this question for the first time on appeal. It was his duty to raise this point before the board of arbitrators or the industrial board.

Fifth. It is claimed that the record fails to show that the claim for compensation was made within six months after the accident, as is provided in section 24 of the act. The proof shows that the accident occurred September 6, 1913. The attorney for the administrator testified that he prepared a written claim for compensation under the act and gave it to a constable to serve on the plaintiff in error on March 5, 1914. He also produced a carbon copy of such written claim, and further testified that the superintendent of the plaintiff in error admitted that the constable had served the notice. This was not denied. The statute is silent as to how such claim shall be made, and we think the proof sufficiently shows that a claim for compensation was made upon plaintiff in error within six months.

It is also claimed that the verdict of the coroner's jury impaneled to inquire into the death of the deceased was improperly admitted in evidence. Proceedings under the workmen's compensation act



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take the place of the ordinary action on the case against an employer for damages for causing the death of or injury to an employee. In actions for causing death by negligence we have held such evidence proper. [Cases cited.]

The judgment of the lower court will be affirmed.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ELECTIVE SYSTEM—*Greene* v. *Caldwell et al., Court of Appeals of Kentucky (June 6, 1916), 186 Southwestern Reporter, page 648.*—Robert L. Greene appealed from a decision of the circuit court of Franklin County holding the Kentucky Workmen's Compensation Act of 1916 constitutional. The decision was affirmed by the court of appeals, Judge Carroll delivering the opinion. He first stated the grounds upon which the former act of 1914 was held invalid, and quoted largely from the decision in the case of State Journal Co. *v.* Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 437 (Bul. No. 169, p. 197). He pointed out that the questions to be considered were, whether the present act eliminates the features found objectionable in the act of 1914, and whether any new sections are repugnant to the constitution. As to the matter of the compulsory or elective nature of the act he said:

We find it insisted that the act of 1916 contains provisions that in their operation and effect, although differing in form of expression from the act of 1914, compel the employee to accept the provisions of the act; and, this being so, it is open to the objection that made the act of 1914 obnoxious to the constitution as pointed out in the opinion referred to. But after carefully considering this act, our opinion is that it conforms in the particular mentioned to the requirements of the opinion, and hence is not compulsory on the employee, but leaves him the individual right to accept or reject its provisions whichever he chooses to do. Under the act of 1914, as was aptly said in the other opinion:

"When the employer accepts the provisions of this act the employee is automatically drawn into this so-called contract and made subject to its provisions."

He could exercise no independent volition in the matter at all. It was not necessary that he should be asked to accept the law because, when his employer accepted it, this act of the employer, in and of itself, without any action on the part of the employee, subjected the employee to all of the provisions of the law, and this arbitrary method by which the provisions of the act were imposed on the employee was one of the principal objections urged to the act of 1914 and the chief ground upon which the invalidity of the act was rested.

In the act of 1916, however, the objectionable compulsory features of the act of 1914, in so far as the employee is concerned, were eliminated, and under the act of 1916 the employer can not, without the consent of the employee, bring him under the influence of the act, nor does it become operative as to the employee until he has voluntarily signified his willingness to accept its provisions by signing the paper described in section 74.

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After considering other sections, Judge Carroll concludes his remarks on this subject as follows:

Has the employee the right to act for himself? Has he the right to exercise his voluntary, independent judgment and do as he pleases? The act declares that he has, and as was said in the former opinion, this is all that is necessary to remove the charge of compulsion.

The opinion then successively disposes of objections to the validity of the statute on the ground that it limits the amount to be recovered for injuries resulting in death or for other injuries; that it enables common carriers to contract for relief from their common-law liability; that it deprives persons of liberty or property without due process of law; that it makes radical changes in the law of parent and child; that it sets up, in the compensation board which administers the act, a court not provided for in the constitution; that it abolishes trial by jury; and that it is local, class, or special legislation forbidden by the constitution. Section 22, relating to alien dependents, is held to be independent, and its consideration is postponed until a case shall arise in which an alien, his relatives, or dependents are parties.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ELECTIVE SYSTEM—EQUAL PROTECTION OF THE LAW—*Hawkins* v. *Bleakly, Supreme Court of the United States (Mar. 6, 1917), 37 Supreme Court Reporter, page 255.*—This case was before the Supreme Court on appeal from the United States District Court for the Southern District of Iowa, the law having there been held constitutional (220 Fed. 378). Conflict with the State and Federal constitutions was alleged, but Mr. Justice Pitney, speaking for the court, pointed out that subsequent to the decision by the Federal court the Supreme Court of Iowa had sustained the act (Hunter *v.* Colfax Consolidated Coal Co., 154 N. W. 1037 [Bul. 189, p. 225]; same case, 157 N. W. 145 [see p. 251]), so that no objection under the State constitution was brought up for consideration. It was pointed out that as an elective law it was similar in its general features to laws found in many States and sustained by their courts (citing cases).

The question of duress to compel acceptance by the withdrawal of defenses was disposed of by referring to the opinion in New York Central R. R. Co. *v.* White, decided the same day (p. 232). The declaration as to the presumption of the negligence of the employer and the placing of the burden of proof upon him where there is an injury was said to be merely an establishment of a rule of law within the power of the State, and if not unreasonable in itself or conclusive of the rights of the parties it did not constitute a denial of due process

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of law. Another objection to a provision of this act differing from the New York statute was disposed of in the following language:

Objection is made to the provision in section 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees [cases cited], it is sufficient to say that the criticized provision evidently is intended to safeguard the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employers' liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

The opinion then took up the method of awards, involving proceedings before the industrial commissioner and an arbitration committee, with provisions for review, the filing of the decree in the district court, and a limited appeal to the courts. Quotation was made from the opinion of the Supreme Court of Iowa in the Hunter case, pointing out that while the act does not in terms provide for judicial review except by an appeal on questions other than pure questions of fact, the statute does not take from the court all jurisdiction in the premises, Mr. Justice Pitney then saying:

Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. (Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531, 545, 34 Sup. Ct. 359 [Bul. No. 169, p. 170].)

To the objection that the right of trial by jury is dispensed with, the same answer was made as in the White case, i. e., that this is not embraced in the rights secured by the fourteenth amendment. It was further contended on this point that the ordinance of 1787 for the government of the Northwest Territory contained a special guaranty available for parties in the State of Iowa. In reply to this it was said that all provisions of this ordinance were superseded by the State constitution. The remainder of the opinion is as follows:

Section 5 is singled out for criticism, as denying to employers the equal protection of the laws. It reads: "Where the employer and

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employee elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employee had not rejected the terms, conditions and provisions thereof." As we have shown, if the employer rejects the act he remains liable for personal injury sustained by an employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a coemployee, or even by showing that the plaintiff was negligent, unless such negligence was willful and with the intent to cause the injury or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by section 3b, "the employer shall have the right to 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 shall apply and be available to the employer as by statute authorized unless otherwise provided in this act"; with a proviso not material to the present point. We can not say that there is here an arbitrary classification within the inhibition of the "equal protection" clause of the fourteenth amendment. All employers are treated alike, and so are all employees, and if there be some difference as between employer and employee respecting the inducements that are held out for accepting the compensation features of the act, it goes no further than to say that if neither party is willing to accept them the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the State, and the legislation can not be condemned when that power has been qualifiedly exercised, without reasonable discrimination.

Section 42 of the act provides: "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the State department of insurance. * * * And if such employer refuses, or neglects to comply with this section he shall be liable in case of injury to any workman in his employ under part one (1) of this act." The Supreme Court of Iowa, in the Hunter case, said of section 42 (154 N. W. 1056): "This clearly shows that no employer is compelled to insure unless he has accepted, and thus becomes subject to, the act"; proceeding, however, to discuss the case further upon the hypothesis that all employers named in the act were compelled to maintain insurance. In view of the construction adopted, it is unnecessary for us to pass upon the question of compulsory insurance in this case, appellant not having accepted the act.

Other contentions are advanced, but they are without merit and call for no particular attention.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—EMPLOYER'S ELECTION BINDING ON EMPLOYEES—*Middleton* v. *Texas Light & Power Co., Supreme Court of Texas (Apr. 26, 1916), 185 Southwestern Reporter, page 556.*—Charles Middleton brought action for

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compensation against the company named, which contested the suit on the ground that the workmen's compensation law was unconstitutional. Judgment was for the defendant in the district court of McLennan County, but on appeal the case was reversed and remanded by the court of civil appeals of the third judicial district, which held that while in its opinion the law was unconstitutional in so far as it deprives employees of employers who have accepted the terms of the act of their right to a common-law action, without option on their part, this did not vitiate the validity of the remainder of the act. This court certified a number of constitutional questions to the supreme court, which answers them in the present opinion, holding the act valid throughout.

Judge Phillips delivered the opinion, and first made an analysis of the purposes, operation and effect of the act. Taking up then the question of its constitutionality, Judge Phillips said for the most part:

This will be determined in the light of the several questions certified without setting them out or attempting to answer them separately. As to employers, it is clear that no fundamental right is invaded. The act leaves them free to adopt its plan of compensation, or remain ungoverned by it. The consequence attached to their not consenting to it, is the denial of the right, existing in common-law actions, to interpose the common-law defenses of fellow servant, assumed risk, and contributory negligence in suits for the recovery of damages for personal injuries suffered by their employees in the course of their employment. But that is not a vested right or a right of property. Those defenses are but doctrines or rules of the common law. Rights of property which have been created by the common law can not be taken away by the legislature. They are protected from destruction by any process except the due process of the law, that is, law in its regular course of administration through courts of justice. But no one has a vested interest in the rules, themselves, of the common law; and it is within the power of the legislature to change them or entirely repeal them. (Munn *v.* Illinois, 94 U. S. 113; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 [Bul. No. 98, p. 470].)

The effect of the act upon the rights of the employees can not be properly weighed or determined without a due consideration of its aim and policy in their interest. Its theory, as it concerns them, is that the plan of compensation it provides for their injuries suffered in the course of their employment is more advantageous than a suit for damages. By the act a fixed compensation is payable to him upon the mere happening of any injury in the course of the employment, or to his beneficiaries in the event of his death from the injury, without reference to any negligence on the part of the employer or his servants, and without regard to defenses available to the employer at common law.

With this as the evident spirit and design of the act in the employee's interest, his entering the service of an employer who in his business pursuit is governed by the act, or his remaining, after notice duly given, in the service of an employer who has adopted its plan of compensation and become subject to it, is made to operate as a waiver

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of any cause of action against the employer on account of any injury suffered in the course of the employment, except for exemplary damages in behalf of a surviving husband, wife, or heirs.

Does this deprive the employee of any vested right or property right? It is clear that it takes from him no property right. A vested right of action given by the principles of the common law is a property right, and is protected by the constitution as is other property. The act, however, does not profess to deal with rights of action accruing before its passage. That which is withdrawn from the employee is merely his right of action against the employer, as determined by the rules of the common law, in the event of his future injury. This is nothing more or less than a denial to him by the legislature of certain rules of the common law for the future determination of the employer's liability to him for personal injuries incurred in the latter's service, and, in the plan of compensation provided, the substitution by the legislature of another law governing such liability and providing a different remedy. The question is: Was the legislature without the power to thus completely change the law upon the subject? This inquiry has no concern in the wisdom of the change; it takes no account of the reason for it; it is limited to the naked question of the legislature's power.

That the legislature possessed the power, must be conceded, unless it be true that the employee is protected by the constitution in the continuance of the rules of the common law for his benefit in the determination of the employer's liability for such injuries as those with which the act deals. That no one has a vested right in the continuance of present laws in relation to a particular subject, is a fundamental proposition; it is not open to challenge. The laws may be changed by the legislature so long as they do not destroy or prevent an adequate enforcement of vested rights. There can not be a vested right or a property right, in a mere rule of law.

It is not to be doubted that the legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the constitution and could not be taken away; nor could the use of the courts for its enforcement be destroyed. This act does not affect the right of redress for that class of wrongs. The injuries, or wrongs, with which it deals are accidental injuries or wrongs. What we know and denominate as the cause of action arising from an accidental injury is purely the creation of the common law. It is a common-law liability founded upon the common-law doctrine of negligence; and but for the rule of the common law,—sometimes also expressed in statutes,—there would be no liability for such an injury, and hence no cause of action for it.

We rest the decision of this question upon what seems to us is the evident proposition that no one has any vested or property interest in the rules of the common law, and therefore no one is deprived of a constitutional right by their change through legislative enactment. (Jensen *v.* Railway Co., 215 N. Y. 514, 109 N. E. 600 [Bul. No. 189, p. 221].)

We do not regard the act in other respects as violative of any of the other constitutional provisions referred to in the certificate. The act contains but one general subject; its purpose is one general

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object; and its title sufficiently expresses it. It vests no judicial power in the industrial accident board which it creates. That board is but an administrative agency provided for the proper execution of the act. The classification adopted by the act is not to be held by a court as an arbitrary and unreasonable one. In the enactment of such a law the legislature was privileged to make a classification in respect to employees subject to the law. Classification for the purpose of a law is a legislative function. It will be sustained by the courts unless it is wholly without any reasonable basis. Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers are excluded from the operation of the act, but this was doubtless for reasons that the legislature deemed sufficient.

Nor does the act impair the right of trial by jury. Trial by jury can not be claimed in an inquiry that is nonjudicial in its character, or with respect to proceedings before an administrative board. The accident board charged with the administration of the act is not a court. In its determination of disputed claims there could be no right to a jury trial. The act authorizes appeals from the decisions of the board to the courts, where a jury trial of the matters in dispute, under the law as embodied in the act, may be had.

The insurance association created by the act is not a private corporation, and this part of the act is not violative of the constitution in its provision that no private corporation shall be formed except by general laws. Some such agency as the insurance association may be deemed to be essential to the efficient execution of the act. It was a way of giving effect to the plan as a dependable method of providing the funds necessary for the payment to employees of the compensation the act is designed to afford. The association is very clearly only an agency for the proper administration of this law.

The act, in our opinion, is in its several provisions a constitutional law.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—EQUAL PROTECTION OF THE LAW—*Sayles* v. *Foley, Supreme Court of Rhode Island (Jan. 26, 1916), 96 Atlantic Reporter, page 340.*—Frank A. Sayles petitioned for relief against John J. Foley and another of his employees, who had begun common-law suits against him for damages for personal injuries. He alleged that their remedy was governed by the workmen's compensation act, he having elected to come under the act and they not having given notice of rejection of it. They in turn alleged in their answer that the act was unconstitutional.

The opinion by Judge Baker first stated the alleged points in which the act violates the State and Federal constitutions. The extension of compensation legislation is noted, and the considerations leading to its enactment. It is next pointed out that the respondents can not press objections based upon the discrimination of the act between employers, or its denial of due process of law to minors, since they are neither employers nor minors.

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The exclusion of domestic and agricultural employees, casual employees, and those whose remuneration exceeds $1,800 per year, was held to be a valid classification, as was also the provision allowing employers of five or less workmen to retain their common-law defenses when they do not elect to come under the compensation provision. The following quotations are made from this portion of the opinion, citations of and quotations from the authorities being omitted:

As to domestic and agricultural employees, if the legislature deemed the nature of their employment with, as a general rule, its intimate personal relations between the employer and his employees, to be such that it would be proper to leave them both as to remedies for personal injuries arising from accidents in the course of their employment to the common-law action and its defenses, we can not say that such classification is arbitrary and unreasonable, as there is a substantial difference between the condition of these employees and those where the obvious risks of the employment are greater and where the mere number of employees permits little opportunity for actual acquaintance.

What has been said as to domestic and agricultural employees is pertinent as to the situation of employers of five or less workmen and their employees; that is, there is a real difference in such employments as to the danger of accident incidental to the bringing together of workers in large numbers. Therefore an attempt by legislation to recognize this difference by classification will be upheld as not palpably erroneous.

The exclusion of the employees receiving more than $1,800 a year is not unreasonable, as in most employments involving considerable danger of injury from accident the employee receiving such a salary or wage may be presumed to be exposed to less danger of accidents than the ordinary workman. The same reason exists for excluding the casual employee.

The next matter considered was that of the abrogation of defenses in case of failure of the employer to elect to be governed by the compensation feature of the act, and their retention in case the employer so elects but his election is made ineffective as to certain employees by their decision to stand upon their common-law rights. The provisions which the act makes in this respect were held reasonable and valid. The principal remaining question was that as to alleged delegation of legislative authority to the employer, it being claimed that it was left with him to say in what cases the act should be in effect. This objection, like the others, was held not to be tenable, and the case was remanded to the superior court for further proceedings. In the discussion of the question of delegation of legislative power Judge Baker said in part:

There is an existing procedure affording remedies and defenses under which both are placed at the start. There is in addition a scheme for compensation for injuries, clearly defined in the act,

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which is entirely elective, and which is available to neither employer nor employee until accepted by both. The employer has the first move, so to speak. If he does not elect, the parties remain under the common law as modified by the statute itself, the employee with his previous right undiminished and the employer shorn of some of his previous defenses. If the employer elects to come under the compensation scheme of the statute, the employee then has the opportunity of electing by positive act to remain under the common law and to preserve his remedies thereunder for future accidents, or by inaction to tacitly accept the compensation features of the act. The power given to an employer to choose from two alternative schemes, both clearly and completely defined by the law and designed to afford compensation for an accident to another, is not a delegation of legislative power, so long as that other is not bound by the employer's choice, but is left free to make his own choice. The choice afforded them severally and jointly is not dissimilar in principle to the choice of remedies afforded a plaintiff under certain circumstances. Instances are not infrequent of there being a right of action at common law and a statutory action of later origin on essentially the same facts, as concurrent or coexisting remedies, with the right of election between them. In the ordinary case a choice of remedy by plaintiff or complainant is conclusive, and determines the character of the litigation. Under the present law the choice of both parties must concur to bring them under the compensation scheme of the act and to fix their mutual rights and liabilities as to compensation for future accidents. It is a somewhat unusual and extended application of the doctrine of the election of remedies, but it does not involve a delegation of legislative power.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—NEGLIGENCE UNDER COMMON LAW—*De Francesco* v. *Piney Mining Co., Supreme Court of Appeals of West Virginia (Oct. 12, 1915), 86 Southeastern Reporter, page 777.*—Antonio de Francesco suffered the loss of a hand and an eye, and other injuries, by the explosion of a stick of monobel, a form of dynamite. He lighted the attached fuse and placed the stick in a hole, but almost immediately, seeing that the fuse did not appear to scintillate, took it out, and it exploded in his hand. He sued under the common law, the company having declined to come within the operation of the workmen's compensation law. The defenses of assumption of risk, contributory negligence and fellow service, and also that the negligence was that of the mine foreman, are declared by the compensation act to be abrogated in the case of such employers. As to the validity of this provision Judge Poffenbarger, who delivered the opinion, said:

An assignment of error, denying the constitutionality of the statute, is not insisted upon in the argument, and therefore may be regarded as having been abandoned. However, power in the legislature to pass such a statute has been affirmed by many decisions. It does not make an employer liable except in cases of his own direct

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or indirect negligence or wrongful act, and the defenses inhibited or barred are such as the legislature had a clear right to eliminate for reasons of public policy.

The alleged negligence of the employer consisted in not warning the employee of the danger. It was held that this danger was one commonly known and obvious to every adult of ordinary intelligence; and it was held that there had been no such duty on the part of the employer to give warning, and that there was no negligence on its part. A judgment in favor of the plaintiff was therefore reversed and a new trial granted.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—PROXIMATE CAUSE OF INJURY—BURDEN OF PROOF—*Hunter* v. *Colfax Consolidated Coal Co., Supreme Court of Iowa (Apr. 6, 1916), 157 Northwestern Reporter, page 145.*—This case, decided in the Supreme Court of Iowa on November 24, 1915, was before the court a second time on petition for rehearing. The petitions were overruled, but the concluding paragraph of the opinion (154 N. W. 1037, Bul. No. 189, p. 225) was amended by striking out certain portions and substituting other matter therefor. A principal contention of the employer was that the injury was due entirely to the negligence of the injured man, and that the act was unconstitutional as construed by the court below in preventing defenses in such a case. The concluding paragraph referred to this point, and in its amended form is as follows:

The trial court erred in holding the act precluded the defense that the employer is in nowise in fault for the injury charged to him. For this, reversal must ensue. In all other respects the decision below is right and the validity of the statute under consideration is hereby affirmed. It follows: (1) Defendant has the burden of proving that the injury to the plaintiff was not the direct result and did not grow out of the negligence of defendant, and that no negligence of defendant was the proximate cause of the injury; (2) that defendant has the burden of proving that plaintiff was willfully negligent, and thus negligent with intent to cause the injury, or that plaintiff's negligence was the result of his intoxication; (3) a defendant may plead other than said contributory negligence on part of plaintiff, but only as in mitigation of damages, in suits brought for injuries sustained after the taking effect of section 3593a of the Supplemental Supplement to the Code of 1915 [relating to the pleading of contributory negligence], and has the burden of proof on these; (4) any of said matters upon which he has the burden of proof defendant must plead as a defense, or as a matter in mitigation, respectively; (5) on issue being joined by thus pleading, a jury trial must be had, unless trial by jury is waived.

The fourteenth amendment is not violated by the announcing of said rule of pleading. The cause is remanded for proceeding therewith in all ways not inconsistent with this opinion.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—STATE INSURANCE FUND—COMPULSORY CONTRIBUTIONS—*Mountain Timber Co.* v. *Washington, Supreme Court of the United States (Mar. 6, 1917), 37 Supreme Court Reporter, page 260.*—This case was before the Supreme Court on a writ of error to the Supreme Court of the State of Washington to determine the constitutionality of the law of that State establishing a State fund for the compensation of workmen injured in enumerated hazardous employments. The plaintiff is a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill, all of which undertakings come within the provisions of the law. The statute had been held constitutional in this case (75 Wash. 581, 135 Pac. 645; see Bul. No. 152, p. 189) by the supreme court of the State, following its own opinion in State *v.* Clausen (65 Wash. 165, 117 Pac. 1101; see Bul. No. 96, p. 814). The act was upheld by the Supreme Court by a divided bench, Mr. Justice Pitney delivering the opinion of the majority, four judges dissenting.

Mr. Justice Pitney first summarized the provisions of the act, which include a classification of industries, the assessment and collection of premiums for the maintenance of a State fund, a schedule of awards, and methods of administration, and concluded:

> From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

It was then pointed out that the rights of employees were involved no less than those of employers, as in the case of Railroad *v.* White, decided the same day (p. 232), the conclusion being reached that in so far as the interests of employees and their dependents are concerned there is no vital difference between the laws of New York and Washington, so that thus far the latter law could be sustained on the grounds announced in the White case. There is a marked difference to be noted, however, in the fact that the Washington act provides for enforced contributions to a State fund, and this feature of the law was that with which the argument was chiefly concerned. The objection that the law violates the provision of the Constitution of the United States guaranteeing to every State in the Union a republican form of government was disposed of by saying that this was not a judicial, but a political, question, committed to Congress and not to the courts. Another objection—i. e., that the right of trial by jury was violated—was found without support, since so far

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as private rights of action are preserved nothing in the act excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The opinion takes up the question of the right of the State to require private employments to be subjected to regulation by a compulsory compensation act which it was claimed "does not concern the interests of the public generally, but only the particular interests of employees and is unduly oppressive upon employers, and arbitrarily interferes with and restrains the management of private business operations." The court again called attention to the fact that in certain provisions the Washington law transcended the provisions of the New York statute, so that while the New York law only fixed a method of meeting the liability of the employer for injuries to his employees the Washington law enforced contributions from all employers, whether injuries occur in their establishments or not. As to this the court said in part:

In the present case the Supreme Court of Washington sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the Clausen case, which was rested principally upon that power, but also sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a State law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the fourteenth amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. (Erie Railroad Co. *v.* Williams, 233 U. S. 685, 699, 34 Sup. Ct. 761 [Bul. No. 169, p. 195].) In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

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The question of what authority the State has to enact laws under its police power was then briefly discussed, following which the court said:

It seems to us that the considerations to which we have adverted in New York Central Railroad Co. *v.* White, supra, as showing that the workmen's compensation law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through State agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of the State power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: "Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises." (Stertz *v.* Industrial Insurance Commission, 158 Pac. 256, 263 [p. 284].) It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the fourteenth amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that unless it be so the corresponding burden upon the industry can not be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of com-

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pensation, we repeat what we have said in New York Central Railroad Co. *v.* White, that in sustaining the law we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question—the distribution of the burden—there is no criticism upon the act in its details, as we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay roll of the industry can not be deemed an arbitrary adjustment, in view of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that in the practice of insurers the pay roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are nonhazardous. (Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531, 544, 34 Sup. Ct. 359 [see Bul. No. 169, p. 170].) But further, the question whether any of the industries enumerated in section 4 is nonhazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, which, however, can not affect the decision of the present case. But in the absence of any particular showing of erroneous classification—

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and there is none—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the fourteenth amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in New York Central Railroad Co. *v.* White, the State is at liberty, notwithstanding the fourteenth amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in New York Central Railroad Co. *v.* White, supra, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act can not be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular

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plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it can not be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue proportioned to the special injury attributable to the activities taxed is not novel. In Noble State Bank *v.* Haskell (219 U. S. 104, 31 Sup. Ct. 186), this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In Hendrick *v.* Maryland (235 U. S. 610, 622), and Kane *v.* New Jersey (242 U. S. 160, 169), we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see Charlotte, etc., Railroad *v.* Gibbes (142 U. S. 386, 394, 395), and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the State courts against attacks based on constitutional grounds. [Cases cited.]

We are unable to find that the act, in its general features, is in conflict with the fourteenth amendment. Numerous objections are urged, founded upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in section 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the State fund,



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and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution.

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WORKMEN'S COMPENSATION—DEATH OF DEPENDENT—VESTING OF RIGHT TO COMPENSATION—*State ex rel. Munding* v. *Industrial Commission of Ohio, Supreme Court of Ohio (July 2, 1915), 111 Northeastern Reporter, page 299.*—One Munding was administrator of the estate of a person who had been awarded, as the sole and total dependent of an employee, $6 per week compensation for six years, or a total of $1,872. The compensation was regularly paid biweekly until the death of the dependent, when the industrial commission, acting as a board of awards, refused to make further payments. The administrator petitioned for a writ of mandamus to compel continuance of the payments to him. The decision of the court was that the statute does not provide for termination of benefits at the death of a total dependent or the cessation of dependency, nor for their termination at the option of the board, but for their continuance when once awarded, until the expiration of the statutory term for which they have been awarded. Paragraph 2 of section 35 was carefully examined in the light of other parts of the act, of foreign decisions, and of the history of the Ohio act, including the report of the investigating commission and the former enactment, and the changes made in it by the act passed in 1913 and in force. In the concluding portion of the opinion Judge Nichols, who spoke for the court, said:

The right to be compensated for an injury has no element of bounty or charity about it. No part of the fund (except such part as it pays for the protection of its own employees) is contributed by the State.

The theory is that when an employee is injured or killed in course of his employment, a sum fixed by law is set off from the fund to compensate him for his injuries, or his dependents for his death, to compensate for taking away the man's right to earn a livelihood, which, but for the accident, he would have earned. The only situation considered is that existing at the date of death. At that time the amount is fixed, not by the board, but by the statute; it is set apart from the general fund, may be paid in lump sums, and there is no provision whatever for rebate.

We hold that when the award is once made to a sole dependent, the right to the compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent.

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WORKMEN'S COMPENSATION—DEATH OF DEPENDENT BEFORE AWARD—BENEFICIARIES—*In re Murphy, Supreme Judicial Court of Massachusetts (June 29, 1916), 113 Northeastern Reporter, page 283.*—Mrs. Mary Murphy commenced proceedings to obtain compensation for the death of her son in the employ of the Holyoke Supply Co., which, with the insurer, opposed them. While the matter was pending on appeal to the industrial board from an award of the committee of arbitration favorable to the claimant, she died. An administrator intervened, and the board directed that $9.75 per week should be paid the administrator for 300 weeks, for the benefit of the next of kin of the deceased claimant. This was affirmed by the superior court, and appeal taken to the supreme judicial court.

The deceased had lived with his mother, who had been for several years incapacitated by the disease from which she died. A daughter did the housework, and there were also in the family a brother and an adopted daughter, both of whom were sickly and contributed to the household only an amount equal to what they received from it. The supreme court held that the claim for compensation did not survive the mother, and reversed the decisions below, Judge Loring, who delivered the opinion, saying in part:

There is no provision in the workmen's compensation act dealing expressly with the question which this case presents.

Dependents are defined by the act to be members of the employee's family or next of kin who were wholly or partly dependent for support upon the earnings of the employee at the time of the injury.

In the case at bar the original petitioner being the mother of the employee was his sole next of kin and under the findings of the industrial accident board was wholly dependent upon the deceased for her support. The act in effect provides that as a measure of justice, the mother (the sole next of kin of the deceased in the case at bar) should receive in lieu of the help she got from the wages of the deceased while he lived, a payment for 300 weeks based upon the amount of his wages. When she died the occasion for making compensation to her came to an end.

To hold that the dependent's right to compensation is a vested right which passes to a legatee by will and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of and so as an incident to the business in which he was employed.

The opposite result has been reached in England and in Ohio. But both these decisions were founded on provisions of the acts there in question which were not like the provisions of our workmen's compensation act.

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For these reasons we are of opinion, that although there is no express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies. It follows that the decree appealed from must be reversed.

It has been suggested that this case should be sent back in order that a motion might be made to the board under the supervisory power given it by the act for an award to some one other than the deceased mother. But in exercising this supervisory power the board is limited in reviewing an order for a weekly payment to making one "subject to the provisions of the act." In the case at bar the deceased had no family. His mother (since deceased) was his only next of kin "at the time of the injury," when by the terms of the act the persons dependent upon him are to be ascertained. The act provides that in case the employee dies of his injury, compensation shall be awarded to those persons who were in fact his next of kin or members of his family at the time of the injury and who in fact were dependent upon him for support at that time. It follows that in the case at bar no order in favor of anyone else could be made now.

There may be cases where on the subsequent death of the dependent it would be proper to send the case back for an opportunity to make a motion for a review of the order for compensation. The case where an employee dies of an injury within the act leaving a widow and children under 18 years of age would seem to be such a case. On the subsequent death of the widow, unless the order directing payment to be made to the widow can be reviewed, a gross injustice would be done such minor children. Upon this point it is not necessary now to come to a final decision.

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WORKMEN'S COMPENSATION—DEPENDENCY—FATHER AND MINOR BROTHERS AND SISTERS—*Havey* v. *Erie Railroad Co., Court of Appeals of New Jersey (Mar. 6, 1916), 96 Atlantic Reporter, page 995.*—William E. Havey, administrator of Garret Havey, commenced proceedings to obtain compensation for the death of the latter, his son. The employee was 18 years of age, and was killed as a result of slipping from the top of a freight car in the course of his employment as a brakeman. He was accustomed to turn his wages over to his father, who used them in connection with his own for the support of the family, which consisted of the father and mother and five sisters and four brothers, eight of whom were under 14 years of age. The common pleas court awarded 60 per cent of the wages as compensation. The supreme court reversed this award and granted 50 per cent. A previous decision had established the principle that under the clause "If widow and father or mother [survive], fifty per centum of wages" should be allowed, compensation may be awarded to father or mother where there is no widow, and that the amount in such a case should be 25 per cent. The supreme court accordingly awarded 25 per cent under this clause, and it allowed 25 per cent additional under the clause relating to minor or incapacitated brothers

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and sisters. The court of appeals again modified the award, holding that the brothers and sisters were not dependents of the deceased brother, but of the father, and that the compensation should consist only of 25 per cent of the wages, awarded to the father.

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WORKMEN'S COMPENSATION—DEPENDENCY—MOTHER HAVING SMALL MEANS OUTSIDE SON'S CONTRIBUTION—*Rhyner* v. *Hueber Bldg. Co. et al., Supreme Court of New York, Appellate Division, Third Department (Jan. 5, 1916), 156 New York Supplement, page 903.*—The employer and insurer in this case appealed from an award of compensation, on the contention that the claimant was not a dependent. The award was affirmed, Judge Howard, who delivered the opinion, saying in part:

This is an appeal from an award to a mother. The principal contention is that the mother was not dependent. But it has been determined by the commission, as a fact, that she was dependent, and under section 20 of the act, where there is any evidence to support such a finding, the decision of the commission is "final" and we are not permitted to review. In the record before us there is much evidence on the question of the dependency of the mother, and, although it is extraneous to our province to express ourselves upon the subject, we may say that we are convinced that the finding of the commission was fully justified by the facts presented. The mother had some small means and some other sources of revenue at the time her son died, but the courts will not hold that a claimant must be reduced to absolute want or be declared a pauper, in order to come within the provisions of the act. Partial dependency is sufficient.

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WORKMEN'S COMPENSATION—DEPENDENCY—"NEXT OF KIN"—*In re Kelley's Case, Supreme Judicial Court of Massachusetts (Feb. 8, 1916), 111 Northeastern Reporter, page 395.*—Michael F. Kelley was killed by accident in the employ of the Simplex Player Action Co., and compensation was allowed by the industrial accident board to John T. McGrath, half brother of the deceased, which award was affirmed by the superior court of Worcester County. It appeared that because of his mother's death and his father's intemperate habits Kelley, who was 16 years of age, lived with the half brother and his wife; that Mrs. McGrath managed the household finances and both men gave their wages to her. The employee was thus a member of the family of the claimant, who was partially dependent upon him for support; but the court held that since the father survived, the half brother could not fulfill the requirement of being "next of kin," and therefore no compensation could be awarded to him under the wording of the Massachusetts statute.

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WORKMEN'S COMPENSATION—DEPENDENCY—WIFE IN STATE ASYLUM—DAUGHTER NOT LIVING WITH FATHER—ILLEGITIMATE CHILDREN ACTUALLY IN FAMILY—*Roberts et al.* v. *Whaley et al., Supreme Court of Michigan (June 2, 1916), 158 Northwestern Reporter, page 209.*—N. H. Roberts was killed while working in a sewer in Grand Lodge, Mich. His wife Minnie, his daughter Gladys, his housekeeper, and two illegitimate children claimed compensation. The facts in the case are stated in the opinion of the court thus:

The record discloses that Roberts was married to Minnie Fox in the year 1903. In the following year, 1904, the daughter Gladys was born. Two years later, in 1906, the wife became insane and was taken to the asylum. After the mother was taken away, Gladys went to live with a Mr. Henderson, where she has since resided and been cared for by him in his family. Roberts, being left alone, employed a housekeeper. He appears to have become enamored of her, and later lived with her openly as a wife, and two children were born to them, Murna and Ellis, the appellants. At the time Roberts was killed, he was living with and supporting those children and their mother. The wife, Minnie, was still in the asylum at the time of his death, and had been supported there at the expense of the State, and Gladys had been supported by Henderson, and it appears that Roberts had contributed nothing to the support of either during their absence.

The industrial accident board ordered an award, divided between the wife and the daughter Gladys, and the illegitimate children and the insurance company asked for a review, the latter denying that compensation should be paid to any of the claimants. The supreme court placed emphasis upon the matter of actual dependency, and held that the wife and the daughter Gladys were not dependent and entitled to compensation, but that the compensation fund should be paid to the younger children.

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WORKMEN'S COMPENSATION—DEPENDENCY—WIFE LIVING APART FROM HUSBAND—*Finn* v. *Detroit, Mt. Clemens and Marine City Ry., Supreme Court of Michigan (Jan. 3, 1916), 155 Northwestern Reporter, page 721.*—William Finn sustained fatal injuries by a boiler explosion in the power house of the company named on May 9, 1914, and died two days later at a hospital at Mount Clemens, Mich. His wife, Alma Finn, made claim for compensation, and the industrial accident board awarded the sum of $3,000, payable in weekly installments of $10.

The compensation law provides that a wife shall be conclusively presumed to be dependent upon a husband with whom she lives at the time of his death, and after stating similar conclusive presumptions in the case of husbands and children, provides that in all other cases questions of dependency shall be determined in accordance with the fact at the time of the injury.

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These parties had been married in October, 1912, and in October, 1913, the wife had left the home in Michigan and engaged in teaching school in Fort Wayne, Ind., the absence to the time of his injury being seven months. Her leaving was the result of continued friction, but they had corresponded in a friendly way, he had sent her money to the amount of $78, and resumption of marital relations at some future time appeared to be contemplated. Being summoned by an official of the employing company she came to the hospital and was with the husband an hour or two in the evening, remaining in the hospital until his death on the following morning. The board had made no detailed finding of fact, but in order to make the award, necessarily found that the circumstances constituted a "living together" at the time of his death. The court reversed the award, reviewing the widow's testimony quite fully, and certain decisions involving somewhat similar facts. The following is a brief quotation from the opinion delivered by Judge Steere:

It is manifest that she intended to and did sever their personal marital relations for an indefinite period with the possibility and the expectation, as she represents, that at some indefinite time in the future, after a reconciliation, they would be resumed. In the most favorable view, as she states the case, the husband and wife were voluntarily living apart because they were not happy together, in different States, each following the pursuits and living the separate life led before marriage, but in friendly correspondence with each other and a possibility that the existing estrangement, whatever it was, might some time be reconciled and they live together again.

It was held therefore that the conclusive presumption of total dependence does not obtain, but in reversing the award the court allowed a new hearing in order to permit a showing of total or partial dependence, as a matter of fact, if the claimant so desired.

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WORKMEN'S COMPENSATION—DEPENDENCY—WIFE LIVING APART FROM HUSBAND—*In re Newman's Case, Supreme Judicial Court of Massachusetts (Feb. 11, 1916), 111 Northeastern Reporter, page 359.*—Edwin C. Newman was killed on October 31, 1914, and his widow proceeded against the employer and the insurer for compensation. It appeared that the parties had married in 1904, and had three children, who several years before were placed in a charitable institution, and that two had died, and one boy, aged 12, still remained there. Some years before Newman's death Mrs. Newman felt that the $11 per week which he was at that time earning was not sufficient to support them properly, and asked permission to go to work. They broke up their home, Newman went out of the State to work, and she continued largely to support herself, though he sent her money from time to time, especially when she was out of work. She testified that they had lived together for a few days on several occasions,

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and had talked of going to housekeeping and making a home for the boy, but had not done so, although his wages had doubled in the meantime. The court held that the case did not fall under the statutory phrase "living apart from her husband for justifiable cause," and that no presumption of total dependency was created; but that the case must go again before the board for determination as to actual dependency.

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WORKMEN'S COMPENSATION—DEPENDENCY—WIFE LIVING IN FOREIGN COUNTRY—NOTICE—*In re Fierro's Case, Supreme Judicial Court of Massachusetts (Mar. 11, 1916), 111 Northeastern Reporter, page 957.*—Angelo D. Ambrosia proceeded as administrator of the estate of Pasquale Fierro, to procure compensation for the benefit of the latter's widow, who had lived in Italy during several years intervening between the coming of her husband to America and his death under circumstances entitling his legal dependents to compensation. The superior court of Suffolk County affirmed an award against the opposition of the insurance company, which appealed. In giving the opinion of the supreme judicial court, reversing the action of the court below, Judge Crosby quoted the provision as to presumption of dependency of wives, and said:

If a widow is entitled to recover under this provision of the statute, such recovery is for total dependency and a finding for partial dependency thereunder could not properly be made. A finding that the claimant in this case was living with her husband at the time of his death would not be warranted. [Cases cited.] There is no evidence in the record to justify a finding that she was living apart from her husband for justifiable cause or that he had deserted her. It follows that she is not entitled to recover under St. 1914, c. 708, sec. 3, cl. A. The board should have determined as a fact whether the widow was actually dependent in whole or in part upon her husband at the time of his death.

There was evidence that the deceased had sent his wife at different times various sums of money amounting altogether to $161.

There is no evidence to show that he had contributed anything else to her support during the eight years preceding his death. There is nothing to show the circumstances of his wife or whether she had other and independent means of support or otherwise. In other words, there is an entire absence of evidence upon this question. The burden of proof rests upon the claimant, and in view of the state of the evidence, we are of opinion that the finding of the board that she was wholly dependent can not be sustained. [Cases cited.] The evidence shows that the widow never has been a resident of the United States, either in fact or by relation to her husband, as it does not appear that he was a naturalized citizen. The question whether the death sections of the workmen's compensation act were intended to benefit widows and dependents who live in foreign countries having no domicile within the Commonwealth has not been raised, and we do not consider it. [Cases cited.]

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It was held that there was not evidence to support the finding that the failure to give notice within six months was justified, and the case was remanded to the industrial accident board for the granting of a further hearing, or a finding in favor of the insurer.

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WORKMEN'S COMPENSATION—ELECTION—EXTRAHAZARDOUS EMPLOYMENT—*Vaughn's Seed Store* v. *Simonini, Supreme Court of Illinois (Dec. 8, 1916), 114 Northeastern Reporter, page 163.*—Anchise Simonini was awarded compensation against Vaughn's Seed Store, a corporation, in proceedings before the State industrial board, but the award was set aside by the circuit court of Cook County, and the claimant sued out a writ of error to reverse the latter decision. The company grows and sells seeds, plants, nursery stock, etc., and deals in agricultural implements. It maintains a farm and greenhouses outside of Chicago, and an office and sales building and a warehouse, both in that city. The claimant was a laborer on the farm, doing teaming mostly, and his injury resulted from the kick of a horse while he was at work in a stable there. The first section of the compensation act gives to all employers an option to come under the provisions of the act by active election. This the seed company had not done, so that the act did not apply to it unless under the third section, which provides that in certain enumerated extrahazardous occupations election shall be presumed, and the common-law defenses abrogated if the employer elects not to come within the act. The contention of the claimant was that because certain phases of the business fell under the extrahazardous clauses, the law applied to it, with respect to all its employees. This contention was held untenable, and the judgment of the court below, setting aside the award, was affirmed. It was also held that otherwise the act would be unconstitutional as discriminating unjustly against such an employer in the part of its business not extrahazardous. Judge Dunn, who delivered the opinion, said concerning the latter point:

To give the act any other interpretation would be to render it unconstitutional. The dry goods merchant who, having no other business, had not elected to provide and pay compensation according to the provisions of the act, would not be deprived of these common-law defenses, and it would not be a reasonable classification to allow such defenses to one merchant and deny them to another, under precisely the same circumstances, because the latter was also engaged in an extrahazardous occupation elsewhere. The reasonable interpretation of paragraph (*b*) of section 3 is that the provisions of paragraph (*a*) shall only apply to an employer engaged in the extrahazardous occupations mentioned, so far as such extrahazardous occupations are concerned. The object of section 3 was the better protection of employees exposed to greater danger by reason of their employment in these extrahazardous occupations, and it was not

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intended that employers engaged in such extrahazardous occupations should for that reason be subject to any greater liability to their employees not engaged in such occupations than other employers under the same circumstances. The defendant in error was not an employer of the plaintiff in error in any of the extrahazardous occupations mentioned in section 3, and plaintiff in error was not exposed to any of the dangers arising from such extrahazardous occupations. Whether or not the defendant in error, as to any part of its business, was subject to the provisions of the workmen's compensation act, it was not subject to such provisions so far as the plaintiff in error was concerned.

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WORKMEN'S COMPENSATION — ELECTION — INSURANCE AS TO PART OF BUSINESS—INJURY ARISING OUT OF EMPLOYMENT—*In re Cox, Supreme Judicial Court of Massachusetts (Nov. 28, 1916), 114 Northeastern Reporter, page 281.*—Wardwell D. Cox was awarded compensation against the Framingham Shoe Co., employer, and its insurer. The insurer appealed, the principal grounds of objection to the award being that the injury was not in the course of employment; that the employer had not come under the act as to its retail business in shoes, in which Cox was employed, but only as to their manufacture; and that at any rate the policy did not cover the retail store. Cox had just become manager of the store, and his predecessor was also at work, and was to conclude his service the next day. Cox was working overtime taking account of stock, and at 8 o'clock in the evening was injured by falling down stairs in answering a telephone call, which it appeared from the evidence it was his duty to do. The particular call was a personal one from his home, but the court held that the injury nevertheless occurred in the line of his duty. As to the other questions also the findings of the boards and court below, favorable to the claimant, were sustained. The court distinguishes this case from Keaney's Case, 217 Mass. 5, 104 N. E. 438 (Bul. No. 169, p. 239), in which it was held that insurance of drivers marketing produce of a farmer does not require insurance of farm laborers who are expressly exempted from the act. Judge Rugg, who delivered the opinion, further said, "A critical examination of the statute discloses no purpose to permit partial insurance by employers. On the contrary, its framework and its details manifest a design to treat the employer wholly within or wholly without the act." He then examined particularly the provisions upholding this view. In the concluding portion of the opinion Judge Rugg says:

It is clear from those provisions that the act is not designed to be accepted in part and rejected in part. If an employer becomes a subscriber he becomes a subscriber for all purposes as to all branches of one business with respect to all those in his service under any contract of hire. All the terms of the act are framed upon the basis

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that the employer is either wholly within or altogether outside its operation. There is no suggestion or phrase warranting the inference that there can be a divided or partial insurance.

The practical administration of the act renders it highly desirable that a single rule of liability should apply throughout any single business. Otherwise difficult and troublesome questions often might arise as to liability or nonliability dependent upon classifications of employees and scope of their duties. Litigation as to the line of demarcation between those protected by the act and those not entitled to its benefits would be almost inevitable. Instead of being simple, plain and prompt in its operation, such division of insurance would promote complications, doubts and delays.

The terms of the policy apparently applying only to the factory at Framingham are not of much significance so far as the employee is concerned. The workmen's compensation act fixes the scope of the insurance so far as the rights of the employee are affected. If the employer becomes a subscriber, then the rights of the employee cannot be narrowed by contract between the employer and the insurer.

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WORKMEN'S COMPENSATION—EMPLOYEE—APPRENTICE ELEVATOR OPERATOR—*Pettee* v. *Noyes et al., Supreme Court of Minnesota (May 19, 1916), 157 Northwestern Reporter, page 995.*—William Pettee brought action at common law, on behalf of his son, against Charles P. Noyes and another. He sued after the son had agreed to a settlement under the compensation law, and it had been approved by the court, his contention being that the employment of the young man to operate the elevator without a license made it illegal, and that consequently he was not an employee under the compensation law, and that law did not apply to him. The trial court dismissed the action and denied a new trial, and the plaintiff appealed. The supreme court affirmed the order, the reasons being shown in the following syllabus by the court:

Plaintiff's minor son, 18 years of age, entered the service of defendants as a student elevator operator with a view to employment as such operator when he became qualified. He was placed to work under the direction of the regular operator, and continued therein for about two weeks when he was injured. At the time of his injury he was operating the elevator alone and in the absence of his instructor, had been so operating it for several days. He was not a licensed operator, but was under the apprenticeship stated.

It is held: (*a*) That the relation of master and servant existed between the parties, rendering the workmen's compensation act applicable; (*b*) that the employment was not illegal, as a violation of the statute requiring elevator operators to be licensed; (*c*) that under the facts stated in the opinion the relation of master and servant was not interrupted by the act of the employee in operating the elevator in the absence of his instructor.

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WORKMEN'S COMPENSATION—EMPLOYEE—CASUAL EMPLOYEE—*Thompson* v. *Twiss et al., Supreme Court of Errors of Connecticut (Apr. 19, 1916), 97 Atlantic Reporter, page 328.*—Julius Twiss and another appealed from an award of the compensation commissioner in favor of George M. Thompson, affirmed by the superior court. Thompson was engaged in the development of a tract of land for Twiss, and had charge of other men. He was paid by the day, receiving more when his team was also used, and he paid to the other men amounts turned over to him by Twiss, without any profit on his part. The court of errors also affirmed the award, holding that Thompson was an employee rather than an independent contractor, and was not a casual employee excepted from the operation of the Connecticut law as amended. The following is quoted from the opinion delivered by Judge Wheeler:

The factor which is controlling was the direction which Mr. Twiss retained over this work, his control over the men, the changes in it, and the additions to it which he made. The fact that Mr. Twiss in the Morris Cove job paid one man directly and placed a man on the Westville job and paid him himself, and on both jobs the plaintiff was at liberty to procure the men he required through Mr. Twiss' brother, are among the facts which show that Mr. Thompson was subject to Mr. Twiss both in his control of the work and men, and that either party was at liberty to withdraw from the arrangement without loss from breach of contract. They point to the relation as that of employer and employee, and not that of independent contractor.

We are concerned in determining whether the nature of the employment was an occasional or incidental one, a regular one not measured by tenor of service, but by the character of the work. The employment of the plaintiff was in the business of Mr. Twiss, and the completion of the work would require at least a number of weeks. If the plaintiff satisfied Mr. Twiss, he would remain to the end. If he chose, he could quit the work at any time. Applying our test to such an employment, we think the common judgment would agree that it was a stable, and not an incidental, employment, and hence not casual in nature within the meaning of our act. But the employee who is barred by our act as amended is not merely one whose employment is of a casual nature, but, in addition, one whose employment is not in his employer's trade or business.

The development of this land was one of the businesses of Mr. Twiss; not evidently his main business, and yet a very substantial one. The plaintiff was injured in the pursuit of Mr. Twiss' business, and his employment was not of a casual nature within the meaning of our act.

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WORKMEN'S COMPENSATION—EMPLOYEE—CONTRACTOR FOR TEAMING DRIVING ONE OF HIS OWN TEAMS—*Western Indemnity Co.* v. *Pillsbury et al., Supreme Court of California (June 29, 1916), 159 Pacific Reporter, page 721.*—H. H. Stevens was the claimant in proceedings against the insurance company named for compensation

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for injuries suffered as an employee of H. S. Tittle. The defense was that Stevens was not an employee, but an independent contractor. He had agreed to furnish two teams for hauling, at $6 per day each for horse, cart, and man, and drove one of them himself. There was no evidence that the contract required his personal services, but on the contrary it appeared that the agreement would have been as well fulfilled if he had substituted another driver. Neither his name nor that of the other driver appeared as a workman on Tittle's books, but the account was carried as "H. H. Stevens' teams." At the end of each week Stevens was given an envelope with $6 per day for each team. The court, reversing a decision of the commission, decided that the claimant was not entitled to compensation, Judge Melvin for the court saying in part:

A "contract of hire" means a contract for personal services, and this is emphasized by the fact that the basis of compensation provided by the act is the amount of wages earned. Doubtless there could be a contract of service without stipulated wages, but there could be no employee unless his personal services were rendered to the employer, and since wages are generally paid for personal services, wages or salary are made the criteria of compensations given to injured employees.

In the case at bar confusion arose out of the fact that Stevens drove his own team, but we see nothing in that fact which made him a servant and not a contractor.

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WORKMEN'S COMPENSATION—EMPLOYEE—COURSE OF EMPLOYMENT—*Cameron* v. *Pillsbury et al., Supreme Court of California (July 19, 1916), 159 Pacific Reporter, page 149.*—Henry E. Trobitz made application for compensation for injuries from being run into by a street car. His employer, Hugh M. Cameron, appealed from the award made to the employee by the commission. The employer was in the real estate business at Oakland, and the employee was hired at $60 per month to collect rents, rent houses, renew insurance policies, and collect premiums upon the renewals. In addition he was given a percentage upon the new business in insurance and sales of real estate brought in by him. The court affirmed the award, holding that he was an employee notwithstanding that he was injured while in pursuit of prospective business for which he would be paid upon the commission basis. In the opinion Judge Henshaw said:

Petitioner presents the proposition that Trobitz sustained a dual relationship to him, the one, that of employee, the other, that of "independent contractor or partner." We can not agree with this view. The employer was entitled to all of Trobitz's working hours and was empowered to direct his labor. In either capacity he was an employee. It is not an uncommon thing for retail merchants, for laundrymen, and the like to pay a commission to the drivers of their de-

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livery wagons for all new business which they bring in. It has never been held that this circumstance creates a distinct relationship in law. A certain amount of freedom of action was inherent in the nature of the work which the injured man performed, but this, however, did not change the character of his employment, for the employer himself still had general supervision and control over it.

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WORKMEN'S COMPENSATION—EMPLOYEE—HAULING LOGS BY THE THOUSAND—CONTROL OVER WORK—*Tuttle* v. *Embury-Martin Lumber Co. et al., Supreme Court of Michigan (July 21, 1916), 158 Northwestern Reporter, page 875.*—Ephraim Tuttle was killed by being thrown from a load of logs. He was hauling by the thousand feet, using his own team and the company's sleigh. Other men doing similar work were paid by the month, but it appeared that the control exercised by the company over the work was the same. The loading and unloading were done mostly by other men employed by the company. The court, in an opinion by Judge Stone, affirmed an award to the widow, Sarah Tuttle, and the following is quoted from this opinion:

In our opinion there was such control over the work of Tuttle, by the company, as makes it inconsistent to say that Tuttle was an independent contractor. His work was limited by the right of the company to terminate it at any time, and it was for no definite period or amount. The loading and unloading were under the control of the company, both as to time and place. True, he was in charge of his team while going from the skidway to the mill, but that was true of all the drivers, whether working by the month or the thousand.

In our opinion he was a person in service under employment of that company, and comes within the provisions of the workmen's compensation law. Whether or not the relation of master and servant exists in a given case, under oral contract, is often a question of fact, or of mixed law and fact, and is to be proved like any other question.

In our opinion there was evidence in the case that warranted the industrial accident board in reaching the conclusion which it did, and the proceedings of that board must be affirmed.

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WORKMEN'S COMPENSATION—EMPLOYEE—HAZARDOUS EMPLOYMENT—CARPENTER ON FOOD MANUFACTORY—*Bargey* v. *Massaro Macaroni Co., Court of Appeals of New York (June 16, 1916), 113 Northeastern Reporter, page 407.*—Compensation was awarded to Louisa Bargey for the death of her husband, Lyman D. Bargey, in the employ of the company named, whose business, that of manufacturing macaroni, is included in group 33 of the employments defined as hazardous in the compensation law. The deceased contracted with the company to raise the floor of the second and third stories and the roof of a portion of the building. He also did certain addi-

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tional items of work, presenting itemized bills for the materials and labor, and while he was doing one of these extra jobs, the construction of a partition, the building collapsed and he was killed. The appellate division of the supreme court reversed an award to the widow upon the ground that he was not an employee engaged in a hazardous employment within the law, and this view the court of appeals sustained. Judge Collin, in the opinion delivered by him, examined the provisions of the law and said in part:

The company was an employer, because it employed workmen in a hazardous employment, to wit, preparing macaroni, a foodstuff. Bargey, the deceased, was not an employee, because he was not engaged in the preparation of macaroni. The placing of the partition was a specific act, for which Bargey was specially employed, which had no relation to the hazardous employment, except that it made more useful the building in which the employment was carried on. He was not, within the intendment of the law, an employee of the company.

The appellant invokes also the part of the language creating group 42 as follows:

"Construction, repair and demolition of buildings."

It is answered by the fact that the company did not carry on the occupation of construction, repairing, and demolishing buildings for pecuniary gain.

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WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—*In re Comerford, Supreme Judicial Court of Massachusetts (July 10, 1916), 113 Northeastern Reporter, page 460.*—Patrick Comerford proceeded against the McDonald & Joslin Co., as employer, and its insurer, for compensation. He had been for three years in the employ of one Connors, a teamster. The company named, on the evening before the accident, notified Connors that they wanted a teamster to take some concrete window sills, a wheelbarrow, and some tools from a storehouse to a garage which the company as contractor was constructing, and Comerford was assigned to do this. The son of Joslin, one of the members of the company, directed him in getting the sills and assisted him in loading them on the wagon. Four were wanted, and while carrying the third the employee slipped and the sill fell on him. The company was a subscriber under the compensation act, while Connors was not. The Industrial Accident Board held that in this work the employee was a servant of the company in the course of its business as building contractor, and made an award on that ground, which was affirmed by the superior court. The supreme judicial court held that the award could not be sustained on this theory, but that the employee was in fact at all times the servant of Connors. It, however, returned the case to the board for further evidence, holding that there was a possibility that compensation might be due under the provisions of the law relating to

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independent contractors for subscribers. The following extracts from the opinion delivered by Judge Pierce bear on this point:

So far as the record discloses, the work of loading and of transportation was to be performed by Connors, through his servant, in his own way.

The conveyance of picks, shovels, wheelbarrows and of constructed and fabricated parts of a building from the storehouse of a builder and contractor, to the premises where they are to be used or are to be combined into a proposed structure, may be found to be a part of the trade or business of a contractor and is not necessarily an act merely ancillary and incidental to the business of that contractor.

Section 17, c. 751, pt. 3, St. 1911, in part reads:

"If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or subcontractors were subscribers."

We are of opinion that the facts of the case at bar may be found to bring it within this statute. (Sundine's Case, 218 Mass., 1, 105 N. E. 433 [Bul. No. 169, p. 244].)

The case is to be recommitted to the Industrial Accident Board, where the employee may move for a hearing and for the introduction of further evidence upon the question whether the work performed by Comerford was a part of the business of McDonald & Joslin Co. or was merely ancillary and incidental thereto.

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WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT—*Dyer* v. *James Black Masonry Contracting Co., Supreme Court of Michigan (July 21, 1916), 158 Northwestern Reporter, page 959.*—Sidney Dyer claimed compensation from the company named, his employer, and the decision by the Industrial Accident Board was in his favor. He was injured December 10, 1914, at the David Stott Building in Detroit. The company was engaged in constructing this building, and Dyer and his partner, Ross, had contracted with it to do the glazing on the building, the company furnishing the glass and they setting it at a contract price. In addition, the company arranged with Dyer to perform service in connection with the delivering of the glass at the building and the unloading of it as it arrived, for which he received pay and in the course of which he was injured. The company claimed that he was an independent contractor, and also that the employment was casual. The court, however, affirmed the award to the claimant, deciding both points against the company. From the opinion delivered by Judge Stone the following is quoted:

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It became necessary in the interest of the business of the general contractor to have the delivery of the glass looked after and supervised, and claimant was employed for that purpose; as the glass was to be delivered as the work progressed on recurring occasions, it certainly can not be said any of the necessary work to be done in furthering the job or enterprises was casual, for it was sure to occur and recur in the operation of the job. There was an element of certainty in the work recurring at times which, though they could not be fixed definitely, yet were fixed generally by the agreement to look after and assist in unloading the glass as it arrived, from time to time.

In our opinion, the employment of the claimant was not casual. We think that the industrial accident board was correct in its finding that the work being done at the time of the accident was not under the terms of the written contract, but was individual labor being performed by the claimant in the employment of the respondent, and entirely outside the terms and scope of the written contract.

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WORKMEN'S COMPENSATION—EMPLOYEE—TEAMSTER SENT BY EMPLOYER TO DO WORK FOR ANOTHER PERSON—*Dale* v. *Saunders Bros. et al., Court of Appeals of New York (Apr. 25, 1916), 112 Northeastern Reporter, page 571.*—Frank Dale, a teamster employed by the company named, was killed by a fall of sand. Compensation was awarded to his widow, for the benefit of herself and children, and the employers appealed from an order of the appellate division affirming this award. Saunders Bros. were brickmakers, but at the time of his injury Dale was hauling sand from a pit belonging to one Walsh, with whom his employers had a contract to do such work at a stated amount per day for the driver, team, and wagon. It was held that Dale was in the employment of Saunders Bros. at the time of the injury and that they were liable for compensation under such circumstances, and the award was affirmed, Judge Pound, in the opinion, saying in part:

The question in this case is not one of responsibility for negligent injury inflicted upon strangers nor upon an employee. The doctrine of respondeat superior has no application here, nor are the rules of employers' liability for negligence controlling. Compensation provided for in the workmen's compensation act is payable for injuries sustained or death incurred by employees engaged in specified hazardous employments carried on by the employer for pecuniary gain, including the operation on streets and elsewhere of wagons drawn by horses.

The word "employee" means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer. Saunders Bros. carried on the business of trucking for pecuniary gain. No claim is made that Walsh was carrying on the business of trucking for pecuniary gain.



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Dale was working for Saunders Bros. as a teamster when he met with the accident that caused his death. He was engaged in teaming, not in "the operation of a sand pit." The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team. (Matter of Costello *v.* Taylor, 217 N. Y. 179, 111 N. E. 755 [see p. 276].)

All this seems clear, but in any event the decision of the commission is final as to questions of fact. If any question is presented upon the facts stated as to whose employee Dale was, it is one of fact only.

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WORKMEN'S COMPENSATION—EMPLOYEE—WORKMAN INJURED WHILE LEAVING AFTER BEING DISMISSED FOR THE DAY—*Kiernan* v. *Priestedt Underpinning Co. et al., Supreme Court of New York, Appellate Division, Third Department (Mar. 8, 1916), 157 New York Supplement, page 900.*—A proceeding was brought against the company named, employer, to obtain compensation for the death of James Kiernan. An award by the compensation commission was affirmed, the reasons being shown in the opinion delivered by Judge Kellogg, as follows:

The claimant had been in the employ of the employer appellant for about eight months, receiving $3.68 per day payable weekly. On Monday, April 27, he worked as usual. Upon appearing for work in the subway Tuesday morning, dressed in his overalls, he was a little late, and the superintendent told him he need not work. He excused him from work, not because he was late, but because he felt that he had been drinking some, and was not in a fit condition to engage in the dangerous kind of work which he had been doing. He started to leave the subway and tripped and fell, receiving the injury complained of.

The appeal proceeds upon the theory that he was not a regular employee, but was there asking for work, which was refused, and that he was not, therefore, injured within the course of his employment. This contention overlooks the fact that he had been employed almost continuously for eight months, and that there was not a separate employment from day to day. The only thing tending to show a daily employment is that he was paid by the day, but his wages were payable weekly. Concededly, he was expected to report for work that morning, and did report, and was told he was not wanted. He was, therefore, a regular employee, and was there in the performance of his duty as such, and is entitled to the benefit of the act.

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WORKMEN'S COMPENSATION—EMPLOYEES INCLUDED—"ENTERPRISE"—*Uphoff* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Feb. 2, 1916), 111 Northeastern Reporter, page 128.*—Frank Uphoff, a farmer, employed B. C. Bruner to help build a broom-corn shed. While the latter was doing this, a piece of metal flew from a hammer and struck him in the eye, destroying the sight. The arbitration committee appointed made an award of $1,442 for the injury,

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which was affirmed by a majority of the industrial board and upheld by the superior court of Cook County, Uphoff then taking the case to the supreme court by means of a writ of error. It was contended on his behalf that the industrial board was without jurisdiction as to the injury, since the employment was not included within the terms of the law, and this view the supreme court adopted. The building upon which Bruner was employed required in its construction the services of about four men for about 10 days. It was 32 by 24 feet, and 17½ feet high. Bruner's employment was not for a specified time, but apparently it was expected that he would continue until the work was completed.

The employer had not elected to come under the act, so that he could not be held liable unless he was one of the class of employers who are held liable under the act even though not electing. The opinion by Judge Carter quotes paragraph (*b*) of section 3 of the act, the first part of which is:

(*b*) The provisions of paragraph (*a*) of this section shall only apply to an employer engaged in any of the following occupations, enterprises, or businesses, namely:

1. The building, maintaining, repairing, or demolishing of any structure.

Section 5 is also quoted, to the effect that the term "employee" shall not include "any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession, or occupation of his employer."

After a discussion of the provisions of the act and the correct method of arriving at the intention as to its meaning, Judge Carter said:

It is contended by counsel for defendants in error that plaintiff in error must be held to come under the provisions of the act under subdivision 1 of paragraph (*b*) of section 3, as the broom-corn shed would be included in the provisions of that section in the building "of any structure." This could only be true if it were held that in so building such broom-corn shed the farmer was engaged in an occupation, enterprise, or business, and was engaged in the usual course of his "trade, business, profession, or occupation," and that the employment was not casual. It is also plain that the legislature only intended to include under paragraph (*b*) any such occupations, enterprises, or businesses of the employer when they are properly considered to be "extrahazardous." It is true that the clause in subdivision 8 of said paragraph (*b*) calling all of these trades, businesses, enterprises, or occupations extrahazardous was inserted for the purpose of making clear what was considered extrahazardous; but it is also clear that the legislature did not intend to include work that every one knows is not extrahazardous, or even hazardous.

It is not seriously contended by counsel that the mere building of this crib could be properly classed as the business or occupation of the plaintiff in error, but it is earnestly urged that it could properly be considered under the term "enterprise."

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The opinion then shows the absurdity of calling the building of any structure, no matter how small, an "enterprise," saying that it is plain that it was intended to mean a work of some importance and hazard. It is noted that the decisions of the industrial board are conclusive only when it acts within the scope of its powers, and concludes that from the facts considered the board had been without jurisdiction in this matter.

The ruling of the court below was reversed, with instructions to set aside the finding of the industrial board.

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WORKMEN'S COMPENSATION—EMPLOYEES INCLUDED—HAZARDOUS EMPLOYMENT—STABLE EMPLOYEE TAKING OUT HORSES—*Costello v. Taylor, Court of Appeals of New York (Feb. 1, 1916), 111 Northeastern Reporter, page 755.*—Daniel Costello proceeded to obtain compensation for injuries, against Taylor as president of the American Express Co., employer and self-insurer. Costello was a stableman, and while he was taking out of the stall one of the horses used for the express wagons, the horse slipped and fell upon him, causing the injury. The operation of trucks, wagons, etc., is enumerated as a hazardous employment, but the company contended that the employment of the petitioner was not included thereunder. The court held that his employment was incidental to and a part of the employment specified in the statute, and affirmed an award in favor of the employee.

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WORKMEN'S COMPENSATION—EMPLOYEES INCLUDED—"LABORERS, WORKMEN AND MECHANICS"—HOSEMAN IN FIRE DEPARTMENT—*Devney v. City of Boston, Supreme Judicial Court of Massachusetts (Mar. 3, 1916), 111 Northeastern Reporter, page 788.*—Compensation was awarded by the industrial accident board to Delia Devney for the death of her husband, Thomas W. Devney, and a decree therefor entered in the superior court of Suffolk County. The employee was a hoseman stationed in one of the engine houses in the city. The statute provides that it shall apply only to laborers, workmen and mechanics employed by municipalities. The court reversed the decree, holding that the employee was not included. After pointing out that in the classification of the department the deceased was rated as in the permanent or "fire force," and in the civil-service rules as in the official force rather than the labor service, Judge Braley, who delivered the opinion, said:

A laborer ordinarily is a person without particular training who is employed at manual labor under a contract terminable at will, while workmen and mechanics broadly embrace those who are skilled users of tools. [Cases cited.] And the framers of the statute

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undoubtedly intended that the words "laborers, workmen and mechanics" should be taken in their ordinary lexical sense which excludes the trained and disciplined force comprising the defendant's fire department.

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WORKMEN'S COMPENSATION—EMPLOYER—EMPLOYMENT OF FOUR OR MORE PERSONS FOR BRIEF PERIOD—*Kelley et al.* v. *Haylock et al., Supreme Court of Wisconsin (May 23, 1916)*, 157 *Northwestern Reporter, page* 1094.—Elmer Haylock was awarded compensation by the industrial commission for injury suffered while in the employ of Henry Kelley. The latter was a farmer, and employed fewer than four men except during short periods, when more were employed in threshing, tobacco work, or, as was the case when Haylock was injured, in filling a silo. The law provides that "every employer of four or more employees shall be deemed to have elected to accept the provisions," etc. On action brought by Kelley and another against Haylock and the commission, the circuit court set aside the award, and the supreme court affirmed this decision, holding that the law did not apply under the circumstances shown. The following is quoted from the opinion by Judge Vinje:

The legislature did not contemplate that mere temporary, though regularly recurring, employment brought the employer within the act. Its language must be taken in its ordinary and usual significance. In ordinary language when it is said that an employer employs four or more employees in a common employment it is meant that he usually does so, or that he does so most of the time, so that such employment becomes the rule and not the exception. The act operated upon and was intended to include only such employers as ordinarily or for some considerable length of time employ four or more employees in a common employment. In defining the term "employee" in subsection 2, section 2394-7, the legislature excluded those whose employment was but casual or not in the usual course of trade, business, profession or occupation of his employer showing that even if the employer was within the act his employee would not be if his employment was but casual or not in the usual course of his employer's business. There is much greater reason for holding that an employer does not come under the act, unless his employment of four or more employees in a common employment continues for some considerable length of time so that he may reasonably be said to be such an employer. The operation of the act as to the employer is limited to the usual, rather than to the unusual, condition of a business, trade, or occupation.

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WORKMEN'S COMPENSATION—EXTRAHAZARDOUS EMPLOYMENT—"BUSINESS OF CARRIAGE BY LAND"—FAILURE TO REQUIRE SUBCONTRACTOR TO INSURE—CONSTITUTIONALITY OF STATUTE—*Parker-Washington Co.* v. *Industrial Board et al., Supreme Court of Illinois (Oct. 24, 1916), 113 Northeastern Reporter, page 976.*—William J. Bowe

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proceeded for the purpose of recovering compensation for the death of Harry Crampton as the result of an injury received on September 25, 1914. Crampton was employed by the Bessmer Teaming Co., a partnership, and while driving a two-horse team, hauling a load of crushed stone, stood and reached over to whip the horses, fell under the wheels of the wagon, and was killed. The Parker-Washington Co., a corporation engaged in contracting work, including paving and tunneling, entered into a contract with the teaming company, a partnership, one of the two members of which was A. W. Kenney, to haul some 2,000 cubic yards of crushed stone from where it was being taken from a tunnel under construction to certain streets which were being paved. A claim was first filed and an award granted against Kenney, but no effort was made to collect from him, apparently because he was insolvent. Claim was then filed against the company, and the industrial board found it liable and granted an award of $2,912, which was affirmed by the circuit court of Cook County. The award was again affirmed by the supreme court, Judge Carter delivering the opinion and saying for the most part:

Plaintiff in error has never elected to come within the provisions of the workmen's compensation act; neither has it given notice, as provided by the statute, that it would not come under the act; therefore if it is liable here it must be because the occupation, business, or enterprise in which it was engaged was extrahazardous, under clauses 2 and 3 of paragraph (*b*) of section 3 of the act. That section reads, in part, as follows:

"The provisions of paragraph (*a*) of this section shall only apply to an employer engaged in any of the following occupations, enterprises or businesses, namely: * * * 2. Construction, excavating or electrical work. 3. Carriage by land or water and loading and unloading in connection therewith." (Laws 1913, p. 339.)

Plaintiff in error argues that it can not come within clause 2 as it was not doing any construction work, but was merely engaged in hauling crushed stone to the place where another party was doing the construction work. Counsel for plaintiff in error seem to concede that if it was constructing a pavement it would come within the provisions of this clause of the act. The industrial board held, in effect, in its finding, that plaintiff in error was paving certain streets, for which the crushed stone was being hauled for a foundation. The contract which plaintiff in error entered into with the Bessmer Teaming Co. for this hauling stated, in terms, that the Parker-Washington Co. had a contract for paving those streets. Paragraph (*f*) of section 19 of the workmen's compensation act makes the decision of the industrial board, if it acts within its powers, in the absence of fraud, conclusive upon the courts. The circuit court and the supreme court, in reviewing a proceeding of this kind, can only review questions of law. As there was evidence in this record justifying the finding of the industrial board that the plaintiff in error was engaged in construction work, even though this evidence was controverted, we can not inquire into this question of fact.

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We are of the opinion, also, that the occupation, enterprise, or business in which plaintiff in error was engaged at the time of the accident, if it was not engaged in construction work but only in the hauling of this crushed stone, can fairly be held to come within the provisions of clause 3 of said paragraph (*b*)—that is, that it was engaged in a business or enterprise of carriage by land. The enterprise can not be considered a mere incident to the general business in which plaintiff in error was engaged.

If plaintiff in error is liable, it must he held so not only because it comes within the provisions already quoted of said paragraph (*b*), but also within the provisions of section 31 of the Workmen's Compensation Act [which makes contractors liable for injuries to employees of subcontractors unless they require the latter to insure for the protection of such employees].

Counsel for plaintiff in error argue that it can not be liable within the provisions of this section unless it not only has failed to require the subcontractor to insure, as therein provided, but has also been shown to have entered into a fraudulent scheme, artifice, or device, as therein provided. We can not so hold. The section, in our judgment, clearly states that there are two classes of contractors that are liable, one class consisting of those who do not require subcontractors to insure, and another class consisting of those who have entered into a fraudulent scheme or device to evade responsibility to the employee. It would certainly be most unreasonable to require that before any contractor could be held under this section he must not only fail to require the subcontractor to insure, but must also attempt, by fraud or trickery, to defeat recovery by the employee. The absurdity of such an intention can not be imputed to the legislature.

Counsel further argue that if plaintiff in error is liable under section 31, said section must be held unconstitutional as requiring an unreasonable and arbitrary classification, in that it sets apart contractors from all other classes of persons and imposes a burden upon them if they fail to require subcontractors to insure, thus arbitrarily distinguishing also one class of contractors from another class. It is not necessary that a law, to be general, should apply to every person. Very few laws do so apply. It is general if it acts upon all persons coming within its scope. While we do not here decide or discuss the question whether only contractors come within the provisions of said section 31, we do hold that if the contention of counsel for the plaintiff in error be correct and only contractors come within the provisions of said section it would not thereby be rendered unconstitutional, for in our judgment, in view of the public necessities and the end sought to be attained, a substantial difference exists between the business of other people and the business in which contractors must be engaged to come within the provisions of the section.

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WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—*Grinnell* v. *Wilkinson, Supreme Court of Rhode Island (July 6, 1916), 98 Atlantic Reporter, page 103.*—William T. Grinnell was employed by Edward Wilkinson as a carpenter in Providence, R. I.

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He was directed to go to New Haven, Conn., to complete work already commenced by him at Providence. While there, on May 20, 1915, he claimed to have gotten a splinter in his finger, and blood-poisoning ensued, from which he had not recovered at the time of this decision. The judge of the superior court, before whom the matter was heard, denied compensation on the ground that the statute did not apply to injuries received outside the State. The supreme court reversed this decision, Judge Parkhurst delivering the opinion and reviewing fully the cases in which it had been held that the laws of the various States did or did not apply to injuries occurring outside, when the contract of employment was made within the State. In concluding Judge Parkhurst said:

We are of the opinion that the reasoning of the cases above cited from New York, New Jersey, and Connecticut is quite applicable to the case at bar; that under the workmen's compensation act of Rhode Island the relation of employer and employee is contractual and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that on principle and in reason, and in view of the purpose, scope and character of the act, it should be construed and held to include injuries arising out of the State as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion.

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WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—PART OF COAL MINE OUTSIDE STATE—*Gooding* v. *Ott, Supreme Court of Appeals of West Virginia (Jan. 25, 1916), 87 Southeastern Reporter, page 862.*—Daisy Gooding instituted proceedings for compensation for the death of her husband, Clyde F. Gooding, a miner, while in the employ of the Davis Coal & Coke Co. Compensation was denied by the State compensation commissioner. The offices and main works of the company were in West Virginia, but at the time of his death the employee was operating a motor in a part of the mine located in Maryland, about 400 feet from the boundary line. The supreme court reversed the order of the commissioner, Judge Miller, who delivered the opinion, saying in part:

A distinction has been noted in some of the authorities between cases arising under compulsory statutes and those controlled by statutes, as in New Jersey, and we think in this State, which are optional. Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside of the State. But where, as in New Jersey and in this State, the statute makes acceptance optional, and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof, binding the parties, and enforceable in any jurisdiction the same as any other contract.

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Employment under these new compensation acts, when elective and not compulsory, and voluntarily entered into, are treated as contracts of employment to be interpreted and enforced as all other contracts, and as binding upon the parties for injuries or death sustained in any place to which such contracts of employment extend the rights of the parties.

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WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—BUSINESS OF STORAGE—FRUIT BUYER FOR STORAGE COMPANY—*Sickles* v. *Ballston Refrigerating Storage Co. et al., Supreme Court of New York, Appellate Division, Third Department (Jan. 5, 1916), 156 New York Supplement, page 864.*—Clarence A. Sickles was injured while going about in an automobile buying fruit and acting as salesman for the company named. The company was engaged in storing fruit, and the business of "storage" is classified by the State compensation law as one of the hazardous occupations included under it. The State industrial commission made an award in his favor, which was reversed by the court in an opinion by Judge Cochrane, in which he said:

I do not think the work in which the claimant was engaged when he received his injury has any logical or appropriate connection with the storage business. That business implies merely the housing and care of property within a storehouse or other appropriate place of deposit. There is no implication that the goods stored belong to the person engaged in the storage business. In fact ownership of the goods is entirely irrelevant. And whatever dangers and hazards may be incident to the storage business certainly have no connection with traveling through the country as a purchasing or sales agent. The purchasing of goods and acquiring ownership thereto is not an incident to the business of conducting a storage house.

This is not a case where the duties of the employee in connection with two different kinds of business are so blended and intermingled that it is impossible to say that the particular act which he was doing when injured related to one kind of employment rather than to the other. Here it appears beyond peradventure that the employee was doing nothing at the time of his injury which had any pertinent or legitimate connection with the storage business, and this is so notwithstanding the presumption which the statute establishes in favor of an award.

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WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—SALESMAN OF CLOTHING FOR MANUFACTURING FIRM—*Lyon* v. *Windsor et al., Supreme Court of New York, Appellate Division, Third Department (May 18, 1916), 159 New York Supplement, page 162.*—Robert Lyon was a salesman in the employ of the firm of Windsor & Davis, who manufactured and sold women's clothing. His employment was primarily in the showroom, where he sold goods to customers. He attempted to recover compensation from his employers for an injury

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consisting of a broken kneecap, which occurred when he went into the factory, located in an adjoining room, to secure finished garments to exhibit, and slipped on the stone floor. The manufacture of women's clothing is listed as a hazardous employment under the law, while salesmanship is not covered. The State industrial commission awarded compensation, but the award was reversed, Judge Woodward for the court saying in part:

The claimant had nothing to do with manufacture, in the general round of his daily tasks. He was injured while doing what he ordinarily and often did. By no stretch of fact or fancy can he be said to have been, at the moment of injury or at any other moment, engaged in the "manufacture" of the article he sought for purposes of display and sale. A salesman does not become an artisan, or a participant in any process of manufacture, merely by crossing the threshold of a factory.

The legislature has not yet, in my judgment, made the employer's business the test, and given all his employees the protection of the statute, if only the business carried on by the employer is one of those enumerated in the statute. His own occupation and employment, the thing which he does for his employer, confers the right, not the nature of the employer's business.

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WORKMEN'S COMPENSATION — HAZARDOUS EMPLOYMENT — VEHICLE—*Wilson* v. *C. Dorflinger & Sons, Court of Appeals of New York (April 25, 1916), 112 Northeastern Reporter, page 567.*—William H. Wilson was killed by a fall down an elevator shaft in the establishment of his employer, the company named, which was engaged in the sale of glassware. A part of his duty was to operate the elevator on occasion. The appellate division of the Supreme Court of New York held that this was a hazardous employment under the compensation law, on the ground that the elevator car was a "vehicle operated otherwise than on tracks," and made an award to the widow (155 N. Y. Supp. 857; Bul. No. 189, p. 265). The court of appeals reversed that decision, holding that the elevator car was not such a vehicle, and that the operation of an elevator was a hazardous employment only when the business of the employer is one included in the hazardous classes.

It is to be noticed that the legislature by chapter 622 of the Acts of 1916, added the operation of elevators to the list of hazardous employments.

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WORKMEN'S COMPENSATION—INJURY—EVIDENCE—PROCEDURE—*Carroll* v. *Knickerbocker Ice Co., Court of Appeals of New York (July 11, 1916), 113 Northeastern Reporter, page 507.*—Compensation was awarded to Bridget Carroll for the death of her husband, against the

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company named, a self-insurer under the law. The decision in the supreme court, appellate division, is reported in 155 N. Y. Supp. 1, and reviewed in Bulletin No. 189, page 244. Under section 68 of the compensation law hearsay evidence, consisting of the statements of the employee himself as to the cause of his condition, were admitted and used as the basis of the award. The court of appeals reversed the order confirming the award, five judges concurring in this decision and two dissenting. The following is quoted from the opinion of the court, delivered by Judge Cuddeback:

The finding of the commission is based solely on the testimony of witnesses who related what Carroll told them as to how he was injured. Carroll's wife testified that when he came home from his work he told her that he was putting a 300-pound cake of ice in Daly's cellar, and the tongs slipped and the ice came back on him. The physician who was called to treat the injured man at his home, a neighbor who dropped in, and the physicians at the hospital, where he was taken later in the day, testified that he made like statements to them.

The question is presented whether this hearsay testimony is sufficient, under the circumstances of the case, to sustain the finding of the commission.

We have only to consider whether the law of this State excluding such testimony has been changed in cases coming within the workmen's compensation law by section 68 of that law.

This section has plainly changed the rule of evidence in all cases affected by the act. It gives the workmen's compensation commission free rein in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. The award of the commission can not be overturned on account of any alleged error in receiving evidence.

This is all true, but, as I read it, section 68, as applied to this case, does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the commission made. That section does not declare the probative force of any evidence, but it does declare that the aim and end of the investigation by the commission shall be "to ascertain the substantial rights of the parties." No matter what latitude the commission may give to its inquiry, it must result in a determination of the substantial rights of the parties. Otherwise the statute becomes grossly unjust and a means of oppression.

The act may be taken to mean that while the commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made.

The only substantial evidence before the workmen's compensation commission was to the effect that no cake of ice slipped and struck the decedent, and there were no bruises or marks upon his body which indicated that he had been so injured. The findings to the contrary rest solely on the decedent's statement made at a time

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when he was confessedly in a highly nervous state, which ended in his death from delirium tremens. Such hearsay testimony is no evidence. (Matter of Case, 214 N. Y. 199, 108 N. E. 408.)

Judge Bartlett's opinion, concurring in the result, was as follows:

I think that the workmen's compensation law permits the State industrial commission to base an award upon hearsay evidence, in the absence of substantial evidence to the contrary; but where, as in the present case, the hearsay evidence is directly contradicted by the testimony of eyewitnesses to the event, it does not suffice to raise any issue of fact. This view accords with the liberal spirit of the enactment without giving to hearsay evidence a sanction which I can not believe the legislature intended to give it.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACCIDENT—FOREMAN KILLED BY DISCHARGED EMPLOYEE—*Stertz* v. *Industrial Insurance Commission, Supreme Court of Washington (June 20, 1916), 158 Pacific Reporter, page 256.*—Louise F. Stertz and her minor children proceeded before the commission named to secure compensation for the death of her husband. He was foreman of a logging camp, and had suspended for misconduct a workman named Steel, but later reinstated him. Steel was discharged a few days later by the president, and waylaid the logging train and killed some of the workmen, including Stertz, all of them being those with whom he had had difficulties while in the company's employ. The commission denied compensation, and its decision was affirmed by the superior court of Thurston County. The situation presented to the supreme court is summarized as follows by Judge Bausman in the opinion delivered by him for the court, reversing the judgment of the court below, and directing an award:

The present claimants are not shown to have collected or sought damages from Steel, but their claims were rejected by both the commission and the superior court. The sole argument now made to sustain their rulings is that the statute contemplates only "accident" as that term is popularly understood and also as "arising out of" the employment. These words nowhere occur in any of the definitions or granting clauses of our statute. Far stronger terms occur.

We are now brought to a point where we must explore this noble legislation with a view to some interpretation both decisive and general.

It is then pointed out that the legislature in its enactment of the workmen's compensation act chose the broadest of the three existing systems as a pattern, and went even beyond it. The purpose to avoid all litigation is set forth, and the compromises effected between employers and workmen to that end are commented upon with the conclusion:

It is for us to say, not whether our workmen ought to have a statute which insures them absolutely on the master's premises, but whether

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they do have it. What they gave up for it is great, trial by jury and unlimited damages. The former was an undeniable advantage, the latter had often brought them fivefold what is afforded by this act, which gives not to exceed $4,000 for a life and $1,500 for the loss of a limb or an eye. What laborers desired was not mere removal of the old defenses.

The amount of controversy arising out of the terms "accident," "arising out of employment," etc., in other acts, is mentioned, and it was said as to the Washington statute:

Wherever right is conferred or a definition given, ours is unqualified. Indeed, our statute is in these features the least qualified that can be found. The intention to get rid of judicial controversy is apparent throughout. We have already recognized that intention.

An examination is then made of the phraseology of the parts of the statute giving definitions, and the substitution of the words "fortuitous event" for the term "accident," etc., is noticed. Continuing, Judge Bausman said:

Ours is not an employers' liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the Industrial Insurance Commission. All the features of an insurance act are present. Not only are all remeddies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employee is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended.

Our act positively ends the "jurisdiction of the courts" on "all phases" of master and servant liability. Now, it is undeniable that liability for a stranger's acts on the premises is one of those phases, undeniable that in nearly every such case a question immediately arises whether it is not the master who may have to respond. But, it is said, we can not hold such liability indisputable under this statute, without establishing a construction that would make the master liable for such extreme things as death by lightning. Let us, therefore, review the statute again with both kinds of accident in view.

We have seen that, as the first section put an end to all civil actions appertaining to master and servant liability, so the fifth declared that the compensation "shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Next, we have seen in the first section that compensation is to be paid regardless of fault. Thus, there was to be compensation for some injuries not actionable before. For instance, let a machine which was excellently made, excellently inspected, and excellently operated cause injury by capricious action contrary to all human experience, in a work, let nobody be to blame, a servant under the common law could not recover, for the master had not been at fault. Yet that this act means to give compensation in just such a situation can never be questioned. We start accordingly with liabilities before unknown, "a sure and certain relief for workmen regardless of questions of fault."

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From the outset the creating of new liabilities was conceded. In the first debate in this court over the act, an opening challenge was the new liability without fault taking away the employer's due process of law; and an illustration was given which it was thought would make the law ridiculous. Let the workman while at work be injured by a stranger's throwing something in from the street, there would be a claim for recovery; he would be injured "on the premises;" the injury would be from "fortuitous event." That such a claim would seemingly come under the act was referred to but left undecided. (State *v.* Clausen, 65 Wash. 156, 117 Pac. 1101 [Bul. No. 96, p. 814].)

It is curious that the very illustration flung at our act to make it ridiculous has not been held ridiculous, even under the narrow English statute. In Challis *v.* London, etc., Railway Co. (2 K. B. (1905) 154), it was held that the employer was liable for the death of a locomotive engineer injured by a stone thrown from a bridge above by a mischievous boy. Having pronounced constitutional, then, an act which compels both employers and employed to go into a scheme of insurance, we do not hesitate to say that the difference in new or added liability by the act of a stranger on the premises is not enough to make it unconstitutional. It is but a slight extension of the common-law assurance of a safe place to work. Neither would it be a violation of the due process guaranty to make the master an insurer of the workman at the shop.

At this point the section defining "workman" is thoroughly considered, and also the decision that the statute gives no action against third persons. Continuing, the court said:

The right of suit against third persons for injuries on the premises is taken away from the workman. To whom, then, does he look? Since the stranger can not be made to pay him the fund must. It would be intolerable to suppose that for this wrong he should have no redress at all.

To seek authority in the decisions of other States is useless, for other statutes have no resemblance to ours. Those decisions are but painful struggles at interpretation of "arising out of," "accident," and "course of employment," which we believe were intentionally left out of our statute. Only one good is found in looking at those cases. They show what evils of litigation are escaped in our enactment. These cases show the refinements to which courts are driven, the contests which workmen have to make at every turn under statutes of a qualified sort, that the new controversies, over "arising out of," are but revivals of old contests over contributory negligence and assumed risk, though to get rid of these was the express announcement of the law.

We decline to read into our act either the narrow word "accident," or the phraseology found in the English and other statutes. We prefer to leave it the force of clear and positive language designed to cure the past mischiefs of endless contention. The reports of other States already abound in contests over the new phraseology. It is for the legislature, not for this court, to modify, if it appear wise so to do, the plain language of our statute.

"Accident," it is urged, does appear in sundry administrative sections of the act. Now, it does not appear in any parts deliberately

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stating the basis of compensation, and even injury was powerfully defined as fortuitous event. "Accident" was used for brevity as a convenient substitute for "fortuitous event" in the administrative details of the act; and no court must construe a statute on general intent against positive definitions.

In one section, the employer, being required to make reports of accidents, is directed to state whether the accident "arose out of or in the course of the injured person's employment." By no language whatever is this section made the basis of compensation or so connected with the compensatory provisions of the law as to give it other than statistical value for information to the department. Moreover, in the preceding clause it is stated that the report must be made whenever any accident or injury whatever occurs. This section, in short, makes no attempt to indicate which shall be paid.

In conclusion, even judicial decisions under the qualified statutes show that we can give full vigor to "injured on the premises" without raising a host of claims untolerated elsewhere. We have seen, in a word, the cases of lightning, of protecting a fellow employee, of the engineer killed by the boy from the bridge, of the assaulted cashier, and the assassinated gamekeeper. But, since each new situation has always some difference, it is an infirmity if workmen are compelled always to argue over interpretation. Interpretation by instance is endless. The framers of this law having said positively that they wish the jurisdiction of courts ended on these controversies, it is our duty to give liberality as much to that as to other provisions of the law.

The situation indeed does not greatly differ from that which once obtained in life insurance. The early policies reserved to the company a perpetual question for any misrepresentations made to obtain them; and, while this right was rarely exercised, yet it was exercised at times and the right to exercise it was found so disquieting that the practically unqualified policy has taken the place of the other. To obtain this situation under the compensation act was undoubtedly the purpose of the workmen. It is also to our mind the language of the law.

Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises.

The judgment of the lower court is reversed and the cause remanded, with instructions to enter a judgment against the commission for the amount of appellant's claim.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACCIDENT—NIGHT WATCHMAN MURDERED AND ROBBED— *Walther* v. *American Paper Co., Court of Errors and Appeals of New Jersey (Nov. 20, 1916), 99 Atlantic Reporter, page 263.*—Louis R. Walther was employed by the trustee in bankruptcy of the company named, at the plant in Bogota, as a night watchman, whose duty it was to make tours through the mill and guard the property. On December 24, 1914, while on his rounds, he

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was struck with a club by a person who had hidden behind rolls of paper in the mill. He was killed by the blow, and his pay envelope containing about $15 was taken from him. The assailant proved to be another employee who had likewise been paid off earlier in the day, and who had lost his money by gambling. He did not attempt any robbery from the mill office or any destruction of the company's property. The defense admitted that the death was in the course of the watchman's employment, but denied that it was an accident or arose out of the employment. The Bergen court of common pleas entered judgment awarding compensation to the executrix, and the supreme court adopted its view (98 Atl. 264).

The court of errors and appeals reversed the decision and denied compensation, saying in the brief opinion:

We think the death of Walther did not arise out of his employment. The case can not be distinguished in this respect from Hulley *v.* Moosbrugger, 88 N. J. Law 161, 95 Atl. 1007 [Bul. No. 189, p. 279]. The judge of the common pleas relied on the opinion of the supreme court in that case, the reversal of which could hardly have been known publicly at the time.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—AIDING FELLOW SERVANT—*Martucci et al.* v. *Hills Bros. Co. et al., Supreme Court of New York, Appellate Division, Third Department (Jan. 18, 1916), 156 New York Supplement, page 833.*—Vincenzo Martucci was employed in the canning factory of the company named, and was killed when he left his regular occupation of boiling sirup and attempted to assist another employee to start an elevator which had stopped on account of the operating cable becoming entangled. In affirming an award to the widow and children by the State industrial commission, Judge Woodward, who delivered the opinion, said in part:

It is doubtless true that the facts would not support a judgment under the common law, nor under the Employers' Liability Act; but the workmen's compensation act contemplates charging the industrial life of the State with the burden of accidents incident to such industry, within the limits fixed by the act, and we are not prepared to hold that a common laborer is not in "the course of his employment" when he steps aside from his immediate employment to give an incidental aid to a fellow employee in the operation of a freight elevator, which is operated in common by all of the employees. It does not appear that the elevator had been broken or damaged; merely that it had ceased to respond to the operating cables, and to say that a man who is at work near the point may not lend a hand in starting this elevator without sacrificing his rights under the law, is too narrow a construction to apply in the construction of the statute.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ALTERCATION—*In re Heitz, Court of Appeals of New York (May 2, 1916), 112 Northeastern Reporter, page 750.*—Gustav Heitz proceeded against Jacob Ruppert (Inc.) his employer, and the insurer, for compensation for injuries received while at work as a driver in the brewing business, one listed as hazardous in the law. On July 14, 1914, he brought his horses into the stable, where he and another employee, Guth, proceeded to wash them with a hose. Heitz told Guth that he was using too much water on the horses, and the latter sprinkled him with the hose. Soon after, Heitz had occasion to pass by Guth, and touched him on the shoulder, saying "Don't do that again." Guth then slapped Heitz on the shoulder, and Heitz, turning quickly around, was struck in the eye by Guth's finger, which caused injury which necessitated the removal of the eye. An award to the claimant by the workmen's compensation commission was affirmed by the supreme court, appellate division, and this was again affirmed, it being held that the injury arose out of the employment. Judge Pond said in part in delivering the opinion:

Injuries received through skylarking or horseplay during working hours and at the place of work have been considered by the courts and it has been held that an accident caused to a workman, while engaged in his work, by the wrongful act of a fellow workman, entirely outside the scope of his employment, has no relation to the employment and is not within the act. (Hulley *v.* Moosbrugger, 95 Atl. 1107 [Bul. No. 189, p. 279].) Altercations and blows may, however, arise from the act of a fellow servant while both are engaged in the employer's work and in relation to the employment. The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment, and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest. Such cases necessarily present close questions of fact. The evidence in this case is sufficient to permit the commission to find that the following facts sought to be proved were established: That it was an obligation of claimant's employment to take care of the horses which he drove and to see that they were not injured by injudicious wetting or otherwise by his fellow workmen; that in the course of their employment while the two men were at work, a quarrel or argument over the wetting of the horses arose and personal injury grew out of the physical contact resulting from the quarrel; and that therefore the accident (*a*) arose out of and (*b*) in the course of employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSISTING EMPLOYER IN FIGHT—*Clark v. Clark et al., Supreme Court of Michigan (Dec. 22, 1915), 155 North-*



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*western Reporter, page 507.*—The claimant for compensation in this case, Willis M. Clark, was in the employ of his brother, David S. Clark, as foreman in the erection of a dwelling. David owned also an adjoining lot, and on the day previous to the injury two men attempted to unload thereon bricks to be used in the erection of other buildings in the neighborhood. The owner had given orders that this should not be permitted, and Willis Clark, after telling them that the bricks were not for his employer and should not be unloaded there, and being unable to convince them by this method, had a physical encounter with them, getting the better of the argument.

The next day the teamster returned with a larger force, evidently with the purpose of "getting even." David Clark was present on this occasion, and engaged in a fight with some of the men, while the employee, Willis, was not actively engaged, but kept back a part of the reserve force. One of the assailants threw an iron missile, which destroyed the sight of one of his eyes. The insurance company not responding when compensation was demanded, he made application to the industrial accident board, which made an award of $10 per week for 100 weeks. This award was set aside by the court, Judge Bird, who delivered the opinion, saying in part:

It may have been commendable in him to volunteer to assist his brother against such great odds, but that does not satisfactorily answer the question what connection his acts had with his employment. He was not called upon to protect his master's property, as on the previous day. He was not asked to assist his master in the fight on the second day. His action was purely a voluntary one, and it seems to us no different than as though he had discovered the same men fighting with his brother a week afterwards 10 blocks away, or as though claimant had observed a fight going on across the street and had gone there to get a better view, and while there had been hit by a flying missile and injured. His presence at the place of fighting was in pursuance of no demand of his employment. Neither was it in aid of any material interest of his master. His presence there and the assistance which he rendered was solely in the interest of his master's personal safety. An injury received under such circumstances can not be said, under a fair construction of the act, to have arisen out of and in the course of his employment.

But claimant says he was in charge of his brother's work while he was away, and also while he was present. If his brother David were present and did not assume to act, claimant probably had the authority to act, but when the master was present, and took personal charge of the matter himself, it necessarily excludes the idea of the claimant's having charge of it.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—COLLAPSE OF FLOOR ABOVE—*Kimbol v. Industrial Accident Commission, Supreme Court of California (Sept. 20, 1916), 160 Pacific Reporter, page 150.*—The industrial accident

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commission of California, by a divided vote, awarded compensation to Fred Douglas from his employer, Ed. Kimbol. Douglas was employed as a dishwasher by Kimbol, the owner of a restaurant on the ground floor of a building in Los Angeles. On the floor above was stored a large quantity of bottled grape juice, and while Douglas was at work this floor collapsed, and Douglas was injured by some of the falling objects. The employer had no control over the use of this floor, and its use for storage was not authorized by the lease under which it was occupied. It was admitted that the injury was in the course of the employment, but it was contended that it did not arise out of the employment. The majority of the court held otherwise, and affirmed the award of compensation. Judge Angellotti, who delivered the opinion, quoted a portion of an opinion of the Supreme Judicial Court of Massachusetts relating to the phrase under consideration, the latter part of which is as follows:

The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. (*In re* McNicol, 215 Mass., 498, 102 N. E. 697 [Bul. No. 152, p. 196].)

Continuing, the opinion reads in part:

This appears to us to be a good general definition of the term "arising out of the employment," and we think it fairly includes such a case as this. Because of this nonauthorized use of the floor above for storage purposes those below were, in fact, in danger of injury from a collapse of the floor, and in that sense the place in which Douglas was required to do all his work was an unsafe place. The danger was one peculiar to that very place—an incident of the particular premises used as they were being used—and it is not unreasonable to say that Douglas was specially exposed to that danger by reason of his employment. Solely by reason of and in pursuance of such employment he was required to remain in this unsafe place exposed to this danger of a collapse of the ceiling of the room in which he was constantly at work. The risk was normally one incident to working in that place, one due solely to its unsafe condition. If this be so, we are of the opinion that the injury may fairly be said, in view of the authorities, to have arisen out of his employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—COMPOSITOR GOING UPON ROOF FOR FRESH AIR—*In re Von Ette, Supreme Judicial Court of Massachusetts (Feb. 29, 1916), 111 Northeastern Reporter, page 696.*—Clara C. Von Ette brought action against the Globe Newspaper Co. and its insurer for the death of her husband, an employee of that company, on the night

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of June 21, 1914. Von Ette went to his work as a compositor on the night in question, and would have finished at 1.45 the next morning. He was last seen at about 11 o'clock, and at 3.45 in the morning his dead body was found upon the ground 6 stories below the floor where he worked. It appears that the room was poorly ventilated and very hot on summer nights, and it was customary for the men to go on the adjoining roof for fresh air, though there was a rule forbidding leaving the room.

The industrial accident board made an award to the widow, finding that there was an established custom to go upon the roof for fresh air, and that the company had waived the rule. It found that the employee met his death by an accidental fall from the roof, and that it was in the course of his employment. The court affirmed this award, pointing out that the only circumstances under which the award would not be justified as a matter of law would be if the deceased committed suicide or his fall was due to intoxication, or if the injury was not in the course of employment. It was shown that the burden of proving that the injury occurred in the course of employment was upon the claimant, but that she was not limited to direct proof, but might establish her case by circumstantial evidence; also that the finding of the industrial accident board must be accepted if warranted by the evidence. The court held that the finding was warranted, that the rule as to leaving the room had become a dead letter before the time of the accident, because of the acquiescence of the employer in the custom of the employees going out for the purpose of cooling off and getting fresh air. And finally it held that the accident might have been found to have arisen out of and in the course of the employment, in spite of the fact that the deceased apparently fell from the roof at a place 23 feet from the door opening from the room to the roof.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DISEASE FROM EXPOSURE—*Rist* v. *Larkin & Sangster et al., Supreme Court of New York, Appellate Division, Third Department (Jan. 5, 1916), 156 New York Supplement, page 875.*—George C. Rist instituted proceedings for compensation for injury claimed to have been sustained while in the employ of the company named. He was operating a crane, and when one of the timbers broke he jumped into the river to avoid being hurt, the distance being 10 feet. The water came to his knees. He waded out but contracted a heavy cold which resulted in pleurisy and pulmonary tuberculosis, which caused prolonged disability succeeding the date of the exposure, September 5, 1914. That the chain of causation was sufficiently direct to bring the results within the course

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of employment was held by the court, Judge Kellogg saying in the opinion delivered by him:

The finding of the commission that claimant's present condition is the result of the accidental breaking of the timber, and that his going into the river resulted therefrom, is not unreasonable, and has some evidence to sustain it. We can not question it. While the claimant jumped into the water, he did so to prevent a personal injury resulting from the accidental breaking of the timber. The jumping into the river was therefore not a voluntary act, but was the result of the accident, which put the claimant in such peril that his getting wet must be considered accidental rather than voluntary.

We consider the claimant in the same position as if the accident had thrown him into the river, and clearly his being accidentally thrown 10 feet into the water was an injury within the meaning of the act, and the disease following has been found to naturally and unavoidably result from that injury.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DRINKING POISON BY MISTAKE FOR WATER—*Archibald* v. *Ott, Supreme Court of Appeals of West Virginia (Jan. 18, 1916), 87 Southeastern Reporter, page 791.*—Clara A. Archibald instituted proceedings to obtain compensation for the death of her husband, and when compensation was denied she appealed. The husband, George Archibald, was in the employ of the Schofield-Cowl Co., and his death resulted from the accidental drinking of poison, which he mistook for drinking water. It was customary for the men to secure water from a neighboring well by means of buckets and keep it in bottles. The employee of another company, at work in the same building where Archibald was engaged as a plumber, used a clear fluid known as lapidolith for the purpose of hardening concrete, and set the remainder away in a bottle, which was of the same kind as used for the water, placing the bottle in a bucket, on which he also placed a broom with a card upon it, on which was written the word "Poison." It was this bottle from which Archibald drank with fatal results, it not being known why he did not discover the poison warning. Judge Poffenbarger, who delivered the opinion reversing the ruling of the commissioner, pointed out that the accident unquestionably was in the course of the employment, also that the mere negligence of either employer or employee was immaterial. He therefore concluded that the question in dispute was as to whether or not the injury arose out of the employment, which he answered in the affirmative, his language in its discussion being for the most part as follows:

Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sus-

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tained in the performance thereof is deemed to have arisen out of the employment. That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment.

Here the unfit, unsatisfactory, or undesirable water supply in the building was one of the generally recognized conditions of the place of service. In consequence thereof all of the workmen supplied themselves from the well by means of buckets and bottles which were left at their respective places of work, and, as may well be supposed, in view of the spirit of comradeship usually prevalent among men working together, it was not unusual for a thirsty workman to take a drink, by tacit permission, from any bucket or bottle that happened to be convenient. Among the bottles in the building there was one that contained a deadly poison having the appearance of water. Its presence there was an incident of the prosecution of the work. It was a substance used therein, and not a thing left on the premises by a stranger, meddler, or miscreant. In the performance of an act attendant upon and incident to all sorts of employment, Archibald, by mistake, drank this fluid for water. That his death was thus accidentally occasioned, in the course of his employment, is admitted, and, in our opinion, the fatal accident arose out of his employment. If the quenching of a workman's thirst while at work is an act within his employment, then undoubtedly an injurious mistake in the performance of that act is the same in its legal nature and character as a misstep in the performance of any other duty resulting in injury. A fall from a scaffold, an accidental cutting or mashing of a hand or foot sustained in the course of work, though negligent, would be a compensable accident. The drinking of water in the course of service is obviously a necessary incident of the work, and, as is disclosed by the facts in this and other cases, is attended by some danger. Such attendant danger as is commonly known was within the contemplation of the parties. Hence Archibald's fatal mistake in that incident of his service was legally the same as any injurious mistake he might have made in any act of direct service. The only perceptible difference lies in the fact that the drinking of water was a remote, incidental, or indirect, not a direct, act of service to the master, and authorities cited treat this as immaterial.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DRIVER FALLING FROM HACK WHILE AFFECTED WITH DIZZINESS—*Carroll* v. *What Cheer Stables Co., Supreme Court of Rhode Island (Jan. 5, 1915), 96 Atlantic Reporter, page 208.*—William Carroll received injuries on December 1, 1914, which totally and permanently incapacitated him. He was in the employ of the company named as hack driver in Providence, and the injuries resulted from a fall from the seat of the hack, which the decree of the superior court recited to have been probably due to dizziness and unconsciousness resulting from a combination of diseases with which

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the employee was suffering. It, however, awarded compensation in the sum of $5.36 per week during the continuance of incapacity, not exceeding 500 weeks.

The court held that there was evidence that the injury was caused at least in part by the lurching motion of the vehicle, and that, even if the diseased condition was a contributing cause, it was not the immediate or proximate one; the decree was therefore affirmed. American and English cases are fully discussed in the majority opinion by Judge Parkhurst and the dissenting opinion by Judge Vincent.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EFFECT OF RECOVERY FROM THIRD PARTY—CLAIM—*Mercer* v. *Ott, Supreme Court of Appeals of West Virginia (Sept. 19, 1916), 89 Southeastern Reporter, page 952.*—J. D. S. Mercer instituted proceedings, as administrator of the estate of Bernard Zubritsky, for compensation for the death of the latter. Compensation was denied by the State compensation commissioner and this action was an appeal from that decision.

The deceased employee was employed by the Mack Manufacturing Co., brick makers, who were subject to the compensation act. His work was to transfer coal from railroad cars to cars in which the coal was distributed about the plant. While he was engaged in this and was under a car removing coal, employees of the railroad, in making a flying switch, threw some cars against the one which he was unloading, which ran over and fatally injured him. The mother of the deceased, living in Russia, was the only dependent. Mercer was appointed administrator and brought suit against the railway company for damages, which was compromised by the payment of $1,250. He then filed his petition for compensation, which was denied. The decision of the commissioner that compensation was not to be paid was based on the view that the application was not "in due form," that the injury was not received "in the course of and resulting from the employment," and that settlement with the third party causing the injury precluded recovery of compensation. On appeal to the court the application as made was held sufficient, and the other questions were also decided in favor of the claimant, so that the order of the commissioner was reversed and remanded for the allowance and payment of compensation. In treating the questions as to relation to the employment and double liability Judge Mason, who delivered the opinion, said in part:

It would seem very plain, indeed beyond controversy, that under these circumstances the injury resulted from the employment in which the deceased was then engaged. He was at the place performing the duties required of him, and in the manner required, and was killed

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by the car upon which he was required to work. The fact that the car was cast upon him by the wrongful act of the railroad company does not make the accident any less the result of his employment than if the accident had been caused by the car falling upon him through some defect in the car. We think that the commissioner erred in holding that the injury was not received "in the course of and resulting from the employment" of the deceased.

It is insisted that our statute should not be so construed as to permit the recovery of double damages for a single wrong. The West Virginia statute deals solely with the employer and the employee and makes no reference whatever to third parties.

By the workmen's compensation act it was intended to create a fund to which an injured employee or his dependents in case of death can apply for compensation, instead of being compelled to collect the same by law. It partakes largely of the nature of pension. These considerations show conclusively that the right to compensation out of this fund under the statute and the right to recover damages of a tort-feasor are of such radically different character that the rules of law invoked by the honorable commissioner are not applicable. The fact that the administrator recovered from the railroad company does not operate to prevent the mother of the deceased from receiving compensation from this fund as a dependent.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYEE ON BARGE TO LOAD AND UNLOAD, DROWNED DURING TRIP—*W. R. Rideout Co.* v. *Pillsbury et al., Supreme Court of California (July 25, 1916), 159 Pacific Reporter, page 435.*—Francisco Coelho fell from a barge of the company named during a trip from San Francisco to Oakland and was drowned. His duties were to help load and unload the barge, and he had no duties to perform during the trip. A house was provided for the men on board the barge, and the company attempted to prove a rule that the men should stay in it, but the commission found that there was no specific rule to that effect, and the court held this finding justified. The employee was seen leaning against a bitt or post on the deck, and later his body was found near the place where the barge then was. It was held that the employee was properly found to have drowned in the course of his employment; also that he was not guilty of willful misconduct, and that his dependents were entitled to the benefit of the presumption that he did not commit suicide. An award of compensation was affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—*Chicago & Alton Railroad Co.* v. *Industrial Board of Illinois, Supreme Court of Illinois (Oct. 5, 1916), 113 Northeastern Reporter, page 629.*—Joseph Turpin was an employee of the railroad company named, and his widow instituted

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proceedings to secure compensation for his death. The industrial board made an award of $3,500, payable in weekly installments, but the decision on review by the circuit court of McLean County was adverse to her. Turpin was an engineer, whose duty it was to try out engines which had been overhauled, and see whether they were suitable to be restored to service. On July 2, 1914, he and his fireman worked all day with a certain engine. On the next day they worked with another engine. They did not work on the 4th, it being a legal holiday, nor on the 5th, which was Sunday. On the 6th Turpin reported, but said he was not feeling well and went home. A physician who was called found him suffering with a strangulated hernia, and he went to a hospital, was operated upon, and died. The fireman stated that the reverse lever of the engine with which they worked on July 2 moved very hard, and on one occasion it took considerable exertion for both of them to shift it. Turpin did not complain to the fireman of being hurt. Over objection the testimony of Turpin's physician and of his brother-in-law, who lived with him, was admitted, as to what the employee told them about his condition and its cause. They testified that he said he felt pain after he had with difficulty shifted the lever. The supreme court concurred with the circuit court in holding that there was not sufficient evidence that the injury arose out of the employment, the hearsay testimony as to the cause of the injury not being admissible. Judge Cooke, who delivered the opinion, said in the concluding portion:

Excluding the testimony of the physician and of McDonald as to the statements made by Turpin as to the cause of his injury, there is nothing whatever left upon which to base the conclusion that the injury was received while Turpin was in the course of his employment. It was incumbent upon the administratrix to show by some competent evidence that the injury was actually received in the course of his employment. It is not indispensable that this be done by direct and positive evidence, as it may be shown by any circumstance which fairly tends to prove it. As there was no evidence tending to show this, the court properly quashed the record of the industrial board, and its judgment is affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—*De Mann* v. *Hydraulic Engineering Co., Supreme Court of Michigan (Sept. 26; 1916), 159 Northwestern Reporter, page 380.*—Wilhelmina de Mann proceeded for the purpose of obtaining compensation for the death of James de Mann, which occurred August 4, 1914, while in the employ of the company named. He was a common laborer, and on the day of the accident was at work in the basement of a theater building, on which extensive repairs were being made. One of his duties was, at the close of work, to look after the tools, which were stored on the stage of the theater.

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The workmen's coats and dinner pails were also kept on the stage. A large wooden beam had been placed near the head of the stairs leading from the basement to the stage, in such a way that it was necessary for a person to stoop in order to go under it. At a few minutes after 5 p. m. his body was found on the cement floor at the foot of these stairs, with contusions on the head. The employer took the matter to the court to review an award in favor of the claimant, of $5.77 per week for 300 weeks. The order was reversed, but only for the purpose of reducing the weekly compensation to $5, which it was held was all that the evidence as to the employee's earnings would warrant. The court held that the finding that the injury occurred in the course of employment was justified, Judge Person in the opinion saying in part:

It was certainly a reasonable inference that the fracture was caused by a fall from the stairway onto the cement floor, and that the fall came from hitting his head against the crossbeam. No other cause for his death is even suggested, and in the report of the accident by the employer to the industrial accident board it was said: "It is supposed that injured fell from the stairway."

It is undoubtedly true that the deceased was on his way from the basement to the stage for the purpose of getting his clothing, or to look after the tools, or both. There is no other apparent reason for his having been on the stairway. If his purpose was to look after the tools, that was clearly within the line of his employment. If he was after his clothing that, also, was within the line of his employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—DISAPPEARANCE—CIRCUMSTANTIAL EVIDENCE—*Western Grain & Sugar Products Co. et al. v. Pillsbury et al., Supreme Court of California (Aug. 24, 1916), 159 Pacific Reporter, page 423.*—Edward Shea was a night watchman for the company named, and an award to his dependents was made by the industrial accident commission, which found that he had met his death at the hands of persons unknown who had entered upon the premises of his employer. The premises were inclosed by a high fence and by buildings, except one side, which was on the water. The watchman was missing on the morning of November 13, 1916, and his cap, in a torn condition, and his pocket knife, also marks which might have been made by dragging a body, were found near the wharf, and there were pools of liquid which, according to some evidence, appeared to be human blood. His body could not be found, and there was additional circumstantial evidence that pointed to a murder having been committed by trespassers. The court affirmed the commission's award, holding that neither the finding of the body nor the lapse of seven years was necessary when there was

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sufficient circumstantial evidence of murder of an employee in the course of employment, and that the theory of suicide need not be negatived by the claimant, nor that of conflict brought on by the employee himself.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—INFERENCE—BURDEN OF PROOF—*Papinaw* v. *Grand Trunk Ry. Co. of Canada, Supreme Court of Michigan (Dec. 21, 1915), 155 Northwestern Reporter, page 545.*—Alfred Papinaw had been for several years a section foreman of the railway company named when he was killed on January 30, 1914. While his principal duties were performed by day, he was expected to keep the switches free on stormy nights, and further to send in semimonthly pay rolls, which it was necessary for him to mail at a point some distance from his home. He left home at about 6.30 on the night of his death, and the papers were mailed by him. On leaving home he remarked to his wife that it was stormy, and said that if he was late he would be busy about the switches. About midnight his body was found badly mutilated, having apparently been struck by more than one train, he having been dead from one and one-half to two hours. The court affirmed the decision of the industrial accident board awarding compensation, Judge Steere speaking for the court and saying in part:

Especial and extra duties rested upon deceased that night. He was required to be on call. It was a stormy night, of a kind requiring unusual vigilance as to the switches, and it was imperative that he mail his pay rolls at the tunnel depot before the evening train left so that they would be in Detroit on the day required. He worked upon those papers until supper time and started after supper for the tunnel depot to mail them, leaving word with his wife which would keep him in touch with his employer during his absence, as near as possible. It is conceded that he mailed the papers that evening, and they reached their destination on time. It was his duty after mailing them to return and either be at home on call or looking after the switches near by. His last words, so far as there is any proof, show such was his intent, and that he left with this duty on his mind. He was in the habit of retiring early when there was no indication of a storm. Under the terms of his employment it was as much his duty to return to his home, or the switches near there after mailing the papers at the tunnel depot as it was to go there for that purpose. In going he started along respondent's track, and presumably went that way, as was his custom and that of other employees of respondent, because it was more convenient and the distance to the tunnel shorter than by any other route. He was a section foreman whose special work was to be upon, travel along, and care for his employer's track. He was not a trespasser upon its right of way in any sense which would deny relief under this act, and no question of his negligence is involved in this proceeding. The place and cause of his

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death are readily inferable from the facts proven. Respondent's counsel say: "He was in the act of going home at the time he was killed." If so, under the circumstances of this case he was performing a duty in the line of his employment out of and in the course of which the accident which caused his death befell him. The accident occurred while he was doing that which a man so employed can reasonably do, and ought to do, and was injured at a place on his employers' premises where, under the proven circumstances, his combined duties made it reasonable that he should be; and there is no proof that he was there for any other purpose than on his return in completing a trip to the tunnel depot, in the line of his employment, to the place where his employment required him to be on call or at work, and where he would have been during that evening but for the necessity of the trip.

This claim is by the dependent of a workman who was accidentally killed, and whose evidence is therefore not available. In Grant *v.* Glasgow Railway (1 B. W. C. 17), it is said:

"If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think it falls on the employer, if he disputes the claim, to prove that the contrary was the case."

The arbitration committee and industrial accident board were at liberty in determining the facts in this case to draw all rational and natural inferences from the evidentiary circumstances shown. To infer and find that the accident, which resulted in Papinaw's death, arose out of and in the course of his employment, had evidential support, and was neither unnatural nor irrational.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FOREMAN GOING FROM ONE JOB TO ANOTHER—*Kunze* v. *Detroit Shade Tree Co., Supreme Court of Michigan (July 21, 1916), 158 Northwestern Reporter, page 851.*—Augusta Kunze, widow of Fred Kunze, proceeded for compensation for the death of her husband against his employer, the company named. He was a tree trimmer and planter, who was acting as foreman, and was obliged to go from job to job about the city on inspection service. After leaving one job in charge of another man, he was on his way to take a car to another point, when he was knocked down by an automobile, receiving injuries from which he died the following day. An award of compensation by the industrial accident board was affirmed, Judge Kuhn, who delivered the opinion, saying in regard to the question whether the accident was one "arising in course of employment":

We think that it is a justifiable conclusion that the accident can be fairly traced to his employment as a contributing and proximate cause. It is true that in going from one place to another, as was his duty, he naturally was compelled to assume risks not in anywise

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connected with the trimming, planting, and treating of shade trees. But his employment extended further than this and necessarily obliged him, in the discharge of his duties, to go from place to place, and in so doing to assume the risks of traffic upon the streets. Where employees are compelled during the course of their employment to travel about the streets, it does not seem to us to be unreasonable to say that the danger of being struck by street cars, automobiles, and traffic of every description should be taken account of. We think it must be said that the very nature of the occupation of the deceased itself exposed him to the unusual risk and danger of an accident of this nature.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FROSTBITE—LONGSHOREMAN—*McManaman's Case, Supreme Judicial Court of Massachusetts (June 29, 1916), 113 Northeastern Reporter, page 287.*—John McManaman instituted proceedings to secure compensation for personal injuries suffered by him in January, 1914, while working as a longshoreman in Charlestown, Mass., when his hands were frozen, and as a result he lost two phalanges of the little finger of one hand, the whole of the other little finger, and the power of grasping and holding with his hands to such an extent as to incapacitate him for his trade. The temperature fell on the day in question to 4° below zero. The employee felt pain in his hands during the latter part of the afternoon, but continued at his work until it was completed at shortly after 5 p. m. His work was pushing a truck on which goods were carried along a plank from the vessel to the wharf. The court affirmed an award in the employee's favor, Judge Loring examining English cases cited by counsel, but finding them of little value as bearing on this case, and saying:

In his argument counsel for the insurer has pointed out that the bags of fabric were not cold; that the petitioner's hands would be but little closed when he handled them; that after he had pushed the truck off the boat his hands were free while he was walking back to get another load and that he had ample opportunity to swing his arms and keep up his circulation at that time. All these were matters proper to be urged upon the board and to be considered by them in passing upon the question of fact upon which they had to pass. But they are not matters which are decisive of the question of law which we have to decide, namely, whether on the evidence as a whole the board were warranted in finding (as they did find) that the petitioner was exposed "to materially greater danger and a likelihood of getting frozen than the ordinary person or outdoor worker on the date" in question.

Although the question is a close one, we are of opinion on the whole that the evidence before the board warranted the finding made by them.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FROSTBITE RESULTING IN ERYSIPELAS—*Larke v. John Hancock Mutual Life Insurance Co., Supreme Court of Errors of Connecticut (Apr. 19, 1916), 97 Atlantic Reporter, page 320.*—Margaret Larke proceeded against the company named, the employer of her deceased husband, Henry J. Larke, for compensation for his death. It was found by the compensation commission, which awarded her compensation, that on February 26, 1916, Larke, in the prosecution of his work as a solicitor of insurance and collector of premiums, drove 15 or 20 miles in extremely cold weather, calling at some 50 heated buildings; that the business required him to visit certain persons and places at certain times, regardless of weather conditions; that on the day named he suffered frostbite of his nose and the adjacent skin and tissues, and that as a result erysipelas developed and death ensued. The company appealed, but the court affirmed the award, holding that the evidence supported the findings that a frostbite was suffered on the day specified, and that the erysipelas resulted therefrom; that the frostbite was a "personal injury" under the law; and that the injury was the proximate cause of the disease which resulted in death. Quotations from the opinion delivered by Judge Wheeler touching upon the two points last mentioned are given herewith:

Mr. Larke's employment, which compelled him to drive 15 or 20 miles on a very cold day, going in and out of heated houses in making upward of 50 calls, exposed him to the severity of the weather and to the danger of frostbite very much more than the ordinary person in that locality was exposed. The risk of frostbite to Mr. Larke was either created or greatly aggravated by his employment, which subjected him to open air work in severe cold.

Erysipelas developed from the frostbite; the finding on this point is conclusive. If the primary injury arises out of the employment, every consequence which flows from it likewise arises out of the employment. The chain of causation may not be broken. Every injurious consequence flowing from it is a part of this chain. It is immaterial that erysipelas does not ordinarily result from frostbite; it is enough if in this instance it be caused by it. All physical consequences and disease result from an injury when there is a causal connection between them.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO RESCUE OF FELLOW WORKMAN—*Waters et al. v. William J. Taylor Co. et al., Court of Appeals of New York (May 12, 1916), 112 Northeastern Reporter, page 727.*—Mary Waters proceeded to obtain compensation for the death of her husband, Roger Waters, who had been killed while in the employ of the company named. That company and another were contractors

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performing work necessary in the construction of a building, and requiring excavation. An employee of the other company was caught by a cave-in of a bank, about 20 feet from where Waters stood. While Waters was trying to release him, another cave-in occurred and injured Waters so seriously that death resulted. Holding, against the contention of the insurance company, that the injury arose out of the employment, and affirming an award of compensation to the widow, the court said in part, speaking through Judge Hiscock:

It seems to us that this act should be regarded as an incident to and within the fair scope of his employment as the latter should be measured for the purposes of the workmen's compensation act. It occurred while he was at work on the undertaking for which he had been hired, and therefore during the course of his employment. It was his employment which brought him where he was, and in a general sense caused him to be confronted with the condition and emergency which he sought to meet. His act was prompted by the relationship existing between himself and a fellow workman, caused by their employment on a common undertaking. It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow workman, working a few feet away, was imperiled by such an accident as occurred here, and it seems to us that the accident arose out of his employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTENTIONAL AND WILLFUL MISCONDUCT—*Beaudry* v. *Watkins et al., Supreme Court of Michigan (June 1, 1916), 158 Northwestern Reporter, page 16.*—Gordon Beaudry was a delivery boy employed by Watkins and another, and used a bicycle in this work. On April 29, 1914, he went to his home for lunch, making a delivery on the way out, and intending to call on the way back for a package which was to be taken to the store. While going from his home to the place where he was to make the "pick-up" of the package, he took hold of the rear of a motor truck. This made a sudden turn and threw him to the pavement in front of another truck, which ran over him, causing his death. The employers argued that since the injury was caused by the act of taking hold of the truck it did not arise out of the employment, and also that he was guilty of intentional and willful misconduct. The court did not agree with either of these views, and affirmed an award of compensation of $2.33 per week for 300 weeks, three judges dissenting.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—MOLDER CLIMBING UPON CRANE—*Bischoff* v. *American Car & Foundry Co., Supreme Court of Michigan (Mar.*

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*30, 1916), 157 Northwestern Reporter, page 34.*—George Bischoff had his right hand caught in the gear wheels of an electric crane and so badly crushed that it was necessary to amputate the greater part of it. He was a molder, in charge of a row of 25 molds, and operated a crane located above the molds. The crane could be reached only by climbing up a brace near it, or by placing a ladder for the purpose. When the crane got out of order he called a machinist whose duty it was to make repairs, and the latter went upon the crane. Neither he nor the molder spoke English well, and they did not understand each other's native language; and after a time the molder climbed up and pointed out where he understood the trouble to be. As he climbed down the ladder, and placed his hand upon a wheel, the machinery was started in some way, and the injury resulted. The industrial accident board found the facts substantially as above, and awarded the maximum compensation of $10 a week. The majority of the court, however, held that he was not injured in the scope of his employment, Judge Person saying in the opinion delivered by him:

The very thing that the claimant attempted to do was the very thing that the industrial accident board has expressly found to have been outside the limits of his employment. The finding of the board is:

"There is nothing in the occupation of a molder which would require him to go upon the crane for the purpose of repairing it should it be out of order; a machinist and an electrician being employed by appellant to make the necessary repairs. Appellee understood that he was employed as a molder, and in no other capacity."

The very thing he did do was to climb upon the crane, not for the purpose of reporting that it was out of order, but to direct the machinist in the performance of his duty.

Three judges dissented from this opinion, emphasizing a different finding of the board, as shown by the dissenting opinion written by Judge Bird, which is as follows:

The sixth finding of fact of the industrial accident board was:

"While the machinist was upon the crane looking for the trouble, appellee, not being able to make him fully understand in English, went up the ladder and got off where the machinist was to point out to him where the trouble was."

This finding of fact seems to me to be justified by the record. Claimant did not go upon the crane to repair the defect in violation of the rules. He went there merely to point out the defect which he was unable to describe in words to the machinist. To do so was to hasten the repair of the machine, which ordinarily would be to the advantage of both claimant and master. I am of the opinion that claimant's conduct should not be characterized as "intentional and willful misconduct." Neither am I of the opinion that we should hold that claimant, in going on the crane under such circumstances, was acting outside of the scope of his employment. The cases cited by Mr. Justice Person on this question were instances where the servant left his particular work and meddled with machinery with which

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he had nothing to do. The machine in the present case was operated by claimant. When it was out of repair his work stopped. He knew where the defect was; the machinist did not for the moment. In an attempt to point out the defect claimant was injured. His effort was made in furtherance of the master's business, and it should not deprive him of the award."

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—OCCUPATIONAL DISEASE—LEAD POISONING—*Industrial Commission of Ohio* v. *Brown, Supreme Court of Ohio (June 17, 1915), 110 Northeastern Reporter, page 744.*—The employee Brown contracted lead poisoning while working for the Eagle White Lead Co., and became disabled for work. He applied for compensation, and the industrial commission disallowed the claim. On appeal to the courts, the decision was in his favor in the court of common pleas and the county court of appeals.

The supreme court states that the administrative body, during the four years that the law has been in force, has so interpreted it as to preclude recovery of compensation for disease, and that the premium rates have been fixed on a basis of compensation for injuries resulting from accident only. The possibility of such serious opposition to the law as to endanger its continued existence, if the broader interpretation were given, is commented upon. Judge Nichols, who delivered the opinion, then said:

This court, with much show of logic and also authority, could construe this phrase as did the courts below. It is no difficult matter to bring within the purview of the words "personal injuries sustained in the course of employment" occupational diseases incurred in course of employment. It can be further conceded that, had the legislature, in enacting either the original or the present law, desired to make plain its intention to exclude occupational disease from participation in the fund, the exclusion could readily have been made by adding to the words "personal injuries" the qualifying phrase "by accident."

As against all this the court feels impelled to follow both the executive and legislative construction of the word "injury" as employed in this act, and to limit recovery of compensation to such as may have suffered injury otherwise than through disease, thereby giving to the legislative and executive construction the added force of judicial construction.

The court arrives at the clear legislative construction of the term by a review of the history of the law in the seventy-ninth and eightieth general assemblies, in connection with the constitutional amendment on the subject of workmen's compensation.

The history as stated is reviewed in the opinion, and the conclusion reached that the legislature had intended not to deal with the distinct subject of occupational disease at that time.



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As authorities, quotations are made from the decision of the Michigan supreme court in the case of Adams *v.* Acme White Lead & Color Works, 182 Mich. 157, 148 N. W. 485 (Bul. No. 169, p. 258), and that of the Ohio court itself in construing the original act in State *v.* Creamer, 85 Ohio 349, 97 N. E. 602 (Bul. No. 99, p. 698), and the judgment of the lower courts is reversed, thus sustaining the industrial commission in disallowing the employee's claim.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—OCCUPATIONAL DISEASE—LEAD POISONING—*Miller* v. *American Steel & Wire Co., Supreme Court of Errors of Connecticut (Apr. 19, 1916), 97 Atlantic Reporter, page 345.*—The company named appealed as employer from an award of compensation, affirmed by the superior court of New Haven County, in favor of Lewis Miller. The employee was found by the commissioner to have suffered injury, on or about March 26, 1916, consisting of lead poisoning, contracted by working in and about a room in which were molten lead, fumes arising from molten lead, and small particles of lead and its compounds. He was totally incapacitated for a short time and was awarded $7.14. The only question was as to the intent of the legislature, in enacting a law providing compensation for "personal injury arising out of and in the course of employment." The court, Judge Wheeler dissenting, held that occupational diseases are not covered by it. Judge Beach delivered the opinion, and first pointed out several difficulties which militate against the interpretation of the act as including occupational diseases. He refers to the construction of the Massachusetts act as permitting compensation for such diseases, since it mentions "personal injury," omitting the words "by accident," and without "any other qualification direct or indirect." He then points out that in the Connecticut act, section 1, part B, "such injury," for which compensation is to be paid, refers to the "personal injury" for which it is provided employers shall not be liable in a common-law action if they have accepted part B. Judge Beach's statement as to the effect of this, and the remaining portion of the opinion from this point on, are as follows:

It cannot make any substantial difference in the construction of the term "injury" as used in that context whether the words "by accident" are inserted or omitted. This is the crucial point in the literal interpretation of our act. The injury to be compensated for is not defined except by the words "such injury," meaning, as the context says, a personal injury arising out of and in the course of the employment in respect of which the employer is exempted from actions for damages in case of the mutual acceptance by employer and employee of part B, and in respect of which he is to be deprived

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of his so-called common-law defenses unless he does accept part B. The point is not merely a verbal one. The act is in form elective. In part A it takes away the employer's common-law defenses, and in part B it offers him a compensation scheme whose disadvantages are more or less nicely balanced against the alternative of facing common-law actions for damages with a crippled defense. It was quite to be expected that the compensation scheme should cover the same ground as the common-law action for damages, and the language of the act was, we think, plainly intended to accomplish that result.

Since the common-law action for damages, which was founded on the master's negligence, never attempted to cover the typical case of an occupational disease caused by continued exposure to the ordinary and known risks of the employment, the inference is plain that the alternative compensation scheme was not intended to cover such diseases. As already pointed out, the act, because of its entire omission to refer to the subject, must include all diseases arising out of and in course of the employment, or none. And, if it was not intended to cover the typical occupational disease, it was clearly not intended to cover any except such as are the direct result or natural consequence of an accidental injury.

Finally, and notwithstanding the discussion on that point contained in Hurle's Case [217 Mass. 223, 104 N. E. 336, Bul. No. 169, p. 260], the term "personal injury," as used in common speech, especially in connection with actions for damages, is more often intended to exclude disease than to include it. It is evidently not used in this act in the legal sense which would include a libel or seduction of a minor daughter, but in the popular sense of a bodily injury sustained while in the course of the employment; and in section 20 the phrase "reports of accidents" is used as synonymous with "reports of injuries."

Other language of the act also lends countenance to the view that the injuries contemplated by the act were those resulting from a definite occurrence which could be located in point of time and place. Section 7, as amended (Acts 1915, c. 288), provides that "any employee who has sustained an injury in the course of his employment shall forthwith notify his employer." Dependency is to be determined as of the time of the injury, and not as of the time of the resulting incapacity. The average weekly wage is to be calculated with reference to the "twenty-six calendar weeks immediately preceding that during which he was injured." Compensation for fatal injuries is given only when death results within two years "from date of injury." The notice required by section 21, as amended in 1915, must be given within one year from the date of the injury, and state "in simple language the date, place, and nature of the injury." These are some of the statutory conditions upon which the compensation or its amount is made to depend, and they are not workable on the assumption that the word "injury" was intended to include disease, because it is notorious that the typical occupational disease is not an injury which can be said to have been "sustained" at a given date. If for the purpose of escaping this difficulty it is attempted to substitute the date of the incapacity for the date of the injury, it will be necessary to repeal and reconstruct a considerable portion of the act.

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It may be said that in point of logic occupational disease is as proper a subject for compensation as industrial accident. Upon that point we express no opinion, except such as we have already intimated. It is certain, however, that the opinions to-day on that subject are more advanced than those of 1913, and that occupational disease was generally recognized, and by the same general assembly specifically recognized, as a subject presenting its own separate problem. The workmen's compensation act was our first legislative experiment in substituting collective justice, regardless of fault, for justice between individuals based upon compensation for legal wrong; and it may be doubted whether the General Assembly of 1913 could have been pushed to the point of including occupational diseases in that experiment. That, however, is not the question before us. We have only to determine whether the general assembly, notwithstanding its failure to expressly include the important subject of occupational diseases in that act, intended to include it under the words "personal injury arising out of and in the course of the employment," and for the reasons indicated we infer that it did not so intend.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PLAYFUL ASSAULT BY FELLOW WORKMAN—*Coronado Beach Co. et al.* v. *Pillsbury et al., Supreme Court of California (June 7, 1916), 158 Pacific Reporter, page 212.*—Harry Flint, an employee of the company named, was injured, and compensation was awarded to him by the industrial accident commission. The company appealed on the ground that the injury did not arise out of the employment. Flint was particularly susceptible to tickling, and another workman punched him on the back as he was going down a flight of stairs with a full bucket, causing him to make a sudden movement, fall, and injure one knee. The court adopted the view of the company, and annulled the award of compensation. Judge Melvin delivered the opinion and said in part:

That the act of his fellow servant was but momentary and without malice, and not in excess of the usual intercourse between servants, makes no difference. Suppose the fellow employee had tripped him up, intentionally but playfully; would anyone contend that the employer was liable because his servants (perhaps entirely without his knowledge) had established a custom of tripping one another? We can not see how this assault differed from any other. We can not see that it is our duty to measure the dynamics of assaults and to hold that the master must be charged with foreseeing and insuring against those which are playfully intended and which may be sanctioned by a custom existing among his servants.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PLAYFUL ASSAULT BY FELLOW WORKMAN—*Fishering* v. *Pillsbury et al., Supreme Court of California (June 7, 1916), 158 Pacific Reporter, page 215.*—F. E. Fishering was em-

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ployed in a store in which were kept, among other things, toys. A fellow employee took a "trick camera," pointed it at him, and quickly touched the button, causing a spring to be ejected from the camera. This struck Fishering in the eye and destroyed the sight. The industrial accident commission refused compensation, and this decision was affirmed by the court, the ground being that the injury did not arise out of the employment. The principle of the case of Coronado Beach Co. *v.* Pillsbury (see 158 Pac. 212, above), was relied on, and it was said that the principle of an English case in which compensation was granted to a locomotive engineer injured by a stone thrown by a small boy did not apply here, because the young man whose action caused the injury in this case was not in the same class with the child in the case referred to.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PLAYFUL ASSAULT BY FELLOW WORKMAN—*Pierce* v. *Boyer-Van Kuran Lumber & Coal Co., Supreme Court of Nebraska (Feb. 5, 1915), 156 Northwestern Reporter, page 509.*—The plaintiff was in the employ of the company named as a teamster, and was struck in the eye by a small stick playfully thrown by a fellow employee, one Brown, causing an injury which destroyed the sight. Brown had jumped into the wagon shortly before, and the men had scuffled; after leaving the wagon Brown picked up and threw the stick. There was evidence that after Brown left the wagon, and before he threw the stick, Pierce tried to strike him with the lines; but on the plaintiff's part it was claimed that he attempted to avoid the fooling entirely. The court considered the facts and the English and American decisions. It quoted from the opinion of the Supreme Court of New Jersey in Hulley *v.* Moosbrugger, which awarded compensation to the dependents of an employee killed by a fall caused by dodging a playful blow of another, and the opinion of the court of errors and appeals of the State in the same case (95 Atl. 1007, Bul. No. 189, p. 279), reversing the award and holding squarely that injuries resulting from "horseplay" could not be compensated. Judge Sedgwick, who delivered the opinion in the present case, said that as the English courts had construed the language of the statute many times before its adoption here, the legislatures of the States adopted it with an understanding of the interpretation placed upon it, which barred compensation under such circumstances, whether or not the employee injured was at fault in provoking the assault.

Upon another point the court held that under the statute a court can not commute payments to a lump sum without the consent of the parties.

The judgment of a district court making an award to the plaintiff was reversed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—RENDERING SERVICE—*Ocean Accident & Guarantee Co. et al.* v. *Industrial Accident Commission of California et al., Supreme Court of California (Sept. 8, 1916), 159 Pacific Reporter, page 1041.*—The workmen's compensation act of California provides that compensation shall be paid for the injury or death of an employee where, at the time of the accident, he is performing services growing out of and incidental to his employment, and is acting within the course of his employment. In this case compensation was awarded by the commission to the dependents of William J. Slattery, who was the engineer of a tugboat owned by the Borzone Fish Co. He went ashore at a time when the tug was moored away from its usual place, so that those going to and from it had to cross two steamers. In the early morning he attempted to return, crossed the two steamers and found that the tug was not there. He shouted and was answered by the captain, who said to him, "Come on over here." He started to go back over the steamers, fell between them and was drowned. The court, examining the language of the statute and many decisions, held that no compensation should be granted, and annulled the award, Judge Henshaw in the opinion saying:

It is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACT OF PERSONAL CONVENIENCE—*Mann* v. *Glastonbury Knitting Co., Supreme Court of Errors of Connecticut (Jan. 27, 1916), 96 Atlantic Reporter, page 368.*—Compensation was awarded Albert B. Mann by a compensation commissioner, but the award was set aside by a superior court. Mann attempted to place a bottle of tea in a hot-air pipe discharging into the drying room. The bottle hit a fan in the pipe, and injury was inflicted resulting in the loss of a part of the first finger of the left hand, and the whole of the other fingers. As the place where he inserted the bottle was not the customary one, the supreme court held on appeal that the injury did not arise out of the employment, and rendered a decision in agreement with that of the superior court. Judge Beach delivered the opinion of the court, from which the following is quoted:

On this particular occasion the claimant, to quote the language of the commissioner, "instead of placing his bottle at the mouth of

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the pipe in the dry room, went around and attempted to place it inside the pipe through the door hereinbefore described, not knowing that inside the pipe was a revolving fan." We think it is quite clear that the master's assent to the custom of heating bottles in the dry room at the mouth of the pipe can not reasonably be said to involve his assent to the claimant's act of going into another room and attempting to put his bottle inside of the hot-air pipe through a door which led to a revolving fan. The finding of the commissioner does not contain any facts which tend to show that the master ought reasonably to have expected the claimant to do this; and, in the absence of any such findings of fact, we think there was nothing from which the commissioner could reasonably conclude that the employer had, in effect, assented in advance to the performance of the act which caused the claimant's injury.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WATCHMAN MISTAKEN BY OFFICERS FOR ROBBER—*In re Harbroe, Supreme Judicial Court of Massachusetts (Mar. 2, 1916), 111 Northeastern Reporter, page 709.*—This was a proceeding by the dependents of William A. Harbroe to recover compensation for his death, opposed by the insurance company, which appealed from an award to the claimants. The employee was night watchman for the Furst-Clark Construction Co., which was engaged in work on the Cape Cod Canal; he was employed to protect their property which lay on both sides of the tracks of the New York, New Haven & Hartford Railroad Co., which crosses the canal by a bridge. At 3 a. m. on October 9, 1914, Hart, a deputy sheriff, being notified that a post office in the vicinity had been robbed, started in pursuit of the robbers, accompanied by his brother. The operator of the bridge mentioned was one Trench, and he notified Hart that the robbers had just crossed the bridge. Near the construction company's office the officers saw Trench and Harbroe, and in the darkness and fog the parties mistook each other for the robbers. There was some evidence that the officers fired first, and ordered that the others hold up their hands; at any rate both parties opened fire, and Harbroe was fatally injured.

The court first took up the question of serious and willful misconconduct, and determined that the conduct of Harbroe did not constitute such misconduct, as he thought he was defending himself from desperate criminals. As to the injury being in course of employment the court pointed out that it occurred during working hours and in the path between the buildings, where he might be supposed to go as a part of his employment, and that he may have been on the way to some other part of the plant. There was therefore held to be evidence to support a finding that the injury did arise in course of employment, and so this question also was resolved

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in favor of the claimants. On the question whether it also arose out of the employment, however, the court held that the finding below was not warranted, reversed the decree, and ordered one for the insurer instead. After discussing the principles governing the determination of this problem, and the authorities, Judge De Courcy, who delivered the opinion, said:

The question we have to determine is whether in the case at bar there was evidence upon which the board could find that Harbroe's death arose out of a special risk incident to the performance of his duties as night watchman. There was no evidence that this property ever had been injured by wrongdoers, or that from its character or location it was especially exposed to theft or harm at the hands of trespassers. He was not shot while protecting his employer's property from thieves. At the time of this accident the property was in no way threatened, nor did Harbroe suppose it was. And he was not fired upon because he was the watchman in charge. The injury might quite as well have been suffered by any person who happened to be in the locality, whether employed by the construction company or not. Further, though Harbroe mistakenly believed that the two approaching figures were "yeggmen," they were in fact an officer of the law and his assistant, who were in the performance of their duty, seeking to apprehend the men who recently had robbed the post office. The injury which they inflicted was the result of an unfortunate misapprehension on their part (to which Harbroe himself unwittingly contributed), and can not reasonably be said "to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence." (Reithel's Case, 222 Mass. 163, 109 N. E. 951 [Bul. No. 189, p. 274].) As was said in Madden's Case, 111 N. E. 379 [below]:

"The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery."

We are constrained to say that there was no evidence to support the finding that the employee's injury "arose out of" his employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WEAK HEART INJURED BY OVEREXERTION—CONSTITUTIONALITY OF STATUTE—*In re Madden, Supreme Judicial Court of Massachusetts (Feb. 7, 1916), 111 Northeastern Reporter, page 379.*—Honora E. Madden was awarded compensation by the industrial accident board, which found that she had received a personal injury "aggravating and accelerating a weak heart condition to the point of total incapacity for work." It appeared that her work was repairing bad spots in the weaving of rolls of carpet, and that it was necessary to pull the carpet along over a table, which required considerable exertion. While doing this work she felt a sensation as of something "giving way," and had to be taken to the hospital. The court upheld the decision of the board. It reviewed

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the English decisions, concluding that if the words "by accident" had been omitted in the British act compensation would have been granted in the cases considered, and also considered the Massachusetts decisions on the subject. As to the matter of condition of health, Judge Rugg, who delivered the opinion, said in part:

There is nothing said about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the amount of relief to be afforded. It has no more to do with it than his lack of ordinary care or the employer's freedom from simple negligence. It is a most material circumstance to be considered and weighed in ascertaining whether the injury resulted from work or from disease. It is the injury arising out of the employment and not out of disease of the employee for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employee in his condition of health and not what that hazard would be if acting upon a healthy employee or upon the average employee. The act makes no distinction between wise and foolish, skilled or inexperienced, healthy or diseased employees. All who rightly are describable as employees come within the act.

That a causal connection between the employment and the injury must be shown is clearly stated, as appears from the following quotation:

It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made.

The contention that as interpreted the statute is unconstitutional as taking away the employer's property for injuries for which he is in no way responsible, directly or remotely, is shown to be invalid, since the act is elective.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—ACCIDENT—BREWERY AGENT SHOT ON ROUTE IN DANGEROUS LOCALITY—*Schmoll* v. *Weisbrod & Hess Brewing Co., Supreme Court of New Jersey (May 24, 1916), 97 Atlantic Reporter, page 723.*—Lena F. Schmoll, administratrix, was the plaintiff in proceedings for compensation for the death of a route foreman in the employ of the company named. His duty was to look after the beer delivery routes, and on Saturdays to personally make deliveries and collect money. On December 19, 1914, while returning to his wagon after making a delivery in a dwelling house in Atlantic City, he was assaulted and shot by an unknown person. He reported to the office and turned over the money collected, then went to the hospital and eventually died from the wounds. The trial judge found

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that the territory in which the employee made his deliveries and collections was known to the police department as one where drunkenness, assaults, and murders occur more frequently than in any other part of the city, and where persons who commit robbery resort. He therefore concluded that Schmoll's death was the result of an accident arising out of and in the course of his employment, and gave judgment for the plaintiff. This the supreme court reversed, Judge Kalisch, who delivered the opinion, saying in part:

We do not think that the character of the place where the attack was made upon the deceased under the testimony of this case is of any particular significance, since it does not appear that the employer had any notice or knowledge of the danger of the locality. The proof in the case went no farther than to tend to establish that the police department had such knowledge.

That being the case the employer ought not to be chargeable with any risk which the place where the work was to be performed entailed by reason of some peculiar and extraordinary situation existing there, unless it was made to further appear that he was aware of such added risk.

If it had appeared by the testimony in this case that the attack that was made upon the deceased had for its object robbery, then it would have been clearly immaterial whether such attack was made in a lawless or a law-abiding district.

In the present case the testimony utterly fails to show any motive for the attack upon the deceased. The assailant of the deceased was unknown. His motive in making the attack was also unknown. No robbery or attempt at robbery was shown. The person who shot the deceased might have shot him out of revenge for some fancied wrong, or by mistake or by accident. There was no proven fact or circumstance before the court below that connected the shooting either directly or indirectly with the employment of the deceased, either as driver or collector.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—BARTENDER STRUCK BY GLASS THROWN BY DRUNKEN MAN—COMMUTATION TO LUMP SUM—*State ex rel. Anseth* v. *District Court of Koochiching County et al., Supreme Court of Minnesota (July 7, 1916), 158 Northwestern Reporter, page 713.*—John B. Tubbs was a bartender for James Anseth in a saloon in the city of International Falls. In July, 1915, while he was engaged in his duties, a drunken patron of the saloon threw a heavy drinking glass, which struck Tubbs in the right eye and destroyed its sight. Compensation was awarded by the district court, and on appeal by the employer, the award was modified and affirmed. Judge Bunn delivered the opinion, and first reviewed the evidence and expressed the conclusion that it supported the finding that the missile was not thrown in the course of an altercation between the customer and the bartender, but that the former was so drunk that he did not know the nature of

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the act he was doing. As to the accident arising out of the employment the opinion says in part:

Did this accident "arise out of" Tubbs's employment as bartender? Did this employment necessarily accentuate the natural hazard from assault to which all men are subject? In other words, did his employment cause a special degree of exposure to the risk? We have no hesitation in answering these questions in the affirmative. The court will take judicial notice that the position of bartender, patron or spectator in a saloon, especially in one situated where rough characters are apt to congregate and carouse, is quite apt to be one of peculiar danger. Barroom assaults are not of infrequent occurrence.

We hold that the accident in the case at bar was one arising out of the employment.

The act provides, in case of loss of an eye, for the payment of 50 per cent of wages for 100 weeks. The present employee earned $20 per week, and was therefore entitled to $10 weekly. The court below awarded $1,000 in a lump sum. The supreme court, examining the applicable provisions, held that a lump sum can only be given by consent of the parties, without the consent of the court when the injuries are less serious, and with its consent in the case of specified injuries. It also held that a commutation, when made, should be for the present worth of the payments; and that the award of $150 for medical services must be reduced to $100, the limit mentioned in the act. Modifying the award to one of $10 per week for 100 weeks plus $100 for medical services, the court affirmed it.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—DRIVER OF EXPRESS WAGON, ON FOOT DELIVERING PACKAGE—*Miller et al.* v. *Taylor, Supreme Court of New York, Appellate Division, Third Department (June 30, 1916), 159 New York Supplement, page 999.*—Priscilla Miller instituted proceedings to obtain compensation for the death of her husband, Clarence R. Miller, against George A. Taylor, president of the American Express Co., which had been his employer. Miller was the driver of an express wagon, and on December 2, 1915, while crossing a street on his way from his truck to deliver an express package, he was struck by an automobile and received fatal injuries. The operation of vehicles is a hazardous employment under the law, but it was contended that the injury did not arise out of this employment. An award to the claimant was affirmed, Judge Lyon, who delivered the opinion, saying in part:

Concededly the injuries were received by the deceased in the course of his employment. The defendant contends, however, that the injuries did not arise out of the employment, and cites in his brief, as justifying such defense, the cases of Newman *v.* Newman, 113

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N. E. 332. [See Bul. No. 189, p. 278, for this decision in lower court, affirmed in case cited. Other cases are cited at this point.]

In the Newman case the deceased had put up his horse and wagon several hours before receiving the injury, and was making the delivery on foot, entirely independently of the use of his horse and wagon, and not as an incident of the operation on the street of a vehicle, as in the case at bar, and hence was not engaged in one of the hazardous employments specified in the workmen's compensation law.

The act of deceased in leaving his vehicle and delivering the express packages on foot was a necessary incident of the operation of the vehicle as an express delivery car, and so doing was within the scope of his employment. In the recent case of Dale *v.* Saunders Bros. (218 N. Y. 59, 112 N. E. 571), Judge Pound, in citing the Costello case said:

"The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team."

I think the award was clearly right, and should be affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—DRIVER STEPPING ON RUSTY NAIL WHILE GETTING UPON WAGON—*Putnam* v. *Murray et al., Supreme Court of New York, Appellate Division, Third Department (Sept. 13, 1916), 160 New York Supplement, page 811.*—The State industrial commission awarded compensation to Catherine Putnam for the death of an employee of Fred Murray. The employee was a driver in the teaming and trucking business, and while engaged in collecting dirt from the streets of Syracuse, had stepped upon a board containing a rusty nail as he was getting into his cart. The nail penetrated his foot and tetanus and death resulted. Judge Lyon, in the opinion affirming the award, said in part:

The defendants challenge the correctness of the conclusion that his injuries arose out of his employment, and cite in support of their contention the cases of Newman *v.* Newman, 113 N. E. 332 [affirming decision noted in Bul. No. 189, p. 278], and De Fillippis *v.* Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761 [Bul. No. 189, p. 278; British cases also cited]; and the defendants contend that there can be no liability, as the accident arose from a common risk, to which any person was equally exposed who happened to travel that way on foot, without regard to the nature of his employment.

The general distinction between the cases cited and the case at bar is that in the former it was held that the injuries were not received while the employee was engaged in one of the hazardous occupations specified in the workmen's compensation law, or in doing an act incidental thereto. In the case at bar the deceased was engaged in the operation on streets of a wagon drawn by horses, which was concededly a hazardous employment under group 41. His duties were not limited to simply driving his team. They included, also, the loading of his wagon. (Costello *v.* Taylor, 217 N. Y. 179, 111 N, E. 755 [see p. 276]; Dale *v.* Saunders, 112 N. E. 571 [see p. 273].)

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The commission has found that one of the duties of deceased was going about the streets, shoveling dirt into his wagon. One of the necessary incidents of driving about the streets was getting on and off his wagon. While the danger of stepping on the nail may be said to have been common to all persons using the street, an injury therefrom to a mere passer along the street, not engaged in a hazardous employment, or in the performance of an act incidental thereto, would probably not afford a right to compensation under the act. The hazardous employment of the deceased required his continued presence upon the street in the discharge of the duties of his employment. The mere fact that a person not engaged in a hazardous employment was exposed to the danger of a similar injury, should he chance to travel that way, furnishes no argument for a denial of the right of compensation to a person whose hazardous employment compelled his constant presence on the street.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—EVIDENCE—*In re Sanderson's Case, Supreme Judicial Court of Massachusetts (June 30, 1916), 113 Northeastern Reporter, page 355.*—Proceedings by Fannie E. Sanderson for the death of her husband, Willis C. Sanderson, were opposed by the company carrying the insurance of his employer, one Black. The employee was a plumber's assistant and had gone from South Deerfield, Mass., to Whately, 4 miles distant, with a horse and wagon of his employer, to do some work in a dwelling house. He left the house about 5 p. m., January 22, 1913. He was seen on the road, apparently in a normal condition, by one Connelly, who five minutes later came upon his unconscious body in the road, the horse being some distance away and moving. Sanderson's head was cut and bruised, and there was a hemorrhage in the ventricles of the heart, which physicians testified caused death. The industrial accident board and the superior court of Suffolk County affirmed the finding of a committee of arbitration that the hemorrhage was caused by a fall from the wagon, which was in turn caused by the sudden starting of the horse. The award of $2,025 to the widow was, however, reversed, the supreme judicial court holding that there was not sufficient evidence to warrant a finding that the death was the result of an injury arising out of the employment. Judge Crosby said in delivering the opinion:

We are of opinion that the dependent has failed to sustain the burden of proof by showing that the employee received an injury which arose out of his employment and resulted in his death.

There seems to be an entire absence of evidence to show that the hemorrhage was caused by the fall from the wagon. It could have been found that the blow upon the head was sufficiently severe to have caused the hemorrhage, but there is no evidence to show that such injury did produce the hemorrhage. In other words, a finding that the hemorrhage preceded the fall and caused the employee to fall from the wagon is as consistent with the evidence as is a finding that the hemorrhage was caused by the fall.

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So far as the record discloses, no one saw the deceased that day while he was in the wagon on the highway, except Connelly, who saw him driving along, and about five minutes afterwards found him lying in the roadway in an unconscious condition. There is an entire absence of evidence to show how he got out of the wagon. The industrial accident board finds that "he was thrown from the wagon by the sudden moving or starting of the horse"; the reason given for this conclusion being based upon the place where the body was found and its position upon the road. We are of opinion that such evidence would not warrant a finding that the deceased was thrown from the wagon by the sudden starting of the horse. There is no evidence whatever that the horse did so start.

Many conjectures could be made as to the cause of the fall of the deceased, if he did fall. He might have fallen while standing up in order to wrap the blanket around him; he might have accidentally dropped his reins and lost his balance while leaning forward to pick them up; the horse might have shied; he might have fallen from weariness or sleepiness; or, as the insurer contends, he might have had an apoplectic seizure which produced the cerebral hemorrhage and caused his fall.

It is plain that if the hemorrhage was due to natural causes, and was not produced by the fall, it could not be found to be an injury arising out of the employment.

It is plain that the inference drawn by the industrial accident board from the evidence, that the hemorrhage followed the injury and resulted therefrom, is based merely upon surmise, speculation, and conjecture, and does not rest upon a foundation of proof by a preponderance of the evidence. It may be the dependent is correct in her contention that the death of the employee was due to a fall from the wagon, but other theories and conjectures are quite as probable. [Cases cited.]

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—INSURANCE AGENT RIDING IN AUTOMOBILE WITH PROSPECTIVE CUSTOMER—*Hewitt* v. *Casualty Co. of America, Supreme Judicial Court of Massachusetts (Sept. 14, 1916), 113 Northeastern Reporter, page 572.*—Rollo Hewitt proceeded against the John Hancock Mutual Life Insurance Co., for which he was an agent, and the casualty company, its insurer. Hewitt accepted the invitation of one Pierce, with whom he had several times talked over the matter of life insurance, to ride from Taunton, Mass., their home, to Providence, R. I. Owing to a breakdown necessitating repairs they remained overnight, and in returning the automobile turned turtle and both men were injured. During the evening previous to the accident Pierce decided to take out a policy. The superior court of Suffolk County decreed an award of compensation, but this was reversed, the supreme court holding that the injury did not arise out of the employment. In the course of the opinion Judge Pierce said:

In the prosecution of the business of soliciting insurance Hewitt was independent. While authorized and expected to go where there

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was any reasonable prospect of securing a customer, his time and his method of procedure were his own. He might travel on foot, on horseback, by trolley, train, or automobile. He might write, telephone, or telegraph. He was wholly free as to time, place or weather. Under such circumstances, where one accepts an invitation to ride an injury received is not "occasioned by the nature of the employment."

The danger incident to the use of an automobile is not a "causative danger" "peculiar to the work," but is a risk which is common to all persons using one. The injury can not be said reasonably to have been contemplated as the result of the exposure of the employment. [Cases cited.]

It becomes unnecessary to decide whether Hewitt was an employee within the meaning of the workmen's compensation act.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—PLAYFUL ASSAULT OF FELLOW WORKMAN—*Federal Rubber Co.* v. *Havolic et al., Supreme Court of Wisconsin (Feb. 1, 1916), 156 Northwestern Reporter, page 143.*—The industrial commission awarded compensation to John Havolic, which was confirmed by the circuit court, whereupon the employer appealed to the supreme court. Havolic was an employee of the rubber company, and in the room where he worked was a compressed-air system with hose and nozzles, with which in his work he had nothing to do. At the close of the day's work he took down a nozzle and proceeded to blow the dust from his clothes. This was forbidden by a rule, but the practice was common, and there was proof that it was acquiesced in by the foreman. While the employee was so engaged, another workman took the nozzle from his hands and as a practical joke applied it to Havolic's body, causing injuries which necessitated treatment in the hospital for several weeks and a disability of 17 weeks. The court left undecided the question whether an injury arising while cleaning the clothing might have been considered as arising out of the employment, but held that the result of such "inexcusable and revolting horseplay" could not by any means be so considered, and reversed the judgment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—TAKING POISON BY MISTAKE FOR MEDICINE—*O'Neil* v. *Carley Heater Co. et al., Court of Appeals of New York (June 16, 1916), 113 Northeastern Reporter, page 406.*—The proceeding of Mary E. O'Neil for compensation for the death of her husband was opposed by his employer, the company named, and its insurer. The company was installing machinery for another company, and an employee of the latter told O'Neil, who was suffering from some illness, to take some Epsom salts, and informed him where a large quantity of these were stored in the factory. O'Neil by mistake

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took some chloride of barium, which almost immediately caused his death. An order of the appellate division of the supreme court affirming an award of compensation was reversed on the ground that the accident did not arise out of the employment. Judge Hiscock for the court said in part:

The findings do not indicate that his illness in any manner resulted from his employment, or, even if it did, that his employer as an incident to or condition of such employment had undertaken to supply medical attendance or medicines in ministering to such an illness as this was; it not being of an emergent character. The employer had done nothing to authorize or induce the decedent to take the poison on the supposition that it was something which he needed or which would be beneficial to him. Decedent's illness and his attempt to minister thereto were not ordinary and natural incidents to his employment. On the contrary, it is found that decedent's mistake was the result of his voluntary action, induced by the advice of one who was not even in the employment of his employer, but legally was an utter stranger thereto. It was an employee of the company for which decedent's employer was working who persuaded or advised him to take the medicine, and who guided him to the place where, instead of taking such medicine, he obtained the poison which caused his death.

The case is clearly distinguishable from those where an employee, seeking to do something which was inevitably connected with his employment and an incident thereto, as obtaining a drink of water, had been injured by foul water which he might have been expected to drink; or by some poisonous liquid placed at a point where it might reasonably be mistaken for drinking water.

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WORKMEN'S COMPENSATION—INJURY AS PROXIMATE CAUSE OF DEATH—WILLFUL MISCONDUCT—*Ramlow* v. *Moon Lake Ice Co. et al., Supreme Court of Michigan (July 21, 1916), 158 Northwestern Reporter, page 1027.*—William Ramlow was an employee of the company named, who on June 3, 1914, while attempting to remove a burr from the axle of a wagon, slipped and fell, breaking both bones of his right leg. He was taken to the hospital and the leg set. On the evening of the 5th delirium tremens set in, and he died on the following morning. His widow, Myrtle Ramlow, applied for compensation, which was granted by the industrial accident board at the rate of $6.40 per week for 300 weeks. On appeal it was contended that the disease, and not the injury, was the cause of death. The preponderance of medical testimony was that the delirium tremens was caused by the injury and the shock arising therefrom, and that such a result was common where the patient was a user of intoxicating liquors. The court sustained the award of the board, Judge Bird in the opinion saying in part:

The fact that his system had been so weakened by his intemperate habit that it was unable to withstand the effects of the injury does

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not thereby shift the proximate cause of death from his injury to his intemperate habit. We are of the opinion that the finding of the board upon this question should not be disturbed.

A further contention is made that the conduct of Ramlow was unreasonable, amounting to willful and intentional misconduct. This is based upon the claim that deceased, when asked by his attending physician if he was an alcoholic, replied that he was not; that, had he answered truthfully that he was, the treatment would have been different, and the attack might have been averted. There is nothing in the record to show that the deceased understood to what extent a person must be addicted to the use of intoxicating liquors to become an alcoholic, neither is there anything to show that he knew that the question propounded had any bearing upon the treatment of his injury. We can not say as a matter of law that the record discloses any willful or intentional misconduct concerning his answer to the doctor's question.

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WORKMEN'S COMPENSATION—INJURY AS PROXIMATE CAUSE OF DISABILITY—EVIDENCE—CONSTITUTIONALITY OF STATUTE—*Frey* v. *Kerens-Donnewald Coal Co., Supreme Court of Illinois (Dec. 22, 1915), 110 Northeastern Reporter, page 824.*—James Frey was a miner in the employ of the company named, and both had elected to be governed by the provisions of the workmen's compensation act. On November 22, 1912, he was knocked down and injured by a mine prop. The company paid him compensation at the rate of $1.42 per day for about a year up to November, 1913, amounting to a little less than $500. On cessation of these payments the employee applied for arbitrators, and they, and afterward, in November, 1914, the circuit court, decided that compensation should be paid the claimant at the rate of $12 per week until a total of $3,500 was reached, the arrears to be paid forthwith. The company brought the case by writ of error to the supreme court, alleging two grounds for reversal, stated in the opinion as follows:

(1) That there is no evidence in the record sufficient to justify the award of compensation to the plaintiff upon the ground that he was injured while in course of employment, because his paralysis was not due to his said injury; (2) That said act of 1911 was never legally passed by the general assembly, because the bill, with its amendments, was not printed, as required by the constitution, before its final passage in the house.

It appeared from the plaintiff's testimony that the prop struck him on the side of the head and knocked him about 15 feet against a rib of coal, fracturing his skull; but that he worked regularly for 7 or 8 days thereafter, until on Sunday morning he became unable to walk and was put to bed; that he was taken to a hospital and operations performed on his skull, but his right side was paralyzed, no improvement having been shown from a time three months after the accident to the



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time of the trial, two years after its occurrence. The testimony of three physicians was that the paralysis was due to the blow. The court held that this evidence was sufficient, Judge Duncan saying:

The foregoing evidence amply sustains the findings of the court. The defendant offered no evidence to contradict the four witnesses aforesaid, and they are all the witnesses who testified on this branch of the case.

On the second point the court said that if any portion of the house journal was introduced, the entire record of the bill in that branch should have been put in. It stated, however, that a previous decision had been made that the journal contained evidence that the bill had been printed before final passage, and that the act had been legally passed, in the case of Dragovich *v.* Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999 (Bul. No. 189, p. 267). The judgment of the circuit court was therefore affirmed.

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WORKMEN'S COMPENSATION—INJURY AS PROXIMATE CAUSE OF DISABILITY—NEGLIGENT SURGICAL TREATMENT—*Ruth* v. *Witherspoon-Englar Co., Supreme Court of Kansas (May 6, 1916), 157 Pacific Reporter, page 403.*—James H. Ruth recovered judgment for $4,509.20 under the Kansas Workmen's Compensation Act against the company named. The amount of this judgment indicated that it was for disability for the full period of 8 years. Ruth had received an injury consisting of a broken thigh, admittedly in the course of employment. Surgical treatment was furnished by the employer and, the leg uniting in such a way as to leave it three inches shorter and useless, Ruth also brought a suit against the physician and the company for negligence in the treatment. The court reversed the judgment in the compensation case, holding that in such an action recovery can be had only for the direct result of the injury. As to this Judge Mason, in the opinion, said in part:

Liability under the compensation act can not be made to depend upon the degree of care exercised. A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing, but on the theory that it should be treated as a part of the ordinary expense of operation. So much of an employee's incapacity as is the direct result of unskillful medical treatment does not arise "out of and in the course of his employment" within the meaning of that phrase as used in the statute. For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTIES—CONSTITUTIONALITY OF STATUTE—*Grand Rapids Lumber Co.* v. *Blair et al., Supreme Court of Michigan (Mar. 30, 1916), 157 Northwestern*

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*Reporter, page 29.*—Herman Spinner received compensation in the amount of $903.50 from the lumber company named for an injury received by him, caused by a pair of mules he was driving colliding with a switch engine of the Pere Marquette Railroad Co., of which Blair and others were receivers. The lumber company sued the receivers of the railroad company for reimbursement under section 15, part 3, of the compensation act, which is as follows:

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 employer 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 employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person.

The trial court directed a verdict for the defendants on the ground that the law is unconstitutional as depriving of the right of trial; but on appeal the act was held constitutional, the judgment reversed and a new trial granted. The following from the opinion of Judge Steere shows the interpretation of the paragraph above quoted:

We think the closing portion of the paragraph under consideration clearly means that in an action against a third party to whose negligence a workman's injury is imputed, proof of the amount of compensation the employer paid the workmen under the act, either by agreement of the parties, approved by the board, or by order of the board under and as provided for in the act, is prima facie evidence of plaintiff's damages, which the defendant is at liberty to meet and overcome, if able by any competent evidence showing that the same is unreasonable, not paid under or in accordance with the act, or not approved nor authorized by the board. So construed, we find the act constitutional.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—EFFECT OF RELEASE—*Woodward* v. *E. W. Conklin & Son (Inc.) et al., Supreme Court of New York, Appellate Division, Third Department (Mar. 8, 1916), 157 New York Supplement, page 948.*—James C. Woodward was injured while in the employ of the company named. He was a mule driver, and was injured while driving across the tracks of the Binghampton Railway Co. He executed a release to the railway company without consideration, and afterwards elected to take compensation under the act. An award having been made by the industrial commission against the employer's insurance carrier, the latter cited the release as a defense. The court held that, under section 29, providing for subrogation of the party liable for compensation to the rights of the employee against the third party, unless the party liable for compensation had agreed in writing to a settlement

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between the others, the release was of no effect upon the rights. The award was therefore affirmed, Judge Cochrane, in delivering the opinion, saying in part:

Clearly a compromise or release by an employee of his cause of action against a third party is ineffectual against the insurer without the written approval of the latter. The release in such case constitutes no obstacle in the way of the insurer prosecuting the assigned claim against the third party. One of the primary purposes of the statute is to protect the employee against his own improvidence, weakness, ignorance, or shortsightedness in compromising his claim for injuries; and a reciprocal advantage or protection to the insurer is given in the form of a claim against any third party negligently causing the injury, which can not be destroyed by the act of the injured party without the written approval of the insurer. When a third party takes a release or settles a claim, he does so with full knowledge of this statutory requirement that the compromise shall have the written approval of the person or corporation liable for compensation under the act, and that without such approval such release or compromise may not be asserted against the person or party whose approval is thus required; and the statute, while protecting the workman, does so without sacrificing or prejudicing the rights of either the insurer or the third party. The latter can not be placed in any less favorable position, because whatever he pays he can not be called upon to pay again; but, if he compromises for less than his actual liability, he remains liable to the insurer for such excess up to the amount allowed under the act unless the latter has consented in writing as the statute provides for the compromise at the less amount.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF REMEDIES—*Barry* v. *Bay State Street Railway Co., Supreme Court of Massachusetts (Jan. 8, 1916), 110 Northeastern Reporter, page 1031.*—While in the service of an employer who was a subscriber under the workmen's compensation law, James J. Barry was injured. He entered into an agreement under the compensation law, and afterwards brought action against the street railway company named, claiming that the injury was caused by its negligence. He was successful in the superior court of Suffolk County, when the company alleged exceptions, their principal contention being that the plaintiff had accepted weekly payments and a settlement of the amount of compensation due from the insurer of his employer, a memorandum of which, signed by the employee and the insurer, had been filed with and approved by the industrial accident board, and this was declared to be an election which prevented his bringing suit, since the statute provided that in such a case the insurer should be subrogated to the employee's right of action. The employee testified that his signature to the first receipt for compensation and agreement as to the amount to be paid was procured by false representations on the part of the

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employer's paymaster, who assured him that the agreement entered into would not affect his right of action against the railway company. He did not claim misrepresentation with respect to the other papers which he signed, including the final memorandum, and it was conceded that he was not illiterate, and that the documents contained full reference to the workmen's compensation act. The court reversed the decision below and sustained the company's exceptions, Judge Braley, who delivered the opinion, saying in conclusion:

The right [of election] under our statute is exercised when with the approval of the board a settlement is made and compensation thereunder is received during disability. The remedies can not be pursued concurrently and the choice postponed until judgment has been recovered and then upon tender to the insurer of the amount received the employee collects the judgment. (St. 1911, pt. 3, sec. 15.) The plaintiff, who upon his own evidence was bound to know the contents of all the papers after the first signed without protest, remained silent, and did not expressly repudiate the settlement until the coming in of the answer. He, moreover, availed himself of the benefits during disability, which seems to have terminated with the final payment made 42 days after the present action was brought. We are unable under such circumstances to accede to his contention, that the jury were to decide whether he was precluded by the proceedings. The rules of law applicable to executed contracts and to the doctrine of equitable estoppel have not been abrogated, and the insurer having acted in good faith and fully complied with the requirements of the statute should not be deprived of its rights. [Cases cited.]

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF REMEDIES—*Miller v. New York Railways Co., Supreme Court of New York, Appellate Division, Second Department (Jan. 21, 1916), 157 New York Supplement, page 200.*—This was a suit by George Miller against the company named as a third party liable for injuries suffered by him while employed by another. The company maintained that the suit was barred by the fact that the plaintiff had already received compensation from his employer, under the compensation law of the State, and this view had been adopted by the court below and judgment rendered in its favor. This was affirmed on appeal to the appellate division, Judge Jenks, who delivered the opinion, saying, in part:

This action is for negligence whereby plaintiff was personally injured. The sole question presented is whether the defendant, who was not the master, can plead as a separate defense that the plaintiff, prior to the commencement of this action, made claim under the workmen's compensation act for compensation for his disability due to the accident (which is the basis of this action), and received an award of compensation.

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The court then quoted section 29 of the law, which provides for an election of remedies where an employee is injured by the fault of a third party, giving the right to claim compensation or to bring suit as he may choose. Where the third party is sued, the act provides that the employer (represented by the State insurance fund) shall be liable only for any deficiency between the amount recovered and the amount of compensation contemplated by the law for such an injury; while if compensation is accepted, the right to sue the third party devolves upon the State fund. This was said by the court to be based on the common-law rule that there should not be a double satisfaction for the same injury, and under such construction it was held that the further claim of a person who had elected to receive compensation was barred and the company's plea to that effect was good.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF WIDOW TO SUE—EFFECT OF RIGHTS OF MOTHER—*In re Cahill, Supreme Court of New York, Appellate Division (1916), 159 New York Supplement, page 1060.*—The workmen's compensation law of New York provides that if the amount paid to a widow and children under 18 of a deceased employee does not equal 66⅔ per cent of his wages, 15 per cent of his wages, or an amount equal to the difference between the payments to the widow and children and 66⅔ per cent, if such difference is less than 15 per cent, may be paid to a dependent parent of the deceased. It also provides that dependents may elect to sue a third party whose negligence caused the injury, instead of taking compensation. In the present case the widow elected to bring suit, and the question arose whether this action precluded favorable action on the application of the mother of the deceased workman for compensation. The court held that an award might be made to the mother, Judge Cochrane in the opinion pointing out that this would not prejudice any right of the other dependents or of the insurer, and that otherwise the mother would entirely lose her rights. The following is quoted from the opinion:

> In this case the dependent mother has no remedy against the third party, and can in no event be benefited by the action instituted by the widow. She has no choice of remedies; she has no opportunity for an election; she has no redress for any grievance against any party, except under subdivision 4 of section 16 of the workmen's compensation law. Clearly section 29 of that law [providing for suits against third parties] has no application to such a case.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY, ALSO UNDER THE ACT—STREET RISKS—*Mahowald* v. *Thompson-Starrett Co. et al., Supreme Court of Minnesota (July 14, 1916), 158 North-*

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*western Reporter, page 913.*—Gebhart Mahowald was a teamster for the Bernard-Cope Manufacturing Co., engaged in delivering furniture in Minneapolis. The Thompson-Starrett Co. was constructing a building, and while the teamster was passing, in the course of his employment, a load of steel beams broke the hoisting apparatus and fell from the eighteenth story, instantly killing him. His administratrix brought a liability suit, and the verdict was in her favor; whereupon, on motion of the defendant company, the district court of Hennepin County granted a new trial, and she appealed. The supreme court held that the amount of liability, all the parties being under the compensation act, was governed by the terms of that act. Instead of ordering a new trial, however, it merely reduced the judgment to the amount allowable under the act. Judge Holt said in the course of the opinion delivered by him:

It will not do to adopt a rule excluding an accidental injury from the compensation act if the servant may recover more damages under other provisions of law, and including it only when otherwise no compensation is attainable. Both employer and employee must be treated with the same fairness. Had the death of Mahowald been brought about by some irresponsible party, under circumstances such as here, would the Barnard-Cope Manufacturing Co. be compelled to pay his dependents compensation? Clearly it would not, except under the workmen's compensation act. But, if the Barnard-Cope Manufacturing Co. is liable under the act, then this defendant, also being thereunder, is liable to the same extent, but no further.

The accident which befell Mahowald was a street risk. If his employment as a teamster upon the streets of a large city, where he not only had to look out for his own safety, but also for that of his employer's team and rig, necessarily accentuated the street risks to him above those to other occasional travelers, it suffices for the conclusion that this accident arose out of his employment.

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WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—FEDERAL AND STATE STATUTES—ADMIRALTY—*Lindstrom* v. *Mutual Steamship Co., Supreme Court of Minnesota (Mar. 3, 1916), 156 Northwestern Reporter, page 669.*—Aaron Lindstrom was on June 9, 1914, in the employ of the Berwind Fuel Co., and engaged in unloading a cargo of coal from a steamship belonging to the Mutual Steamship Co. onto the fuel company's dock in Duluth. He was injured through the negligence of the steamship company and brought an action at common law against it for damages. The company demurred, and the demurrer was sustained by the district court of St. Louis County, on the ground that the Minnesota workmen's compensation law applied to the case, which view was upheld and the order sustaining the demurrer affirmed by the supreme court.

Judge Hallam delivered the opinion, and first pointed out that the sovereignty of the State extends to a vessel of the State, though

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upon navigable waters. He then stated the terms of the act, which excepted from its operation only employers and employees "engaged in interstate or foreign commerce by railroad." The language of Judge Hallam in speaking of the questions of interference with interstate commerce and of admiralty, is quoted with considerable omissions:

Nor is the act invalid as an interference with interstate commerce. The right of Congress to pass laws governing the liability of employers engaged in interstate commerce for injuries sustained by their employees while engaged in such commerce, to the exclusion of State legislation upon that subject, is unquestioned, and as to railroads Congress has enacted some applicable laws. (Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 [Bul. No. 98, p. 470].) But Congress has passed no laws regulating the liability of interstate carriers by water, at least not as to any matters here involved, and until Congress legislates upon this subject it is within the province of the several States to do so. (Second Employers' Liability Act [supra]; Stoll *v.* Pacific Coast S. S. Co., 205 Fed. 169 [Bul. No. 152, p. 213].)

The only doubtful question in the case is whether the Minnesota compensation act is, in its application to this case, an infringement upon the Federal jurisdiction over the subject of admiralty. The Constitution of the United States extends the power of the Federal courts "to all cases of admiralty and maritime jurisdiction." (Article 3, sec. 2.) Section 9 of the Judiciary Act of 1789 saves to suitors "in all cases, the right of a common-law remedy, where the common law is competent to give it." (1 U. S. Stats. at Large, p. 77.) This case hinges on the construction of the saving clause.

The injury was sustained aboard a ship on navigable waters of the United States. This brings the case within the jurisdiction of the Federal courts of admiralty. Just as clearly it is subject to the common-law jurisdiction of the courts of this State.

It is said in The *Belfast* (7 Wall. 624), that proceedings in a suit at common law on a maritime contract "are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty."

In its application to this case, the important effect of the saving clause is that it saves the right of a party to proceed in the State courts in personam "according to the course of the common law" to redress wrongs committed at sea, although the person injured had the concurrent right to proceed in rem in the Federal court of admiralty. [Cases cited.]

The contention of the plaintiff is that, when action is brought in the State court, the rules of liability are the same as though the proceeding were in admiralty. In other words, the contention is that where a remedy is sought in a State court that court enforces, not the laws of its own jurisdiction, but the general laws of admiralty, much as the courts of one State, in enforcing liabilities which arose in another, will apply the laws of the State where the cause of action arose, and since the State has no right to modify or amend the general maritime law, it is contended that the Minnesota compensation

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law is here inoperative. This is really the crucial question in the case. It is a Federal question, and we think that it is settled adversely to plaintiff's contention by the decisions of the United States Supreme Court. [Cases discussed.]

We accordingly hold that, where liability is asserted in the courts of this State against the owner of a vessel of this State to redress a maritime tort, the question of whether liability exists is to be determined by the common law of this State, as the same has been modified by the valid general statutes of the State, and, since the compensation act is now the law of this State, substituted for all common-law remedies before existing, that statute furnishes a rule upon which the liability and the extent of it are to be determined.

The conclusion we have reached is sustained by In re Walker, 109 N. E. 604 [Bul. No. 189, p. 249], where it is held that the compensation law of New York was applicable to a precisely similar situation.

The same result was reached in Kennerson *v.* Thames Towboat Co. (94 Atl. 372 [Bul. No. 189, p. 256]), where it is said that the common-law remedies reserved by the Judiciary Act of 1789 "embrace all methods of enforcing rights and redressing injuries known to the common or statutory law." Stoll *v.* Pacific Coast S. S. Co. [supra] is also in harmony with our views.

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WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—WATCHMAN IN RAILROAD YARD—BURDEN OF PROOF—*Chicago, Rock Island & Pacific Railway Co.* v. *Industrial Board of Illinois, Supreme Court of Illinois (June 22, 1916), 113 Northeastern Reporter, page 80.*—Nettie Bassett, administratrix, brought action to recover compensation for the death of Robert L. Stockton, and the industrial board awarded her $6.05 per week for 416 weeks. The company contended that the remedy should have been sought under the Federal Employers' Liability Act, but the award was affirmed by the supreme court. After stating that it had been decided in Illinois that if the employee is engaged in interstate commerce the Federal act applies exclusively, Judge Cooke, who delivered the opinion, examined the facts in this case in the light of various decisions, and concluded that the deceased employee was not shown to have been so engaged. Stockton was a watchman in the yards in the city of Peoria, which were some three miles long. Other facts sufficient for the understanding of the grounds for the decision are indicated in the quotation from the opinion given below:

It is true that it is conceded that there were one or more cars within the yards at the time of the injury which contained interstate freight. Where these cars were located is not shown. If they were a part of the transfer cut which Stockton was engaged in inspecting or upon which he was hanging at the time of his injury, the burden was upon plaintiff in error to show that fact. It must be assumed for the purposes of this case that none of the cars in this transfer cut contained interstate freight. Had plaintiff in error shown that at the

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time of the accident Stockton was actually inspecting cars containing interstate freight, or that cars containing such freight were at the moment within the line of his vision, a different question would be presented. For all this record shows, the cars containing interstate freight may have been one, two, or three miles distant from Stockton. If such were the case, he could not reasonably be said to have been at that time engaged in a work which was a part of the interstate commerce in which the carrier was engaged, and under such circumstances the accident to Stockton could in no way affect the handling of such interstate freight. At such a distance Stockton was not able to exercise any authority or supervision over such freight, and it might be broken into, pilfered, or injured as effectively whether Stockton was injured or uninjured.

The decision in this case is not necessarily controlled by the conclusion reached in the Pedersen case, and we are not disposed to extend the doctrine there announced.

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WORKMEN'S COMPENSATION—INTERSTATE EMPLOYEE INJURED WITHOUT NEGLIGENCE OF EMPLOYER—FEDERAL AND STATE STATUTES—*Winfield* v. *Erie Railroad Co., Court of Errors and Appeals of New Jersey (Jan. 6, 1916), 96 Atlantic Reporter, page 394.*—Mrs. Amy L. Winfield proceeded against the railroad company named for compensation for the death of her husband, and judgment was rendered on an award in her favor, in the Hudson County court of common pleas. This was reversed by the supreme court, but in the present decision the court of errors and appeals reversed the decision of the supreme court, holding that the claimant was entitled to compensation. The question at issue was whether under the New Jersey compensation law benefits could be awarded in the case of an employee injured in interstate employment, where negligence on the part of the employer is not alleged nor proved. The court held that the State law is applicable in such cases, Judge Gummere, who delivered the opinion, saying:

The question is whether the widow of an employee of a common carrier by railroad which is engaged in interstate commerce, who comes to his death while he is employed by such carrier in such commerce, must in all cases bring her action to recover compensation under the Federal Employers' Liability Act. This question, we think, must be answered in the negative. It may be conceded (although we are not to be considered as so holding) that in all cases where the Federal statute affords a remedy that statute controls to the exclusion of all State laws; but it can not be that, where the Federal act affords no remedy—that is, where the death of the employee occurs under such circumstances that no liability is imposed on the carrier by the act—the widow can not enforce a remedy which is given to her by a State statute. An examination of section 1 of the Federal statute shows that the liability of a carrier imposed by that act is limited to cases where the death of the employee results in whole or in part from the negligence of an officer, agent, or employee of such carrier, or occurs by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works,

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boats, wharves, or other equipment. When death results to an employee without such negligence being present as a producing cause either wholly or partly, the statute imposes no liability upon the carrier. It must follow, therefore, we think, that in order to oust the court of common pleas of jurisdiction in a proceeding brought under our workmen's compensation act, it must affirmatively appear either in the pleadings or the proofs that a right of action is given to the widow or personal representatives of the deceased employee by the Federal statute; in other words, that his death resulted in whole or in part from negligence chargeable to the defendant company; for such negligence will not be presumed.

What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation created by section 2 of our workmen's compensation act with the consent of both employer and employee, and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence, and thus created a liability against it under the Federal statute. No such averment is contained in her petition; no such admission appears in the defendant's answer; and no proof of defendant's negligence was offered by either party.

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WORKMEN'S COMPENSATION—LUMP-SUM PAYMENTS—PAYMENTS INTO STATE FUND—*Adams et al.* v. *New York, Ontario & Western Railway Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 29, 1916), 161 New York Supplement, page 919.*—Compensation was awarded in July, 1914, to Ida Adams and others for the death of an employee of the company named. In June, 1916, the State industrial commission directed the employer, under section 27 of the compensation law, to pay into the State insurance fund the present value of the future installments. This was in accordance with rules adopted by the commission on May 31, 1916, directing mutual insurance companies and self-insurers to pay the present values of such future installments into the State fund in all cases. These rules embodied a system for the computation of such present values, plus a percentage for expenses of administration.

The court held that the provisions of section 25, in which provision is made for payment of lump sums to individuals, and section 27, providing for such payments into the State fund, should be construed together, and that the making of a sweeping rule for such commutation under the latter section was not justifiable, the intention of the statute being to provide for exceptional cases. Speaking first of section 25 Judge Cochrane, who delivered the opinion, said:

It was not the purpose of this last-quoted provision to destroy the general scheme of the statute establishing periodical payments, and permit the commission in every instance to commute periodical

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payments into a lump-sum payment. Rather it was the purpose to provide for particular and exceptional instances. It was recognized by the legislature that there might be individual cases where justice would be promoted by a deviation from the principle of periodical payments, and it was desired to place in the hands of the commission authority to deal with such individual cases, and to provide for one or more lump-sum payments as the circumstances of that particular case might seem to require. That such was the purpose of the statute is clear from the qualifying expression therein contained, "provided the same shall be in the interest of justice." There should be something taking the case out of the ordinary rule to justify the commission in making an exception thereto. The exception must be "in the interest of justice," and should not depend on the whim or caprice of the claimant or the employer, nor should it depend on an arbitrary ruling of the commission. Each case should be considered by itself, and in each case it should be apparent that there is some circumstance or some feature thereof which differentiates it from the general rule and makes it apparent that such differentiation is "in the interest of justice." The commission would not be justified in making a sweeping rule applying to all cases, or to all cases of a certain class, because that would defeat the theory of the statute, which is periodical compensation.

It is not the purpose of either section [25 or 27] to break down the theory of periodical compensation.

The commission has by an omnibus resolution destroyed this theory of the law in all death cases, where the employer is insured in a mutual compensation insurance company or is a self-insurer. If the commission can do this, it can pass a resolution requiring the payment of a lump sum into the State fund, or to the injured employee or his dependents, in every case, and thereby destroy absolutely the theory of periodical payments and accomplish a repeal of an important feature of the law. We do not think that was the intent of the statute.

It follows that the decision of the commission, requiring the appellant to make this payment into the State fund, can not be sustained, for the reason that such decision does not appear to be "in the interest of justice," nor does it appear that the commission has properly computed "the present value of all future payments with due regard for life contingencies." Both of such facts should appear in order to sustain in any case a determination of the commission which is a departure from the general rule declared by the statute.

Our conclusions are that no set of rules can be devised to apply indiscriminately to all cases, or to a certain class of cases; that the meaning of the statute is that only in exceptional cases should its policy of periodical payments be departed from; that each case must be considered with reference to its own circumstances; and that in each case the circumstances must be such as to make it appear that the departure of the commission from the theory of periodical payments is in respect to such individual case "in the interest of justice," and the circumstances must also be such as to make "it possible to compute the present value of all future payments with due regard for life contingencies."

The decision of the commission should be reversed.

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In affirming the decision in this case the Court of Appeals of New York, under date of January 30, 1917, assigned a different reason, saying that section 27 does not apply to an award made to a widow. Judge Cuddeback says further:

> It does not contemplate and fails to provide for weighing or determining the contingency of the widow's remarriage—which would bring about a cessation of the payments to her.

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WORKMEN'S COMPENSATION—MALPRACTICE OF PHYSICIAN—RIGHT TO SUE—*Ross et ux.* v. *Erickson Construction Co. et al., Supreme Court of Washington (Feb. 17, 1916), 155 Pacific Reporter, page 153.*—Harry L. Ross and wife brought action against the company named and one McGillvray. Ross was injured in the course of his employment with the company on December 21, 1913. He was taken to the hospital, operated on by McGillvray, who was employed to do the surgical and hospital work for the company, being paid from a fund obtained by deducting $1 monthly from the wages of each employee. After leaving the hospital Ross made claim under the industrial insurance law of the State and accepted a final award. He then brought this suit, alleging malpractice of the physician, and the verdict in the superior court of King County was in his favor for the sum of $1. A new trial was granted him on the ground of newly discovered evidence, and from the order granting a new trial the company appealed. It relied among other things upon the contention that Ross had been compensated for all injuries resulting from the primary injury, or proximately attributable thereto, so that no suit could be maintained for malpractice in the treatment. The court sustained this contention, which made it impossible for the employee to recover in a suit at all, and therefore unnecessary to consider other points.

The opinion delivered by Judge Chadwick first points out the situation that existed in such cases before the passage of the industrial insurance law. He emphasizes the declared purpose of the legislature to withdraw "all phases of the premises from private controversy," and the consistency of this with the general economic and sociological intent of the law, and also discusses many cases upholding the view taken. It is held that this would apply only to injuries approximately resulting from the original injury, so as to be considered an "aggravation" of it. The case was reversed and remanded, with instructions to dismiss the suit.

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WORKMEN'S COMPENSATION—MALPRACTICE OF PHYSICIAN FURNISHED BY COMPANY—ELECTION—*Pawlak* v. *Hayes, Supreme Court of Wisconsin (Feb. 22, 1916), 156 Northwestern Reporter, page 464.*—Steve Pawlak was injured while he was an employee of the John S.

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Owen Lumber Co., on March 5, 1914, by a log rolling upon him and fracturing his leg. He employed Charles A. Hayes to treat him, and this suit was brought against Hayes for malpractice, it being claimed that he was guilty of negligence and lack of skill in his treatment and set the leg improperly. The employee received compensation and part of his medical treatment from the employer from March 5 to about April 20, when he claimed he first discovered the negligence of the physician, and thereupon, electing to proceed against the latter, refused to receive further compensation, and offered to return what he had already received, or such part thereof as the court should adjudicate. The circuit court of Chippewa County sustained a demurrer to the complaint, and the employee appealed. The demurrer was overruled and the complaint held sufficient, the reasoning of the court appearing from the opinion delivered by Judge Vinje, as follows:

The circuit court sustained the demurrer to the complaint on the ground that, when plaintiff filed a claim against his employer, his cause of action for the injury received and the proximate results thereof were assigned to his employer by virtue of subdivision 1 of section 2394–25, which reads as follows:

"The making of a lawful claim against an employer for compensation * * * shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party."

It is quite evident from the reading of this subdivision that it contemplates the existence at the same time of two remedies either of which the employee may pursue. He may invoke the statutory remedy against his employer, or the common-law remedy against the third person who by his negligence caused or contributed to his injury. (McGarvey *v.* Independent O. & G. Co., 156 Wis. 580, 146 N. W. 895 [Bul. No. 169, p. 267].) It is equally obvious that these two remedies must coexist in order to give the employee an election. That the statute contemplated an election is made clear by subdivision 2 of the same section, which provides that:

"The making of a claim by an employee against a third party for damages by reason of an accident * * * shall operate as a waiver of any claim for compensation against the employer."

Thus, while the statute gives the employee the option of pursuing either remedy, it deprives him of all rights under the one he does not pursue as soon as he makes his election by assigning to the employer his cause of action against the third party if he proceeds against the employer, and by releasing the employer if he proceeds against the third party.

It does not appear that at the time plaintiff was injured there was any negligence by any third party or, indeed, by anyone. This being so, plaintiff had no election to make when he filed his claim under the statute against his employer, and no cause of action passed to the latter. The employee could proceed only against his employer. There was no one else liable so far as the complaint discloses. He could not at that time be required to make an election

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because the facts giving rise to an election were not then in existence, nor could they be reasonably anticipated because malpractice is the exception not the rule. No duty or opportunity to elect could arise until the facts creating the liability of the third person came into existence. In this case they were not known to plaintiff until about August 20th, and there is nothing to show he was negligent in not sooner ascertaining them. As soon as they came to his notice he promptly elected to hold the third person whose alleged negligence aggravated the first injury, and thereby he waived further liability against his employer.

The making of a lawful claim against the employer eo instanti operates to assign to him any cause of action the employee may then have against a third party. (McGarvey *v.* Independent O. & G. Co. [supra].) But it does not assign a cause of action then not in esse. It merely acts upon what is in existence at the time the lawful claim is made. When the negligence of a third party to the knowledge of the employee, who exercises ordinary diligence in respect thereto, intervenes, his right to an election arises—not before then. It was therefore competent for plaintiff, when he first learned of the negligence of the defendant, to elect to hold him and release his employer, or to hold his employer under the provisions of the compensation act.

In a common-law action for negligence it has been held that the defendant is liable for the aggravation of the injury caused by the malpractice of the physician called by plaintiff to treat it, where it is shown that he exercised ordinary care in the selection of the physician. The compensation act requires the employer to furnish a physician, and makes him liable for the value of the physician's services for not exceeding 90 days. This, we think, implies liability for any aggravation of the injury caused by the negligence of the physician treating the employee during such time. Whether the employer would be liable for malpractice after the expiration of 90 days is not decided. The negligent treatment here is alleged to have begun about two weeks after the accident.

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WORKMEN'S COMPENSATION—MEDICAL SERVICES—ACTION BY PHYSICIAN AGAINST EMPLOYER—*Bloom* v. *Jaffe, Supreme Court of New York, Appellate Term, First Department (March 13, 1916), 157 New York Supplement, page 926.*—Simon Bloom was a physician, who furnished treatment to an injured employee. The workmen's compensation commission approved a claim for medical services in the amount of $21, and suit was brought by the physician against the employer to recover this amount. Judgment in a municipal court was in favor of the plaintiff, but this was reversed on appeal, the court holding that the physician has no cause of action against the employer. The law requires the employer to furnish certain medical and surgical aid, and in case of his failure to do so the employee may procure it at the employer's expense. The act was construed as authorizing the inclusion of such expense in the compensation awarded; it also provides that the physician's fee shall be

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a lien on the award. Judge Lehman, who delivered the opinion, said in part:

The primary purpose of the statute is not to provide compensation to the physician, but solely to provide compensation to the injured employee for such medical service as the law permits him to procure at the expense of the employer. It does not, therefore, provide for any award to the physician, but merely gives the physician a lien upon the compensation awarded to the workman, which "shall be paid therefrom only in the manner fixed by the commission." (Section 24.) In this case the plaintiff is not seeking to enforce his lien on the compensation awarded to the employee, but is seeking to recover the amount directly from the employer. Moreover, even if he were seeking to enforce his lien on the award in a direct proceeding before the commission, he would be bound to show that the commission had fixed the manner of its payment. The assignment from the injured employee can, of course, give him no right of action, because the statute expressly declares that claims for exemptions or benefits due shall not be assigned. (Section 33.)

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WORKMEN'S COMPENSATION—MEDICAL TREATMENT—PROXIMATE CAUSE OF DISABILITY—REFUSAL TO UNDERGO SURGICAL OPERATION—*Lesh* v. *Illinois Steel Co. et al., Supreme Court of Wisconsin (April 11, 1916), 157 Northwestern Reporter, page 539.*—Charles Lesh suffered an injury to his leg, which developed into an ulcerous condition. After being compensated for over a year's disability he returned to work, and seven months later was offered work of the same kind he was doing when injured; but he refused this and claimed compensation for permanent injury. The medical testimony at the second hearing, held to consider this question, showed that an operation which was not serious or dangerous would be quite sure to cure the disability. The court affirmed an award of the industrial commission adverse to the employee, Judge Rosenberry saying in part:

Where, as in this case, the applicant under the workmen's compensation act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability, and is not attended with serious risk or pain, and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal.

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WORKMEN'S COMPENSATION—MEDICAL TREATMENT—SUBMISSION TO OPERATION—*Kricinovich* v. *American Car & Foundry Co., Supreme Court of Michigan (Sept. 26, 1916), 159 Northwestern Reporter, page 362.*—Pete Kricinovich, an employee of the company named, suffered a fracture of the leg between the knee and ankle, as a result

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of which he was confined to the hospital from December 5, 1912, to April 25, 1913, and was twice operated upon by the employer's surgeon. He was treated until August 25, 1913, when the bone was firmly united and the wound entirely healed, and the physician reported him well and able to work. The company paid all medical expenses, and a compensation of $6.43 per week, one-half the average weekly wages, until September 27, 1913. Later, compensation was paid for partial disability, and the plaintiff worked for a short time, but claimed to suffer pain, of which there were no objective symptoms. Finally the company petitioned the accident board for relief from further payments. This was denied, and the board ordered the payment of compensation for total disability up to September 16, 1915, less payments actually made, and the continuance of such payments until the condition should change to one of partial disability. The company appealed, claiming that if there was in fact any pain it was caused by the entanglement of a nerve filament in the scar or in the callus thrown out by the bone in the healing process; and that a slight operation for the loosening of tissues would not be at all dangerous and would be very likely to effect a cure. This claim was supported by medical testimony. The supreme court reversed the order and held that further compensation should be denied until the claimant submitted to an operation. Judge Kuhn delivered the opinion, in the course of which he said:

It is a reasonable and salutary rule that:

"If the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him."

Since, according to the testimony of the surgeons, who were of unquestioned standing in their profession, little, if any, danger is involved in the operation, and little suffering, and their diagnosis is not disputed, and the operation, according to the testimony, is not an experiment, and the defendant stands ready to bear all the expense of the operation and treatment, and has acted at all times with extreme fairness and consideration for the claimant, it would seem that, if he were a reasonable person, he would submit to the operation. Disinterested parties were sufficiently impressed with the testimony to encourage the claimant to submit, and the only reason offered for not agreeing to the proposal is a groundless fear that he will lose his leg, and possibly his life. Before the defendant is to be charged, in law or morals, with the duty to compensate him, the claimant should first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole. This, in our opinion, he has not done, and the defendant seems to have discharged the burden of proving that the claimant's refusal to submit to the operation to relieve him is unreasonable.



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WORKMEN'S COMPENSATION—MINOR LAWFULLY EMPLOYED—CONSTITUTIONALITY—SUIT AT COMMON LAW—*Rhodes v. J. B. B. Coal Co., Supreme Court of Appeals of West Virginia (Dec. 13, 1916), 90 Southeastern Reporter, page 796.*—Frank Rhodes, who at the time of injury in the coal mine of the company named was a boy between 14 and 16, brought action against the company for damages, under the common law. The complaint alleged failure on the part of the company to comply with the workmen's compensation act, while the company pleaded that payment had been made to the State fund and notices posted in accordance with that act. The unlawful employment of the boy was alleged as the proximate cause of the injuries, and it was claimed that he was not an employee subject thereto, even if the company had brought itself under the act as to adult employees. A verdict was brought in by the jury in the plaintiff's favor, but the judge of the trial court, the circuit court of McDowell County, awarded a new trial to the company. On appeal, this judgment was affirmed, some of the points of pleading and evidence involved being rather complicated and technical. Others of interest from a labor standpoint are mentioned here.

It was held that the employment of the minor was not unlawful under the statute of the State embodied in sections 71 and 72 of the Code of 1913. The heading preceding these sections is "Employment of minors in mines, factories, etc." The original law enacted in 1887 and in force up to 1911 included mines, and forbade employment under 16 years. In 1907 an act creating a department of mines and revising the mining laws was enacted, providing that no boy under 14 years of age should be employed in mines, and in 1911 the word "mine" was omitted from the sections first referred to. The plaintiff's contention was that their provisions as to factories, etc., should be construed to cover mines. The court, however, held that the legislature must be supposed to have intentionally omitted the word "mine" from the law. In holding that the minor was an employee covered by the provisions of the compensation act, Judge Miller, speaking for the court, said in part:

Does the act in question comprehend employees over 14, though under 21 years of age, when lawfully employed in mines? Unless invalid we answer unhesitatingly that it does comprehend and cover infant employees lawfully employed. A statute which makes it lawful to employ an infant over 14 years of age in a coal mine should certainly receive a construction that will authorize him to make a lawful contract of employment, to bind himself thereby, and to participate in all the benefits which would accrue to him, under a statute made for the protection of employees.

In introducing the question of constitutionality Judge Miller said:

We have distinctly decided, in De Francesco *v.* Piney Mining Co. (86 S. E. 777), that section 26 thereof, denying to certain classes of employers certain common-law defenses, is constitutional and valid.

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But the question presented here is, does the act deprive employees coming under the act of any of the constitutional guaranties to which they are entitled, as due process of law, the equal protection of the law, or right of trial by jury?

And after reviewing the decisions in other States he concluded this portion of the opinion as follows:

Legislative acts like ours though compulsory are but other forms of industrial insurance. We are asked in this case to follow the earlier decisions, which denied the validity of the statutes, but we must decline to do so in the face of the more recent and well considered cases, which we think are more in consonance with reason and enlightened public policy.

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WORKMEN'S COMPENSATION—NOTICE—ACCIDENT, MISTAKE, OR UNAVOIDABLE CAUSE—SEVERE ILLNESS AND ABSENCE IN HOSPITAL—*Donahue* v. *R. A. Sherman's Sons Co., Supreme Court of Rhode Island (July 5, 1916), 98 Atlantic Reporter, page 109.*—Thomas L. Donahue petitioned for compensation against the company named, his employer. He was severely injured, and there was no question as to his being a workman under the provision of the law. The company, however, contested the claim on the ground that he did not give notice to it within 30 days, as required by the terms of the act. The superior court of Washington County decreed compensation to the petitioner, and on appeal the decree was affirmed. Judge Sweetland called attention to the seriousness of the injury and of the condition of the employee during the whole period, for the last 23 days of which he was in a hospital, among strangers, and at a distance from his home and from the employer's place of business. The following is quoted from the opinion:

It was in evidence that during the last 23 days of that time he was unable to do any writing or attend to any business. Although he was in the possession of his mental faculties, and was able to talk with those about him, he was in a condition of great physical weakness. During the 23 days in question, he was clearly unable to give the prescribed written notice himself. If given at all, such notice would have to be given by some one else at his request and in his behalf. If it was a matter which we could review, would we not be forced to say that the justice of the superior court was warranted in finding that the illness and weakness of the petitioner presented such circumstances of accident and unforeseen cause as would excuse him from taking steps to procure some other person, among the strangers about him, to give the written notice containing the particulars required by the statute?

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WORKMEN'S COMPENSATION—NOTICE—KNOWLEDGE—*In re Bloom, Supreme Judicial Court of Massachusetts (Jan. 14, 1916), 111 Northeastern Reporter, page 45.*—Fred Bloom proceeded for compensation for an injury against his employer, the Webb Pink Granite Co., and

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its insurer, and an award was made to him in the superior court of Suffolk County. The law requires filing of notice of an injury "as soon as practicable after the happening thereof," and claim within six months. A written claim was filed four months after the first of several injuries, and more than two months after the last; and without deciding whether this could operate also as a notice, the court held that it was too late to fulfill the requirements.

The law further provides that "want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury." The board found that the employee notified the foreman of the first of the injuries to his eye, and that the foreman had notice of the later ones; also that he notified the timekeeper, who made out a report of the injury after the last one occurred. The question is discussed whether the foreman was an agent whose knowledge would bind the corporation, and the decision was in the affirmative, the court saying that he was the representative of the employer most likely to have knowledge of the frequent injuries happening to stone cutters, and that apparently it was his duty to disclose them to the employer. The award in the claimant's behalf was therefore affirmed.

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WORKMEN'S COMPENSATION—NOTICE—WHEN INJURY OCCURS—*Johansen* v. *Union Stockyards Co. of Omaha, Ltd., Supreme Court of Nebraska (Feb. 5, 1916), 156 Northwestern Reporter, page 511.*—Fred Johansen claimed compensation from the company named under the so-called employers' liability act of Nebraska. On December 18, 1914, hot-tar mixture used in roofing splashed into his left eye. The accident was considered of no importance until December 25, when he was induced to consult a physician, who advised him to see a specialist. This he did, when it was first discovered that the injury might become serious. Finally loss of the eye resulted. The statute requires notice of the injury as soon as practicable "after the happening thereof," and claim within six months "after the occurrence of the same." It appears that the foreman knew of the accident about the time it happened; but the company's contention, and the judgment of the district court of Douglas County in its favor were based upon the theory that the claim was not made within the statutory limit, since more than six months elapsed between the accident and the writing, on June 19, 1915, of the letter making claim for compensation. The supreme court in the opinion by Judge Sedgwick quotes the provision of the act defining the terms "accident" and "injury," and, in reversing the judgment below, says:

The injury resulting from the accident gradually became developed, and it can not be said that the injury resulted from the accident,

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within the meaning of the statute, before the time that it was discovered that it might become permanent, which was some time after the 25th of December. This evidence clearly justifies the finding of the trial court under this statute, that the accident resulted in a total disability to plaintiff on December 25, 1914.

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WORKMEN'S COMPENSATION—NOTICE AND CLAIM—*Matwiczuk* v. *American Car & Foundry Co., Supreme Court of Michigan (Dec. 21, 1915), 155 Northwestern Reporter, page 412.*—Maryanna Matwiczuk claimed compensation from the company named for the death of her husband while in its employ, and the industrial accident board affirmed an award in her favor. The compensation act provides that no proceedings shall be maintained without notice of the injury within three months and claim for compensation within six months after the injury. The notice is required to be in ordinary language, stating the time, place, and cause of the injury, and must be signed, in the event of the employee's death, by his dependents or in their behalf. It is further provided that want of written notice shall not bar the action if the employer has notice or knowledge of the injury. The wife and family of the deceased in this case lived in the interior of Poland. On the day after the death the brother-in-law of the employee employed an attorney, who wrote to the employer a letter stating the time and place of the injury and giving the cause as defective insulation of an electric wire, also stating that the deceased had a family dependent upon him in Poland, and asking for compensation. A power of attorney was sent to the wife for signature, and she mailed it to the brother-in-law within six months from the date of the injury, but it did not reach this country during that period. The court affirmed the award of the commission. It held that, as the statute must not be technically construed, the notice given was sufficient, since it gave the employer full opportunity to investigate the accident. The original notice was held to be both notice and claim and to be validly ratified by the widow later.

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WORKMEN'S COMPENSATION—PUBLIC EMPLOYEES—CONSTITUTIONALITY OF STATUTE—*Wood* v. *City of Detroit, Supreme Court of Michigan (Dec. 21, 1915), 155 Northwestern Reporter, page 592.*—Mary Wood instituted proceedings for compensation for the death of her husband, an employee of the public lighting commission of the city of Detroit, and the industrial accident board made an award overruling the contention of the city that the act was void as applied to municipal corporations. This judgment was affirmed by the supreme court. In the opinion by Judge Ostrander the title of the act is quoted, and the contentions of the city are then stated as follows:

The propositions of plaintiff in certiorari [the city of Detroit] are that the effect of the act, in operation, is to deprive it of its property

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without due process of law, the legislature being without power to compel it to respond in damages to an employee injured without its fault; that by the terms and operation of the law and in respect to its private and proprietary functions and powers its rights and the similar rights of individuals and of private corporations are not equally protected. It is also contended that in the Home Rule Act the legislature exhausted its powers and may not by the act in question affect municipal affairs as it has assumed to do.

The opposing contentions of the claimant are also stated, and there is a general discussion of the constitutionality of compensation laws with reference to compulsion, and of the power to abrogate defenses of the employer. Judge Ostrander then says:

The individual and the private corporation employing labor, and refusing to be bound by the act, may elect to contest, though with limited defenses, liability for injuries; municipal corporations may not. In this respect, only, the act affects, differently, municipal corporations and other corporation and individual employers of labor. It expressly provides that "the State, and each county, city, township, incorporated village and school district therein, and each incorporated public board or public commission in this State authorized by law to hold property and to sue or be sued generally" shall constitute employers subject to the provisions of this act. (Act No. 50, Public Acts 1913.) And no distinction is suggested between employment in work heretofore classified as governmental in character, or involving the exercise on the part of the corporation of governmental power, and employment in work heretofore classified as private in character.

As to the first question presented, namely, the power of the legislature to impose upon municipal corporations the duties and liabilities created by the act, I think there would have been, under our former constitutions, no reasonable doubt. So long as it was admitted that the State, through the legislature, must determine for each of its municipal corporations the powers it should exercise and the capacities it should possess, and that it must also decide what restrictions should be placed upon them, "as well to prevent clashing of action and interest in the State as to protect individual corporators against injustice and oppression at the hands of the local majority," it followed that municipal activity in the employment of labor, if permitted at all, might be permitted only upon compliance with such conditions as are found in the act here considered.

Following the above, the court discusses and quotes the case of Atkin *v.* Kansas, 191 U. S. 207, 24 Sup. Ct. 124 [Bul. No. 50, p. 177], affirming the power of the State to regulate the hours of labor of employees of municipalities, and the effect of the statute of 1909, which it was argued restricted the power of the State over municipalities in their so-called private capacities. In the concluding portion of the opinion Judge Ostrander said:

The constitution of 1909 has pointed out the extent of the local powers and capacities of cities and villages with more precision than was done in former constitutions, thus restricting the power of the

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legislature to grant or to deny to particular communities the enumerated capacities and powers, at will, but it has not abolished all distinctions between municipal and other corporations and individuals with respect to the exercise of the powers conferred nor denied the power of the legislature to enact general laws applicable to cities. The distinction between powers governmental in character and those private in character, as exercised by municipal corporations, does not involve the abrogation of the distinction between private municipal activity and private individual activity. To employ a seeming paradox, private municipal activities are all of them public. What has been called private in municipal activity is, nevertheless, public when contrasted with purely private enterprise and adventure.

There remains, and always must remain, the distinction pointed out in the opinion last referred to. [Andrews *v.* South Haven (Mich.), 153 N. W. 827.] The actual basis for the carrying on by municipal corporations of private municipal business is taxation. There is not, and there can not be, any merely local power to tax persons or property, and municipal activity may still be, and it is the command of the constitution that it shall be, restricted, limited, by the limitation of the power to tax, to borrow money and to exploit the municipal credit. Moreover, municipal corporations are still State agencies, and as such subject to legislative direction and control, none the less so because the exercise of such control may indirectly affect a private municipal activity. The act, in its application to municipalities, involves no right of local self-government, or local control and management of corporate property. It deprives the municipality of none of its property, because, in effect, it is made lawful to raise by tax the money required to pay all injured employees some compensation. A new public purpose for which taxes may be levied is declared.

The subject of the legislation which is in question here is a social subject, in its very nature referable for community action to the State itself. A social theory needed to be crystallized into law. Its nature was such that no community less than the State could be appealed to for this purpose. The theory of this and of similar legislation includes the essential idea that the industrial worker is himself a social asset and ought not, in any case, to bear the whole result of a personal injury arising out of and in the course of his employment; that society at large ought to share the loss. The subject is one of governmental control, of public policy, necessarily committed to the legislature. Whether it is or is not denominated a police regulation, municipal corporations are, for the purpose of carrying out such a measure, subject to legislative control. The first question is therefore answered adversely to the plaintiff in certiorari.

The second question, namely, whether the classification of employers as municipal and other can be defended, is, in principle, answered by what has been already said. The legislature was confronted with the duty to devise a plan, complete in itself, for dealing with the subject and accomplishing the desired purpose. The limitation upon its power in this direction is the constitution, which I think it has not contravened. The burden created, if it can be called a burden, is uniform as to each individual of each class. There is no vested right of any person to labor for a municipal corporation.

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There is found in the imposition of the law upon municipal corporations no invasion of private rights, but only the enforcement of a State policy which, in view of municipal activities, ought to be uniformly accepted and observed by all municipal corporations.

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WORKMEN'S COMPENSATION—PUBLIC EMPLOYEES—ELECTIVE OR COMPULSORY APPLICATION OF LAW—*City of Butte et al.* v. *Industrial Accident Board et al., Supreme Court of Montana (Feb. 24, 1916), 156 Pacific Reporter, page 130.*—Hugh Smith proceeded against the city of Butte for compensation for injuries suffered while engaged in a hazardous employment for the city. The claim was rejected by the industrial accident board and the district court, whereupon this appeal was taken. Since the city had not made election to come under the act, the question arose whether or not the act was compulsory as to public corporations, which made necessary its construction in view of rather loose and conflicting language. The attorney general took the view that the act was elective as to cities. It was held by the supreme court, however, that the order denying compensation should be reversed, and that the act is compulsory as to public corporations, the language of section 3 (*e*) of the act being decisive on this point. The paragraph reads as follows:

> Where a public corporation is the employer * * * the terms, conditions and provisions of compensation plan No. 3 shall be exclusive, compulsory, and obligatory upon both employer and employee.

In commenting upon the above, Judge Holloway, speaking for the court, said in part:

> The legislature declared that where a public corporation is the employer, the terms, conditions, and provisions of compensation plan No. 3 shall be not only exclusive but compulsory and obligatory as well. It is a general rule of statutory construction that "every word of a statute must be given some meaning if it is possible to do so." But, if the contention of the attorney general prevailed, the words "compulsory and obligatory" would be meaningless.

The case was therefore remanded for further proceedings in accordance with the foregoing ruling.

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WORKMEN'S COMPENSATION—PUBLIC EMPLOYEE—FIREMAN—RELIEF ASSOCIATION—*State ex rel. City of Duluth* v. *District Court of St. Louis County et al., Supreme Court of Minnesota (July 7, 1916), 158 Northwestern Reporter, page 791.*—Frederick E. Granzow, assistant chief of the fire department of the city of Duluth, was killed while in the performance of his duties. The question whether a fireman is an employee under the workmen's compensation act was held to be

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settled affirmatively by the decision in the case of a policeman (State ex. rel City of Duluth *v.* District Court of St. Louis County, 158 N. W. 790 see [below]). It was further held that the fact that the deceased was a member of the Duluth Firemen's Relief Association, and his beneficiaries would receive payments from that source also, should not affect the payment of compensation or the amount thereof.

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WORKMEN'S COMPENSATION—PUBLIC EMPLOYEE—POLICEMAN—*State ex rel. City of Duluth* v. *District Court of St. Louis County, Supreme Court of Minnesota (July 7, 1916), 158 Northwestern Reporter, page 790.*—Proceedings for compensation for the death of Neil Mooney, a policeman, were opposed by the city of Duluth. The district court of St. Louis County made an award of compensation, and on proceedings for review instituted by the city this was affirmed. The reasons for holding policemen to be included in the provisions of the act are given in the opinion by Judge Hallam, from which the following is quoted:

This case depends on the question whether a policeman is an "employee" or "workman."

The question is not whether a policeman is an officer or an official, but whether he is an "official * * * elected or appointed for a regular term of office." Clearly he is not. A "regular term of office" signifies a definite period of time. Under the Duluth charter policemen receive their office by appointment under civil-service rules. They hold office during good behavior. There is no term at all. Manifestly this is not an appointment for "a regular term of office."

Since a policeman is, in fact, a "person in the service of a * * * city," and is not, in fact, an official elected or appointed for a regular term of office, he is within the intent and meaning of the act.

We know of no authority or precedent that is helpful. Decisions are cited which hold that policemen are not employees, but they are made under statutes not like ours. None of the statutes so construed are as broad as ours.

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WORKMEN'S COMPENSATION—PUBLIC EMPLOYEES—REPEAL OF PROVISIONS OF CITY CHARTERS—NOTICE—*Purdy* v. *Sault Sainte Marie, Supreme Court of Michigan (Dec. 21, 1915), 155 Northwestern Reporter, page 597.*—William Purdy, who made claim for compensation, was employed by the city named as a street sweeper, and was run down and injured by a conveyance in the street. The city contested the award made by the industrial accident board, many of its contentions relating to constitutionality and being the same as found in the case of Wood *v.* City of Detroit (see p. 341). In addition, however, it was claimed that the city charter contained provisions for the payment of claims for injury to employees, and that these

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had not been repealed by the compensation act. The court held that such provisions were repealed by the general repealer of "all acts and parts of acts inconsistent with the act."

The question of notice also entered into the case, and it was held that absence of written notice within three months was not material where several officers of the city were conversant with the facts.

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WORKMEN'S COMPENSATION—PUBLIC EMPLOYEES—SHERIFF—*Sibley* v. *State, Supreme Court of Errors of Connecticut (Dec. 17, 1915), 96 Atlantic Reporter, page 161.*—Kate B. Sibley made claim against the State for compensation for the death of her husband, Preston B. Sibley, and an award was made in her favor by a compensation commissioner. The superior court reserved the case for the advice of the supreme court as to the interpretation of the law. Sibley was sheriff of Windham County, and while boarding a trolley car to make a trip in connection with the duties of his office was thrown to the ground, and received injuries which resulted in his death. The compensation law defines an employee as one working under a contract of service. The court held that the relation between the State and a person elected to a public office is not one of contract. In certain States "public officials" are in terms excepted from the "employees" of the State covered by the laws. It was pointed out, however, that the definition of the term "employee" in the laws of all those States was different, including "every person in the service of the State * * * under any appointment or contract." The superior court was advised to render judgment for the State, setting aside the award of the commissioner.

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WORKMEN'S COMPENSATION—RAILWAY CONSTRUCTION—NEW INSTRUMENTALITY—CONSTITUTIONALITY OF STATUTE—DUE PROCESS OF LAW—*Raymond* v. *Chicago, Milwaukee & St. Paul Railway Co., United States Circuit Court of Appeals, Ninth Circuit (May 29, 1916), 233 Federal Reporter, page 239.*—William Raymond was injured while in the employ of the company named. He was engaged in the work of constructing a tunnel, which when completed would be used to shorten the line of the railroad, used in interstate commerce. The District Court for the Western District of Washington gave judgment for the defendant, dismissing the petition, and on appeal this was affirmed. The employee contended that his occupation brought him within the Federal Employers' Liability Act, but this was held not to be the case, Judge Gilbert, who delivered the opinion, examining the Pedersen case, and saying:

We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged

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in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce.

That the remedy of the employee was not by an action to enforce common-law liability, but under the statute providing for compensation for workmen, was also decided, Judge Gilbert saying:

It [the compensation law] declares that the construction of tunnels is a hazardous work within the meaning of the act, and it provides a schedule of contribution by employers, and a schedule of compensation in case of death or injury, declares that the total loss of eyesight is a permanent total disability within the meaning of the act, and provides that the person injured shall receive monthly, during the period of such disability, if unmarried, the sum of $20.

It is contended that the provision for the payment of this insignificant sum in a case where a strong, healthy young man has been totally deprived of his eyesight, is so inadequate that it results in depriving him of his property without due process of law, and denies him the equal protection of the laws, and deprives him of his right under the seventh amendment of the Federal Constitution to a trial by jury. The proposition that by the compensation law of Washington, the plaintiff is deprived of the right to a jury trial, contrary to the provisions of the Federal Constitution, can not be sustained. Neither the seventh amendment nor the fourteenth amendment forbids the State to abolish or deny the right of trial by jury. [Cases cited.]

The constitutionality of the law of the State of Washington has been affirmed in State ex rel. Davis-Smith Co. *v.* Clausen, 65 Wash. 156, 117 Pac. 1101 [Bul. No. 96, p. 814; other cases cited]. We are not convinced that the act is within the prohibition of any provision of the Federal Constitution. It was adopted by the State in the exercise of its police power, and with a view of correcting an evil by the substitution of a remedy for the existing remedy, which, the act declared, "has been uncertain, slow and inadequate" for injuries which, "formerly occasional, have become frequent and inevitable."

The State legislature, in the exercise of its wisdom, has adopted for the case of an injury resulting in total disability to an employee a monthly compensation which is fixed and determined, and is secured to him for the remainder of his life. We are not prepared to say that it is not a better provision for him than the common-law remedy, whereby he was required to prove the negligence of the defendant, and his cause of action was subject to the defenses of contributory negligence and assumption of risk, and the amount recoverable was uncertain, and was largely to be reduced by the payment of attorney's fees.

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WORKMEN'S COMPENSATION—REOPENING OF PROCEEDINGS FOR ADDITIONAL AWARD—*Foley* v. *Detroit United Ry., Supreme Court of Michigan (March 30, 1916), 157 Northwestern Reporter, page 45.*—Patrick Foley, a motorman on a street railway, sustained a compound fracture of his left leg above the ankle on July 22, 1913, when the car

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which he was running collided with one in front of it. He remained in the hospital until February 17, 1914, and the company provided him with medical and hospital attendance, and paid him one-half of his wages, or $8.13 a week, until his return to work February 22, 1914. At that time the employee signed a receipt in settlement, which was not filed with the industrial accident board or approved by it, though the original agreement fixing the weekly amount of compensation had been so filed and approved. The employee resumed work as a watchman, receiving as much pay as before the injury. After a time he made claim for further compensation for partial incapacity, and the evidence was sufficient to sustain a finding that he would be unable to act as motorman, or to do any work requiring considerable standing, for years at any rate. The board reopened the case and granted additional compensation. The court affirmed this award, Judge Steere saying in the concluding paragraph of the opinion:

The agreement approved by the board only provided for a weekly payment of indefinite duration, which was discontinued without its approval. Under such circumstances, we conclude authority yet remained with the board to review the matter of weekly payment and diminish, or approve the ending of the same, as it found the facts warranted, as provided in section 14, part 3, of the act.

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WORKMEN'S COMPENSATION—RIGHT TO SUE FOR NEGLIGENCE—EMPLOYEE OF BREWERY COMPANY INJURED IN SALOON BUILDING OWNED BY COMPANY—*Winter* v. *Peter Doelger Brewing Co., Supreme Court of New York, Appellate Division, First Department (Dec. 29, 1916), 162 New York Supplement, page 469.*—Rudoph Winter brought a common-law action for negligence against the company named. He was in its employ as a driver. While delivering beer to a saloon he was injured by the collapse of an elevator on the premises. The building was owned by the brewing company which employed him. The municipal court dismissed the complaint on the ground that his remedy was under the compensation act, and the appellate term reversed this decision on the authority of Lester *v.* Otis Elevator Co., 155 N. Y. Supp. 524, which held that when a person is injured, in the course of his employment, by the negligence of a third party, he is not deprived of his common-law remedy against the party at fault. In the present decision this judgment was reversed and that of the municipal court affirmed, the appellate division holding that the employee had been entitled to compensation, but not to damages. Judge McLaughlin, in the opinion which he wrote, said:

In the present case plaintiff was injured, not by reason of the negligence of a third party, but solely by reason of the negligence of his employer. The fact that the elevator and building were located

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some distance from the defendant's brewery did not make the defendant a third party, or in any way change the relation existing between plaintiff and defendant. The employer, it is true, owned and controlled the building and elevator; but plaintiff's duties were to take beer from the brewery and deliver it to such places as the brewery company might direct. One of the places which it was supplying with beer was the saloon referred to, where the plaintiff was delivering beer, as he had been directed to do. He was, therefore, at the time of his injury, engaged directly in the work for which he had been employed. His relation to the defendant was precisely the same when delivering the beer that it was when he left the brewery. To hold, under the facts, that the brewery company ceased to be his employer and could be treated as a third party, would, in effect, as it seems to me, destroy the whole scheme and purpose of the statute.

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WORKMEN'S COMPENSATION—SETTLEMENT AND RELEASE—MUTUAL MISTAKE OF LAW—APPLICATION OF SPECIFIC INDEMNITIES—*Carpenter* v. *Detroit Forging Co., Supreme Court of Michigan (March 31, 1916), 157 Northwestern Reporter, page 374.*—Roy Carpenter was injured in September, 1913, a steel sliver entering the third finger of his right hand and causing infection. He was unable to do any work for 10 weeks, and at the end of that time all four fingers were permanently stiffened. An agreement was made and approved by the industrial accident board by which the employee received one-half his weekly wages, or $9 per week, for the 10 weeks of total incapacity, and for 20 weeks in addition, the latter being one-fifth the statutory award for the entire loss of the four fingers involved. At the time the settlement was made between the claimant and the adjuster of the company's insurer the hand was in a splint, and it appeared that the adjuster told the employee and his wife that the agreement was not finally binding and that the board would see that further compensation was granted if the injury proved to be more serious than was anticipated. At the close of the payment of the compensation agreed upon the employee applied to the board for additional compensation, and it found that he had lost 60 per cent of the normal use of his right hand, and awarded compensation for 60 weeks more (making 90 in all, or 60 per cent of 150). The court, affirming the award, held that under the circumstances of the agreement there was a mutual mistake of law in its making, and that it was therefore not binding. It held, however, on the authority of cases decided since the award of the board, that the award should not have been made on the basis of the schedule of specific injuries, that applying only when there is entire loss of a member or its use, but that it should have been based on wage loss. The case was therefore remanded to the board for further hearing and consideration.

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WORKMEN'S COMPENSATION—SUBROGATION OF INSURER TO RIGHTS OF EMPLOYEE—*United States Fidelity and Guaranty Co.* v. *New York Rys. Co., Supreme Court of New York, Appellate Term, First Department (Jan. 4, 1916), 156 New York Supplement, page 615.*—In July, 1914, Philip Magrino was injured in a collision between his employer's truck, upon which he was riding, and a car of the railway company named. He elected to receive compensation and assigned his claim against the railway company to the insurance company, which was liable for the payment of the compensation. The latter brought this action, and insisting upon a right to recover the entire amount to which the employee would have been entitled in such a liability action, waived its right to collect merely indemnity for the compensation paid. The trial court ruled against its claim and entered a nonsuit. This view was sustained and the judgment in favor of the defendant company affirmed. The court held that the compensation law so modified the previous law making claims for damages for personal injury nonassignable, as to allow them to be assigned for the purposes of the act. It held, however, that the term "subrogation" in its use in the act must be taken in the sense of indemnification rather than of substitution to the entire rights of the employee.

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WORKMEN'S COMPENSATION—TOTAL AND PARTIAL DISABILITY—LOSS OF FINGER OF HAND ALREADY MAIMED—*Winn* v. *Adjustable Table Co., Supreme Court of Michigan (Sept. 26, 1916), 159 Northwestern Reporter, page 372.*—On the 21st day of October, 1914, Edward H. Winn, an employee of the company named, had the third finger of his right hand cut off by a rip-saw between the first and second joints. Later it was necessary to remove the entire finger and the metacarpal bone, and even after the wound had healed the employee claimed to have considerable pain in his shoulder. Several years before he had lost the greater part of the other fingers of that hand, but he was able to follow his trade as a carpenter until the loss of the third finger, after which he could no longer work at that trade. An agreement, signed by the employee, was made for the payment of $7 a week for 20 weeks, the amount provided by statute for the loss of a third finger. After receiving 19 payments he refused to accept the 20th, and petitioned the industrial accident board to set aside the agreement. It did so, and ordered the payment of the same rate of compensation for the period of his disability, but not to exceed in all 200 weeks. On appeal this order was reversed and the employee's petition dismissed. Judge Person, who delivered the opinion, said first that no deceit being shown in the procuring of the agreement, and it being shown that the employee was able to read it for himself had he wished, the agreement was a valid one, but that

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nevertheless it might be reviewed by the court. Continuing, Judge Person said in part:

But the facts do not bring this case within any provision of the law that will permit an increase of compensation beyond the amount stated in the agreement. The industrial accident board found that claimant was totally incapacitated from following his trade as a carpenter, but it also found, as it necessarily must have found, that the total incapacity was not the result of the present accident alone, but of that in conjunction with the earlier accident.

But how can an award for partial disability be made, under the statute, in the presence of a total actual disability, except as a specific liability under the schedule in section 10 of part 2? There is no way by which we can fix the duration of a partial disability that has been merged in a total disability. This is true even if the partial disability is, as asserted by claimant, something more than the mere loss of the finger. And, if we could approximate its probable duration, there is no method provided for determining the amount of the compensation.

It is impossible to know how much the claimant might have earned if suffering only from the partial disability, when, as a matter of fact, he can not earn anything because of the total disability. The difficulty is illustrated by the award that the industrial accident board made. That board found a total disability, but did not make an award for total disability, inasmuch as it limited the payments to a period not exceeding 200 weeks, when for total disability they might have extended through a period of 500 weeks. Nor, on the other hand, did the board measure the amount of compensation by the statutory rule for partial disability. It evidently treated the injury as the loss of an arm for which the period of compensation is 200 weeks. But the arm was not lost within the meaning of the statute, and the order was unauthorized. It was an attempt to meet a situation not provided for by the statute, and neither the industrial accident board nor this court has any power to do that.

The injury must be treated simply as the loss of the third finger for which the claimant is specifically compensated by the terms of the statute. The agreement entered into by the parties was in accord with this provision, and must stand.

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WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—DRIVING AUTOMOBILE AT HIGH SPEED IN VIOLATION OF LAW—*Fidelity & Deposit Co. of Maryland* v. *Industrial Accident Commission of State of California, Supreme Court of California (Jan. 18, 1916), 154 Pacific Reporter, page 834.*—W. D. Head, president and superintendent of the Head Drilling Co., was killed by accident, and an award was made to his widow by the commission. On appeal the insurance company contested the award on the ground that Head was guilty of willful misconduct. He had occasion in the course of his employment to go by automobile from Taft to Bakersfield, where he was to take a train. The distance was 40 miles, and he had four hours in which to make the train connection. After leaving Taft he displaced the chauffeur and drove

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the machine himself at a rate between 35 and 45 miles an hour. According to the findings of the commission, the automobile struck a sandy place in the road and was overturned, and the accident resulted in Head's death. The commission found that the rate of speed was not entirely safe in view of the condition of the roads, but that the evidence did not prove that it was uncommon in that vicinity, or that it amounted to speed mania, foolhardiness, or dare-deviltry, or that any orders of the company were violated thereby. There was, however, a State law forbidding any speed in excess of 30 miles an hour. The court annulled the award, holding that the violation of the law constituted willful misconduct. Judge Henshaw delivered the opinion, a part of which is as follows:

Head was violating the express mandate of the law designed for his own protection, for the protection of the other occupants of the car, and for the protection of the general public. His act in so doing was criminal. Much of the finding of the commission is quite beside the question and without the slightest persuasive force. It matters not, for example, that the evidence is insufficient to establish that such speed was "unusual according to the usual custom of drivers of automobiles in that vicinity." That 40 men violate the law and commit crimes is neither justification nor excuse for the forty-first man who does the same thing. Nor yet does it matter that Head was not afflicted with "speed mania," nor that his excessive speed did not "amount to foolhardiness or dare-deviltry." Nor is it of the slightest consequence that Head was not violating any rule or order made by his company. Indeed, it would be as remarkable as it would be unnecessary for an employer to give a specific instruction upon a matter completely covered by a penal statute.

There is no finding and indeed nothing in the record extenuating or excusing the conduct of the deceased. He was not even impelled by the desire to make the train connection. He had four hours in which to travel 40 miles. The conclusion is unavoidable that he was guilty of the willful misconduct contemplated by the law.

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