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DECISIONS OF COURTS AFFECTING LABOR: 1917

LINDLEY D. CLARK
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REVIEW OF DECISIONS OF COURTS AFFECTING LABOR, 1917.

INTRODUCTION.

This bulletin is the sixth in the series devoted exclusively to the presentation of court decisions, the preceding numbers being 112, 152, 169, 189, and 224. The first bulletin noted bears date of 1912, prior to which time decisions of this nature appeared in practically every issue of the bimonthly bulletins, ending with No. 100. Brief statements are given in the MONTHLY LABOR REVIEW of the bureau of the more important cases as soon as they come to the knowledge of the office, but these are included in the annual summary. No attempt is made to cover the entire list of decisions handed down by the State and Federal courts, representative types being usually sought for. In a few classes of cases, however, as those construing workmen's compensation laws, those relating to labor organizations, and those involving important questions in interstate commerce, a more general inclusiveness is practiced. The decisions used are mainly those handed down by Federal courts and the State courts of last resort, though in some cases opinions of subordinate courts of appellate jurisdiction are used, notably of the Supreme Court of New York. As has been the case for the past few years, no opinion of the Attorney General of the United States construing Federal labor legislation has appeared.

The opinions are presented in abridged form, the facts being usually stated in the language of the editors, with quotations from the language of the court in most cases, though occasionally the conclusion reached is indicated without such quotation. The sources used are the same as in the past, i. e., the National Reporter System, published by the West Publishing Co., and the Washington Law Reporter for the District of Columbia. With a few exceptions the cases used are those which were published during the calendar year 1917, the volumes covered being as follows:

Supreme Court Reporter, volume 37, page 22, to volume 38, page 64.

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Federal Reporter, volume 236, page 609, to volume 245, page 816.

Northeastern Reporter, volume 114, page 321, to volume 117, page 848.

Northwestern Reporter, volume 160, page 209, to volume 165, page 304.

Pacific Reporter, volume 161, page 113, to volume 168, page 1120.

Atlantic Reporter, volume 99, page 257, to volume 102, page 336.

Southwestern Reporter, volume 189, page 801, to volume 198, page 816.

Southeastern Reporter, volume 90, page 801, to volume 94, page 480.

Southern Reporter, volume 73, page 1, to volume 76, page 824.

New York Supplement, volume 161, page 961, to volume 167, page 704.

Washington Law Reporter, volume 45.

An unusually large group of important decisions relate to the subject of labor organizations, a notable case being that of Hitchman Coal Co. *v.* Mitchell, passed upon by the Supreme Court of the United States. The workmen's compensation laws of the various States afford the largest single group of cases, and here again the Supreme Court of the United States has rendered important decisions on the subject of the application of the State laws on this subject to cases of admirality and interstate commerce. Other important decisions uphold the constitutionality of the minimum-wage laws of Arkansas and Minnesota and declare unconstitutional the initiated act of Washington forbidding employment agencies to collect fees from persons seeking employment by their aid.

This review is an attempt to present in brief the salient points passed upon by the courts in cases under consideration. Technicalities are omitted as far as practicable in the more extended reports and are almost entirely eliminated in this briefer review. In some instances the case must be referred to under more than one head by reason of the fact that more than one point is involved in the discussion. As last year, the subject matter of the case, and not the nature of the law on which it is based, i. e., common or statutory, determines the grouping.

EMPLOYER AND EMPLOYEE.

ENFORCEMENT OF CONTRACT.

While it is commonly said that a contract for personal services is not subject to the rule of specific performance, a few States have enacted laws practically seeking the enforcement of contracts where advances have been made by the employer on the strength of an agreement for services. The Florida law on this subject was under consideration in a case (Goode *v.* Nelson, p. 69) in which conviction

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by the lower court was reversed by the supreme court of the State on account of the declared unconstitutionality of the law as tending to create a status of involuntary servitude. The Federal statute forbidding peonage was held applicable in a case (Bernal *v.* United States, p. 185) in which a Mexican woman was being held to compulsory service by the proprietor of an alleged hotel in Texas on a claim that the latter had paid the woman's fare, and refused to allow wages for the work done.

A different aspect of the subject of enforced contracts is presented in the case of employees leaving service after having obtained knowledge of secrets of manufacture or other important data of value to their employer, whose exclusive right thereto is guaranteed by principles of common law. An obvious difficulty in passing upon questions involving secret processes of manufacture is their necessary disclosure to experts in cases in which the novelty of the process is in dispute. Such a question was involved in the case E. I. Du Pont de Nemours Powder Co. *v.* Masland, p. 78); in which the Supreme Court sustained an injunction against a general disclosure to experts, leaving the court opportunity to control inquiries and limit them to those necessary for a determination of the rights of the employer and the employee. In Aronson *v.* Orlov (p. 80) a simpler question was involved, since the contest hinged on the right of an employer to make use of a device for which applications for patents were under discussion. In this case the Supreme Court of Massachusetts affirmed an injunction against the employee making use of his employer's device in the conduct of a rival business in the same field. A list of customers of a laundry was held (New Method Laundry Co. *v.* McCann, p. 79) to be a trade secret, the use of which for soliciting trade for a rival company could be enjoined. The company's contention that the injunction should cover the receipt of work by its former employee from its old customers was not sustained.

BREACH OF CONTRACT.

Damages for the unlawful discharge of an employee were approved in a case (Barry *v.* New York Holding & Construction Co., p. 68) where an estimated value of commissions on business that might have been obtained but for the unlawful discharge was included in the award. A manager of a department store was held entitled to damages for discharge made during the course of the fourth year of service, under a contract for the term of one year, with presumed renewals, the court holding such a presumption controlling (Stewart Dry Goods Co. *v.* Hutchison, p. 72). Employment during a part of the time was held not to reduce damages, since it was unremunerative.

The effect of a custom of trade was under consideration in Cormier *v.* Lumber Co. (p. 70), in which it was held that "straight time"

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covered the period of a protracted shutdown, since the employee had not been definitely discharged at its commencement.

The inattention of the superintendent of an establishment to its operation was held to warrant his discharge in Farmer *v.* First Trust Co. (p. 71), where it was in evidence that the establishment was not being satisfactorily managed and required close personal supervision—this in face of the contention that an employee of his rank could not be held to constant personal attendance upon his duties.

CLEARANCE CARDS.

The vexed question of the constitutionality of laws compelling the employer to furnish on demand a clearance card or service letter was before the Supreme Court of Missouri (Cheek *v.* Prudential Insurance Co., p. 75). That laws of this class ore within the police power of the State and that they are of beneficial intent as protecting workmen from the oppressive practices sometimes indulged in by employers or groups of employers was maintained by the court in the face of adverse citations.

INTERFERENCE WITH EMPLOYMENT.

The Supreme Court of Massachusetts had before it a case (Doucette *v.* Sallinger, p. 74), in which the question of damages for discharge caused by the activity of a third person was involved. The offender had acted under a mistake, but it was held that it was his duty to assure himself of the identity of the person complained of for nonpayment of a debt, failing which he was liable for damages for causing the discharge of an innocent man.

Two cases are noted which arose under the Sherman Antitrust Act, one (United States *v.* Hollis, p. 65) being a prosecution for conspiracy and combination to restrain trade by an association of retail lumber dealers. Its purpose was, among other things, to prevent sales to consumers by others than retail dealers and to boycott wholesale dealers and manufacturers who made such sales. Activities of this nature were held to be offenses against the law and were enjoined. The second case (Knauer *v.* United States, p. 64) involved quite similar activities on the part of an association of master plumbers, and in this case a conviction for violation of the Sherman Act was affirmed by a circuit court of appeals.

A novel case based on general economic principles was passed upon by the Supreme Court of the United States, which sustained the constitutionality of a statute of Maine which authorized municipalities to maintain coal and wood yards for the purpose of selling fuel at cost to the resident population. Interested parties sought to have this act declared unconstitutional on the ground that taxation

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for such purposes was not for a public purpose and was not within the power of the legislature to levy. This the Supreme Court, however, denied and sustained the law. (Jones *v.* City of Portland, p. 121.)

SEAMEN.

Since the enactment of the seamen's law of 1915 the status of such employment is much more closely assimilated to that of laborers generally, though none of the cases herein noted makes reference to that act. In Alaska Steamship Co. *v.* Gilbert (p. 188) the point involved is simply as to the terms of the contract to be held as implied at the time of employment and changed without notice to the employee. The court held that a discharge for refusal to accept the changed conditions of employment was not warranted and affirmed a judgment awarding wages and expenses. Quite similar questions were involved in the second case (The *Moana*, p. 187), in which sailors were held entitled to the benefits of an understood agreement for a round-trip employment, as against the employer's contention that they were hired for one way only.

A third case that may be mentioned under this head involved the construction of the Federal alien contract labor law and its application to aliens brought from a foreign country for employment on an outgoing vessel, service as sailors also being rendered on the voyage to the United States. The claim that this service was a subterfuge was rejected, as was their classification as laborers; while their transfer from one vessel to another in an American harbor was held not to constitute a bringing of them into the United States under the terms of the law. (Scharrenberg *v.* Dollar S. S. Co., p. 61.)

RESIDENCE IN COMPANY VILLAGE.

An interesting case that does not fall under any of the usual headings is one (Harris *v.* Keystone Coal & Coke Co., p. 73) in which the Supreme Court of Pennsylvania passed upon the validity of a company order excluding a tradesman from the streets of a village owned by it and occupied by its employees. The authority to make such exclusions was sustained as being within the terms of a valid contract with the workmen.

WAGES.

MINIMUM WAGE LAWS.

The question of the constitutionality of laws authorizing the establishment of a minimum wage for women and minors was before the courts of last resort of Arkansas and Minnesota. The Supreme Court of Oregon had upheld a law of that nature in a decision rendered in 1914 (Bul. 169, p. 172), and this was sustained on April 9, 1917, by an evenly divided court on an appeal to the Supreme Court

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of the United States, one justice known to be in favor of the constitutionality of the act not taking part in the decision by reason of his connection with the case during its trial. Subsequent to this decision (June 4, 1917), the Arkansas law establishing a statutory daily wage was sustained by the supreme court of the State (State *v.* Crowe, p. 191), reference being made to the physical needs of women as requiring an adequate wage. The Minnesota statute resembles that of Oregon in providing for a commission to determine wages, and a subordinate court had taken the position that the law was unconstitutional and enjoined its enforcement. The supreme court, however (Williams *v.* Evans, p. 193), took the opposite view and sustained the law as a valid exercise of the police power not forbidden by the fourteenth amendment.

MODE AND TIME OF PAYMENT.

In the Ballestra case (p. 195), a California statute forbidding the payment of wages in scrip, etc., unless immediately redeemable in full in lawful money was held constitutional and a conviction for its violation affirmed.

A case that may be noted here as involving the question of the full and adequate payment of wages earned, though not concerned with the question of scrip or orders, is one decided by the Supreme Court of Oregon (Sumpter *v.* St. Helens Creosoting Co., p. 199), the matter of overtime pay being under consideration. A contention that the 10-hour law of the State was unconstitutional was first rejected, but inasmuch as the monthly pay checks were so drawn as to constitute, when indorsed, receipts in full of wages earned to date it was decided that no claim could be sustained for labor performed in excess of the 10 hours declared by law to be a day's work.

A law of Arizona establishing a semimonthly pay day was challenged as to its validity, primarily because its enforcement might involve imprisonment for debt where the employer became subject to punishment for its violation (Arizona Power Co. *v.* State, p. 197). This contention was rejected in view of the fact that the employer in the present instance was a corporation, which could not be imprisoned, and was therefore not entitled to raise the question. The fact that the law applied only to corporations was likewise held not to invalidate it; nor could it be regarded as void for uncertainty in requiring payment of wages " at once " to persons leaving service, the language being held to imply payment within a reasonable time.

ASSIGNMENTS.

The practice of assigning future earnings as security for loans is regulated by law in an increasing number of States, and the con-

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stitutionality of such laws was challenged in two cases coming under review at this time. In People *v.* Stokes (p. 62) a conviction was affirmed by the Supreme Court of Illinois against a lender who charged a rate in excess of the statutory amount, the law being held valid against claims that it was class legislation and that it abridged the privileges and immunities of citizens, depriving them of property without due process of law. The Supreme Court of Ohio (Wessell *v.* Timberlake, p. —), likewise sustained the validity of the law of this State against quite similar objections where money had been loaned without procuring the license required by the statute.

An assignment of a different type was before the Supreme Court of Virginia (London Bros. *v.* National Exchange Bank, p. 179), the case being one in which a contractor had assigned a balance due him prior to the satisfaction of claims for labor and supplies. The lower court had sustained the validity of the assignment, holding that the mechanics' lien law of the State was not available where the property improved was owned by a municipal corporation. The supreme court reversed this decision, however, and held the assignment invalid until the claims had been met.

Where a contractor borrowed money from a bank and assigned as security all money to become due him on a contract with a city, prior to any notice that claims might be made for unpaid wages, the final balance paid by the city was subject to the assignment to the bank rather than to such claims, leaving the contractor's bondman liable therefor. Time checks for labor assigned by the workmen themselves might also be cashed by the bank and fall within the protection of such bond, though the claims of a subcontractor and a bookkeeper were not of such a nature as to be entitled to this protection (Northwestern National Bank of Bellingham *v.* Guardian Casualty & Guaranty Co., p. 196).

HOURS OF LABOR.

RAILROADS.

The most important decision of the year under this head is that construing and sustaining the Federal eight-hour law applicable to railroad employees, decided in March, 1917. As it was possible to insert this decision in the bulletin covering 1916 decisions, it was reproduced in that number (No. 224, p. 144). The decisions to be noted at this time relate entirely to the construction of the 16-hour law, so-called, though some of the cases relate to the 9-hour employment of certain classes of persons under the same act. Thus in Chicago & A. R. Co. *v.* United States (p. 118), a circuit court of appeals held that switch tenders who habitually received orders by telephone were within the class to whom the nine-hour provision ap-

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plied. A similar conclusion was reached in a case (Denver & Interurban Ry. Co. *v.* United States, p. 118), where a telegraph operator who occasionally handled orders for interstate trains was held to be within the act, even though on a particular day no such orders might be transmitted. A third case under this head (Illinois Central R. Co. *v.* United States, p. 115), involved the question of offices continuously operated, the court holding that the shifting of the register and order book from a station to a tower a few hundred feet away after 12 hours' use by one operator, there to be used for 12 hours by another operator, must be held as the maintenance of a single office, and individual employment therein limited to 9 hours of service within 24.

The starting point for computing the 24-hour period within which 16 hours of work are to be performed was considered in United States *v.* Missouri Pacific Ry. Co. (p. 114), the court of appeals agreeing with the company that this should be the time when the individual enters upon his duties for the day.

Two somewhat contradictory opinions were given as to what constitutes a break in continuous service within the law. In Minneapolis & St. L. R. Co. *v.* United States (p. 115), an absolute release of from two to two and one-half hours at the intermediate station of a round trip was held not to be such interruption as to be subtracted from the total period between the start and the completion of the round trip. In Pennsylvania R. Co. *v.* United States (p. 117), on the other hand, a court of similar rank in another circuit held that the crew of a pushing engine helping trains over mountain grades was off duty during rest periods of 50 minutes each, the time being spent in a rest house, the men being subject to call at any time, and pay being continuous. This opinion does not seem to be based squarely on the provisions of the law, however, as appears from the statement of the court that the nature of the work and the circumstances surrounding it were exceptional, reference also being made to unusual conditions arising from a state of war, to which consideration might well be given if no actual overstrain of the employees was permitted.

What is unavoidable delay so as to constitute an emergency excusing excess employment was considered by the Supreme Court in Atchison, Topeka & Santa Fe Ry. Co. *v.* United States (p. 119). The actual cause of the delay was held to be unavoidable accident, but since the crew might have been relieved at a division terminal, the overtime work was held to be unjustifiable, even though that terminal was not the regular end of the crew's run. Another case before the same court (United States *v.* Northern Pacific R. Co., p. 116), involved the point of making reports of overtime employment, and an honest mistake on the part of the company in selecting the point of time from which the hours of service should be reckoned, was held to warrant the nonenforcement of the penalties provided for its violation.

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WOMEN.

A Wyoming statute had established a workday for women, including those employed in restaurants, but excepting railroad restaurants from the application of the law. The supreme court of the State found no adequate reason for making this exemption, and declared the law unconstitutional in so far as it applied to restaurants of any kind (State *v.* Le Barron, p. 113). A later act of the legislature met the situation by extending the law to restaurants without distinction.

SUNDAY LABOR.

That the observance of the Jewish Sabbath, made in good faith, was an adequate compliance with a law calling for the observance of Sunday, was maintained by the Kentucky court of appeals in Cohen *v.* Webb (p. 191). In a New York case the pasteurizing and bottling of milk on Sunday was held not to be work in a factory in violation of the labor law of the State (People *v.* R. F. Stevens Co., p. 189); while in another case, under the same law (People *v.* Transit Development Co., p. 200), the employment of a machinist for 7 days without a rest of 24 consecutive hours was held to be a violation of the law, a construction-and-repair shop, auxiliary to a street railway company, being held to be a factory within the meaning of the law, and not exempted in the group of power houses, etc., owned and operated by public-service corporations, which are excluded from the operation of the act.

What is a work of necessity was passed upon by the Supreme Court of Arkansas (Rosenbaum *v.* State, p. 190), the operation of a moving-picture show on Sunday being held not to fall within that class—this over the contention of the proprietor that the importance of furnishing suitable entertainment for soldiers encamped near by, who were at liberty only on Sunday, constituted a necessity under the circumstances.

FACTORY REGULATIONS.

The liability of a tenant for conditions in a factory building of which he occupies a part was considered in People *v.* Shevitz (p. 112), construing the New York statute. It was held that even though the defect lay outside of the portion of the building rented by him, the defendant was liable for punishment for taking quarters in a building not conforming to the provisions of the law.

RAILROADS.

The Supreme Court of the United States ruled (Illinois Central R. Co. *v.* Williams, p. 187), that the safety-appliance law of 1910

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required security in certain equipment even though orders standardizing such equipment were not in force, the time allowed for standardization not being permitted to waive responsibility for safety in the meantime.

The relation of State and Federal laws was considered by the court of appeals of Alabama in a case (Louisville & Nashville R. Co. *v.* State, p. 186) in which the construction of laws requiring locomotive headlights was passed upon. Here again the effect of delay due to the establishment of regulations was under review, but the court held that the Federal law was in effect from the date of its enactment, so that the State law in the same field must be considered as superseded at that time.

LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

Though the question of employers' liability is of much less interest at the present time on account of the action of the legislatures of so many States in passing workmen's compensation laws, the fact that such laws are not exclusive in a number of the States and that railway service is in large degree still subject to the doctrines of liability law—exclusively so as to interstate commerce—leaves to the subject a measure of importance.

Approximating the principle of compensation, in that the employer is held liable for injuries occurring in designated hazardous occupations without regard to the question of negligence, is an Arizona statute enacted in conformity with provisions of the State constitution. The constitutionality of the statute was challenged (Inspiration Consolidated Copper Co. *v.* Mendez, p. 85), on the ground that the act is in conflict with the fourteenth amendment to the Federal Constitution. The supreme court of the State held that the act was valid is spite of the declaration of liability without fault, basing its position largely on the decision of the Supreme Court of the United States upholding workmen's compensation laws embodying the same principle. Other points against the same statute were raised in Superior & Pittsburgh Copper Co. *v.* Tomich (p. 82), the contention being made that the provision requiring the defenses of contributory negligence and assumed risks to be always considered as questions of fact and left to the jury was unconstitutional. This also was rejected by the court, and the law appears now to be well established in the judicial system of the State.

SAFE PLACE AND APPLIANCES.

The maintenance of safety conditions in mines is prescribed in practically every mining State by regulations covering the subject of inspection and maintenance of standard conditions of safety. The

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Utah statute calls for an inspection for gases in mines "known to generate explosive gases," and this provision was held (Eleganti *v.* Standard Coal Co., p. 87), to be absolute, without regard to the amount of such gases developed. An explosion of gases in a place marked safe was held by the Supreme Court of Arkansas (Sterling Anthracite Co. *v.* Strope, p. 91) to be evidence of negligence, making the employer liable even though the inspector who had made the mark had reported the working place unsafe. An interesting point in this case was as to the proximate cause of death, which was due directly to pneumonia. The physician had testified that in his opinion the pneumonia was a sequel of the burns received at the time of the injury and the recumbent position made necessary thereby, and the supreme court refused to disturb the finding and judgment of the court below on this point.

Poisonous fumes of slow operation may give rise to a suit for damages if it appears that the employer was negligent in failing to provide adequate ventilation in a place made dangerous by such fumes (Fritz *v.* Elk Tanning Co., p. 90), the Supreme Court of Pennsylvania holding that such was the case both under the common law and under the statutes of the State. The fact that the injured man continued at work under assurances from his superintendent was held not to charge him with contributory negligence.

The negligence of the employer in failing to inspect piling upon which a railway track was supported was held to charge it with liability in South *v.* Seattle, Port Angeles & Western Ry. Co. (p. 102), though the company contended that since piling should last for three years there was no duty to inspect until that time had expired. It appeared, however, that conditions had indicated the propriety of such inspection prior to the accident, and liability was affirmed.

The question was raised in Louisville & Nashville R. Co. *v.* Layton (p. 99) as to how far the benefits of the Federal law requiring safety couplers on railway trains extend. A switchman, not at the time interested in the matter of coupling or uncoupling cars, was injured by the failure of two cars to couple, and the company contended that the act could be of no benefit to him, since it was only to protect against defects in the coupling those whose duty required them to go between the cars. The Supreme Court of the United States admitted that the immediate occasion of the law was to protect those directly employed in coupling, but that its benefits were by no means confined to that class of employees. Another case involving a defect in safety appliances was that of Minneapolis & St. Louis R. Co. *v.* Gotschall (p. 100), like the foregoing decided by the Supreme Court of the United States, the case coming up from the Supreme Court of Minnesota. Negligence was held properly inferable from the failure of the coupler to hold, resulting in the

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fatal injury to a head brakeman—this in view of the fact that a positive duty is devolved upon the railroads by the law. The right of a father to damages for the death of his son was considered in this case, no pecuniary loss appearing. It was held, however, that as under the Minnesota law the father was entitled to the earnings of the minor, no evidence of pecuniary loss was necessary to support an award of proper amount.

The construction of a Kansas statute regarding the operation of dangerous machinery and the abrogation of the principle of assumed risks was also passed upon by the Supreme Court in Bowersock *v.* Smith (p. 83). A paper company had contended that the guarding of the machinery in question was not practicable, and that the injured man, who was superintendent, had assumed the risk of the injury inasmuch as it was his duty to safeguard the machinery. The court below had also instructed that where there was a violation of the statute the common-law defenses of contributory negligence, fellow service, and assumed risks were not applicable, to all of which the company excepted, contending that such a construction would deprive it of its rights under the fourteenth amendment. The Supreme Court of Kansas had affirmed an award in the plaintiff's favor, and this was upheld by the United States Supreme Court, which said as to the claim that the superintendent was himself obligated to safeguard the machinery, that the duty was imposed upon the employer in an absolute manner, and that he could not relieve himself therefrom by contract, the constitutionality of the law being sustained in full.

The matter of the material worked upon rather than of the conditions of the plant itself was considered in a Delaware case (Potter *v.* Richardson & Robbins Co., p. 88) in which damages were sought because of an infection due, as alleged, to the handling of putrid carcasses of chickens furnished to be canned. The court held that the fitness of the chickens for food did not concern the employee, but that she was employed to prepare the chickens, which were presumably suitable for the purpose; and if she found them to be otherwise, she was in the best position to determine their condition, and in proceeding to handle a decayed carcass she was guilty of contributory negligence, barring her right to recovery.

The responsibility of an employer for medical treatment to be furnished under an agreement with his employees was held by the Supreme Court of South Carolina to extend to a case in which death followed the refusal of the company physician to render the service requested to an employee's wife. (Owens *v.* Atlantic Coast Lumber Corp., p. 86.) This ruling was based on the assumption that the company maintained the fund on a basis of pecuniary profit to itself, no showing to the contrary appearing.

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Going beyond the contract relationship of employer and employee, a case (Clayton *v.* Enterprise Electric Co., p. 102) was passed upon by the Supreme Court of Oregon, which held the company liable for the death of an employee whose employer derived power from the transmission wires of the company. The failure of the company to properly insulate its switches was held to entail a liability upon it under the State statute.

OVERTIME WORK.

The effect of prolonged employment as entailing liability upon the employer for injuries traceable thereto was considered by the Supreme Court in a case before it on appeal from an appellate court of Illinois. (Baltimore & Ohio R. Co. *v.* Wilson, p. 99.) Over 14 hours had intervened between the excessive work and the time when the injury was received. The jury had found that the injury was due to the strain upon the plaintiff because of the excessive labor. The contention that the injury must be received during the time of excessive work was rejected by the Supreme Court, as well as other contentions, and the defenses of contributory negligence and assumed risks were not allowed, and the judgment was affirmed.

RELATION TO COMPENSATION LAWS.

The compensation laws of a number of States establish alternative systems, providing that where the employer rejects or fails to accept the provisions of the compensation act liability remains with certain defenses abrogated. The Iowa statute is of this nature and declares that where injury occurs it should be presumed that such injury was due to the negligence of the employer as its proximate cause. In Mitchell *v.* Phillips Mining Co. (p. 104) this presumption was originally relied upon by the plaintiff, but on evidence being introduced to overthrow the presumption, both parties brought in additional evidence on this point. The trial court passed upon this evidence without submitting the case to the jury, but the supreme court of the State held this action improper, and remanded it for a jury trial, holding that only thus could the purposes and objects of the act be carried out.

In Shaughnessy *v.* Northland Steamship Co. (p. 103) the Supreme Court of Washington held that the workmen's compensation law of the State, which was claimed by the company to abolish suits at law for injuries to employees, was not applicable in a case in which a longshoreman was injured while unloading a vessel in Puget Sound. The court held that this abrogation could take effect only where the State laws were operative, and that this, being a maritime case, was outside of State control. Of the same tenor was the conclusion reached by the Supreme Court of Massachusetts in a case (Morrison

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v. Commercial Towboat Co., p. 105) in which the mate of a towboat operating in Boston Harbor was injured while attempting to deliver an article to a seagoing barge. The State law excludes interstate commerce and seamen from its operation, and as the claimant was engaged in the excluded employments no benefits were obtainable under the act.

The status of a minor lawfully permitted to work, but engaged in a prohibited employment, was held by the Supreme Court of Minnesota not to be that of an employee under the compensation act, so that an action for damages was properly brought. (Westerlund *v.* Kettle River Co., p. 106.)

FEDERAL STATUTE.

Jurisdiction.—Where a suit has been decided under the law of a State without objection from the defendant, the Supreme Court of Missouri held that it was too late to raise the question of interstate commerce and the application of the Federal law on an appeal, and affirmed the judgment of the court below. The Supreme Court of the United States took the same position, holding also that since there was no right or privilege duly claimed under the Federal act it had no jurisdiction, and dismissed the case, leaving the judgment of the State courts undisturbed. (Missouri Pacific Ry. Co. *v.* Taber, p. 101.)

Limitation.—Involving, like the foregoing, a consideration of State and Federal laws, was a case (Hogarty *v.* Philadelphia & Reading R. Co., p. 97), passed upon by the Supreme Court of Pennsylvania. The conductor of a shifting crew on a railroad had sued at common law, and the company defended on the ground that he had received benefits from its relief society. On its admission that the injured man was engaged in interstate commerce at the time of the accident, he pointed out that the Federal law did not make this a release from liability. On the company's reply that the action was not brought under Federal law, an attempt was made to amend the pleadings so as to bring the case under that statute, which the trial court refused to allow. The supreme court reversed this ruling, and ordered a new trial, whereupon judgment was given for the employee. An appeal was again taken to the supreme court, which thereupon reversed its previous decision, following the decision of the Supreme Court of the United States in a case involving this point, which had in the meantime been handed down. This was to the effect that a new cause of action was introduced by pleading the statute, and since more than two years had elapsed since the injury was received, the limiting provisions of the law prevented the prosecution of the case.

Exclusiveness.—By far the most important cases relating to the exclusiveness of the Federal statute will be considered under the

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heading "Workmen's Compensation, Interstate Commerce." A decision by the Supreme Court of the United States affecting a phase of this question determined that where a minor had recovered in a suit for damages under the Federal law, no common-law rights survived to the father, since the Federal statute determined the full liability of the company in cases of injury to its employees in interstate commerce (New York Central & Hudson River R. Co. *v.* Tonsellito, p. 98).

Interstate commerce.—The question of when the Federal law is applicable, and when it can not be availed of because the employee is not in interstate commerce, continues to be a vexing one. The general principle underlying the decisions is that the workman must at the time be engaged in work that is directly connected with or will facilitate interstate commerce. That such a connection existed in the case of a gateman who met his death while undertaking to back a horse and wagon from the track, so that he might close a protecting gate for the passage of an intrastate train, was held by the Supreme Court of California in Southern Pacific Co. *v.* Industrial Accident Commission (p. 92). This action involved the overruling of an award made by the commission under the State compensation law, the decision being based on a finding that the use of the track for both interstate and intrastate commerce brought within the scope of the Federal statute persons keeping it in suitable condition for use in interstate traffic. The same court reached an identical conclusion in a case involving the same principals (p. 93), the employee in this instance being a lineman engaged in removing a telephone wire which had fallen upon a trolley wire, the latter being a part of the equipment of an electric railway used in interstate and intrastate commerce. The Supreme Court of Massachusetts (Lynch *v.* Boston & Maine Railroad, p. 96), likewise held the Federal law applicable in the case of a station agent killed while attempting to secure mail bags delivered by an interstate train; so also of a workman injured while assisting in jacking up a wrecked car to release another employee and to assist in clearing away the wreck (Southern Ry. Co. *v.* Puckett, p. 92), the decision in this instance being rendered by the Supreme Court of the United States. Another inclusion decided upon by the court of appeals of Missouri (Christy *v.* Wabash R. Co., p. 94) was that of a switchman killed while shifting cars to be taken to a point a few miles away for loading for interstate commerce. The court held that since the car had been designated for that use the Federal law applied, even though the car had not yet been loaded. Another point involved in this case was as to a violation of the safety-appliance law; the cars were properly equipped with safety couplers, but inasmuch as the method of switching adopted required the employee to take a position between the cars, it was held that the law was violated and liability incurred.

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Cases held to be excluded from the operation of the Federal law, the employment not being of the nature of interstate commerce, were decided by the Supreme Court of the United States as follows: In Illinois Central R. Co. *v.* Peery (p. 91), where a freight conductor injured on a return trip, purely intrastate, claimed damages on the ground that the outgoing trip, in which interstate goods were carried, gave quality to the entire run—a contention which the court rejected; a case (Lehigh Valley R. Co. *v.* Barlow, p. 95) involving the shifting of cars loaded with coal for use in coaling the engines, the coal having been brought from without the State but stored for several days in a yard within the State where the injury occurred, the court in this case holding that the interstate movement had terminated when the coal reached the yards; and a third case (Minneapolis & St. Louis R. Co. *v.* Winters, p. 94), in which the work of repairing a locomotive used in both interstate and intrastate commerce was involved. In this case the court distinguished between such repairs and repairs upon a road permanently devoted to commerce among the States, the use of the engine being variable.

WORKMEN'S COMPENSATION.

While the vast majority of cases arising under the compensation laws receive final adjudication at the hands of the administrative officials, or by agreement between the parties, a considerable number reach the courts of last resort for the determination of contested points.

CONSTITUTIONALITY OF STATUTES.

Charges of unconstitutionality were made in several cases, some being directed against the essential principles of the acts, while others were addressed to specific provisions of law held objectionable by the contestants. Thus in Fassig *v.* State (p. 212) an objection was raised to provisions of the Ohio law permitting an injured employee to submit to the State commission his claim for redress where the employer has failed to come under the act and has not received permission to become a self-insurer. The right of thus submitting a claim to the commission is made alternative to that of bringing a suit for damages with the common-law defenses barred. The trial court had held that the legislature had exceeded its authority in making such a grant, but the appellate courts sustained the law and affirmed the award of benefits and penalty. Another provision of this same law provided for self-insurance where ability to make the necessary payments was satisfactorily shown. Certain employers, having secured the right to become self-insurers, proceeded to take out insurance for their protection in stock companies, whereupon

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the State sought to oust such companies from writing insurance on the ground that the provision of the law authorizing self-insurance was unconstitutional. This the court rejected, and held the action both of the legislature and of the self-insurers to be valid (State ex rel. Turner *v.* United States Fidelity & Guaranty Co., p. 284). A subsequent amendment debars self-insurers from obtaining such insurance.

Of more general nature were objections raised against the Illinois law (Chicago Rys. Co. *v.* Industrial Board, p. 215), the appellant contending that the act in question differs so largely from the act of 1911, which had been held constitutional, that the decision with reference thereto was not conclusive. The chief difference charged was that of discriminatory or class legislation, but the court found no merit in this contention and affirmed the constitutionality of the law on the principles laid down in its decision on the earlier law. The contract of the employee to assume the risks of his occupation was held to be void as contrary to the policy of the act. The employer in a case before the Maryland Court of Appeals (Solvuca *v.* Ryan & Reilly Co., p. 216) made various objections to the law on grounds of due process and contravention of the law of the land, but these objections were held answered by decisions of the Supreme Court. The contention that the act created a judicial body in violation of the State constitution was likewise ruled out. In Adams *v.* Iten Biscuit Co. (p. 217), the unconstitutionality of the law of Oklahoma was maintained by an employee who sought larger benefits in damages than the compensation law allows. A novel contention raised was that the compensation law is so revolutionary in character as to be in effect an amendment to the State constitution and beyond the power of the legislature to enact. The court held, however, that the act was within the police power of the State and valid. Another point involved in this case was as to the payment of damages for serious disfigurement in addition to the benefits allowed by the compensation law for disability; this the court would not allow, holding the act to be exclusive in its operation and not permitting supplementary action of the sort contemplated.

A circuit court of Hawaii had held the compensation law of that Territory unconstitutional as not allowing due process of law, both because of its alleged deficiency in the matter of requiring notice of hearings before the arbitration committees and because it abolished trial by jury; some question was also raised as to classification. The Supreme Court of the Territory rejected all the contentions made and sustained the act in every part. (Anderson *v.* Hawaii Dredging Co., p. 211.)

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PARTICULAR PROVISIONS OF THE LAWS.

INJURIES COMPENSATED.

Accidents.—The Supreme Court of Minnesota (State ex rel. Faribault Woolen Mills Co. *v.* District Court, p. 201) reversed an award in favor of a claimant whose injury was typhoid fever, said to have been contracted from drinking infected water furnished by the employer, the court holding that such an event was not of a sudden and violent nature, essential to constitute an accident. This court held, however, that freezing (State ex rel. Nelson *v.* District Court, p. 202) and sunstroke (State ex rel. Rau *v.* District Court, p. 202) were accidental injuries compensable under the act.

The Court of Appeals of Connecticut reversed an award in behalf of a fireman in a brewery, whose death was due to pneumonia following an unusual exposure, added to exhaustion, holding that exhaustion, although due to accident, could not be classed as a bodily injury within the meaning of the act. (Linnane *v.* Aetna Brewing Co., p. 277.)

A rather peculiar definition of the term "accident" is insisted upon by the Supreme Court of Michigan (Landers *v.* City of Muskegon, p. 200), when it holds that pneumonia following protracted wetting in a freezing temperature was the sequel of but a common occurrence in the occupation of a city fireman, and that even a sudden rush of water drenching the fireman from head to foot was only an ordinary incident of his duties and not an accident; the disease that followed was brought on, therefore, not by an unexpected event but by one incident to that nature of employment. A more liberal view was taken by the Appellate Court of Indiana in a case (United Paper Board Co. *v.* Lewis, p. 277), where nephritis followed overheating and wetting and subsequent chill, the employee being engaged in flushing hot pulp out of a basement into which it had escaped from a broken pipe. The court held that any disease due to such exposure might properly be classed as a personal injury by accident, compensable under the law of that State.

Occupational disease.—The element of accident as a cause is not in evidence in a case (In re Maggelet, p. 274), decided by the Supreme Court of Massachusetts, the claimant being a cigar maker who suffered from neurosis, claimed to be due to the employment. In view of medical testimony to the effect that the disease was probably caused by a stooping position assumed by the workman, but not necessary to the conduct of his work, the case was distinguished from one of true occupational disease, and the claim disallowed.

An inflamed condition of the lining membranes of the nose and mouth due to dust inhaled in handling pulverized grain was classed as a compensable injury by the Supreme Court of California (Hartford Accident & Indemnity Co. *v.* Industrial Commission, p. 239).

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COVERAGE.

Employment status.—A claim for compensation made by the president and principal stockholder of a lumber company for injuries received while handling lumber was denied by the Court of Appeals of New York (Bowne v. S. W. Bowne Co., p. 228), the court saying that the provisions of the law were evidently directed to persons of a different status from that in evidence for the claimant in the case, and the distinction was such as should not be obliterated. A wife employed as cashier and bookkeeper in a store owned by her husband was held by the Supreme Court of Massachusetts not to be an employee under the act, since a married woman can not make a contract with her husband (In re Humphrey, p. 229).

Election.—Some difficulty attended the adjudication of a case which was before the Supreme Court of Arizona (Woodruff *v.* Producers' Oil Co., p. 224), the case coming before the court a second time, with the result that the first decision was reversed. In the first place the court denied to the plaintiff employee any right to sue for damages, declaring that his only recourse was under the compensation law, which he would therefore have no interest in having declared unconstitutional, and it refused to pass upon the points of unconstitutionality raised by him. On the second trial it was decided that since the act calls for express or implied election before it can become applicable, but establishes a presumption in favor of such election unless an express statement in writing is given not less than 30 days prior to the accident, the apparent contradiction must be solved by giving effect to the paragraph of presumably later enactment, and since 30 days had not elapsed from the time of employment the compensation act would not be considered to govern.

The status of minors was involved in two cases before the Court of Errors and Appeals of New Jersey, in one of which (Brost *v.* Whitall-Tatum Co., p. 226) the father was held to be duly notified of the son's exclusion from the benefits of the compensation act by a printed notice appearing on the boy's pay envelope. The company was therefore not allowed to plead its liability under the compensation law as a bar to a suit for damages. In the second case (Young *v.* Sterling Leather Works, p. 226), the provision making the law applicable to minors in the absence of a written statement to the contrary, which, in the case of minor employees, must be given by or to the parent or guardian, was claimed to deprive minors of their right of election, and so of their property rights. The court held that the effect of the law was exactly to the contrary, being to safeguard the minor's interest and protect him against acts of immature judgment, as the legislature had the power to do.

Place of employment.—The law of New Hampshire is applicable to work in shops, mills, factories, etc., employing five or more per-

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sons. It was held (King *v.* Berlin Mills Co., p. 230) not to cover the case of a workman erecting a carrier for pulp wood at a distance of about a mile from the mill of the employer, though engaged at the time with five or more other men. So also the Supreme Court of Kansas (Hicks *v.* Swift & Co., p. 258) reversed an award in behalf of a driver delivering meat at a distance from the employer's packing house, since the accident did not occur on, in, or about any of the company's establishments.

Casual employment.—The problem of a workman employed for the odd job, or not in the regular line of the employer's business, remains unsolved. The laws of a majority of the States exclude the so-called casual employee from the benefits of com[illegible]tion, though the definitions are not uniform. The courts, of course, [illegible] not initiate action, but there is a considerable diversity in the definitions formulated by them, where this duty devolves upon them. Whether the disjunctive "or" or the conjunctive "and" is used in describing the employees under consideration is significant, some laws saying "casual and not in the regular line of the e[illegible]le others use the word "or" instead. In a case passed upon by the Supreme Court of Minnesota (State ex rel. Nienaber *v.* District Court, p. 229), the driver of a sprinkler cart was requested by a teamster delivering coal to assist in extricating him from a mudhole. While rendering this assistance the driver received an injury, and made claim of compensation against the coal dealer, which the court allowed, since, though the employment was casual in the ordinary sense, it was in the usual course of the dealer's business. On the other hand, a workman engaged in plastering a room being erected as an addition to a brewing establishment was denied the benefits of the Illinois statute on the ground that employment for three or four days was casual and not contemplated for inclusion in the enactment of the law (Aurora Brewing Co. *v.* Industrial Board, p. 210).

A denial of the benefits was the result of a consideration by the Supreme Court of Pennsylvania of a case (Marsh *v.* Groner, p. 230) in which a residence was being remodeled, a plasterer employed in the work receiving injury. The employer was held not to be engaged in business in this undertaking, so that no responsibility for injury to the workman could be predicated on the existing facts. A different status appeared in a case passed upon by an appellate court of California (Miller & Lux (Inc.) *v.* Industrial Accident Commission, p. 211), where it appeared that building operations were a part of the regular business of a company owning a ranch, so that a carpenter in their employment was entitled to the benefits of the act. The defense that farm employments are excluded was not allowed, and the commission's award was approved. Another case involving

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the principle of casual employment is discussed under the succeeding heading (McLaughlin case, p. 227).

Hazardous employments.—The limitation of the acts to classes of employment designated as hazardous renders necessary adjudications as to the meaning of this term and also as to how far an incident of the principal employment is to be affected by the character of that employment. The Court of Appeals of New York (Dose *v.* Moehle Lithographic Co., p. 233) affirmed an award made by the industrial commission of the State in favor of a building laborer who was engaged in repairing the building used by the company, though the appellate division of the supreme court had denied the right. The company was engaged in a so-called hazardous employment, and under the definition of "employee" in the amended New York law benefits were available to employees of the company in connection with its business, even though not employed in the main line of its industry. It is clear that this differs from the doctrine announced in the Bargey case (Bul. 224, p. 270), where similar employment was [illegible] to be in the line of the employer's business—a rule followed [illegible] Brewing Co. case, noted under the previous heading. The New York court pointed out that the conduct of the business necessitated proper buildings, and that repair work was so essential thereto that it could properly be called part of the undertaking.

The same court found it necessary, however, to distinguish between the general business of an employer and the duties of a specific employee in a case (Glatzl *v.* Stumpp, p. 235), in which a florist, whose business was not hazardous under the act, employed a driver, this specific employment being classed as one of the hazardous occupations. Notwithstanding this, a driver who went so far as to undertake to arrange a window box for which flowers were being delivered, was held to have departed from his hazardous employment as driver in so doing, and not to be within the protection of the law. Another case passed upon by this court involved identical principles, a salesman in a nonhazardous business having been fatally injured while operating a motorcycle, i. e., a vehicle propelled by gasoline or other power, and by reason of such specific act bringing himself within the terms of the law. The claim that the employer was not engaged in the business of operating motorcycles for gain was admitted, but since he was engaged in a business for gain, and in that business made use of motorcycles, this was held to bring him within the act. (Mulford *v.* A. S. Pettit & Sons (Inc.), p. 236.)

The New York law classes storage as one of the hazardous occupations to which it applies, but the appellate division of the supreme court held (In re Roberto, p. 237) that the storing of coal by a large

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retail dealer was not such storage as the law contemplates; so also in a retail establishment, where an employer was injured while moving the goods temporarily stored in the basement. (Walsh *v.* F. W. Woolworth Co., p. 237.) The contrary view was taken by the Supreme Court of Illinois (Friebel *v.* Chicago City Ry. Co., p. —), in which it was held that where a furniture company maintained a warehouse for the storage of its furniture, it was operating a warehouse within the meaning of the act.

The loading and unloading of goods in transportation is called hazardous by the New York law, and anthrax contracted through an abrasion of the skin received while handling hides was held compensable as an accidental injury in an included employment. (Hiers *v.* John A. Hall & Co., p. 238.)

Admitting the work of blasting out stumps on a highway to be hazardous, the Supreme Court of Illinois (McLaughlin *v.* Industrial Board, p. 227) denied benefits in the case of a workman killed while so employed, on the ground that such work was merely casual or incidental. Thus, though the injured man was a regular employee in road building, the fact that blasting was not regarded as a regular part of that work debarred him from the benefits of the law.

Farm labor.—The common exclusion of agricultural, horticultural, etc., employments was held by the appellate court of Indiana not to be applicable in the case of a workman employed about a thrashing machine that went about from farm to farm (In re Boyer, p. 233); so also in the case of a workman operating an ensilage cutter propelled by a gasoline engine (Raney *v.* State Industrial Commission, p. 235), in which case the Supreme Court of Oregon classed this work as the operation of a feed mill, which is designated as one of the hazardous occupations under the law. Such a decision, however, is no longer possible, since an explicit exemption of such work on farms is made by an amendment enacted in 1917. The janitor of a building injured while pruning a tree was held to be engaged in horticultural labor, and an award of the California commission in his favor was on that ground reversed. (Kramer *v.* Industrial Accident Commission, p. 239.)

Public employees.—While public employees are commonly included under the terms of the various State laws, the phraseology is often such as to debar them of their presumptive rights. Thus the Supreme Court of Kansas denied the right of a workman engaged in hauling gravel for use on the county road, since the county was not engaged in the work of road construction for the purpose of business, trade, or gain. (Gray *v.* Board of County Commissioners, p. 280.) Another case before the same court (Griswold *v.* City of Wichita, p. 281) was decided adversely to the claimant, a police captain killed by a burglar being held not to be a workman. It was also pointed out that in the

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exercise of purely governmental functions, not carried on for profit, there was no possibility of passing on the burden entailed by compensation payments to a consuming public; but the weight of this argument as applying to a governmental corporation sustained entirely by taxation is not entirely obvious.

The Supreme Court of Massachusetts denied the benefits of the compensation law of that State to a teacher of automobile repairing in an industrial school conducted by the city of Lowell, who met his death as a consequence of some improper action of a boy whom he was instructing, the claim being rejected on the ground that the injured man was not a laborer, workman, or mechanic within the meaning of the law. (Lesuer *v.* City of Lowell, p. 281.) The same court held, however, that a schoolhouse janitor who personally did the work of cleaning, heating, washing windows, etc., about the building was a laborer within the meaning of the law and not in the "official service," though an appointee under the civil-service act. An award in his behalf was therefore affirmed. (White *v.* City of Boston, p. 280.)

The Washington statute provides compensation benefits for public employees unless State law or city charter or ordinance makes other provision in their behalf. Workmen injured while employed in the lighting department of the city of Seattle claimed damages at common law for their injuries, and a settlement was agreed upon. The contention being made that the city was under the provisions of the compensation act, a subordinate court took the ground that either common-law damages or a pension provided for by the city charter were the remedies available. The supreme court, however, held that the alternative provisions of the compensation law did not revive any common-law liability as to public employees, but that where the city charter makes provision that provision must be accepted. The constitutionality of such construction was challenged, but the court overruled the contention, even though different recoveries might result in different municipalities, holding that where a substantial provision was made, the local enactment would govern. (State ex rel. Fletcher *v.* Carroll, p. 278.)

Extraterritoriality.—Two opinions noted under this head come from the Supreme Court of California and indicate a restriction to State boundaries of the operation of the law. In North Alaska Salmon Co. *v.* Pillsbury (p. 231), a workman was injured in Alaska while employed under a California contract. On first consideration the court assumed jurisdiction, but on a second examination of the question a contrary conclusion was reached, a distinction being drawn between a compulsory law, under which the parties to the contract have no voice in the matter, and an elective law, which they might voluntarily accept as a part of the contract. In the second instance

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(Kruse *v.* Pillsbury, p. 232), the claim was on account of a man killed on a vessel in a port in the State of Washington. Accepting the view as to extraterritoriality previously adopted by the court, the contention was still made that by a fiction of admiralty the vessel was a part of the territory of the State of California, so that the law would apply. This contention was rejected and the award made by the commission was annulled.

Interstate commerce.—A question of the highest degree of importance and interest was passed upon by the Supreme Court of the United States in its consideration of decisions made by the New York courts in favor of persons employed in interstate commerce, but injured without the negligence of the employer. These courts had held that the Federal statute relating to employers' liability limited itself to cases in which injury was due to negligence, and the State might find an unoccupied field in which it could act and furnish a remedy for injuries due merely to the hazards of employment without regard to negligence. This the Supreme Court denied (New York Central R. Co. *v.* Winfield, p. 260), the conclusion being reached that the Federal act undertook to define the full scope of the common carrier's liability when it enacted a law basing that liability on negligence, and declared the act to be both comprehensive and exclusive, two justices dissenting.

The New Jersey courts had taken the same view as the New York courts, and in Erie R. Co. *v.* Winfield (p. 265) the Supreme Court announced its reversal of a decision sustaining an award in behalf of a compensation claimant. An added point considered in the New Jersey case was as to the nature of the injured man's employment, he having left his engine, the injury occurring while he was leaving the yard after completing his day's work. Since he had been engaged in interstate commerce during at least a portion of his employment through the day, it was held that in leaving the yard he was still employed in commerce of the same nature, since the trip through the yard was a necessary incident of his day's work. It was also held that since the Federal law was dominant, no presumption of election to be governed by the State law could be imputed or allowed. Following the decision in this case, the Court of Errors and Appeals of New Jersey reversed a decision of the Supreme Court of that State, which had affirmed an award in a case involving no negligence on the part of the employer, stating that the State courts are bound by the decisions of the Supreme Court of the United States (Rounsaville *v.* Central R. R. of New Jersey, p. 267).

The difficulty of deciding between State and Federal legislation is in no wise minified by the enactment of compensation laws in lieu of liability statutes, and the question of what employments shall be classed as interstate continues to afford difficulty. The Supreme

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Court of Illinois affirmed an award made by the State board in a case (Jackson *v.* Industrial Board, p. 259), in which a workman employed in painting bridges, towers, etc., had been killed and compensation claimed in his behalf. An action had been brought under the Federal liability statute, but was demurred to on the ground that the employee was not engaged in interstate commerce. The court sustained this, and an award under the compensation law followed, the supreme court declaring that no right to compensation had been lost by the election to sue under the liability act. The decision in the foregoing case that the employment was not in interstate commerce can hardly be regarded as in harmony with the finding of the Court of Appeals of New York that a laborer incurring injury while mowing weeds and grass along the right of way was engaged in interstate commerce, since his "work contributed to the safety and integrity of the railroad," which must certainly be admitted of the work of a painter of bridges, switch towers, and the like. In the New York case (Plass *v.* Central New England R. Co., p. 267), an award affirmed by the supreme court of the State was reversed on the ground that the Supreme Court of the United States had placed interstate employees entirely outside the scope of the State law. The supreme court of the State, appellate division, also ruled against the compensation claim of a plumber whose duty it was to look after the pipes and plumbing equipment about the stations of the road employing him, the court holding that this was a maintenance of the ways and instrumentalities of interstate commerce (Vollmers *v.* New York Central R. Co., p. 268). Where, however, a spur track for private use was the place of injury of a railroad laborer, no interstate traffic being moved thereon at the time, it was held that the injury was of an intrastate nature, so that the compensation law could apply (In re Liberti, p. 270); and where a switchman was killed while assisting in the movement of cars onto a storage track, to be iced for the shipment of meats, it was held by the Supreme Court of Illinois (Chicago Junction R. Co. *v.* Industrial Board, p. 270) that even though several cars subsequently were loaded for interstate shipment they had not acquired the interstate quality at the time of the injury, and a compensation award was affirmed.

Admiralty.—The courts of New York (Southern Pacific Co. *v.* Jensen, p. 203), and California (North Pacific Steamship Co. *v.* Industrial Accident Commission, 163 Pac. 199—case not reproduced), had taken the view that longshoremen and stevedores might choose the benefits of the compensation laws of their respective States in lieu of proceeding in admiralty, and a number of awards were made and approved in accordance with these views. The Supreme Court of the United States, however, in the Jensen case, declared the remedy offered by the State compensation laws incompatible

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with the theory of uniformity contemplated by the Constitution in matters of maritime commerce; so that, although there was by Federal law a saving to suitors of the common-law remedy, where competent, in lieu of admiralty proceedings, the remedy proposed by the compensation statutes, wholly unknown to the common law, could not under existing law be regarded as an alternative. A like conclusion was announced by the same court in the case of Clyde Steamship Co. *v.* Walker (p. 203), the principles involved being the same. It is of interest to note that Congress has met the situation by reserving to suitors not only the common-law rights previously enjoyed by them, but permitting them also to make claim under the compensation laws of their States of residence if they so elect.

ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

The limitation implied in the phrase "arising out of and in the course of the employment," is of the essence of the right to compensation under practically every law. Washington provides by its law a kind of insurance covering the employee while at his work, compensation being "a kind of pension in exchange for absolute insurance on his master's premises." The Ohio statute does not contain the words "arising out of," but despite this omission the supreme court of the State held (Fassig *v.* State, p. 212), that it was the plain intention of the act not to cover any injury which had its cause outside of and disconnected with the employment. In most acts, however, the two terms are used conjunctively and no question can arise as to the necessity of both tests.

The Supreme Court of Illinois (Chicago Rys. Co. *v.* Industrial Board, p. 215) overruled the contention that negligent conduct on the part of the injured man would take him out of the employment in which he was engaged, nor would the accident be for this reason regarded as out of the course of employment. Reference might here be made to the Maggelet case (p. 274) previously noted, where it was held that the neurosis from which the claimant suffered did not arise out of the employment as a necessary incident thereof.

The effect of natural conditions was involved in a case that was before the Appellate Court of Indiana (In re Harraden, p. 250), in which a fire insurance agent slipped upon the icy sidewalk while going from the railway station to a hotel in a city to which he had been sent on business. Compensation was allowed on the ground that the claimant was where he was on account of his employment, and that his exposure to such increased hazards generally was a consequence of the nature of his employment. The Supreme Court of Massachusetts took the opposite view in quite a similar case (Donahue *v.* Maryland Casualty Co., p. 251), where a salesman was returning from a business interview to take a car, and slipped on the ice.

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The court reversed an award for compensation on the ground that the injury was due to a risk common to the public, and not due to his employment. A different condition existed in a case before the Supreme Court of New York (Redner *v.* H. C. Faber & Son, p. 242), in which a workman slipped on the ice on a street which separated the two parts of the employer's factory. The contention that it was simply a street accident was rejected, even though the street was an actual highway, since its situation was such that in going from part to part of the plant it was necessary to cross it.

Two other cases in which the question was raised as to the effects of natural conditions were passed upon by the Supreme Court of Minnesota. In one (State ex rel. Nelson *v.* District Court, p. 202), a janitor suffered from the freezing of a toe, the ultimate result being the amputation of his leg, the freezing taking place while he was engaged in shoveling snow on a very cold day. The lower court denied the claim on the ground that while the injury arose out of the employment, it was not an accident; but as the supreme court had reached the conclusion in another case that freezing is an accident, the only question that remained on this appeal was as to whether it arose out of the employment, which the court held to be true in this instance. Another case decided the same day also reversed the lower court, and approved the claim of a widow for the death of her husband, who had suffered from sunstroke while employed as a street laborer (State ex rel. Rau *v.* District Court, p. 202). There was a conjunction of extreme conditions of exposure to heat and moisture, which led the court to say that there was a violent injury produced by a power not natural.

The principle involved in the Redner case differs in no respect from that of the workman going from one part of the building to another to answer a telephone call (Holland-St. Louis Sugar Co., *v.* Shraluka, p. 240). Here the Appellate Court of Indiana affirmed an award, especially as the workman had been summoned by a superior, and might well assume that the answering of the telephone pertained to his employment.

It is generally held that horseplay is so removed from the duties of workmen that injuries in the course of it are not compensable, but the court last mentioned approved an award in a case (In re Loper, p. 245), in which a workman was fatally injured in his attempt to jerk away from the nozzle of a compressed air hose turned upon him by a fellow-workman, the evidence indicating that the injured man was at the time attending to his duties, and that the employer at other times had acquiesced in the play which in this instance resulted fatally.

Injury received while the employee is engaged in an act outside the line of his duty would ordinarily remove him from the operation

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of the act. Thus the Supreme Court of Illinois (Eugene Dietzen Co. *v.* Industrial Board, p. 251) reversed an award in the case of an employee engaged in buffing, who opened the cover near a ventilating fan for the purpose of recovering from the dust receptacle an article which he had accidentally dropped therein; so in a Massachusetts case (In re Borin, p. 241), in which a workman in a dye house sought to open windows that were nailed down, obviously for the purpose of preventing such opening, the court holding that the nailing was a plain notice of intent, and that in violating such notice the workman was engaged in an undertaking outside of his duties. Where, however, the extraneous undertaking is related to a duty, the injury may be held to be within the terms of the act, as in the case of a boiler tender whose duty it was to read a steam gauge, and while attempting to do so found his way obstructed by some heavy beams and undertook to remove them, suffering injury as a consequence (Manning *v.* Pomerene, p. 247). The Supreme Court of Nebraska held in this case that pain and nausea were sufficient objective symptoms of an injury to warrant its classification as an accident.

When the injury is due, not to the employment but to the physical condition of the workman, it can not be said to arise out of the employment, even though occurring in its course. This is the pronouncement of the Supreme Court of Michigan in a case (Van Gorder *v.* Packard Motor Car Co., p. 244), in which a workman was fatally injured in a fall from a scaffold about 6 feet from the floor, the fall being due to an epileptic fit. The Supreme Court of California announced a like conclusion in a case of practically identical circumstances not reproduced (Brooker *v.* Industrial Accident Commission, 168 Pac. 126).

The point of time at which the status of employee terminates was the essential element in a decision by the Supreme Court of Massachusetts (In re O'Brien, p. 244), in which an employee fell from a stairway while leaving the place of his employment. The court ruled that the circumstances warranted the presumption that such an accident was a reasonable probability, so that it could be regarded as having occurred in the course of employment and as a risk and hazard of the business. An extension of the same doctrine led the Supreme Court of Connecticut to award compensation in the case of a man who was killed while being transported from the place of his work to his home, transportation charges being provided by the employer in addition to the regular wages, and an arrangement made by which one of the employees received the transportation money directly from the employers to carry the men back and forth in his automobile (Swanson *v.* Latham & Crane, p. 249). The Supreme Court of California decided (Atolia Mining Co. *v.* Industrial Accident Commission, p. 246) that a shotfirer who left the mine after laying the fuses

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and returned some 20 minutes later to remedy the conditions due to the supposed failure of two charges to explode was still within the employment when he was shot by a watchman on his return from this visit of inspection. In spite of the fact that the shooting was unjustifiable and reckless, it was still held to be within the scope of the watchman's duties, not being an intentional or premeditated assault, so that the injured man had suffered from conditions created by his employer, and the injury was an incident of such conditions.

That the employment status did not exist at the time of the injury, or rather that the injury did not arise out of the employment, was the conclusion of the Supreme Court of New York in a case in which a contractor's employee went to a part of a building distinct from the working place of his employer for the purpose of there eating his lunch (Manor *v.* Pennington, p. 242). The Appellate Court of Indiana likewise (Inland Steel Co. *v.* Lambert, p. 252), held that a switchman was not injured in the course of his employment when, after having quit work, he changed his working clothes for street clothes and started to deposit a time card; while on the way he attempted to go upon a moving engine that would carry him to his destination without compelling him to make a detour on account of an excavation that interrupted his usual walk. An award in his favor was reversed, the court saying that the act of attempting to board the car was not within the duties of his employment, but was an act only for his own convenience, characterizing it as an unnecessary attempt to do a perilous act, so that the injury did not arise out of the employment. Somewhat in contrast with the foregoing was the action of the Supreme Court of New Jersey in holding (Kolasynski *v.* Klie, p. 241), that a domestic servant fatally injured while lighting a fire with alcohol in disobedience of orders not to use kerosene "or anything like that," was, notwithstanding, injured by an accident arising out of and in the course of employment.

The circumstances under which the injury is received may be such that whether or not the injury comes within the description of the phrase under consideration can only be inferred. Thus, where a carpenter was working on the top of a car upon which were iron frames, near the end of an uninsulated live cable, and the first information as to the injury was derived by seeing the workman fall, the Supreme Court of Illinois held that there was sufficient evidence of accidental injury arising out of and in course of employment to sustain an award, even though there could not be an actual demonstration of all that took place (Bloomington, D. & C. R. Co. *v.* Industrial Board, p. 243). Likewise favorable to the claimant was a decision of the Supreme Court of New York (Chludzinski *v.* Standard Oil Co., p. 248), in a case in which a workman was

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burned to death by his flannel shirt catching fire in a locker room in which was a lighted Bunsen burner, the injured man being alone in the room at the time when he received the injury. The Supreme Court of Illinois held the presumption to be in favor of the claim made in connection with the death of a night watchman who was apparently assaulted with an iron pipe by some unknown person (Ohio Building Safety Vault Co. *v.* Industrial Board, p. 249). The court held that the nature of his employment made his assault by trespassers a possibility, so that an injury of this nature would be classed as a hazard of his work.

WILLFUL MISCONDUCT.

A district court of appeals of California held (Pacific Coast Casualty Co. *v.* Pillsbury, p. 292) that a messenger boy who undertook to operate a freight elevator in violation of specific orders not to do so, notice to that effect also being posted, was excluded from the benefits of the law because of willful misconduct. With this may be noted the action of the Supreme Court of Rhode Island affirming a decree denying compensation where it was clear that the death of an employee was due to his intoxication, the claimant's husband being drowned while attempting to come ashore from a dredge where he was employed as a watchman, to secure an additional supply of liquor (Collins *v.* Cole, p. 269).

Where the employer is found guilty of serious and willful misconduct, the law of Massachusetts permits a double award. In Riley *v.* Standard Accident Insurance Co. (p. 286), the supreme court of that State reversed a finding of such a penal award made against an employer on the ground that he had maintained an elevator in such a state of disrepair as to make him guilty of willful misconduct. The court held that negligence, even though gross or culpable, will not be classed as serious and willful misconduct under the act, since the idea involved is one rather of intentional wrongdoing with a wanton and reckless disregard of its probable consequences. The Ohio statute proceeds on a different principle, and allows a suit for damages instead of an action under the compensation law where an employer fails to comply with any lawful requirement for the welfare of his employees. An appellate court affirmed a judgment in a case (American Woodenware Mfg. Co. *v.* Schorling, p. 286) in which the supreme court found only common-law negligence, and reversed the courts below. The matter of failing to comply with a lawful regulation was held to be limited under the act to disobedience to specific orders or requirements of the industrial commission of the State, or definite provisions of laws and ordinances; so that the mere neglect to maintain a safe place along lines of common-law definitions could not be regarded as making the employer liable in damages instead of under the compensation law.

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LIABILITY OF THIRD PARTIES.

It is a common provision of the statutes that where the injury is due to the negligence of a third party the injured employee may sue him or take his compensation from his employer at his own option. In the latter case the employer has recourse against the third person for recoupment, but no excess recovery may be maintained by him for his personal benefit. A United States circuit court of appeals construed the Nebraska law in a case of this nature (Otis Elevator Co. *v.* Miller & Paine, p. 256), in which settlement had been made by the employer under the provisions of the compensation law of the State. On the employer's suit against the third party a larger recovery was made than the total of the award. The third party's contention that it should have been permitted to show that the employer's negligence concurred in producing the injury was denied, the court holding that under the law the employer's responsibility was positively fixed without regard to questions of its negligence, and that it was entitled to a subrogation to the rights of the injured man or his dependents in proceeding against the culpable third party. Payments made by the employer on account of the compensation award, and the expense of the prosecution of the suit, were held to be proper deductions from the judgment recovered, the balance to go to the dependents of the deceased workman.

Where all the parties are under the compensation law, the Illinois statute provides for recovery of compensation from the employer, the latter being then subrogated to the rights of the employee to the extent of recovery from the third party of the amount paid as compensation. An injured man's suit against the third party was therefore held by the supreme court of the State to necessarily fail in a case where this condition controlled, even though there was a possibility of a larger recovery in such a suit (Friebel *v.* Chicago City Ry. Co., p. 255). It was pointed out that while the employee might be a financial gainer if he had elected not to come under the compensation law, he was at least protected by a double recourse for a limited recovery under the law, so that he could not be regarded as unconstitutionally deprived of his rights. The Kentucky statute varies from the more common methods of procedure in permitting the employee to claim compensation from his employer or proceed against the third party, or to secure redress from both by concurrent or successive actions, though double recovery can not be had. In Book *v.* City of Henderson (p. 258), the injured man first secured a compensation award and then sued the third party for damages, making his employer a party to the suit. Such a step was held by the court of appeals of the State to be proper, and if the employer would interplead, any amount recovered from the third

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party would be properly distributed between the two suitors, the employer's recovery being limited to his compensation payments, but the employee being entitled to any amount in damages recovered without regard to the awards provided in the compensation law.

Where a third party was sued and judgment recovered an appeal was taken and the defense set up that the widow of the injured man, the employer, and the insurer, were parties to a contract by which it was provided that the widow was to sue, and if she recovered $3,000 or more was to receive no compensation, but if she received less than $3,000 the deficit was to be made up to her. The third party defendant in this case contended that this agreement amounted to an election of the compensation remedy, but the court held the agreement void, and the judgment was affirmed (Detloff *v.* Hammond, Standish & Co., p. 254).

A peculiar condition was involved in the case, Dietz *v.* Solomonwitz (p. 253), passed upon by the supreme court of New York. The claimant had been assaulted by strikers, and was awarded compensation, assigning his right to sue for damages to the person or institution which should be liable to make the compensation payments. In the meantime criminal prosecutions were had against the assailants, and they were sentenced to imprisonment, sentence being suspended on condition of good behavior and the payment of certain sums to the injured man. The industrial commission had refused to make any allowance for these payments in awarding compensation, but the court directed that the amounts thus paid should be deducted from the compensation benefits.

DEPENDENCE.

The Supreme Court of Illinois held (H. G. Goelitz Co. *v.* Industrial Board, p. 207) that the rights of a widow to compensation were based on the legal obligation of the husband to support her, and not upon cohabitation or actual dependence. In this case the husband had been separated for a number of years, and he had lived illicitly with another woman, but it was held that his unfaithfulness, while warranting the wife's living apart, did not invalidate her claim, the Illinois statute not requiring that the husband and wife must be living together at the time of the injury. On the other hand, a wife remaining in a foreign country on a farm operated by a hired man, and receiving some funds from her son in this country, was held by the Supreme Court of Massachusetts not to be dependent upon her husband who had been a few months in America, and had sent her nothing, but intended to have her come to this country later on (In re Gorski, p. 223); but where remittances were regularly made of an amount that would afford only partial support, the Supreme Court of Michigan (Kalcie *v.* Newport Mining Co., p. 223), approved an award

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made by the industrial accident board for benefits as for complete dependency, on the ground that the evidence showed that there was an actual dependency, her earnings being insufficient for her support.

An unusual aspect of the question of a surviving wife's rights was involved in a case (Crockett *v.* International Ry. Co., p. 221) in which the Supreme Court of New York held that a widow who had married the deceased subsequent to the date of his injury was a beneficiary within the terms of the law, since the question of dependency is immaterial as regards wife or children, and construing the sentence of the law, "All questions of dependency shall be determined as of the time of the accident," as not applying to persons in those relationships. A similar situation was passed upon by the Supreme Court of Wisconsin, which held (Kuetbach *v.* Industrial Commission, p. 220) that the widow had no rights at the time of the injury, and could acquire none by her subsequent marriage.

The status of a sister who had made a home for her brother, receiving weekly contributions from him for expenses, was held by the Supreme Court of Massachusetts not to be that of a dependent, the deceased man being declared not to be the head of a family of which the sister was a member (In re Murphy, p. 222).

A father partially dependent, receiving all the earnings of his minor son, was declared by the Appellate Court of Indiana (In re Peters, p. 219) to be entitled to the maximum award, even though he was only a partial dependent, since he had been in receipt of the full earnings of his son. Partial dependency was also found by the Supreme Court of Kansas where a minor son had turned over to his mother the major part of his earnings, even though the father owned property of some value and received wages of $125 per month, the court declining to consider the private affairs and economies of the family (Fennimore *v.* Pittsburg-Scammon Coal Co., p. 219). Whether regularity of contributions was essential to sustain a finding of dependency was decided in the negative by the Supreme Court of Illinois, the court finding that the statute did not require dependence in the case of surviving parents or lineal heirs (Commonwealth Edison Co. *v.* Industrial Board, p. 221).

DISABILITY.

The Appellate Court of Indiana had before it a case involving multiple injuries—one, the amputation of an arm, calling for an award for permanent partial disability, while other injuries occasioned temporary total disability. The State board inquired whether separate awards should be made for the two injuries, to which the court replied in the affirmative, stating that the provision that awards for permanent partial disabilities should be in lieu of all other compensation meant only other compensation for such injuries them-

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selves, and not for other injuries that might be received at the same time (In re Denton, p. 289). A different view was taken of such a situation by the Court of Appeals of New York (Marhoffer *v.* Marhoffer, p. 289). The State industrial accident commission had made an award for a period of total disability where there was a laceration of the thumb and index finger and an amputation of the second finger, and an additional award for the schedule period for the loss of the second finger. Current and consecutive awards based on separate items of physical impairment, disconnected from earning power, were held not to comport with the spirit and purpose of the act.

An award for total disability where the injury consisted of the amputation of one finger of the right hand and a stiffening of two other fingers was held by the Supreme Court of Massachusetts not to be warranted in a case (In re Lacione, p. 290) in which no employment had in fact been obtained since the accident. The evidence was held, however, not to show either a total inability to do work or to secure work to do, so that the award could not stand.

The Supreme Court of Wisconsin had before it a case involving an attempt of the employer and insurer to overthrow an award for permanent total disability where there was a paralysis, though not total, of the lower limbs and the lower part of the back, disqualifying entirely for work as a carpenter or laborer, these being the lines of former employment of the injured man. The fact that a lump sum was requested in order that the man and his wife might engage in some small business was held not to warrant a review of the question of total disability, since the award was based on his wage-earning capacity, and not on what might follow if he should attempt to supervise or direct a business undertaking (McDonald *v.* Industrial Commission, p. 275). A quite similar case was before the Supreme Court of Kansas (Moore *v.* Peet Bros. Mfg. Co., p. 291), where a man awarded benefits for permanent total disability was found to be making an income of some $12 or $15 a week from the conduct of a cleaning, pressing, and tailoring business in the basement of his home. The court held that the profits of business did not constitute earnings under the law, and such an undertaking was in no wise incompatible with total incapacity for work.

Another case that was before the same court was that of a man who suffered total and partial disability for a period in excess of two years, for which period compensation benefits were allowed. Before the expiration of the time he found other employment at wages in excess of his earnings at the time of the injury, but the court held that this fact did not afford any warrant for a cancellation of the minimum allowance made to him, the statute having made no provision for such a case. It was also said that the condition would be of comparatively short duration and without serious

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results (Dennis *v.* Cafferty, p. 209). The Supreme Court of Nebraska took a similar view in the case of an injury to a minor employed as a laborer, who after his injury attended a business college and returned to his former employer at an advance in wages. Such advance was held, however (Epsten *v.* Hancock-Epsten Co., p. 291), not to be incompatible with an award as for loss of earning power, since this was the fact as to employment in his former occupation. A case of permanent impairment of use of a foot was before the Appellate Court of Indiana (Underhill *v.* Central Hospital for the Insane, p. 210), the claimant asking for benefits as for total disability. An award which considered the proportionate loss of use as compared with the actual loss of a foot was sustained by the court as falling within the implied limitations.

AWARDS.

The Supreme Court of Massachusetts rejected the contention of the insurer that insanity from another cause than the injury for which compensation benefits were being paid should terminate such payments (In re Walsh, p. 224). This claim was based on the contention that insanity was analogous to death from a cause independent of the injury, but the court disallowed it and ordered the continuance of payments.

An agreed award was held not to be binding by the Supreme Court of Kansas (Weathers *v.* Kansas City Bridge Co., p. 282), where the extent of the disability was not known at the time of the settlement and signing of a release. The court held that if the mistake of fact was mutual, there should be an opportunity to develop the facts as they existed that a proper adjustment might be made.

The proper award for the loss of a defective eye was passed upon by the Supreme Court of Michigan in a case (Purchase *v* Grand Rapids Refrigerator Co., p. 208) in which the injured man had had a defective eye since childhood, due to accidental injury. The eye was capable only of distinguishing light and perceiving approaching objects, and the contention was made that an award as for the loss of a perfect eye was not warranted. The workman was in fact able to return to work at undiminished wages after a few weeks, but the court held that the law made no specification as to the eye for which compensation should be awarded being normal, though perhaps a mere sightless organ might be considered no eye at all. In the case in hand, however, an award for full benefits was affirmed.

MEDICAL TREATMENT.

In State ex rel. Turner *v.* Employers' Liability Assurance Corp. (Ltd.) (p. 293), the Supreme Court of Ohio construed the law of that State requiring insurance companies to provide specifically for medi-

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cal expenses in their insurance contracts, this provision being held valid as a limitation upon the kind of contract that the companies might write in certain cases in the State.

The other cases under this head arose under the Indiana law, and hinged upon a single provision of the statute; all were decided by the appellate court. In the first case noted (In re Kelley, p. 272), it was found at the termination of the 30 days of required medical service that further attention was necessary in order to save the life of the injured man, whereupon the employer instructed the physician to continue treatment. The insurer contested its liability for such additional services, but it was held obligated, in view of the provisions of the act giving the employer the option of furnishing additional needed attendance, and requiring policies to cover all benefits offered by the act. Quite in contrast with the foregoing was a case (In re Henderson, p. 271) in which an evidently necessary operation was deferred until after the expiration of the statutory 30 days, and the question was raised whether the board could obligate the employer to pay the expenses of such deferred operation. The court found the statute somewhat ambiguous, but answered the question in the affirmative.

When the statutory 30 days begins to run was considered in a case (In re McCaskey, p. 271) in which the injured man did not become disabled from the accident until the 30 days' period had expired. The court held that in this case the injury and accident were not contemporaneous, but that the development of the resulting disability furnished the starting point of the period.

PROCEDURE.

Notice and claim.—Failure to file notice on the mere assumption that somebody was safeguarding his interests was held by the Supreme Court of Massachusetts to be fatal in a case (In re Fells, p. 274) where the time elapsed without action, ignorance or mistake not being considered as reasonable justification. The same court found the law not complied with where no notice and claim were filed in behalf of a nonresident widow, the injuries having been received in June, 1914, and an administrator appointed in February, 1915, who mailed a form of notice to the employer and to the board, which, however, was not received by the board (In re Gorski, p. 223). In this case, though the wife was absent, the son was present, and no sufficient reason appeared under the statute for condoning the delay. The Supreme Court of New York (In re Dorb, p. 273) held it not a sufficient notice of injury where the injured man simply telephoned that he was sick without indicating the nature of the illness or that there had been an accident. Subsequent conversa-

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tion with a foreman disclosed the nature of the injury, but not the time, place, or circumstances of its receipt, nor did it give any intimation that there would be a claim for compensation. It was also said that to admit such acts as notice would completely nullify the provision of the law for written notice, the object of which was to give the employer opportunity to make investigation of the circumstances of any alleged accidental injury.

Review.—What must be regarded as a condition requiring legislative correction was developed in a case (Adleman *v.* Ocean Accident & Guarantee Corporation (Ltd.), p. 284) passed upon by the Court of Appeals of Maryland. An award had been made, following the death of a workman, for a term in excess of four and one-half years, to his mother and sister. After about six months the sister married, an event which would have caused the termination of payments to a widow, and the insurer sought a review of the award under the provision of the law that authorizes modification and reapportionment of awards on occasion. The court held, however, that it had no authority to annul the compensation of a beneficiary who was dependent at the time of the employee's death, a situation which obviously discriminates between the widow and other dependents whose marriage may take place during the compensation period.

A case involving readjustment of awards under the law of New Jersey, which permits such readjustment after a year from the original award, was considered by the supreme court of that State (Safety Insulated Wire & Cable Co. *v.* Court of Common Pleas, p. 272). The facts of this case resemble those found in cases under the previous heading of disability, the company having sought a modification of awards in view of the fact that the injured man, after being incapacitated for about a year and a half, had so far recovered from his condition of total disability as to be able to do light work, and had subsequently procured a position at wages in excess of those earned at the time of his injury. The court of common pleas took the ground that it could not review the award, but the supreme court reversed this, saying that a modification of the award might be had on a showing of change in conditions.

The effect of final settlements was passed upon in two cases noted, one before the Supreme Court of Massachusetts (In re McCarthy, p. 282), which held that a lump-sum settlement in full of all liability for the injuries received was binding even though a condition might develop from the injury unknown at the time of the settlement. The same view was taken by the Supreme Court of Kansas (Odrowski *v.* Swift & Co., p. 283), where a release had been given about four months after the injury, on receipt of the amount of compensation due up to that time, no fraud or undue influence appearing in the

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procuring of the release. In connection with the McCarthy case, attention may be called to the Weathers case already noted (p. 282), in which the Supreme Court of Kansas held that where there was inadequate consideration and a mutual mistake of fact, the release was not binding.

Somewhat more technical was the point involved in a case before the Appellate Court of Indiana (Union Sanitary Mfg. Co. *v.* Davis, p. 278). Davis had been awarded compensation, and the employer appealed, whereupon Davis sought to secure a dismissal of the appeal, since no motion for a new trial had been made, as in ordinary civil suits. The court ruled that such procedure was not necessary in the case at hand, especially as there had been a review of the award by the full board, so that the parties had had opportunity for presenting all questions.

EMPLOYERS' LIABILITY INSURANCE.

A statute of Massachusetts provides that where a loss occurs under a contract of liability insurance, the company is directly and absolutely liable without regard to whether or not the insured person makes settlement with the injured person. In Lorando *v.* Gethro (p. 107), the supreme court of the State upheld the law as constitutional, and affirmed the right of the injured person to have the insurance money applied directly to the satisfaction of the judgment in his favor. A quite similar point was involved in Verducci *v.* Casualty Co. of America (p. 108), a judgment having been secured against employers that were insolvent. The company admitted that they were insurers of the employers, but contended that the policy was only for the benefit of the insured firm in case payments had been made by it. The Supreme Court of Ohio held that such a stipulation was inconsistent with the law of the State, and that it was void; judgment was therefore entered for the employee. Another point that arose under the law of this State was as to the writing of insurance by stock companies to indemnify an employer for the result of his own negligence or that of his agents. Such insurance was forbidden by the law, and a company writing insurance of the prohibited nature was ordered to conform with the law or cease operations in the State (State ex rel. Turner *v.* Employers' Liability Assurance Corp. (Ltd.), p. 293).

Not involving the matter of employers' liability insurance, but noted here as a matter of interest, is a case of brotherhood insurance of a trainman who became affected with color blindness and was, as a consequence, discharged from his employment (Routt *v.* Brotherhood of Railroad Trainmen, p. 68). The policy provided for benefits as for total and permanent disability where there was complete

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and permanent loss of sight of both eyes. The Supreme Court of Nebraska held that there had been such loss of sight for the purpose of the employee's vocation, so that he was entitled to full benefits under the insurance contract.

Another case involved the question of accident insurance, the Supreme Court of Illinois declaring that the sunstroke of a traffic policeman, compelled to stand on the streets on a very hot day, entitled him to benefits as for bodily injury sustained "solely through accidental means," reversing the lower courts, which had denied the benefits of the policy (Higgins *v.* Midland Casualty Co., p. 120).

PENSIONS.

Public employees.—The first case to be noted under this head is one involving the right of a policeman receiving benefits from a pension fund for the maintenance of which deductions had been regularly made from his wages, to continue to receive such benefits after an award of compensation under the Iowa law (Dickey *v.* Jackson, p. 184). The decision of the city officials in refusing to make pension payments was annulled by the courts, the supreme court of the State affirming this action on the ground that the rule against double pensions did not apply. A later amendment makes the compensation law inapplicable where city employees are entitled to pensions under local regulations.

The application of an Illinois statute directing the establishment of pension funds for employees of counties was passed upon by the supreme court of that State in Helliwell *v.* Sweitzer (p. 183). Contributions to the fund had been contested by some of the employees of Cook County, and the act was held void by a county court as to all officers and employees provided for. The supreme court, however, distinguished between employees whose salaries were governed by county regulations and those over whom the legislature had direct authority, holding the law valid and applicable as to the latter only.

Mothers' pensions.—As a form of outdoor relief presenting an industrial aspect, in that it is restricted to benefits where there are children under the working age, the subject of mothers' pensions has been included as in some degree a labor proposition. The constitutionality of the Utah statute was sustained by the supreme court of the State (Denver & R. G. R. Co. *v.* Grand County, p. 180), over the contention that the tax for the maintenance of such a pension is not a public purpose. The benefits of the law were held to warrant its enactment, and a second contention that the legislature could not devolve upon the county commissioners the right of levying the necessary tax was also rejected, and the law sustained in all its parts.

The continuance of payments under an amended form of the

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law was passed upon by the Supreme Court of Pennsylvania (Commonwealth ex rel. Trustees of Mothers' Assistance Fund of Philadelphia County *v.* Powell, p. 181). An act of 1913 authorized pension payments to abandoned mothers among others, while in 1915 the law was made to apply only to those whose husbands are dead or permanently confined in institutions for the insane. The court refused to indulge in the presumption of death in a case where the father had disappeared in 1906 and had not been heard from since, and overruled the trustees and the lower courts, which had adopted the view that an unexplained absence for more than seven years raised a valid presumption of death.

Old-age pensions.—The New Hampshire Legislature sought the advice of the supreme court of the State on the constitutionality of a proposed measure for the payment of old-age pensions (In re Opinion of the Justices, p. 182). While the opinion turns largely on the somewhat unusual provisions of the constitution, it is of interest to note that these provisions limit the grant of pensions to those for actual services, and for not more than one year at a time. The court held that there was no means by which the legislature could circumvent the limitations by means of valid act.

EMPLOYMENT OFFICES.

The single case noted here is one of unusual interest, the decision having been rendered by the Supreme Court of the United States, four of the nine Justices dissenting (Adams *v.* Tanner, p. 108). The question before the court was as to the constitutionality of an initiated law of the State of Washington, forbidding employment offices to take fees from workmen for securing positions for them. The act was held to be unconstitutional as interfering unjustifiably with a legitimate business in violation of the provisions of the fourteenth amendment to the Federal Constitution. Interesting dissenting opinions were prepared, contending that the law should be sustained as a declaration of the public policy, in view of demonstrated evils involved in the existing system.

LABOR ORGANIZATIONS.

MEMBERSHIP.

While the rights of members as such are usually determined by the constitution and by-laws of the organizations themselves, the courts may find occasion to intervene where there is a failure to comply with these provisions, or where they are inadequate, or where malice is shown. The Supreme Court of Rhode Island (Fales *v.* Musicians' Protective Union, p. 139) found that the proceedings of the local in its trial of the complainant had not been in good faith or in legal

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form, and declared them void, saying that in such case an injured party need not exhaust his remedy by appeal within the society. Where, however, it appears that there has been an adequate observance of the regulations and the hearing and procedure have been free from fraud and duress, the courts will not intervene to compel the reinstatement of an expelled member (Pratt *v.* Amalgamated Association of Street and Electric Railway Employees, p. 144).

The Supreme Court of Georgia found that a member who had been fined on the ground that he had preferred unfounded charges against a fellow member had been unable to make his defense because of the intimidation of the witnesses. He was not present at the time this action was taken, nor had he been notified of the intention to consider his case. The court therefore ordered that he be given the privileges of the union pending a proper trial (Holmes *v.* Brown, p. 175).

It may happen that a member of a union is expelled in accordance with its constitution, so that the expulsion is not reviewable by the courts, but a right to damages will still remain if the union proceeds maliciously to prevent the expelled member from securing other employment. The action of the union in interfering with the member's securing other employment in the case in hand was found to be not to serve the economic interests of the association, but to preserve discipline in their own ranks by punishing him for leaving and becoming a member of a rival organization (Shinsky *v.* Tracey, p. 142). The Supreme Court of Massachusetts therefore affirmed an assessment of damages made by a master.

A protracted battle has been fought in the case St. Louis Southwestern Ry. Co. *v.* Thompson (p. 141), it having been at least four times before the Appellate and Supreme Courts of Texas in the more than 10 years during which it has been contested. The present hearing was on an appeal from an award of damages against the railroad company which had caused him to be expelled from a brotherhood and against the brotherhood for its action in expelling wrongfully and not in good faith. The judgment was affirmed and the contention that an excess of damages had been awarded was rejected, since a previous decision had been made that a larger verdict was not excessive.

RESTRAINT OF TRADE.

The Supreme Court of the United States had before it a case (Paine Lumber Co. (Ltd.) *v.* Neal, p. 176), alleging a conspiracy of a labor organization to prevent the sale in interstate commerce of goods manufactured by the complaining company. A district court and a court of appeals had refused to award the injunction prayed for, and the Supreme Court took the same view, four justices dis-

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senting. The conclusion was based principally on the finding that there was no malice toward the plaintiffs; nor had they been caused any special damage warranting an injunction. It was held that if there was in fact restraint of trade in violation of the so-called Sherman Antitrust Act a private person could not bring suit for an injunction thereunder; reference was also made to the position taken by the New York courts in regard to the issuance of injunctions as set forth in its opinion in the Cumming case (170 N. Y. 315).

Quite similar was the position of the Supreme Court of Minnesota in regard to a dispute between a builder and contractor of St. Paul and the local building-trades council (George J. Grant Construction Co. *v.* Building Trades Council, p. 131). The injunction sought was not so much to restrain designated acts as unlawful, but what was termed "organized economic oppression," the contest being over the right and liberty of the employer to maintain an open shop. It was held that the employer was entirely within his rights in so doing, but also that the members of the union might not only refuse to work in an open shop, no contract being involved, but might also agree not to work for any subcontractor on any part of the work, even though he employs only union men. On rehearing in this case the question of restraint of trade was pressed, and, while it was admitted that the acts of members of labor-unions might be such as to violate the State law on the subject, there was nothing shown to indicate that such action had yet been taken by the union in question. It was added that the statute in question was not intended to require unwilling rendition of service during the pendency of the dispute.

INTERFERENCE WITH EMPLOYMENT.

Several cases were noted in which employers or business managers sought protection against the acts of organized labor which tended to interfere with the conduct of their establishments. The most important of these was passed upon by the Supreme Court of the United States, involving the right of a labor organization to seek to unionize a plant against the owners' wishes (Hitchman Coal & Coke Co. *v.* Mitchell, p. 145). In this case the mine in question was being conducted as a nonunion mine, all workmen therein being under contract not to become members of a labor organization so long as they remained in their present employment. A protracted contest due to efforts of the United Mine Workers to organize the mine led to an injunction restraining such activities, and the Supreme Court held, three justices dissenting, that the operators were entitled to the protection sought against what was determined to be an illegal interference with their rights. The right of an employer to the good will of its employees and to protection in enjoying a reasonable prospect

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of their continued service on agreed terms was mentioned as having a pecuniary value "incalculably great," for the protection of which the courts would act. On the same day that the foregoing decision was rendered the same court announced its conclusions in a case involving much the same principles (Eagle Glass Mfg. Co. *v.* Rowe, p. 152). In both these cases the District Court had granted a temporary injunction, which had been reversed by the Circuit Court of Appeals, and in both the action of the Circuit Court of Appeals was reversed and the injunctive right granted. An additional point in the present case was as to threats of violation by an organizer, and the motive and purpose behind his activities, as to which leave was given to connect other persons within the jurisdiction of the court with such acts of the organizer named.

In Bossert *v.* Dhuy (p. 129) the Court of Appeals of New York considered the action of union carpenters in instigating a boycott against an open-shop establishment. Bossert's factory had been selected from among several as the one against which a boycott would first be declared, and the proprietors had secured an injunction, which was on this appeal reversed. The doctrine of the court, as already laid down, was referred to, and the acts found justifiable as being for the benefit of the membership and in good faith, rather than for any malicious purpose or for the destruction of the plaintiff's business.

That the union had gone beyond legal bounds in its boycott of an employer was found by the Supreme Court of Massachusetts in Harvey *v.* Chapman (p. 128). The entire controversy apparently arose out of the failure of the employer to discharge his clerks on account of their neglect in the matter of the payment of dues to the union. The court held that there was no apparent justification for the conduct of the union in picketing and boycotting, it having no real dispute with the employer, and his employees not being engaged in the dispute.

The same court had before it a case in which rival organizations of moving-picture operators were involved (Martin *v.* Francke, p. 127). The proprietors of the theater, and their operators, who were members of the Knights of Labor, sought an injunction against a boycott and the advertising of the theater as unfair to organized labor. Although no actual loss in attendance was shown on account of the picketing, the rival union was enjoined from interfering with the rights of the employers and their employees. A quite similar case was brought before the Supreme Court of Minnesota, though in this instance the operator employed was not a union man. An injunction was sought to prevent the picketing of the theater and the carrying of a banner announcing that the proprietor was unfair to organized labor. It was held that the term "unfair" had a limited

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meaning pertaining to the relations of the employer with organized labor, without implying moral shortcomings or lack of integrity, and since the effort was made to further the interests of the union, and not as a malicious interference with the right of the employer, no injunction would be allowed. It was said, however, that if, upon a hearing, the charges made were found true, proper relief would be afforded (Steffes *v.* Motion Picture Machine Operators' Union, p. 125). A like conclusion was reached by the Supreme Court of Montana in a case (Empire Theater Co. *v.* Cloke, p. 123), where the dispute arose over the refusal of the company to employ five members of the Musicians' Union at every exhibition of moving pictures. It was denied that the plaintiff had any vested right in the patronage of the defendants, or of any one else choosing to withhold it; nor had persons wishing to patronize the theater any vested rights of patronage; but they must take it on the terms imposed or leave it as they saw fit. Admitting that such dictation is offensive, it was held that attempted dictation is always present, and that the public must choose whether it will yield, such dictation not being an unlawful invasion of liberty if it amounts to nothing more than a demand which a person has a legal right to make, upon the alternative of his displeasure.

Involving circumstances quite similar to the Martin case above, is one (Tracey *v.* Osborne, p. 138), ni which an organization of shoe workers sought to restrain a rival union from causing employers to break agreements to employ members of the plaintiff union. Agreements had been made by the authorized agencies of the complaining union whereby employers should be furnished with labor by that union, so long as it was able to do so, and for that period members of the union should be employed to the exclusion of all others. The lawfulness of such agreements was sustained by the Supreme Court of Massachusetts, and efforts to procure the breach of contracts of this nature were held to be an invasion of rights warranting the issue of the injunction.

STRIKES.

Any distribution of cases involving labor disputes is difficult, in view of the fact that strikes involve picketing, and picketing is for the purpose of a boycott, while injunctions are sought to prevent whatever specific act appeals to the aggrieved party as the vital or vulnerable point of attack. The cases grouped under this head therefore involve matters of picketing, conspiracy, etc. In a case passed upon by a United States district court, the obligation of a telephone company to maintain its service as set forth in its charter was pleaded, and a decree asked for, directing the company to render its service and maintain its equipment as a duty paramount

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to the private interests of the company and all other persons whatsoever. It was replied that the inability to render service was due to the acts of strikers and sympathizers, who prevented the employment of repairmen, and an injunction was issued against interference with the company's employees. The contention was then raised that the injunction attempted to restrain the strikers from actions claimed to be lawful under the antitrust act as amended by the so-called Clayton Act. The court found that this act, sometimes called "Labor's Bill of Rights," also recognized the rights of the employer and of the public, and limited the acts it would justify to those which are lawful and peaceful, accepting as a fair test of peaceful picketing the inquiry as to whether these acts would be lawful if no strike existed (Stephens *v.* Ohio Telephone Co., p. 165). The injunction was not modified, the court holding that no actions permitted by the Clayton Act were interdicted by it. A circuit court of appeals also sustained an injunction, though with modifications, in a case (Tri-City Central Trades Council *v.* American Steel Foundries, p. 158), where pickets had assaulted employees, threatening any who might take employment with the employers. All picketing was enjoined by the decree entered by the district court, but the court of appeals held that peaceful picketing was lawful. The principles governing strikes for higher wages and improved conditions were passed upon, such action being declared lawful, though if there is an unlawful conspiracy to destroy business, even lawful acts of striking employees may be restrained. The mere fact that business is interrupted was said not to determine the lawfulness of a strike, or of persuasion or picketing in the interests of a lawful strike; but the question of legality is to be decided upon the facts in each case. The status of former employees on strike was touched upon, being described as one of a temporary suspension of relations, but not one of an absolute determination of them; so that such interference as might lawfully be engaged in could not be said to be an act of mere intermeddlers.

An injunction was granted by the United States District Court for the Western District of Washington (Alaska Steamship Co. *v.* International Longshoremen's Association of Puget Sound, p. 160), conspiracy and violence being shown, also interference with interstate commerce. Lawful picketing was recognized, but it was said that slight violence or intimidation would have much weight in determining its character. The right to strike was maintained, but no overt act obstructing the use of the complainant's property is justifiable. Reference was made in this case to the Clayton Act, but the privileges enounced were held to have been exceeded. Another case in which an injunction was granted was that of the Niles-Bement-Pond Co. *v.* Iron Molders' Union (p. 172), in which a district court

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for the Southern District of Ohio found strikers guilty of assaults and violent conduct participated in by members of the union and even the strike committee, with no apparent effort on the part of the union to discourage such wrongful conduct. The right to strike and maintain a peaceful picket was declared, but abuse and intimidation were said to have no place.

An agreement of members of the union not to work with nonunion men was again upheld (Cohn & Roth Electric Co. *v.* Bricklayers', etc., Union, p. 162), the complainant in this instance being an electric company whose opportunity to make contracts was being interfered with because other mechanics would not work on buildings on which nonunion employees were engaged. An injunction sought for was therefore refused by a lower court, this finding being approved by the Supreme Court of Connecticut. The same court granted a new trial in a case in which damages had been awarded by the court below by reason of the acts of strikers and pickets, a part of the damages allowed being for the expense of guards to protect the company's property. (Max Ams Mach. Co. *v.* International Ass'n of Machinists, p. 164.) It was inferable that a portion of this expense was for guards employed after the issue of the injunction, and as it could not be assumed that the injunction would be violated, the court decided that such expense should be borne by the company itself if it wished to continue the guards, and it was for the allowance of this cost that the new trial was ordered.

Where an employer was engaged in the conduct of business on the open-shop plan, and both union and nonunion men had been employed, the Supreme Court of Massachusetts held that the union men are within their rights in withdrawing from the employment, but may be enjoined from interfering with other contracts by means of a secondary boycott or blacklist. Damages by reason of the violation of an alleged contract by the officers of the union to furnish labor were held not to be available, since the officers had no power to make a binding bargain, unless authorized thereto in some definite way by the men themselves. (W. A. Snow Iron Works (Inc.) *v.* Chadwick, p. 171.) The illegality of a secondary boycott was also maintained by the Supreme Court of New York (Justin Seubert, Inc., *v.* Reiff, p. 136), where there was an effort to compel the use of a union label; an injunction was therefore issued, and the question of damages was submitted to a referee.

A novel feature in a case passed upon by the Supreme Court of New Hampshire (White Mountain Freezer Co. *v.* Murphy, p. 169) was as to the right of the labor commissioner of the State to be exempt from testifying in a labor dispute, with regard to which he had obtained particulars by reason of attempts on his part to act as a conciliator. The court held that there was no confidential relation in-

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volved, but that his status was comparable to that of a subordinate court, so that he might be called upon to give evidence. It may be noted that the situation was changed by an act of the legislature making it impossible for the commissioner thus to give testimony in the future. The dispute in this case arose over an attempt to procure the unionizing of the shops, and questions as to whether the action of the union could be classed as a conspiracy and whether organized picketing was unlawful, were carried to the supreme court, which decided that under the circumstances the strikers were called upon to give evidence as to the lawfulness of their motives in declaring the strike, and that the legality of picketing would be determined by the facts shown in a disclosure of the methods used.

Punishment for contempt was considered by the Chancery Court of New Jersey in a case, Flockhart *v.* Local No. 40 (p. 163), in which the conduct of an alleged violator of an injunction was said to indicate an assumption on his part that he could by some means evade punishment for any act that he thought necessary for the success of the strike. In view of the persistence of the offenses jail sentences for 40 and 20 days were imposed upon two offenders, but there was a subsequent remission of the unexpired portion of the sentence on the ground that there had been a sufficient penalty to convince the offenders that they must obey the injunction.

Unfortunate events that frequently accompany labor disputes, resulting fatally in two cases noted, were considered by the California Court of Appeals and the Supreme Court of Colorado. In the first instance (People *v.* Schmidt, p. 133), the court affirmed the conviction and sentence to life imprisonment in the case of a person charged with responsibility for the death of a person named, on the occasion of the destruction of the Los Angeles Times Building in 1910. The case turned largely on the nature of the evidence which connected the defendant with the events leading up to the explosion and its consequences; the principles governing convictions for conspiracy are also briefly discussed. The connection of the party with the different activities was held to be shown by the various items of circumstantial evidence developed, and the conviction was affirmed.

In the case before the Colorado court (Zancannelli *v.* People, p. 173), the action of the court below in convicting the appellant for murder was reversed, the circumstances being such that the court was not able to content itself with a simple reversal, but showed the animus of the prosecution and the court, and the nature and number of the errors to be such that if they had not been "written into the record as they are, under the seal of the trial court, we could not believe that such things had occurred in the trial of a cause in a court of record."

Another case that may be noted in this connection is one in which the Supreme Court of Arkansas affirmed a sentence of imprisonment

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in the case of an assault by a striker. (Cranford *v.* State, p. 157.) The contention of the appellant was chiefly as to erroneous admissions by the court of testimony as to what he had said before the occurrence of the alleged assault. The court ruled that it was admissible as showing the state of the appellant's mind, and his feeling toward persons of the class to which the assaulted man belonged.

PICKETING.

The specific point of picketing in strikes was passed upon in a few cases noted, the Supreme Court of New York (Heitkamper *v.* Hoffman, p. 154) granting an injunction against such picketing as to blockade the entrance to the complainant's place of business, marching upon the sidewalk in front of his shop, or interfering with his customers by threats, violence, etc., though at the same time recognizing the right of the union to distribute a circular giving information as to the relations between the complainant and union labor and asking those who sympathized with such labor to withhold their patronage. Similarly, an injunction against picketing was directed by the Supreme Court of Washington in a case involving much the same class of conditions. (St. Germain *v.* Bakery & Confectionery Workers' Union, p. 153.) The court below had described what picketing would be allowed, but the supreme court held that all picketing should have been forbidden, since there was a legal right to carry on business without obstruction. This case arose on the failure of the employer to compel the payment of union dues by its employees, and cards had been distributed, and large numbers of persons blockading the streets and sidewalks had joined to coerce the action of the employer.

Municipal ordinances were considered by appellate courts of Texas and Oklahoma. In the former case (Ex parte Stout, p. 155) the constitutionality of an ordinance of the city of El Paso forbidding walking up and down in front of the place of business with signs to discourage dealing with the person being picketed was affirmed. The court took the ground that the conduct prohibited was of a nature likely to lead to disturbances, to intimidate customers, and injure business which should properly be protected. In the other case, on the other hand (In re Sweitzer, p. 156), an ordinance of Oklahoma City prohibiting loitering was held not to be available to prevent picketing, in view of the fact that there was a State law authorizing the performance of acts in labor disputes which would not be criminal if committed by one person. It was said that the ordinance could not do indirectly or incidentally what it could not do directly, and a discharge was granted in the case of the defendant convicted thereunder.

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DECISIONS OF COURTS AFFECTING LABOR: 1917.

Alien Contract Labor—Bringing Seaman from China—*Scharrenberg* v. *Dollar S. S. Co. et al., Supreme Court of the United States (Nov. 5, 1917), 38 Supreme Court Reporter, page 28.*—Action for statutory penalties was brought by Paul Scharrenberg against the company named and two other corporations, operators of the British steamship *Bessie Dollar*, and the master of that ship. There were 19 counts in the complaint, each charging the bringing of a Chinaman from Shanghai, China, to San Francisco. Scharrenberg afterwards shipped on another steamship, the *Mackinaw*, working "as a seaman" upon it for some days at San Francisco, going thence to Grays Harbor, Seattle, Wash., and being under contract to complete the voyage to Shanghai. The action was brought while the vessel was still at Grays Harbor. The subordinate courts rendered judgment for the defendants on demurrer, and this was affirmed by the Supreme Court, which held that the facts alleged in the complaint made out no violation of the law of the United States prohibiting the importation of alien contract laborers. Mr. Justice Clarke delivered the opinion, and, after stating the allegations, spoke as follows:

The employment of the man to serve as a bona fide seaman on the *Mackinaw* is not questioned, and the allegations of the complaint negative any suspicion that the employment of him in China was a subterfuge adopted for the purpose of unlawfully securing his entry into the United States.

Basing his right upon the allegations of the complaint, the claim of the petitioner is, that by employing and bringing an alien laborer as a seaman to San Francisco, in the manner described, for the purpose of shipping him, followed by his actually being shipped, as a seaman on board a vessel of American registry, the defendants violated the act of Congress of February 20, 1907 [forbidding the importation, etc., of alien contract labor] (34 Stat. at Large, p. 898).

The argument in support of this claim is that the seaman, described in each count of the complaint, was an alien contract laborer; that the steamship *Mackinaw* was a part of the territory of the United States, and that therefore the contracting to bring such alien to San Francisco and to there employ him upon such vessel was to knowingly assist and encourage the migration of an alien contract laborer into the United States, for the purpose of having him perform labor therein, in violation of the fourth and fifth sections of the act.

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The pertinent provisions of the act are then reviewed, and the opinion continues:

In familiar speech a "seaman" may be called a "sailor" or a "mariner," but he is never called a "laborer," although he doubtless performs labor when assisting in the care and management of his ship; and a "seaman" is defined, in the United States statutes applicable to "merchant seamen," as being any person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel. (R. S. sec. 4612.) In the shipping articles, which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as "seamen" or "mariners." Thus, neither in popular nor in technical legal language would the men employed on the *Mackinaw* be called or classed as "laborers," and such seamen are not brought "into this country" to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them or on another, as soon as employment can be obtained.

ASSIGNMENTS OF WAGES—CONSTITUTIONALITY OF LOAN LAW—*People* v. *Stokes*, *Supreme Court of Illinois* (*Dec. 19, 1917*), *118 Northeastern Reporter*, *page 87*.—F. B. Stokes was convicted of a violation of the act, page 553, Laws of 1917, requiring lenders of money in amounts less than $300 and at rates of interest greater than 7 per cent per annum to be licensed, and regulating the conduct of such business. The offense charged consisted of loaning to one Miller, on an assignment of his wages, $100 at a rate of interest alleged to be $8\frac{1}{3}$ per cent per month—the borrower receiving $100, and agreeing to pay back $25 per month until $150 had been paid. The only ground of appeal from the judgment of conviction was that the statute was invalid. The supreme court upheld the act and affirmed the judgment, Judge Craig delivering the opinion. He considered together the first and second objections, viz, that the act was class legislation, abridging the privileges and immunities of citizens and depriving them of property without due process of law, in contravention of the Federal and State constitutions, and that it granted special privileges or franchises. These contentions were answered by references to decisions of the Supreme Court of the United States and of the courts of the States. The other objections, based on the State constitution, are likewise found to be untenable, in that the act embraces subjects not expressed in its title, and is a local or special law regulating the rate of interest; and that it vests judicial powers in an administrative body, the department of trade and commerce, which is authorized to grant or refuse licenses, according to the qualifications of the applicant or the lack of them, and to demand additional security from licensees when the bond given becomes

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doubtful for any reason. It was pointed out that these powers were administrative and intended merely to further the carrying out of the law as enacted, and that a party who was refused a license, or whose license was revoked, had an undoubted right to resort to the courts for redress.

Assignments of Wages—Constitutionality of Loan Law—*Wessell v. Timberlake, Supreme Court of Ohio (Nov. 21, 1916), 116 Northeastern Reporter, page 43.*—Herman Wessell was arrested by one Timberlake, a constable, for making loans at a rate of interest in excess of 8 per cent without a license. He brought habeas corpus proceedings to test the validity of the chattel-loan law of Ohio (sec. 6346-1 to 6346-9, General Code). The common pleas court of Hamilton County and the court of appeals successively declared the law valid, and this judgment was affirmed by the supreme court, Judge Wanamaker delivering the opinion. The claim of unconstitutionality was largely based upon deprivation of property and due process of law, emphasis being placed upon the alleged arbitrary power conferred upon the superintendent of banks to revoke a license when in his opinion the licensee was guilty of violation of the law, with an unfair and ex parte hearing or none at all, and with no opportunity of appeal to the courts. The judge stated that the plaintiff relied largely upon the decisions of a United States district court regarding the so-called blue-sky law, but that this decision had recently been reversed by the United States Supreme Court (Hall, etc., *v.* Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217). Judge Wanamaker then discussed the nature and scope of the police power, and quoted from an opinion by Mr. Justice Day on the subject. Ancient and modern instances of legislation against usury are cited. Continuing, he said:

It would seem now too late to challenge the constitutionality of such legislation upon the ground that it is a denial of the right of property or liberty of contract.

The right of property, or liberty of contract with reference to property, is by our own constitution made "subservient to the public welfare." Where, therefore, a statute seeks to accomplish such purpose as prevention of usury, such statute is clearly within the police power of the State of Ohio under the provisions of both the State and Federal constitutions, unless some part of the machinery for its administration may violate some provision of State or Federal constitution.

The power of the State to regulate the business of chattel loans was said to be settled in Sanning *v.* City of Cincinnati, 81 Ohio St. 142, 90 N. E. 125.

The court continues:

We come now to consider the second question as to whether or not the plans and provisions of the statute for the promotion of such purposes are a legal exercise of such police power.

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The legal machinery provided by the statute for the enforcement of its provisions obviously must be operated by some officer or board. The statute designates the superintendent of banks as such officer. He grants the license provided for by the act, and agreeable to the act may revoke a license. He is merely the executive of the State for the enforcement of the statute, and the presumption surely is that he would exercise his discretion fairly and justly and in accordance with the purpose, terms, and spirit of the act.

The decisions of the United States Supreme Court in the "Trading Stamp Case," Rast *v.* Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, and in the "Blue Sky Law Case," were then examined, and the doctrine as to valid classifications adopted in those cases was held to apply to the present. The court then said that the chief and most serious objection is that relating to the revocation of licenses; but since in this instance the plaintiff did not take steps to secure a license at all, but ignored the law and contested its validity as a whole, the question of the validity of the provisions for revocation was not presented as essential to the disposition of the case. In so far as involved, is the conclusion, the act is a valid one within the police power of the State, and not in conflict with any provision of the Constitution of the United States.

Boycott — Blacklisting — Conspiracy — Combination in Restraint of Trade—Antitrust Act—*Knauer* v. *United States, United States Circuit Court of Appeals, Eighth Circuit (Sept. 16, 1916), 237 Federal Reporter, page 8.*—Prosecution was inaugurated against 36 persons, members of the National Association of Master Plumbers, and they were indicted for conspiracy in violation of section 1 of the Sherman Antitrust Act enacted in 1890. They were convicted of this offense in a district court, and the circuit court of appeals affirmed the judgment, the illegality of the policies carried out by the association being shown in the following quotation from the opinion delivered by Judge Smith:

When the Sherman law was passed in 1890 the National Association of Master Plumbers had been organized for the "protection" of master plumbers against the competition of the manufacturers and wholesalers, and had pledged members not to buy of such manufacturers and dealers as sold to consumers, and this had been declared "the pivot of the position we are striving for as an organization." On the day that the Sherman law became effective this organization became illegal under the decision of Eastern States Lumber Ass'n *v.* United States, 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53].

It is not our purpose to in any way limit the power of the members of the association to withdraw as soon as it became manifestly an illegal association. In other words, we would not deprive any member of his locus pœnitentiæ; but in 1899, after the passage of

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the Sherman law, at New Orleans the National Association of Master Plumbers adopted what is known as the "New Orleans resolution," as follows:

"That we, the master plumbers of the United States, in convention assembled, do hereby assert our rights to be protected in conducting our business as plumbers and business men, and in the future will purchase our supplies from those who sell only to members of the national association of master plumbers and manufacturers and jobbers in accord therewith."

As there were about twice as many master plumbers outside the association as inside, though generally speaking the individuals outside had rather a smaller business than those inside, still the business of those outside was so considerable that many of the manufacturers and dealers decided to resist the attempt, which was apparently successful in cutting from the list of their customers the consumers, and now sought to extend this to two-thirds of the plumbers. This resulted in a conference in New York, at which an agreement known as the "New York agreement" was made. Conflicts arising under this agreement, in 1902, at Atlantic City, what was known as the "Cleveland resolution" was adopted, as follows:

"That members of the National Association of Master Plumbers are requested to confine their purchases of plumbing goods to manufacturers and jobbers who are willing to assist in improving the condition of the plumbing business, and who sell plumbing goods in localities where there are members of the National Association of Master Plumbers only to recognized master plumbers whose names appear in the National Directory of Master Plumbers, published under the supervision of the National Association of Master Plumbers."

It thus satisfactorily appears that the National Association was called for the purpose of doing what is now a violation of law, and such purpose was "the pivot of" its position. Instead of withdrawing when it became illegal, members by remaining such, and continuing without objection when the association increased the already illegal restraint, became guilty under the Sherman law without proof of any individual participation in any overt act. The institution, if the law had been as it now is, would have been illegal from its inception, and all who joined it with knowledge of its purposes, and remained members after the Sherman law was passed, and made no effort to withdraw, or have the association withdraw, from its illegal course, are subject to conviction for conspiracy under the law. One who was a member when the act of July 2, 1890, was passed, or who subsequently became a member, and who knew the illegal purpose of the association, and never withdrew from it or repudiated its illegal methods, is guilty under the act in question.

Boycott — Blacklisting — Conspiracy — Combination in Restraint of Trade—Antitrust Act—*United States* v. *Hollis et al., United States District Court, District of Montana, Fourth Division (Mar. 14, 1917), 246 Federal Reporter, page 611.*—Suit in equity was brought under the Sherman Antitrust Act against Willard G. Hollis and others, alleging them to be engaged in an unlawful con-

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spiracy and combination to restrain trade. The defendants were members of the Northwestern Lumbermen's Association, composed of retail lumber dealers in Minnesota, Iowa, North Dakota, South Dakota, and part of Nebraska. It was charged that the objects of their organization were as follows:

(1) To unreasonably eliminate or restrict competition, except as between retail yards, for the trade of (a) contractors and builders, (b) mail-order houses, (c) cooperative yards, (d) the ultimate consumer, except possibly some consumers, such as the United States Government, railroads, grain elevators, etc. (2) To force the ultimate consumer to buy at retail prices from regularly established and organized retail lumber merchants, recognized by retail associations. (3) To force the ultimate consumer to buy from the regular and recognized retail merchant who is operating a yard in the vicinity where such lumber is to be used. (4) To prevent any wholesale dealer or manufacturer from quoting prices, or selling and shipping to consumers.

The association adopted a code of ethics which had been adopted by the National Lumber Manufacturers' Association, one article of which was as follows:

It should be the duty of the manufacturer and wholesaler to take an active interest in the marketing of their products through regular channels only. * * * It is the sense of the conference that the widest trade publicity be given for the purpose of making known irresponsive, irregular, and unscrupulous dealers and manufacturers.

The word "irregular" in the above was in 1909 changed to "unethical."

One method which the activity of the association took was the use of "customers' lists." The members of the association reported the names of wholesalers and manufacturers with whom they dealt, and from this information a list of the customers of each wholesaler and manufacturer was compiled. This was extended by exchange of lists with similar associations in other territory. Through reports of the members and of detectives employed by the association, information was received of sales by wholesalers or manufacturers to consumers, including cooperative and mail-order houses, and this was sent to the customers of the wholesalers or manufacturers concerned, who protested against the "unethical" shipment. The members did not deny the existence of this method, but did deny that it was carried out in furtherance of a conspiracy, or that members receiving such notice were under any obligation to take action upon it. Information as to shipments of lumber directly to consumers was furnished by the secretary of the association to the Mississippi Valley Lumberman, and this journal also published under the heading "selfish dealers," a list of retailers who traded with the offending manufacturers, and a list of the manufacturers and wholesalers who had signed an affidavit that "they

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do not sell to catalogue houses, nor solicit trade of the consumers in the territory of the legitimate dealers." One contention of the defendants was that there was no evidence of actual restraint of interstate commerce resulting. The court reviewed the testimony, showing that the manufacturers usually made promises of amendment when reprimanded by the retailers, and that the testimony from the mail-order houses, etc., made it plain that they had difficulty in securing the desired lumber, although in some cases they were able to get what they wanted. In the concluding portion of the opinion Judge Booth, who held the law violated and granted the injunction sought by the Government, said:

The test is, not whether by alleged methods carried out in pursuance of a conspiracy some portion of interstate commerce is annihilated, but whether such commerce is substantially interfered with or restrained.

The responsibility of those who unlawfully place substantial obstacles in the legitimate channels of interstate commerce is not lessened by the fact that some of the persons engaged in such commerce are able by superior agility to surmount the obstacles, and that others by strength are able to break them down.

The court will not feel itself compelled to adjudicate in mathematical terms the extent of the restraint of interstate commerce, if the evidence shows that it is substantial. Nor is it material here that the motives of the defendants in carrying out the activities above described were of the best, and that the acts were inspired by an honest belief that the interests, not only of those engaged in the lumber trade, but of the community at large, would be best served by having lumber and lumber products distributed solely through so-called regular channels. Such matters might very properly be considered by Congress in determining the propriety of enacting proposed legislation. The sole inquiry here before the court at this time, however, is whether the facts disclosed by the record make out a case within the statute already enacted.

In Eastern States Lumber Association *v.* United States the court uses the following language:

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. Addyston Pipe Co. *v.* United States, 175 U. S. 211, 241, 242, 20 Sup. Ct. 96.

In my judgment, the Government has clearly made out a case within the statute, as interpreted in Eastern States Lumber Association *v.* United States, 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53], and Lawlor *v.* Loewe, 235 U. S. 522, 35 Sup. Ct. 170 [Bul. No. 169, p. 140], and is entitled to relief by way of injunction.

It is proper to add that the defendants have, each of them, activities other than those above criticized, of wide range and considerable importance, in reference to which no complaint is made.

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EMPLOYEES' DISABILITY INSURANCE—COLOR BLINDNESS AS COMPLETE AND PERMANENT LOSS OF SIGHT—*Routt* v. *Brotherhood of Railroad Trainmen, Supreme Court of Nebraska (Nov. 3, 1917), 165 Northwestern Reporter, page 141.*—Doris Routt was a trainman in the employ of the Union Pacific Railroad Co. and was discharged on June 5, 1913, because he had become affected with color blindness. He was insured by the Brotherhood of Railroad Trainmen, among other things, against "the complete and permanent loss of sight of both eyes," which was declared to constitute total and permanent disability. On refusal of the association to make payment he brought suit, and a verdict in his favor for $1,740 was rendered by the district court of Douglas County. The brotherhood contended that color blindness was not "complete and permanent loss of sight," since the eyes might be used for other purposes, though the employee was disqualified for railroad service. The court, Judge Hamer delivering the opinion, affirmed the judgment, first examining certain cases analogous to the present one, and then saying in part:

Applying the principle declared in the above cases, complete and permanent loss of the sight of both eyes means loss of the use of the eyesight of both eyes for the purposes of the insured's vocation. [Cases cited.]

The condition is not made that the eyes of the insured shall be taken out of their sockets and away from his physical body, but only that he "shall suffer the complete and permanent loss of sight of both eyes." It does not say that he shall become blind in both eyes, so as to become unable to see objects of any kind, but that he shall lose the "sight of both eyes." This he did when he became color blind.

Where the peculiar malady known as color blindness so impairs the sight that the member of such [railroad trainmen's] association who is insured therein is disabled and is unable longer to continue in the train service, and is discharged therefrom on account of such defect in his vision, it will be held that he is entitled to the benefits provided by the certificate, the constitution, and by-laws and rules of the society. In such case, while the sight of the insured may not be entirely destroyed for some purposes, it will be deemed destroyed and lost as to the particular avocation of a railroad trainman, and he will be held entitled to recover upon the benefit certificate which he holds.

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—BREACH—AMOUNT OF DAMAGES—COMMISSIONS—*Barry* v. *New York Holding & Construction Co. et al., Supreme Judicial Court of Massachusetts (Jan. 24, 1917), 114 Northeastern Reporter, page 953.*—Richard F. Barry brought action against the company named for damages for breach of a contract of employment for one year from September 22, 1913. He was employed to secure contracts for the use of a fireproof building material known as "ribbed concrete." He was to

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receive a salary, and in addition commissions on contracts secured by him. During the previous contract, which was in force from January 1 to September 22, 1913, and under which he devoted half his time to this work, the auditor to whom the case had been referred found that he had procured contracts from which the company received over $51,000. The auditor also found that a second contract for full time was entered into September 22, and that on November 21 he was unlawfully discharged, not having secured any contracts during this period. Further findings of the auditor were that $90 was due the employee for salary and cash expenses, and that he had suffered damages to the amount of $2,000. Judgment was entered for $2,090, and, the company having gone into bankruptcy just after this judgment was rendered, its trustee took an appeal. The court, Judge Loring delivering the opinion, held that under the circumstances the judgment, including damages for the estimated amount of commissions, was proper. The following is quoted from the opinion:

We are of opinion that on the facts found by him the auditor was warranted in making a finding for more than nominal damages for this breach of the contract on its part. Of course the auditor could not know that commissions would have been earned. But under the circumstances of this case that did not prevent the auditor finding more than nominal damages. The amount of his earnings during 9 months under the first contract might well be taken as a basis for determining what he would have earned under the second contract during the 10 months during which he had a right to earn commissions under that agreement.

Employer and Employee—Contract of Employment—Breach by Employee after Receiving Advances—Constitutionality of Statute—Involuntary Servitude—*Goode* v. *Nelson*, *Supreme Court of Florida* (*Jan. 18, 1917*), *74 Southern Reporter*, *page 17*.—Harry Goode petitioned for a writ of habeas corpus against F. M. Nelson, a sheriff. Goode had been convicted and sentenced to imprisonment on a charge of contracting to perform labor, and, with intent to defraud, securing an advance of $37 and failing to perform the labor or return the money. He was remanded to custody by the circuit court of Bay County, but in the supreme court the statute (ch. 6528, Acts of 1913) under which the conviction was had was held unconstitutional, and the sheriff was directed to discharge the prisoner. The court based its opinion largely on the decision of the United States Supreme Court in Bailey *v.* Alabama, 219 U. S. 219, 31 Sup. Ct. 145 (see Bul. No. 93, p. 634), that a similar statute violated the provisions of the Federal Constitution forbidding involun-

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tary servitude. The court in its opinion differentiated other cases, and in conclusion said:

The statute of the State here assailed by its terms provides punishment, not for obtaining money or other thing of value with intent to injure and defraud, but for failure or refusal, without just cause, to perform labor or service under the contract, or for failure or refusal to pay for the money or other thing of value so received upon demand. By making the failure to perform labor or service under a contract a cause for imprisonment, the statute violates the organic law in a manner that is quite similar to, and not distinguishable from, that condemned in Bailey *v.* State of Alabama. The Alabama statute provided that the failure or refusal to perform the service must be "with intent to injure or defraud." The Florida statute does not contain this element with reference to the failure to perform labor, and is therefore at least as clearly a violation of the Federal law, though the Florida act does not contain other provisions found in the Alabama law that were condemned in the Bailey case.

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—EFFECT OF CUSTOM—"STRAIGHT TIME"—*Cormier* v. *H. H. Martin Lumber Co., Supreme Court of Washington (Oct. 13, 1917), 167 Pacific Reporter, page 1105.*—R. Cormier was a logger of 34 years' experience, for the last 24 of which he had been employed as foreman of crews either on the boom or in the woods. He entered the employ of the company named in August, 1912, at the agreed rate of $150 per month "straight time." Near the last of August, 1913, he was ordered by the manager of the company to shut down the camp. He testified that he understood that it was to be closed for 30 days, but the manager denied making this statement. Cormier understood that the hiring at "straight time" meant that he was to be paid during all shutdowns, unless at the time of shutting down he was notified that his services were no longer wanted. At any rate, he kept in touch with officials of the company as to reopening, and refused offers from other companies on the ground that he was still in the employ of the Martin Co. In March, 1914, the manager repudiated the agreement as claimed by the employee, and refused to pay him anything more than the balance due on the month of August, 1913. On the trial of the case the plaintiff introduced evidence to support his contention that there was a custom in western Washington that the meaning of the words "straight time" should be as he had interpreted it. The jury rendered a judgment in his favor, though not for the total amount claimed, and it was affirmed by the supreme court. Judge Holcomb delivered the opinion, and in his discussion of the effect of custom said:

Appellant insists that, under the terms of hiring, it had a right to rely upon the understanding that respondent had been discharged

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the same as all its other employees; that his employment at $150 per month was a hiring from month to month, which renewed the contract each month that his services were required, and, on the other hand, discontinued it each month they were not required and furnished. That is not the case when such custom as was here relied upon and shown existed. As the usage entered into the contract, respondent's hiring did not cease until it was discontinued by one or the other of the parties. The jury were authorized to find from the evidence that neither party discontinued the employment until March, 1914.

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—GROUNDS FOR DISCHARGE—*Farmer v. First Trust Co., United States Circuit Court of Appeals, Seventh Circuit (Sept. 4, 1917), 246 Federal Reporter, page 671.*—A. J. Farmer was a mechanical engineer, employed as superintendent of the gas-engine shops of the Milwaukee Motor Co. After serving in that capacity for about two months, a contract for a year was entered into on August 1, 1912, under which Farmer was to superintend and manage the shops, devoting his entire time, and to receive a salary of $6,500 for the year and a bonus of $3 per engine if 3,000 engines were produced during the year at a specified factory cost with the original equipment and certain additional equipment to be installed. The company had a contract with the Imperial Automobile Co. for 2,200 engines during the year, with an option for 1,000 more, the contract deliveries during 1912 being—August, 100; September, 130; October, 260; November, 260; and December, 300. The installation of the new machinery was proceeding, and work on engines was being done in December, but only 190 engines had been delivered, and these were not altogether satisfactory. On December 18 the vice president went to Jackson in response to the complaints of the automobile company, taking Farmer with him. The next day the latter started back via Chicago and was urged to get back to the shop as soon as possible. He said he would reach Milwaukee the same day, as he was only going to stop off to purchase a Christmas present for his wife. Instead he remained at Chicago for personal purposes until the 22d, and then, having contracted a severe cold, was not able to go to the shops, and on the 24th he was dismissed. The company becoming bankrupt, he entered with its trustee a claim for more than $13,000 damages. The findings of the referee on the matter are stated thus:

The referee found that the absence from duty was in no manner on account of his own necessities or of the employer's business, but because of Farmer's own self-indulgence during that time. He found further that his absence and the failure to return to his employment was not such a breach of his contract of employment as to justify his dismissal, and that his conduct during such time was not such as was inconsistent with the nature of his employment, or rendered him unfit

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to continue it. He allowed the claim to the extent of $3,862.50 for the balance of the full year's salary, and disallowed it for the rest of the claim, which was based upon the bonus.

Both parties petitioned for review, and the district court disallowed the entire claim; this order was affirmed by the court of appeals, Judge Alschuler delivering the opinion, from which the following is quoted:

It is maintained for appellant that one serving in a supervisory capacity is not so strictly accountable to the employer for his time as is a clerk or a workman, and that Farmer's absence of two or three days without permission was not such a breach of the contract as warranted its termination. The legal proposition, as generally stated, is sustained by the authorities cited from Wisconsin, the State where this contract was made, as well as elsewhere. [Cases cited.] But the applicability of such a rule must depend upon the facts of particular cases.

The difficulties under which the shop was operating were pointed out, and the court then said:

The responsible head was Farmer. He had various foremen under him, but he was the only mechanical engineer connected with the plant, and while in authority it was upon his designing, planning, and direction that success or failure depended. This high-priced man faced obstacles, to surmount which would manifestly require his fullest capacity and undivided attention. Surely this was not a situation wherein the man at the helm might needlessly and with impunity abandon his post that he might tread "the primrose path of dalliance."

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—TERM—DISCHARGE—DAMAGES—*Stewart Dry Goods Co.* v. *Hutchison, Court of Appeals of Kentucky (Nov. 16, 1917), 198 Southwestern Reporter, page 17.*—Mrs. A. L. Hutchison was employed by the company named in January, 1912, as manager of a department of its business. The employment was for a term of one year, at a salary of $1,500, with an understanding that the amount would be increased as deserved. Increases were made to $1,800 and $2,400, the latter in 1914. She continued in the service until August, 1915, when she was discharged, wrongfully as she claimed. She sued the company for damages for the discharge, and a judgment in her favor was entered in the circuit court of Jefferson County. She testified that she had made diligent efforts to secure a position after her discharge, but failed for the reason that contracts for such employment are usually made in January and July. In December, 1915, she went into business for herself, but the attempt resulted in a loss. The judgment of the lower court was affirmed. Judge Clay delivered the opinion, and first, citing many cases, stated the law to be that where the original hiring is for a period, as one year in this case, and employment continues after

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the expiration of that period without any different contract, it is presumed that the contract is renewed for a similar period at the expiration of each successive term. The changes in salary were said to make no difference as to this rule. The trial court had instructed the jury to make no deduction for the time near the close of the year when she was in business on her own account, since she was not profitably employed at that time.

The trial judge had refused to instruct the jury that if the plaintiff was discharged because she did not keep the hours usually observed by the other employees, it should find for defendant. This action was held to be justified, since "no witness claiming to know the terms of the original contract of employment testified to any violation thereof by plaintiff."

Employer and Employee—Exclusion of Person from Streets of Mining Village—Contract Between Landlord and Tenant—*Harris* v. *Keystone Coal & Coke Co., Supreme Court of Pennsylvania (Jan. 8, 1917), 100 Atlantic Reporter, page 130.*—Louis Harris, who traded as the Victor Supply Co., brought action against the Keystone Coal & Coke Co. and others for conspiracy, because he had been prevented from going upon the streets of the village of Greensburg and selling and delivering merchandise there. The company stated that its reason for so excluding him was that he persisted in selling to its employees and tenants explosives, which the rules, made for the safety of the employees and property, forbade being stored in the village. A covenant in the leases by which the employees held their dwellings in the village reserved to the company the right to bar objectionable persons from the streets, which were the private property of the company, it owning all the land in the village. The judge in the trial court directed a verdict for the coal company, saying that any right which the plaintiff had must be derived from the tenants, as customers, and that under the terms of the lease the company had the right to exclude him. The supreme court agreed with this view, saying that since the language of the lease was clear, there was no question to submit to the jury as to its meaning, but the interpretation was a question of law for the court. Judge Mestrezat, in the opinion delivered by him, said further:

We know of no principle of law and have been cited to no decision which prevents the enforcement of this contract. The parties had the same right to contract for the control and supervision of the highways in the village as they had to agree to the terms on which the houses and lots were held by the tenants. The entire premises were the private property of the defendant company. It had the right to impose any lawful terms as to any part of the property, and,

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the tenant consenting thereto, the contract became obligatory on both parties.

We have not been convinced that, under the circumstances, the restrictions placed upon the streets and alleys of the village are unreasonable, nor that the provision of the lease imposing the restrictions offends public policy. If, as we think is apparent, these restrictions on the use of the highways were inserted in the contract for the purpose of protecting the property of the defendant company and to secure "the peace, comfort and safety" of the tenants, they did not invalidate the lease. These were objects about which the parties could properly contract and about which they, in view of the purpose for which the village was constructed, might well be expected to contract.

The jury would have been justified in finding, under the evidence, that the plaintiff was delivering to the tenants an explosive for storage in their houses, which was dangerous to the tenants and injurious to defendant company's property, and which was forbidden by an order or regulation of the company. This was persisted in for such a length of time as to convince the defendant company and its officers that the plaintiff could not be trusted to go upon the premises. Such conduct clearly justified the plaintiff's exclusion from the premises.

Employer and Employee—Interference with Employment—Causing Discharge by Mistaken Notice to Employer of Assignment of Wages—*Doucette* v. *Sallinger, Supreme Judicial Court of Massachusetts (Nov. 27, 1917), 117 Northeastern Reporter, page 897.*—Lawrence Doucette brought action against Nathan Sallinger for interference with employment resulting in Doucette's discharge from his employment with the Heyward Bros. & Wakefield Co. Sallinger transmitted to the company a copy of an assignment of wages appearing to have been given by the plaintiff, but which was really made by another person of the same name. The superior court of Middlesex County gave judgment for the plaintiff, and on appeal this was affirmed. Judge Braley for the court said in part:

It further appears and the jury could find, that the defendant upon being notified by plaintiff's counsel of the mistake in identity declined to withdraw the notice until the plaintiff came to his place of business, and satisfied him that he was not the assignor and debtor. The plaintiff was under no obligation in the forum of morals or of law, to make this journey. Nor was the burden upon him to convince the defendant of his mistake and to satisfy him that he was not the debtor. (Lopes *v.* Connolly, 210 Mass. 487, 494, 97 N. E. 80.) The purser having insistently held to his course after being notified that he was in the wrong, must take the natural and probable consequences resulting from his negligence or refusal to institute the necessary inquiries, even if when he declined to act damage to the plaintiff might not have been expected or foreseen. [Cases cited.] The defendant not only was notified September 13, 1915, that the plaintiff was an employee of Heyward Bros. & Wakefield Co., and that he had been discharged

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under a rule of the company, properly admitted in evidence, that "any employee executing an assignment of wages will be liable to immediate discharge," but on September 23, 1915, when informed of his loss of employment by the plaintiff's counsel declined to act, and deliberately insisted upon the enforcement of the alleged assignment. It was not until the plaintiff, who, finding that he could not be reinstated unless the assignment was withdrawn, went to the defendant's place of business "and presented himself for identification," and procured an "order for the release of his wages," that his employment was restored October 2, 1915.

Employer and Employee—Service Letter—Right of Action for Failure to Furnish—Constitutionality of Statute—Blacklist—*Cheek* v. *Prudential Insurance Co. of America, Supreme Court of Missouri (Feb. 20, 1917), 192 Southwestern Reporter, page 387.*—Robert T. Cheek brought action for damages against the company named, and judgment was rendered in favor of the company on demurrer, the St. Louis circuit court holding that the two counts of the plaintiff's petition did not properly state a cause of action. The petition set forth that the plaintiff had for 10 years been a solicitor of industrial and other life insurance, and was qualified only for such employment, and especially, on account of several years of residence there, for such work in St. Louis. The first count was based upon the failure of the company on demand after he had quit its service, after 14 years of employment, to furnish him a service letter. Section 3020 of the Revised Statutes of 1909 requires that such a letter shall be given by corporations to employees of over 90 days' standing leaving employment, the letter to state the nature of the service rendered and the true cause of the severance of the relation. The second count alleged conspiracy on the part of the company and its two principal competitors to blacklist employees who had left the service of any one of them. Damage by reason of loss of employment resulting from these wrongs was alleged. The supreme court reversed the judgment of the lower court, holding the petition good and remanding the case for trial. The company contended that the statute relating to the letter of dismissal, while levying a penalty for violation, did not provide a basis for private action for damages; also that the statute was unconstitutional. These contentions were overthrown by the opinion delivered by Judge Woodson, who said as to the purpose of the act:

Prior to the enactment of this statute a custom had grown up in this State, among railroad and other corporations, not to employ any applicant for a position until he gave the name of his last employer, and upon receiving the name, it would write to said former employer, making inquiry as to the cause of the applicant's discharge, if dis-

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charged, or his cause for leaving the service of such former company. If the information furnished was not satisfactory, the applicant was refused employment. This custom became so widespread and affected such vast numbers of laboring people it became a public evil, and worked great injustice and oppression upon large numbers of persons who earned their bread by the sweat of their faces.

The statute quoted was enacted for the purpose of regulating that custom, not to destroy it (for it contained some good and useful elements, enabling the corporations of the State to ascertain the degree of the intelligence as well as the honesty, capacity, and efficiency of those whom they wished to employ, for whose conduct they are responsible to the public and their fellow employees), and thereby remedy the evil which flowed therefrom.

As to the right of action by an individual injured because of a violation of the statute, he said in part:

The best and clearest rule I have been able to find governing the construction of such statutes is stated in 1 Corpus Juris, p. 957, in the following language:

"The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute and according to whether it appears that the duty imposed is merely for the benefit of the public and the fine, or penalty, a means of enforcing its duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals, or classes of individuals. If the case falls within the first class, the public remedy by fine, or penalty, is exclusive, but if the case falls within the second class a private action may be maintained, particularly where the injured party is not entitled, or not exclusively entitled, to the penalty imposed."

This statute was enacted for the protection of the public, and for the benefit of the employees of corporations who had become victims of said custom, as shown by the authorities previously cited. The contention is therefore decided in favor of the appellant and against the respondent, and we hold that the statute gives the plaintiff a cause of action.

At this point the court showed that it is not the duty of the superintendent personally, but of the corporation through him, to furnish the letter. Taking up the question of constitutionality, and of the conspiracy to blacklist, it was said:

It is insisted by counsel for defendant that said section 3020 is violative of the "Constitution of Missouri, in that it is discriminatory, class legislation, and infringes right of free speech"; also that it violates the "Constitution of the United States, in that it deprives the respondent of its liberty to contract without due process of law."

The statute under consideration was enacted in pursuance of the police power of the State, and in no manner discriminates against the respondent; it applies to all corporations doing business in this State. Nor can this statute be declared class legislation.

This statute embraces within its provisions all persons and things which naturally and reasonably belong to the same class and simi-

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larly situated, and it operates equally and uniformly upon all of them, and is not limited to only a portion of the persons and things which rationally belong to the same class. Similar statutes of Georgia and Kansas have been held unconstitutional and void by the Supreme Court of each of those States. Wallace *v.* R. Co., 94 Ga. 732, 22 S. E. 579 [Bul. No. 2, p. 201]; Atchison, etc. R. Co. *v.* Brown, 80 Kans. 312, 102 Pac. 459 [Bul. No. 84, p. 416].

In my opinion the Georgia case and the Kansas case are not in line with the spirit of similar statutes nor the spirit of this progressive age, which is to protect and shield the public and the wage earner from bodily injury, and to remove him from injurious cliques and combinations formed by others to control his right to work and labor for himself and those who are dependent upon him; otherwise, the effect would be to pauperize him and his family, as well as all other wage earners similarly situated.

That a foreign corporation has no inherent right to exist or to do business in this State is no longer an open question. It derives those rights from the State, impressed with such conditions and burdens as the State may deem proper to impose, and when such a corporation comes into this State to do business, it must conform to the laws of this State, and will not be heard to complain of the unconstitutionality of our police regulations.

Moreover, when a corporation of this State, or one doing business herein, employs a person to work for it, it thereby, by necessary implication at least, agrees with him to give him a letter of clearance when he leaves the company, as provided for by said statute, for the reason that said statute becomes a part of every such contract.

It is finally insisted by counsel for plaintiff that the demurrer to the second count of the petition was improperly sustained. This count charges that certain foreign corporations, including the defendant, doing business in this State, writing life and industrial policies of insurance, made an unlawful agreement whereby each agreed with the other not to employ within a period of two years any person leaving the service of the other company, or who had been discharged by it, and that said agreement resulted in the inability of the plaintiff to find employment in the line of work in which alone he could earn a living.

It is not contended that such corporation may not employ whomsoever it will; but that is not this case. Here the agreement or combination pleaded gave said companies a monopoly in said business, which prevented the plaintiff from obtaining employment from any one engaged in that business, thereby depriving him of his legal right to follow his chosen occupation.

While the petition may be somewhat inartificially drawn, yet, in our opinion, it states facts sufficient to constitute a good cause of action against the respondent, under the constitution, common law, or the statute, or all of them collectively.

For the reasons stated, we are of the opinion that the action of the court sustaining the demurrer to each of the counts of the petition was erroneous, and that the judgment should be reversed, and the cause remanded for trial.

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EMPLOYER AND EMPLOYEE—TRADE SECRETS—INJUNCTIONS—*E. I. Du Pont de Nemours Powder Co., et al.* v. *Masland et al., Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 575.*—The company named applied to a United States district court for an injunction to prevent Walter E. Masland, a former employee, from using or disclosing secret processes with which he had become familiar while in its service. He admitted that he intended to engage in the manufacture of artificial leather, to which some of the processes related, but denied that he intended to use any trade secrets that he had learned in confidential relations with the company. He, however, averred that many of the things claimed by the company were well known to the trade. At first a preliminary injunction was refused, but the defendant proposed before the final hearing to make disclosures to experts whom he would employ, sufficient to insure proper preparation for his defense. The district court thereupon issued a preliminary injunction against disclosing any of the company's alleged processes to any one except counsel, with leave to move to dissolve the injunction should occasion to consult experts arise. Later a motion to dissolve was denied. The circuit court of appeals reversed the decree, and the matter was taken to the Supreme Court by writ of certiorari. The latter decision was there reversed, it being held that the district court properly granted an injunction against disclosure to experts, leaving the court opportunity to control the extent and method of such disclosure if any should prove necessary. Mr. Justice Holmes delivered the opinion, which, after a statement of the facts, continues as follows:

The case has been considered as presenting a conflict between a right of property and a right to make a full defense; and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defense are adjudged against him before he has a chance to be heard or to prove his case. We approach the question somewhat differently. The word "property" as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence can not be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good.

The injunction asked by the plaintiffs forbade only the disclosure of processes claimed by them, including the disclosure to experts or

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witnesses produced during the taking of proofs, but excepting the defendant's counsel. Some broader and ambiguous words that crept into the decree, seemingly by mistake, may be taken as stricken out and left on one side. This injunction would not prevent the defendant from directing questions that should bring out whatever public facts were nearest to the alleged secrets. Indeed, it is hard to see why it does not leave the plaintiffs' rights somewhat illusory. No very clear ground as yet has been shown for going further. But the judge who tries the case will know the secrets, and if, in his opinion and discretion, it should be advisable and necessary to take in others, nothing will prevent his doing so. It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—LIST OF CUSTOMERS—INJUNCTION—"RECEIVING" BUSINESS—*New Method Laundry Co.* v. *MacCann, Supreme Court of California (Dec. 15, 1916), 161 Pacific Reporter, page 990.*—The company named, engaged in the laundry business in the city of Oakland, bought from John W. MacCann a laundry route formerly operated by him, and employed him as a driver and solicitor upon it. He carried on this route for five years, keeping a list of customers, with the day of the week when each expected his unlaundered articles to be called for. On April 5, 1913, MacCann left the employ of the company, and began soliciting for a rival laundry from the same customers. On petition by the company for an injunction against this practice the superior court of Alameda County granted such an injunction, restraining MacCann "from soliciting, but not from receiving" such work. The company appealed, contending that the injunction should, as had been the practice in previous similar suits, restrain the receiving of business. Judge Lawlor, who delivered the opinion in the supreme court, referred to the leading case of Empire Steam Laundry Co. *v.* Lozier, 165 Cal. 95, 130 Pac. 1180 (Bul. No. 152, p. 51), which established the doctrine that such lists of customers constitute a trade secret, against the violation of which the employer may have a perpetual injunction. He noted that while the injunction in that case prohibited receiving laundry work, the exact point had been raised in the present case for the first time. The conclusion reached was that the judgment below should be affirmed in its original form. As to the question of the prohibition of receiving work, he said in part:

Coincident with the right of the employer to the protection of his trade secrets against their unwarranted disclosure to or unconscionable use by persons not entitled thereto, is the right of all per-

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sons, in absence of negative covenants to the contrary, to follow any of the common occupations of life. This right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property. See Dent *v.* West Virginia, 129 U. S. 114, 9 Sup. Ct. 231. "Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner." Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007 [Bul. No. 35, p. 797]. It can not, indeed, be questioned that an employee, in a case such as this, retains the right to work for a rival laundry if he so chooses, or, having established a laundry business himself, to serve all persons who voluntarily offer him their trade. But in such competition, he must act with utmost fairness, resolving every doubt rather in favor of the interests of the former employer than against them, and exercising, at all times, every precaution to avoid violating, in letter or spirit, the confidence reposed in him.

The judgment of the lower court also finds support in sound principles of public policy. To restrain a person, lawfully engaged in a laundry business, from receiving unlaundered goods from certain former patrons is to sanction, to that extent, the establishment of a trade blacklist, thereby depriving such patrons, without any fault on their part, of the right to have their laundry work done where they will. The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen to whom he may desire to extend his patronage, and equity can not invade or take away this right, either directly or indirectly, without due process of law.

Discussing the claim that the permission to receive work would lead to evasion which would amount to a solicitation, Judge Lawlor said in part:

The decree expressly forbids defendant from in any manner soliciting or attempting to induce, directly or indirectly, such customers to withdraw their patronage from plaintiff. Clearly, conduct on the part of the defendant, his agent, or others in his behalf, such as suggested, would be contra bonos mores and a deliberate invasion of the injunction issued to plaintiff.

Injunctive relief, in any case, must depend upon broad principles of equity rather than on the particular wording of any decree. Conceivably, cases may arise where the court would be warranted in restraining a person, engaged in a business, from "receiving" trade of certain members of the community, but the facts presented here do not demand such relief.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—USE BY FORMER EMPLOYEE—*Aronson et al.* v. *Orlov et al.*, *Supreme Judicial Court of Massachusetts* (*July 3, 1917*), *116 Northeastern Reporter*, *page 951*.—The plaintiffs, Abraham Aronson and others, manufactured petticoats in Boston, and sold them to large retail dealers in various parts of the country. In November, 1912, Aronson invented a method of improving the product by making the seams elastic. The

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garments were put on the market under the trade name "Flexo Seam." The defendants Fatherson and Wachtel were employees of the plaintiffs, and learned this trade secret through this connection. Later they withdrew from their employment, and with Orlov began the manufacture of a similar article, calling it by the designation of "Wunder Seam." They advertised by letters to the trade in various States, including those who were customers of the plaintiffs, and were known to the defendants to be such. A decree granting the plaintiffs an injunction was entered in the superior court of Suffolk County, and this was affirmed by the Supreme Judicial Court. Judge Rugg delivered the opinion, which was largely taken up with questions as to the rights of the parties arising out of applications for patents on the invention. The following, relating to the use of trade secrets by former employees, is quoted from the opinion:

Apart from the questions arising because of the applications for patents, it is plain that the plaintiffs make out a case for equitable relief on the facts found by the master. The idea of the improvement in the manufacture of garments was Aronson's. It was not a mere nebulous phantom of the fancy, but a definite conception of a material device so simple that its mere statement would convey as clear a notion as would a model of a complicated mechanism. This idea was used rightfully by the plaintiffs. Fatherson was the first of the defendants to know of that idea and he learned of it solely by reason of and in the course of his employment by the plaintiffs. The doctrine is well settled that an employee can not lawfully use for the advantage of a rival and to the harm of his employer confidential information which he has gained in the course of his employment. This rests upon the implied contract, growing out of the nature of the relation, that the employee will not after the termination of his service use information gained during the period of his employment to the detriment of his former employer. This doctrine has been frequently applied in this Commonwealth and it prevails generally. [Cases cited.]

It is also true, as decided by these and other cases, that equity will enjoin interference with the rights of a manufacturer to his own trade secrets and will prevent continuance of violation of duty by a former employee in divulging them, and will give relief in damages for injury already inflicted. There is a plain distinction between instances where employees leave one employer and use their own faculties, skill and experience in the establishment of an independent business or in the service of another, and instances where they use confidential information secured solely through their employment to the harm of their previous employer. The plaintiffs have a clear cause of action against their former employees, Fatherson and Wachtel. The former, at least, has appropriated the Aronson idea for improvement in dress design acquired solely through his employment. The latter participated in, if he did not frame, the scheme whereby Orlov was to embark in the business of manufacturing petticoats in competition with the plaintiffs by the use of the information which

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he and Fatherson had acquired wholly through their employment by the plaintiffs. Orlov in this respect stands no better than the other two defendants. The Aronson idea was communicated to him by one or both of his codefendants. At the first meeting of the three, the previous employment and experience of Fatherson with the plaintiffs formed the subject of the conference. Orlov and Wachtel were well acquainted. The inference is irresistible that one of his dominating motives in forming the arrangement with the other two was the knowledge that there would be at his disposal the Aronson idea of garment design. Under these circumstances he is on the same footing and subject to the same liabilities as Wachtel and Fatherson.

EMPLOYERS' LIABILITY—DEFENSES—CONSTITUTIONALITY OF STATUTE—*Superior & Pittsburg Copper Co.* v. *Tomich, Supreme Court of Arizona (July 2, 1917), 165 Pacific Reporter, page 1101.*—Frank Tomich, having been injured in the mine of the company named, brought action against it for damages. Judgment was in his favor in the Superior Court of Cochise County, and the company appealed, alleging that the law was unconstitutional. This question, as far as some of the most important considerations were concerned, had been settled by the decision in Inspiration Consolidated Copper Co. *v.* Mendez, 166 Pac. 278 (see p. 85), in which it was held that the enactment of such a law declaring liability without fault was within the power of the legislature. Other complaints as to the constitutionality of the statute were held not to be well founded, Judge Cunningham delivering the opinion and saying:

Appellant contends that chapter 6 of title 14 is void for the reason its terms conflict with sections 5 and 7 of article 18 of the State constitution. Section 5 is that:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

This section does not restrict the power of the legislature to modify or abolish the defense of contributory negligence. The restriction contained in the section is clear that no law shall be enacted which attempts to make the defenses of contributory negligence or assumption of risk, when interposed, determinable by the courts as matters of law, but such defenses are made to depend upon facts when they are properly interposable, and, interposed, they are required to be established by a preponderance of the evidence to the satisfaction of the jury. Whether the plaintiff's negligence contributed to the wrong, or whether the plaintiff assumed the risk and danger from which the wrong arose, must be determined as a fact from the evidence by the jury.

Section 7 commands the legislature to enact an employers' liability law, by the terms of which any employer shall be liable for the death or injury of workmen employed in all hazardous occupations named, and any other industry designated by the legislature, whenever such death or injury is caused by any accident due to a condition or con-

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ditions of such occupation, except when such death or injury has been caused by the negligence of the employee killed or injured. The only restriction placed upon the legislative power in carrying out said constitutional mandate found in the section of the constitution is the exception, viz.:

Liability is incurred "in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

In all other cases the legislative power is unlimited by said section 7.

A careful examination of chapter 6 of title 14 discloses no violation of such limitation on the power of the legislature. The exception is carefully preserved in paragraph 3154 of the statute. If the injury resulted from an accident arising out of and in the course of labor, service, and employment in a hazardous occupation, and was due to a condition, or conditions, of such occupation or employment, and was not caused by the negligence of the employee the liability to damages exists. If, however, the injury was caused by negligence to which the injured workman contributed, the liability of the employer remains to an amount of the full damages, less the amount of damages attributable to the employee's negligence. In other words, the damages are to be apportioned to the parties, employer and employee, as the negligence attributable to the one is to the negligence attributable to the other. "The fact [appearing] that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," are the words of the statute. The statute is in full harmony with the constitutional mandate and with its restrictions.

Questions as to the excessiveness of the damages awarded by the jury, and as to the admission and rejection of evidence, and the conduct of the trial, in which the jurors had been allowed to ask questions of the witnesses rather freely, were resolved also in favor of the plaintiff, and the judgment of the lower court was affirmed.

Employers' Liability—Guards for Dangerous Machinery—Assumption of Risk by Superintendent—Constitutionality of Statute—*Bowersock* v. *Smith, Supreme Court of the United States (Mar. 6, 1917), 37 Supreme Court Reporter, page 371.*—Sumner I. Smith, superintendent of the Lawrence Paper Co., while engaged in adjusting some unguarded dryer rolls, was crushed between them and killed. His administratrix sued J. D. Bowersock, owner of the factory, for damages, relying upon sections 4676 to 4783 of the General Statutes of Kansas of 1909, which provide for the guarding of dangerous machinery, and for recovery where absence of such guards contributes to death or injury. In defense it was pleaded that it was not practicable to guard the dryer, and that Smith was guilty of contributory negligence; also that he had assumed the risk of injury, as it was his

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duty as superintendent to safeguard the machinery. Judgment in favor of the plaintiff was affirmed by the supreme court of the State. Mr. Chief Justice White delivered the opinion, again affirming this judgment, and saying for the most part:

The court instructed the jury, over the objection of the defendant, that, under the statute, contributory negligence was no defense, and that the fact that Smith was employed as superintendent of the factory, with authority to safeguard the machinery, would not bar a recovery, and charged with reference to the burden of proof, in accordance with the provision of the statute relating to that subject. It was held, following previous decisions, that the common-law defenses of contributory negligence, fellow servant, and assumption of the risk were not applicable to suits under the statute. The court, further construing the statute, held that it embraced all employees of every class or rank in the factories to which it applied, and that merely because the deceased was employed as superintendent did not exclude him from the benefits of the act nor relieve the owner from responsibility under it. And it was held that a different result was not required because the deceased had contracted with the owner to safeguard the machinery under the circumstances of his employment. In so ruling the court referred to the evidence, and pointed out that although there was testimony as to the authority of the deceased, under his contract, to safeguard the machinery, at the same time the evidence showed that, in the exercise of such authority, he was under the control of three superiors, all of whom had testified that they did not consider it practicable to safeguard the dryer rolls. Attention was also directed to the notice which the defendant posted with reference to guards on machinery, as showing a control over that subject by the owner. 95 Kan. 96, 147 Pac. 1118.

The case is here because of the asserted denial of rights guaranteed by the fourteenth amendment.

That Government may, in the exercise of its police power, provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded, and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, is undoubted. And it is also not disputable that, consistently with due process, it may be provided that, in actions brought under such statute, the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar a recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act. [Cases cited.]

While not directly disputing these propositions, and conceding that the Kansas statute contains them, and that it is not invalid for that reason, nevertheless it is insisted that the construction placed upon the statute by the court below causes it to be repugnant to the due process clause of the fourteenth amendment. This contention is based alone upon the ruling made by the court below that, under the statute, the deceased had a right to recover although he had contracted with the owner to provide the safeguards the failure to furnish which caused his death,—a result which, it is urged, makes the owner liable and allows a recovery by the employee because of his neglect of duty. We think the contention is without merit. It is

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clear that the statute, as interpreted by the court below,—a construction which is not challenged,—imposed a duty as to safeguards upon the owner which was absolute, and as to which he could not relieve himself by contract. This being true, the contention has nothing to rest upon, since, in the nature of things, the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered inefficacious. Second Employers' Liability Cases (Mondou *v.* New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 32 Sup. Ct., 169 [Bul. No. 98, p. 470].

Employers' Liability—Liability without Fault—Constitutionality of Statute—*Inspiration Consolidated Copper Co.* v. *Mendez, Supreme Court of Arizona (July 2, 1917), 166 Pacific Reporter, page 278.*—Ceferino Mendez brought action against the company named under the Employers' Liability Act of Arizona, chapter 6, title 14, of the Civil Code of 1913. The employee was a miner engaged in underground work. On June 28, 1914, he opened a compressed air valve for the purpose of clearing a compartment of the mine of foul air, and the air, escaping from the valve under heavy pressure carried dirt and other substances into his eyes, injuring them. No negligence on the part of the employer was asserted, but the declaration, based on the provision of law mentioned, alleged that the occupation was a hazardous one, and that the accident was due to a condition of such occupation. The company made claim that the chapter in question was void as in conflict with certain provisions of the State constitution and with the fourteenth amendment to the Constitution of the United States. The company further alleged that the employee's negligence was the sole cause of the injury, that he was guilty of contributory negligence in failing to promptly and properly treat the injuries, that he assumed the risk of this injury as an ordinary risk of his employment, and that the remedy, if any, was under the succeeding chapter of the Code, the Workmen's Compensation Law. The superior court of Yavapai County overruled the objections based on alleged unconstitutionality, and judgment was rendered for the employee in the sum of $5,500, less an amount already paid over. Certain questions of practice relating to the proceedings on appeal were considered and determined in favor of the employee, after which the main question of the validity of the law was taken up. Judge Cunningham was the spokesman for the court in upholding the law and affirming the judgment below, and from his opinion the following is quoted on this point:

The appellant contends, and I think its contention is correct, that the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous

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occupations, due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. The cause was tried upon that theory, and the judgment must stand or fall according to the validity or invalidity of the said statute.

Chapter 6 of title 14 [the statute under consideration] was enacted as a response to the mandate contained in section 7 of article 18 of the State constitution, reading as follows: [Provision quoted.]

This provision is clearly one mandatory upon the legislative branch of the State government as to all the requirements set forth in that provision for affirmative action by the legislature. The only limitation or restriction thrown about the legislature's duty in this respect is that in the enactment of employers' liability laws or other laws of such nature, no employer shall be made liable for the death or injury of any employee, when such death or injury shall have been caused by the negligence of the employee killed or injured.

The statute clearly does not require as a condition of liability that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers, and therefore it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks, although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation.

The decision of the United States Supreme Court in New York Central R. Co. *v.* White, 233 U. S. 188, 37 Sup. Ct. 247 (Bul. No. 224, p. 232), is then quoted from at length. This decision is made the basis for the decision in the present case, as is shown by the following pargraph quoted from Judge Cunningham's opinion, after which he disposes of other matters as to assumption of risks, limitation of amount of liability, and the sufficiency of the evidence to sustain the verdict, and announces the affirmance of the judgment of the court below:

Thus, from the court of ultimate authority over questions affecting constitutional guaranties and rights, we find answers to all of the arguments advanced by the appellant why chapter 6 of title 14 is in conflict with the fourteenth amendment of the Constitution of the United States. I am of the opinion that the statute is free from the objections urged by appellant on the authority of such case.

EMPLOYERS' LIABILITY—MEDICAL TREATMENT—NEGLIGENCE OF PHYSICIAN—*Owens* v. *Atlantic Coast Lumber Corporation, Supreme Court of South Carolina (Oct. 29, 1917), 94 Southeastern Reporter, page 15.*—The company named was sued by Julius Owens, an em-

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ployee, for damages for the death of his wife. His complaint alleged that the company collects from the monthly wages of each of its numerous employees the sum of $1, to maintain a staff of two physicians to render medical services to the employees and their families. Owens' wife becoming ill, he called upon one of the physicians, Dr. Brown, who refused to attend on the ground that he was too busy. Owens tried to find Dr. Sawyer, the other physician, but could not. Three or four days later his wife's condition became critical and being still unable to find Dr. Sawyer, and without means to employ another physician, he begged Dr. Brown to attend her; but the physician would not go with his automobile across the ferry, although it was one regularly operated by the county authorities, and the wife died. Damages were sought in the sum of $10,000, and the company demurred to the complaint alleging the above as facts. The trial court held that a cause of action was not stated by the complaint, and sustained the demurrer. The supreme court, however, reversed the order, thus placing the case in a position where it might be tried on its merits. Judge Hydrick, in delivering the opinion, said in part:

If the deductions made resulted in direct pecuniary profit to defendant, then, clearly, it would be responsible for the negligence or malpractice of the physicians employed even with due care, on the same principle that a private hospital conducted for gain, or the physician himself, is made liable.

Nothing appearing to the contrary, the allegation that defendant exacted and received pay for the promised services warrants an inference, at least prima facie, that defendant received pecuniary profit from the scheme. Certainly it is not inferable that it was conducted as a charity, even in part. The fund so raised was retained in defendant's treasury and, if there was any surplus, it inured to the benefit of defendant. This put upon defendant the burden of showing that it derived no pecuniary gain in the conduct of the undertaking and administration of the fund to escape the liability arising from that situation.

Construing the allegations of the complaint most liberally for plaintiff, as we must on demurrer, they bring his case, at least prima facie, within the situation described, in which the decided weight of authority and reason holds the master liable for the malpractice or negligence of physicians chosen by him, even with due care; for, in that situation, the master assumes an absolute duty and responsibility to the servant. [Cases cited.]

Employers' Liability—Mine Regulations—"Known to Generate Explosive Gases"—*Eleganti* v. *Standard Coal Co., Supreme Court of Utah (Oct. 15, 1917), 168 Pacific Reporter, page 266.*—A. Eleganti brought action against the company named, as administrator of the estate of Giacamo Boetto, whose death, it was alleged,

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was caused by the negligence of the company while he was employed in its mine, in November, 1914. The company appealed from a judgment against it, entered in the District Court of Salt Lake County. It was unquestioned that several weeks before the accident explosive gases had been found in the mine, and at that time proper steps were taken to exclude them. A statute requires that inspection for gases be made in all mines "known to generate explosive gases." Such inspection was not made in the mine in which the injury occurred during the interval after the first discovery of gas, and failure in this respect was the negligence charged. There was a controversy as to the meaning intended to be conveyed by the expression quoted. The judge in the trial court had told the jury that the mine was under the circumstances a mine known to generate explosive gases, and the company contended that he should have left this question to be determined by the jury from the evidence. This as well as the other disputed points were resolved in favor of the plaintiff, and the judgment below was affirmed. From the opinion delivered by Judge Frick the following is quoted:

Counsel's theory seems to be that unless the mine in question developed a certain quantity of explosive gases, that is, a quantity which would in the opinion of experts make a mine dangerous or unsafe, it would not constitute a mine known to generate explosive gases within the purview of our statute. In our judgment that contention is clearly untenable. The language of the statute is positive and direct. There is no qualification such as counsel seem to assume. The language of the statute is, "In all mines known to generate explosive gases" the examination and inspection directed by the statute must be made. A moment's reflection will make clear that the statute was intended to and does apply to all mines where explosive gases are known to exist, regardless of the quantity thereof. The legislature thus withdrew the question respecting the quantity of gases, or whether the quantity was safe or otherwise, from the judgment of all classes, whether experts or nonexperts, and imposed the duty of examination and inspection in all mines where explosive gases in any quantity are known to exist.

Employers' Liability—Negligence—Contributory Negligence—Infection from Decayed Chicken in Cannery—*Potter* v. *Richardson & Robbins Co., Superior Court of Delaware (Jan. 26, 1915), 99 Atlantic Reporter, page 540.*—Annie Potter, an employee of the company named, suffered from blood poisoning and claimed that it was the result of the actionable negligence of the employer in furnishing putrid carcasses of chickens to be prepared by her for canning. She had a scratch or cut on a finger, through which it appeared the poison entered her system. It was alleged that the chickens had been in cold storage, and

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that the company knew or should have known their unsafe condition and warned the plaintiff, who did not know of the danger. The company demurred on the ground that a cause of action was not stated in the declaration, and the demurrer was sustained, in effect overthrowing the present suit. Judge Pennewill delivered the opinion, and stated that two questions of law were presented by the case: First, did the defendant exercise due care in furnishing to the plaintiff carcasses of chickens to be cut up and prepared? and, second, was the plaintiff guilty of negligence which proximately contributed to her injury? The opinion was in part as follows:

The first count is based upon the proposition that since the plaintiff was employed by the defendant to clean and prepare the carcasses to be cooked or potted by the defendant, it owed her the duty of furnishing and providing her with reasonably safe and sound carcasses of chickens to be cleaned and prepared. And since these chickens were to be prepared and to be put on the market for food for the public, the plaintiff had the right to rely upon the defendant to furnish her with only such carcasses as might be deemed fit for human food.

We think the plaintiff is here confusing the defendant's duty to an employee with the duty it owes its customers, the buyers of its goods, who can have no knowledge of the condition of the chickens before they are cooked and canned. The defendant's duty to the plaintiff can not be measured by the fitness of the chickens for food. The carcasses were given to her only for the purpose of being prepared for cooking and canning.

The care the defendant should have exercised in procuring and furnishing the carcasses for the plaintiff was reasonable and ordinary care, that is, such care as a reasonably prudent and careful person would have exercised in a like case, or under like circumstances. Such being the duty imposed upon the defendant, it can not be held liable unless there was a failure to exercise such care.

We are clearly of the opinion that the plaintiff's means and opportunities of discovering the danger complained of were even greater than those of the defendant. It is inconceivable that she did not observe and know the condition of the carcasses she handled. Indeed, she must have known else she would not have made the averments she has made in her declaration.

The plaintiff was employed to cut up and prepare chickens to be cooked and canned or potted. She was not employed to cut up and prepare putrid, rotten and decayed chickens. If she found a carcass in such condition it was her duty to report the fact to her employer, the defendant. Instead of doing that she went on and cut up the carcass and her injury resulted therefrom. She was, in the opinion of the court, guilty of contributory negligence.

After carefully considering this case, the court are of the opinion that there is no substantial ground on which the jury would be justified in finding negligence on the part of the defendant; and also, that negligence on the part of the plaintiff approximately contributing to her injury, appears from her declaration.

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Employers' Liability—Poisonous Fumes—Duty of Employer to Eliminate—*Fritz* v. *Elk Tanning Co., Supreme Court of Pennsylvania (May 14, 1917), 101 Atlantic Reporter, page 958.*—Norman A. Fritz was employed from October, 1911, to February, 1913, in the bleaching room of the tannery carried on by the company named. In this room were several vats containing fluids used in bleaching, one being a warm solution of sulphuric acid. His duties required him to be near the vats a large part of the time, and at certain times, when the acid was put in or renewed, or the hides dipped in it, steam or fog arose and enveloped the employee. He developed symptoms of illness six weeks before he quit work, but was assured by the superintendent that there were no injurious fumes. As to the disability which the employee suffered from some cause, the court, speaking through Judge Walling, says:

When plaintiff began this work, he was robust, 26 years of age, and weighed 195 pounds; when he quit he was a physical wreck, and for 16 months thereafter walked upon crutches, and much of that time was confined to the house, and has not since been able to do any work. At the time of the trial in 1916 he could walk with the assistance of a cane, and weighed 140 pounds, and seemed to be permanently disabled.

The testimony of physicians for the plaintiff is reviewed, their opinions being very strongly to the effect that sulphuric acid poisoning could and did result from the constant inhaling of the fumes. Expert testimony equally positive is also summarized in favor of the contention of the company that such poisoning was not the cause of the illness. The court then expressed its view that the judgment should stand, the concluding portion of the opinion for the most part being as follows:

Where seemingly credible evidence tends directly to establish the facts upon which defendant's liability depends, a verdict based thereon is not the result of guesswork, although such evidence is strongly contradicted by that submitted for the defense. And where, as here, a plaintiff's case is supported by positive and circumstantial evidence, and also by expert opinion, it must be submitted to the jury, notwithstanding the strength of the opposing proofs. In such case the remedy, if the verdict be against the weight of the evidence, is a new trial, which was not here sought. The fact that no case like this has come within the knowledge or information of any witness called, while strongly persuasive, is not conclusive against the plaintiff.

As the case was submitted, the verdict implies a finding by the jury, not only that the fumes were poisonous, but that such fact was or should have been known by the defendant, which was the common-law rule; but under section 11 of the act of May 2, 1905 (P. L. 352), it was defendant's duty to know the character of the fumes and gases arising in its bleachroom, and, if poisonous, to provide for their elimination by exhaust fans or other sufficient devices. As no attempt

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was made to comply with the statute, and no claim that it could not have been done, if the fumes were poisonous, and plaintiff was injured thereby, without negligence on his part, he was entitled to recover as the provisions of the statute are mandatory. [Cases cited.]

The fact that the plaintiff, under the assurance of the superintendent, continued at his work, did not as matter of law charge him with contributory negligence.

Employers' Liability—Proximate Cause of Death—Pneumonia Resulting from Burns and Recumbent Position—*Sterling Anthracite Co.* v. *Strope, Supreme Court of Arkansas (Oct. 8, 1917), 197 Southwestern Reporter, page 858.*—Fred Strope was injured by an explosion of gas in the mine of the company named on February 18, 1916, and died 11 days later. On the trial of the suit of his administratrix against the company for damages, there was evidence on her behalf that the fire boss, after his required inspection on the morning of the day of the injury, had reported the working place of Strope to be unsafe, but had marked "O. K." on the board used for that purpose; but for the defense evidence was introduced that a mark was made to indicate that the place was found to be dangerous. When the employee reached the working place and lighted his miner's lamp the explosion occurred. The court stated that since there was substantial evidence of negligence, it could not disturb the jury's verdict, which had been in favor of the plaintiff.

Another question was whether the injury could be considered as the proximate cause of death, which resulted directly from pneumonia. The burns received were about the chest, shoulders, face, and arms. The attending physician testified that in his opinion the pneumonia resulted from the burns and the recumbent position necessitated by the injuries. It was held that there was justification also for the jury's finding on this point. Specific instructions to the jury relating to both matters, which were objected to, were held to have been proper, and the judgment for the plaintiff was affirmed.

Employers' Liability—Railroad Companies—Federal Statute—Interstate Commerce—Freight Conductor on Return Trip After Moving Interstate Shipment—*Illinois Central Railroad Co.* v. *Peery, Supreme Court of the United States (Dec. 18, 1916), 37 Supreme Court Reporter, page 122.*—Robert H. Peery was injured in a rear-end collision while in the performance of his duties as a freight conductor, and sued the company named, his employer, action being brought under the Federal law, employment in interstate commerce being alleged. Judgment in his favor in the Supreme Court

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of Minnesota was reversed on this appeal, the Federal law being held inapplicable. Peery's run was from Paducah south to Fulton, both points being in the State of Kentucky. The train out generally, and on the day in question, had interstate goods on board, but the return trip carried none, and it was on the return that the injury complained of was received. The court held that the two trips were separate movements, "in opposite directions, with different trains." Conceding that the greater probability of getting traffic going south was the chief reason for establishing the run, it was held that this could not dominate the return to the extent of fixing its character as interstate when there was no traffic of that nature being carried.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—GATEMAN—*Southern Pacific Co.* v. *Industrial Accident Commission of California, Supreme Court of California (Dec. 14, 1916), 161 Pacific Reporter, page 1139.*—An award of compensation was made by the California Industrial Accident Commission to Jessie L. Rolfe on account of the death of her husband, Thomas C. Rolfe, in the employ of the railroad company named. The company petitioned for review on the ground that the employee was engaged in interstate commerce, and that the remedy of his widow was provided by the Federal Employers' Liability Act. Rolfe was a crossing gateman at a point where both interstate and intrastate trains passed over the track. As an intrastate train was about to pass and he had closed one of the gates, he discovered that a horse and wagon had approached so near to the track that he could not close the other gate without striking the horse or the wagon, and he started to cross the track to back the horse away, was struck by the train, and killed. The decision was that this was sufficiently related to interstate commerce so that the Federal act applied, and the compensation award was annulled. Judge Angellotti, in rendering the opinion, called attention to decisions to the effect that a track used indiscriminately for both kinds of traffic is an instrumentality of interstate commerce, and that those engaged in keeping it in repair or in suitable condition for use are engaged in such commerce, and so also as to persons removing obstructions from the track.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—JACKING UP WRECKED CAR—*Southern Railway Co.* v. *Puckett, Supreme Court of the United States (June 11, 1917), 37 Supreme Court Reporter, page 703.*—H. E. Puckett, an employee of the company named, was injured in August, 1911, and

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brought action under the Federal Employers' Liability Act against the company. At the time of injury he was engaged in carrying blocks to jack up a wrecked car, the purpose being to release another employee who was pinned down by the car, and to assist in clearing away the wreck. He stumbled over some large clinkers beside the track, and struck his foot against some old ties overgrown with grass, fell, and was seriously injured. The court held, the Chief Justice dissenting, that he was employed in interstate commerce, and affirmed the judgment of the Court of Appeals of Georgia in his favor, Mr. Justice Pitney saying:

The court held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.

We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce.

Employers' Liability—Railroad Companies—Federal Statute—Interstate Commerce—Lineman—*Southern Pacific Co.* v. *Industrial Accident Commission of California, Supreme Court of California (Dec. 14, 1916), 161 Pacific Reporter, page 1143.*—In this case an award of compensation had been made by the industrial accident commission to Jessie Covell for the death of her husband, Victor Covell. At the time of the fatal accident he was at work for the company as a lineman, and engaged in removing a telephone wire which had fallen upon a trolley wire, the removal of which was necessary before trains could be operated on an electric railway constituting a part of the passenger system, both interstate and intrastate. It was decided that the principles controlling in this case were the same as those applied in the case of the same title relating to a gateman (161 Pac. 1139; see p. 92), and the award was annulled, it being held that the matter was governed by the Federal Employers' Liability Law, and that the commission had been without jurisdiction to make an award. The following is quoted from the brief opinion delivered for the court by Judge Angellotti:

It was necessary that this telephone wire be removed in order that cars might be operated, as it was impossible to operate cars over the line until such wire had been removed. Deceased being thus engaged directly in removing an obstruction to the use of an instrumentality in actual use for purposes of interstate commerce was engaged in interstate commerce at the time of the accident.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING LOCOMOTIVE—*Minneapolis & St. Louis Railroad Co.* v. *Winters, Supreme Court of the United States (Jan. 8, 1917), 37 Supreme Court Reporter, page 170.*—George H. Winters, a machinist's helper, was injured while working in a roundhouse repairing an engine. Judgment in his suit against the company was in his favor, and the company appealed. The record in the case did not make it clear whether the verdict was rendered in accordance with a view that the case was within the scope of the Federal act or the State law. In order to give the Supreme Court jurisdiction on appeal to consider questions raised by the company it was necessary to find that the facts, which had been agreed upon in the trial court, showed an employment in interstate commerce and a consequent applicability of the Federal act. The court held that this was not shown, Mr. Justice Holmes saying in the opinion delivered by him:

The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. The engine "had been used in the hauling of freight trains over the defendant's line. . . . which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CAR TO BE LOADED WITH INTERSTATE SHIPMENT—SAFETY APPLIANCES—UNCOUPLING FOR FLYING SWITCH—*Christy* v. *Wabash R. Co., Kansas City Court of Appeals, Missouri (Jan. 29, 1917), 191 Southwestern Reporter, page 241.*—Laura Christy brought action for the death of her husband, occurring while in the employ of the railroad company named. In the circuit court of Randolph County a jury rendered a verdict in her favor, and judgment was entered thereon. It was evident from this verdict

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that the jury found the facts alleged on the part of the plaintiff to be true, and the court in this decision held that they were sufficient to support the conclusion that the car which was being switched was to be taken the next morning to a point a few miles away, there to be loaded with eggs and sent to Chicago, an interstate movement. The court held that this situation made the employment interstate service, Judge Ellison, who delivered the opinion, saying as to it:

No sound reason can be suggested why that was not interstate service. We think it was such service in a special and immediate sense. For the use to which the car was to be put was the already ascertained service of a specific shipment into another State; and that shipment was to be made on the day the car was being switched out of the yards for that use.

The fatal injury to the deceased occurred in the making of a flying switch of the car. The car was placed behind the engine, and after they were in motion the engine was uncoupled and its speed increased, so that they became separated a sufficient distance for the switch to be thrown after the engine passed, turning the car upon the siding. The engine and car were both equipped with automatic couplers, as required by law, but it was held that the safety-appliance act was violated by this method of switching, which required the employee to asume a position between the engine and the car, a thing which the law was designed to prevent. In this instance, as a matter of fact, the employee fell off, probably in the act of pulling the coupling pin, and was run over and killed. All questions were decided in favor of the plaintiff, and the judgment was affirmed. As to the violation of the safety-appliance provisions Judge Ellison said:

There was abundant evidence to show that a "flying switch" made by the employee standing on the footboard in front of the moving engine could not be accomplished without standing between the engine and car, or without hanging to the end of the car by placing one foot in a stirrup and reaching some part of the body around between the two. We think in these circumstances a case was made for plaintiff. For, notwithstanding an interstate carrier complies with the Safety Appliance Act, yet if it operates the cars so that the appliances can not be used without doing the thing the act seeks to avoid, i. e., going between the cars, it violates the statute as fully as if it had failed to install the appliances.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CARS WITH COAL FOR ENGINES—*Lehigh Valley R. Co.* v. *Barlow, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 515.*—James H. Barlow was awarded damages for personal injuries in his suit against the company named, the action having been brought under the Federal Employers' Liability Act. The judgment in his favor was

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affirmed by the various courts of New York State, the decision by the court of appeals being reported in 214 N. Y. 116, 107 N. E. 814, and summarized in Bul. No. 189, p. 110. The only question carried to the United States Supreme Court was as to the employment of Barlow in interstate commerce at the time of the injury. The facts are stated, and the decision of the court that he was not occupied with interstate commerce at the time of injury, but that the judgment must be reversed, is set forth in the brief opinion delivered by Mr. Justice McReynolds:

The accident occurred July 27, 1912, when, as member of a switching crew, he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, New York. These cars belonged to it, and with their contents had passed over its line from Sayre, Pennsylvania. After being received in the Cortland yards—one July 3 and two July 10—they remained there upon sidings and switches until removed to the trestle on the 27th.

We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in Chicago, B. & Q. R. Co. *v.* Harrington, 241 U. S. 177, 36 Sup. Ct. 517 [Bul. No. 224, p. 105], did not materially differ from those now presented. There we sustained a recovery by an employee, holding he was not engaged in interstate commerce; and that decision is in conflict with the conclusion of the court of appeals.

Employers' Liability—Railroad Companies—Federal Statute—Interstate Commerce—Station Agent Securing Mail Bags from Interstate Train—*Lynch* v. *Boston & Maine Railroad*, *Supreme Judicial Court of Massachusetts* (*May 25*, *1917*), *116 Northeastern Reporter*, *page 401*.—Julia Lynch brought action under the Massachusetts Employers' Liability Act for the death of her husband, Jeremiah Lynch, in the employ of the railroad company named. Lynch was employed at the station at Newburyport during the night, and it was a part of his duty, after lowering the gates across a street near the station, to cross the tracks in front of the train and get the mail bags for that station. The engineer saw Lynch start to run across ahead of the engine and pass out of sight in front of it; his body was later found where it had been dragged by the engine before the train stopped for the station. The train was an express running from Portland to Boston, stopping only at Biddeford, Me., and Portsmouth, N. H., before reaching Newburyport. The judgment was for the company, on the ground that the widow's right of action, if any, was under the Federal Liability Act, since the injury occurred during employment in interstate commerce. This was also

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the view of the supreme judicial court, Judge Crosby in the opinion saying:

This train was a passenger train and carried mail and baggage which it was the duty of Lynch to take from the train and place in the baggage room at the station. It is plain that the train not only was an interstate train but was engaged in the transportation of interstate passengers and property—and so was engaged in the business of interstate commerce. It can not be doubted that the transportation of mail stands upon the same footing as the transportation of freight, baggage, or other commodities. It is common knowledge that railroad companies carry mail under contracts entered into with the Federal Government authorized by statute and that such transportation is paid for in accordance with the terms of such contracts. The fact that the carriage is for the Federal Government does not stand different than if the service is rendered to an individual; it is a part of the regular business of railroads from which they derive a substantial revenue.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIMITATION—AMENDMENT OF ACTION BEGUN AT COMMON LAW—*Hogarty* v. *Philadelphia & Reading Ry. Co., Supreme Court of Pennsylvania (Oct. 9, 1917), 99 Atlantic Reporter, page 741.*—William J. Hogarty lost his right arm on February 1, 1910, while in the employ of the company named, as conductor of a shifting crew. He was thrown under a car by striking a telegraph pole when he leaned beyond the side of a car to uncouple it, and alleged that the pole was negligently placed too near the track. His original declaration was at common law, stating no facts indicating that the employment was in interstate commerce. The company defended on the ground that he had accepted benefits from its relief society. It had admitted, however, that the employment at the time of the injury was in interstate commerce, and he called attention to the fact that the Federal Employers' Liability Act does not permit the defense of release by payment from relief funds. The company replied that the Federal statute had no application, since he had sued at common law. The rejoinder of the plaintiff claimed the right to amend by pleading the statute, which the trial court denied. On appeal the supreme court reversed the trial court's judgment for the company and ordered a new trial. This decision was reported in 245 Pa. 443, 91 Atl. 854, and noted in Bulletin No. 169, p. 84. On the second trial judgment was for the employee, and the supreme court in the present decision reversed its previous decision as well as the judgment, saying that in the meantime the United States Supreme Court had settled the question in Seaboard Air Line Co. *v.* Renn, 241 U. S. 290, 36 Sup. Ct. 567, which was to the effect that if the amendment

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introduced a new and different cause of action, the statute of limitations must be considered; so that, since more than the statutory period of two years had elapsed between the injury and the attempt to make the amendment, such amendment would not be allowed. Judge Moschzisker, who delivered the previous opinion, dissented from the present view. The majority opinion was delivered by Judge Brown, who, referring to the admission by the company that the employment was in interstate commerce, said:

At the time the admission was made, and for nearly three years before, all liability of the defendant under the act of Congress had ceased; for none could have been enforced against it except by an action brought within two years from the time the injuries were sustained. The admission was not that the plaintiff had a cause of action under the act of Congress, but merely that at the time of the accident, and for two years thereafter, the defendant might have been liable under the act, which, however, was no longer available to the plaintiff.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—RIGHTS OF PARENT OF MINOR—*New York Central & Hudson River R. Co.* v. *Tonsellito, Supreme Court of the United States (June 4, 1917), 37 Supreme Court Reporter, page 620.*—The Court of Errors and Appeals of New Jersey affirmed judgment for damages awarded in a suit brought by Michael Tonsellito, an injured minor employee of the company named, for personal injuries; and in a separate suit by his father, James Tonsellito, for loss of his son's services and for medical expenses incurred. These cases were reported in 94 Atl. 904, and noted in Bulletin No. 189, p. 98. The Supreme Court affirmed the judgment in the former case, but reversed it in the latter for reasons made plain in matter quoted from the opinion of Mr. Justice McReynolds as follows:

The court of errors and appeals rule, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in New York C. etc. R. Co. *v.* Winfield, 37 Sup. Ct. 546 [see p. 260], and Erie R. Co. *v.* Winfield, 37 Sup. Ct. 556 [see p. 265]. There we held the act "is comprehensive and also exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to operate uniformly in all the States as respects interstate commerce, and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.

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Employers' Liability—Railroad Companies—Hours of Service Act—Violation—Defenses—*Baltimore & Ohio Railroad Co.* v. *Wilson, Supreme Court of the United States (Dec. 18, 1916), 37 Supreme Court Reporter, page 123.*—James B. Wilson was injured while in the employ of the railroad company named. It was alleged that he was kept on duty for more than 16 hours, and subsequently, apparently 14 hours later, was again called on duty, and was at that time so exhausted from the strain of the previous work that he was not able to protect himself, and was injured as a consequence. The jury which rendered a verdict for the plaintiff was instructed that if it found that the violation of the Hours of Service Act proximately contributed to the injury, it should not consider contributory negligence on the part of the plaintiff in determining the amount of the damages. After stating the above facts, Mr. Justice Holmes, who delivered the opinion affirming the judgment of an appellate court of Illinois in favor of the plaintiff, spoke as follows:

The first step in the railroad's real defense was that the plaintiff was not kept on duty more than 16 hours,—a proposition that there was substantial evidence to maintain. But that having been overthrown by the verdict, it contends that the injury must happen during the violation of law, or at least that the Hours of Service Law fixes the limit of possible connection between the overwork and the injury at 10 hours by the provision that an employee, after being continuously on duty for 16 hours, shall have at least 10 consecutive hours off. It also objects that the plaintiff, if feeling incompetent to work, should have notified the defendant. But no reason can be given for limiting liability to injuries happening while the violation of law is going on, and as to the 10 hours, the statute fixes only a minimum, and a minimum for rest after work no longer than allowed. It has nothing to do with the question of the varying rest needed after work extended beyond the lawful time. In this case there was evidence that whether technically on duty or not, the plaintiff had been greatly overtaxed before the final strain of more than 16 hours, and that, as a physical fact, it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liability Act, secs. 3 and 4, questions of negligence and assumption of risk disappear.

Employers' Liability—Railroad Companies—Safety Appliances—Couplers—Protection of Employees not Coupling and Uncoupling—*Louisville & Nashville R. Co.* v. *Layton, Supreme Court of the United States (Apr. 30, 1917), 37 Supreme Court Reporter, page 456.*—O. Y. Layton sued the railroad company named for damages for personal injuries, and judgment in his favor was affirmed by the Supreme Court of Georgia. The action was brought under the Georgia Employers' Liability Act, which provides that

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the employee shall not be held to be guilty of contributory negligence, nor to have assumed the risk, where violation of any statute enacted for his safety contributed to the injury—the reference being, it was assumed, to the Federal Safety Appliance Act. The employee was admittedly in the performance of his duty when injured. He was a switchman, and was on top of one of two standing cars, when an engine and car were backed against five other standing cars near by to couple on to them. Through defect of the coupling apparatus, the connection was not made, but the five cars were set in motion against the car on which he was, throwing him to the track, where his right arm was crushed by the cars. The question disputed was whether the provisions of the Safety Appliance Act relating to couplers is intended for the benefit of all who may be injured through failure to conform to its regulations, or only of those whom such failure compels to go between the cars. The Supreme Court adopted the former view, sustaining the position taken by the court below, saying that while the immediate occasion of the enactment of the laws was the protection of the class of employees who were required by their duties to go between the cars, their benefits were by no means confined to such persons.

Employers' Liability—Railroad Companies—Safety Appliances—Presumption of Negligence—Father's Right to Damages for Death of Minor Son—*Minneapolis & St. Louis R. Co.* v. *Gotschall, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 598.*—Merlin E. Gotschall, 20 years of age, was head brakeman on a freight train transporting merchandise in interstate commerce. He was near the rear end of the train, proceeding over the tops of the cars toward the engine, when the train became separated because of the opening of a coupler on one of the cars, the emergency brakes automatically became set, and the sudden jerk caused thereby threw him off the train and under the wheels, killing him. Nora Gotschall brought suit as administratrix against the railroad company, and the Supreme Court of Minnesota affirmed a judgment in her favor. Whether the mere fact of the failure of the coupler to hold was sufficient to enable a jury to infer negligence was in dispute, as was also the necessity of evidence of pecuniary loss on the part of the father, in whose interest the action was brought. The judgment was affirmed, Mr. Chief Justice White delivering the opinion, and saying:

The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since, as there was no other

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evidence of negligence on the part of the company, the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as res ipsa loquitur. We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars. [Cases cited.]

Again it is insisted that error was committed in submitting the case to the jury because there was no evidence of pecuniary loss resulting to Gotschall's father, on whose behalf the suit was brought. But this disregards the undisputed fact that the deceased was a minor, and as, under the Minnesota law, the father was entitled to the earnings of his son during minority, the question is one not of right to recover, but only of the amount of damages which it was proper to award.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—STATE AND FEDERAL STATUTES—JURISDICTION OF FEDERAL SUPREME COURT—*Missouri Pacific Railway Co.* v. *Taber*, *Supreme Court of the United States* (*May 21, 1917*), *37 Supreme Court Reporter*, *page 522*.—Charles L. Small was killed while employed as a switchman by the railway company named, and Margaret L. Taber, the guardian of his minor children, brought suit in their behalf to recover damages. Action was brought under the statutes of the State of Missouri, and no objection was made to this by the company in its answer or at the trial. The company appealed from a judgment in the plaintiff's favor, but the State supreme court refused to consider the contention that, since Small was engaged in interstate commerce, the Federal act should have been relied upon, and affirmed the judgment of the court below. The Supreme Court of the United States also held that it was too late to raise the question. Mr. Justice McReynolds, in delivering the opinion, stated that "Unless some right, privilege, or immunity under the Federal act was duly and especially claimed, we have no jurisdiction," and concluded as follows:

The original action was based upon a State statute; the answer did not set up or rely upon the Federal act; the trial court's attention was not called thereto, and although urged to hold liability dependent upon it, the supreme court declined to pass upon that point because not presented to the trial court. This ruling seems in entire accord with both State statutes and established practice. [Cases cited.]

The case was therefore dismissed for want of jurisdiction, leaving the judgment of the State courts undisturbed.

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EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—INSPECTION OF PILING—*South* v. *Seattle, Port Angeles & Western Ry. Co., Supreme Court of Washington (Nov. 20, 1917), 168 Pacific Reporter, page 896.*—Benjamin R. South was fireman on a locomotive of the company named, when, on January 28, 1916, it was precipitated into the bay at Port Angeles by the giving way of a trestle. He brought suit for damages, and a verdict in his favor for $16,000 was rendered by a jury in the superior court of King County, which sum was reduced by the court to $10,000. The company contended that no negligence on its part was shown. The trestle was built for the passage of trains hauling logs to a mill, and was constructed in May or June, 1914. It was claimed by the company that since such piling should last for three years there was no duty to inspect before the expiration of that time; also that the trestle had been repaired in fulfillment of any duty owed by it, about December 1, 1915. A man of experience testified, on the other hand, that while the life of piling varied in different waters, it was not safe to rely on its being in good condition for more than a year. The repairing referred to was upon the side next the bay, where one or two piles were replaced and fender piles built to prevent damage from floating logs. There was testimony that on the other side, next the shore and the log dump—the side where the engine went off—the piling was soft and spongy under the water from the action of teredos and submarine growths; and that several weeks before the accident a pile was seen to be loose, and to be separated about 2 feet from the cap which should rest on its top, and that some days before the accident it disappeared entirely; it was at this point that the break occurred and the engine went down. The court affirmed the judgment, holding that the duty of inspection and attention to the weakness of the trestle was cast upon the company by the conditions shown.

EMPLOYERS' LIABILITY—SAFETY PROVISIONS—LIABILITY OF ELECTRIC COMPANY TO EMPLOYEE OF PATRON—*Clayton* v. *Enterprise Electric Co., Supreme Court of Oregon (Dec. 5, 1916), 161 Pacific Reporter, page 411.*—W. S. Clayton was killed by electric shock while turning a switch, and his widow sued the company named for damages, and prevailed. He was in the employ of Carl Roe, the owner of a pumping plant used for purposes of irrigation, power being derived from the transmission wires of the electric company. It was asserted that the company failed to properly insulate its switches and other apparatus, and that it was therefore liable under the provisions of the employers' liability law of the State. On the other side it was claimed that the statute applies only to the relation

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of employer and employee, and that the judgment of the court below for the plaintiff was not warranted for this among other reasons. Judge Bean, who delivered the opinion of the supreme court, deciding the points raised in a manner which sustained the decision below, said on the question stated:

From the language of the statute, which makes three special references to the safety of the general public, or the public, it seems there can be no doubt but that the provisions of the law are intended to safeguard members of the public from injury by coming in contact with wires or appliances owned and controlled by an electric company and used in the transmission and application of electricity of a dangerous voltage. The title of the act plainly shows the purpose, more fully set forth in the body of the act, to protect all persons working around high voltage wires, without regard to whether they are employees of the electric company or not. The enactment is for the protection of life and limb, and should be given a fair and liberal construction in the interest of public safety and protection of human life.

EMPLOYERS' LIABILITY — WORKMEN'S COMPENSATION ACT — EFFECT—APPLICATION TO WORKMAN ON SHIP ON NAVIGABLE WATERS—*Shaughnessy* v. *Northland Steamship Co., Supreme Court of Washington (Jan. 24, 1917), 162 Pacific Reporter, page 546.*—George Shaughnessy recovered a judgment for $3,500 as damages in a common-law action in the superior court of King County for injuries suffered by him in the employ of the company named upon the steamship *Aiki*, which he was assisting in unloading at a wharf located in the navigable waters of Puget Sound. He was obliged to descend into the hold for his work by a ladder, which was perpendicular and set back under the edge of a hatch a few inches so as not to interfere with the movement of the cargo sling when it was raised and lowered through this hatch. Above the hatch coaming was a rope supported by stanchions so as to form a railing. When he bore his weight upon the rope in order to get a footing upon the ladder one of the stanchions gave way, and he was precipitated into the hold 20 feet below, suffering the injuries complained of. The supreme court first held that there was no reason for disturbing the findings of the jury, which, in rendering a verdict for the plaintiff, necessarily found that the company was negligent in allowing the rope, of which an employee might be expected to take hold in climbing to his work, to be insecure, and also that the employee was not guilty of contributory negligence in relying upon its support.

The important question, it is said, is whether the workmen's compensation act has withdrawn such cases from the consideration of the courts in a common-law suit, as was contended by the defendant company. It is pointed out that the act is compulsory, neither em-

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ployer nor employee having any option in the matter where the occupation comes within the scope of the act. This, says Judge Parker, who wrote the opinion, "points to a legislative intent to make the act applicable only to those relations of employer and employee which are in the legislative control of the State untrammeled by the laws of the United States and the jurisdiction of the courts of the United States." It would follow, in the view of the court, that contribution is not required to the fund by the company, so far as the maritime service of its employees is concerned, and, though the ship was in the harbor, it was in a position which would subject the matter to the admiralty jurisdiction if the employee saw fit to pursue that remedy. The opinion cites the case, State ex rel. Jarvis *v.* Daggett, 87 Wash. 253, 151 Pac. 648 (Bul. No. 189, p. 250), in which it was held that such maritime service was not within the act, and an attempt to compel the compensation commission to collect a contribution from the employer and for the fund, in order that the claim might be paid from the fund, was unsuccessfully prosecuted. The decisions in other States are for the most part differentiated because the laws are elective, and it is held that the compensation act does not apply to such cases under the Washington statute. The judgment for the employee was therefore affirmed.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION ACT—EFFECT OF REJECTION—PRESUMPTION OF NEGLIGENCE—*Mitchell* v. *Phillips Mining Co., Supreme Court of Iowa (Nov. 16, 1917), 165 Northwestern Reporter, page 108.*—This was an action for damages for the death of a miner employed by the company named, who received fatal injuries from the fall of slate from the roof of the mine. The Iowa workmen's compensation law provides:

In actions by an employee against an employer for personal injury sustained, arising out of and in the course of the employment, where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

The plaintiff in this case did not at first introduce evidence of the negligence of the company, but relied upon the presumption created by the paragraph of the law quoted above. The company then introduced evidence which it claimed was sufficient to overthrow the presumption and disprove its negligence. Further evidence was then in turn given by both parties. Without presenting any question to the jury, the court directed a verdict for the company,

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and the plaintiff appealed. Judge Preston delivered the opinion of the court, which held that the evidence should have been submitted to the jury for determination of certain questions of fact and remanded it to the trial court for that purpose. The subject of presumption is first discussed in a more general way, after which the court says:

The act, and particularly the section now in question, should be construed so as to carry out the purposes and objects of the act. This being so, there is little room for doubt that the legislature intended that the evidence of the injury should be considered as evidence of negligence, and to prove the fact of negligence by operation of the presumption. The presumption is rebuttable, and the defendant may show by evidence that it was not guilty of negligence, and that the negligence was not the proximate cause of the injury. We shall see later that it is a question for the jury to say whether the presumption has been overcome. Ordinarily this will be so, but there may be exceptional cases.

We are of opinion that under the record made the case should have been submitted to the jury for its determination as to whether the statutory presumption of negligence had been overcome, and that the case should be reversed on this ground. We think, too, there are some circumstances in the record which it would have been proper for the jury to consider in aid of the presumption, and, see later that it is a question for the jury to say whether the presumption there was sufficient evidence to take the case to the jury.

The opinion then reviews the evidence, and holds that, even disregarding the statutory presumption, there was evidence tending to show negligence, sufficient to take the case to the jury.

Employers' Liability—Workmen's Compensation Act—Interstate Commerce—Seaman on Towboat Handling Interstate Barge—*Morrison* v. *Commercial Towboat Co., Supreme Judicial Court of Massachusetts (May 26, 1917), 116 Northeastern Reporter, page 499.*—Francis B. Morrison brought action for personal injuries, against the company named, under the provisions of the Workmen's Compensation Act of Massachusetts which apply to cases in which the employer is not a subscriber under the act, and which abrogate common-law defenses. The act exempts seamen, etc., on vessels engaged in interstate or foreign commerce. The employee was, at the time of injury, mate of a towboat which operated in Boston Harbor. This boat was to tow a barge which also belonged to the company from its wharf to the flats in the harbor, after which the barge, loaded with coal, would be taken to Norfolk, Va., by an ocean-going tug. Preliminary to this the towboat went under the bow of the barge to deliver a bundle of fish for consumption on the trip, and while there an engine on the barge was started without

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warning, and the employee was injured by the steam and boiling water. The court held that since the compensation act and amendments except interstate commerce and seamen from their operation, no action could be brought thereunder in the present instance, and ordered judgment for the company. The following are extracts from the opinion delivered by Judge De Courcey:

Interstate commerce in a legal sense embraces not only the transportation of freight from one State to another but every link in that transportation, whether or not some of the links are entirely within one State.

At the time of the plaintiff's accident the tug *Hersey* had run under the bow of the barge *Helen*, preparatory to towing it down to the flats. The captain of the *Helen* was on the wharf for the purpose of casting off the hawser; and the donkey-engine, which was used in heaving in the hawser, was started. At the time the purpose of the movements of the plaintiff and of the tug was to reach and move an interstate vessel.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION ACT—MINORS LEGALLY PERMITTED TO WORK—DANGEROUS EMPLOYMENT—*Westerlund* v. *Kettle River Co., Supreme Court of Minnesota (May 18, 1917), 162 Northwestern Reporter, page 680.*—Hilding Westerlund, a minor, brought action by his guardian to recover for personal injuries alleged to have been due to the negligence of his employer, the company named. The company operated stone quarries, and the plaintiff was at work for it, at the age of 14 years and 4 months, when he was injured. He was assisting in the work of loading waste material and dumping it outside the plant. He attempted to stop a car which was being shunted and whose brakes were out of order, by placing a block in front of the moving wheels, and was run over by it. This method was alleged to be in accordance with the custom in handling cars. He was not engaged in operating machinery of any kind, but was in close proximity to it much of the time when at his work. The compensation statute includes in its definition of the term "employee" "minors who are legally permitted to work under the laws of the State." The laws forbid employment of boys under 16 in operating or assisting to operate dangerous machinery and in other specified work, and the provision concludes with a prohibition of their employment in "any other employment dangerous to their lives or limbs or their health or morals." It was argued on behalf of the company that this, under the rule of ejusdem generis, refers only to employments similar to those enumerated. The lower court had held the complaint sufficient, over the objection that the matter was covered by the compensation law, and dismissed a demurrer to the complaint; and this order was on this appeal affirmed, the court holding that the boy was employed in an occupation dan-

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gerous within the meaning of the provision quoted, and was therefore not legally employed nor an "employee" under the compensation act.

EMPLOYERS' LIABILITY INSURANCE—LIABILITY, REGARDLESS OF SATISFACTION OF JUDGMENT—DIRECT RECOVERY—CONSTITUTIONALITY OF STATUTE—*Lorando* v. *Gethro et al., Supreme Judicial Court of Massachusetts (Sept. 13, 1917), 117 Northeastern Reporter, page 185.*—Albert Lorando had recovered a judgment against Joseph C. Gethro for personal injuries. While the report of the case does not disclose whether or not Lorando was an employee of Gethro, the principles involved would cover, in their most usual application, instances of injuries to employees. The present suit was brought in equity against Gethro and the insurance company carrying his liability risk, under chapter 464 of the acts of 1914, which provides that, upon the occurrence of loss on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of the loss shall not depend upon the satisfaction of the judgment by the assured; and that the judgment creditor shall be entitled to bring suit in equity to have the insurance money provided in the contract of insurance applied to the satisfaction of the judgment. The insurance company demurred to the bill on the ground that the statute was unconstitutional, and in the trial court an order was entered overruling the demurrer. This order was affirmed by the supreme judicial court, the validity of the law thus being upheld. Judge Rugg delivered the opinion, and called attention to the reason for the existence of the law in the protection offered to the injured person in case of the bankruptcy or financial irresponsibility of the assured. He resolved difficulties in ascertaining the meaning of the law by an authoritative interpretation of certain expressions. The question of constitutionality was then taken up, and the following quotation shows the grounds taken by the court:

The statute is reasonable in its purpose and effect. Its obvious design is to afford to the assured of modest resources the direct benefit of his insurance. It well might be a practical impossibility for an assured who has complied with every other term of his contract and has paid all premiums demanded by the insurer, first to pay the loss and damage for which he was liable and against which he was insured. The man without capital or credit might be powerless to meet his obligation and put himself in position to recover against the insurer. The man of slender resources or doing a considerable business on small capital might be forced into bankruptcy, and get little or no benefit from the insurance for which he had paid. The persons injured by accidents, for which such classes of assured might be liable, would be in effect remediless as to practical results for the

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damages sustained by them. It well might be thought by the legislature a sound public policy that casualty insurance should become an effective instrumentality for both the assured and the injured, and not be a snare to the assured and a barren hope to the injured. If the legislature believed this, it reasonably might decide to frame the terms of policies of casualty insurance and to provide means for their enforcement to the end that these results might be avoided, and to declare that policies lacking these requisites should not be written, or if written should be ineffective as to these terms.

The instant statute is a declaration of public policy by the general court respecting one aspect of casualty insurance. It is a declaration as to a subject within its general power of regulation. It governs contracts made after it took effect. It is not retroactive. Its terms are reasonable and violate no right secured by the Constitution. It is well within the principle of numerous decisions where statutes more or less interfering with the freedom of contract have been upheld. [Cases cited.]

EMPLOYERS' LIABILITY INSURANCE—PROVISIONS OF POLICIES—SUBROGATION OF INJURED EMPLOYEE TO EMPLOYER'S RIGHTS—*Verducci* v. *Casualty Co. of America, Supreme Court of Ohio (May 15, 1917), 117 Northeastern Reporter, page 235.*—Antonio Verducci was injured while in the employ of the firm of Ensminger Bros. He sued them, and recovered a judgment in the sum of $10,000 and costs. In the present suit he brought action against the company named, which had executed a policy of liability insurance in favor of the employers, and had conducted the defense in the prior suit. It was alleged that no part of the judgment had been paid, and that the employers were insolvent. The answer admitted the execution of the policy, but stated that the policy provided that it could be enforced only by the insured firm, and then only on condition that a judgment rendered against it had been satisfied. On the authority of State ex rel. Turner *v.* Employers' Liability Assurance Corporation (see p. 293), the court held that these stipulations, inconsistent with the statute, were void. A judgment had been rendered in favor of the defendant insurance company in the court of appeals of Cayuhoga County, but this was reversed, and judgment entered for the employee, on the facts contained in an agreed statement.

EMPLOYMENT OFFICES—PROHIBITION OF RECEIPT OF FEES FROM WORKMEN—CONSTITUTIONALITY OF STATUTE—*Adams* v. *Tanner et al., Supreme Court of the United States (June 11, 1917), 37 Supreme Court Reporter, page 662.*—The people of the State of Washington enacted in 1914 Initiative Measure No. 8, popularly known as the Employment Agency Law. On December 3 of that year the gov-

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ernor issued his proclamation announcing that the majority had been in favor of its passage, and declaring it a law effective from that date. In brief, the act forbids the taking of fees from workmen for securing employment for them.

Even before the official proclamation of the passage of the law proceedings were instituted, on November 25, to secure an injunction preventing its enforcement, on the ground that it was invalid as in conflict with the provision of the fourteenth amendment to the Federal Constitution protecting property rights. The injunction was denied and the bill dismissed by a Federal district court, whereupon the case was taken to the Supreme Court of the United States on the constitutional question. This court, divided 5 to 4, reversed the decision below, and declared the law unconstitutional.

The majority opinion was delivered by Mr. Justice McReynolds, who stated the facts as to the proceedings in the lower court. With reference to the decisions of the State supreme court construing the law rendered in the meantime, and to the question whether the law, if valid, would practically prohibit the business of the complainants, he said:

In Huntworth *v.* Tanner, 87 Wash. 670, 152 Pac. 523 [Bul. No. 189, p. 123], the supreme court held school teachers were not "workers" within the quoted measure and that it did not apply to one conducting an agency patronized only by such teachers and their employers. And in State *v.* Rossman, 161 Pac. 349, the same court declared it did not in fact prohibit employment agencies since they might charge fees against persons wishing to hire laborers; that it was a valid exercise of State power; that a stenographer and bookkeeper is a "worker"; and that one who charged him a fee for furnishing information leading to employment violated the law.

The bill alleges "that the employment business consists in securing places for persons desiring to work," and unless permitted to collect fees from those asking assistance to such end, the business conducted by appellants can not succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants' occupation as agent for workers can not exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. "You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."

Decisions of the court recognizing that employment agencies are subject to regulation and control are cited at this point, but Justice McReynolds failed to find a reason for their absolute suppression, since "there is nothing inherently immoral or dangerous to public welfare in acting as a paid representative of another to find a position

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in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand." He quoted with approval the opinion in the California case of In re Dickey, 144 Cal. 234 [Bul. No. 57, p. 693], which characterizes the business as "not only innocent and innocuous, but highly beneficial." The extent of the business of the plaintiffs, who furnished positions for 90,000 persons in one year, and received applications from at least 200,000 laborers, is referred to. Continuing, Justice McReynolds said:

A suggestion on behalf of the State that while a pursuit of this kind "may be beneficial to some particular individuals or in specific cases, economically it is certainly nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while possibly indicative of the purpose held by those who originated the legislation, in reason gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunties for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution can not be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

Only a portion of one of the quotations made at this point in the opinion is here reproduced:

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. * * *

If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail. McLean *v.* Arkansas, 211 U. S. 539, 547, 548, 29 Sup. Ct. 206 [Bul. No. 81, p. 419].

The opinion concludes as follows:

We are of opinion that Initiative Measure No. 8, as construed by the Supreme Court of Washington, is arbitrary and oppressive, and

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that it unduly restricts the liberty of appellants, guaranteed by the fourteenth amendment, to engage in a useful business. It may not therefore be enforced against them.

Mr. Justice McKenna dissented on the ground that "the law in question is a valid exercise of the police power of the State directed against a demonstrated evil." A dissenting opinion of considerable length was prepared by Mr. Justice Brandeis, Mr. Justice Holmes and Mr. Justice Clarke concurring. Mr. Justice Brandeis referred to the frequently expressed doctrine that "The action of the legislature is final unless the measure adopted appears clearly to be arbitrary or unreasonable or to have no substantial relation to the objects to be attained," and added that these facts and conditions can not "be determined by assumptions or by a priori reasoning. The judgment should be based upon the consideration of relevant facts, actual or possible—ex facto jus oritur" (the law arises from the fact).

In carrying out this method of inquiry into the facts, the evils, the remedies, the conditions in the State of Washington, and the fundamental problems were discussed in order, with numerous citations from Government reports and from studies of the questions of unemployment and the procurement of employment. The sources cited included Bulletins Nos. 68, 119, 192, and 211 of the Bureau of Labor Statistics; the report and testimony submitted to Congress by the United States Commission on Industrial Relations; reports of the Washington State Bureau of Labor; the American Labor Legislation Review, etc. Thus the economic grounds for the act were brought under review and the actual facts and conditions involved considered. The concluding division of the opinion, under the head "The Fundamental Problem," is quoted in full, exclusive of footnotes giving citations and quotations from the authorities for the statements made:

The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment—perhaps the gravest and most difficult problem of modern industry—the problem which, owing to business depression, was the most acute in America during the years 1913 to 1915. In the State of Washington the suffering from unemployment was accentuated by the lack of staple industries operating continuously throughout the year and by unusual fluctuations in the demand for labor, with consequent reduction of wages and increase of social unrest. Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges is an indispensable first step toward its solution. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice, but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.

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It is facts and considerations like these which have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. And weight should be given to the fact that the statute has been held constitutional by the Supreme Court of Washington and by the Federal district court (three judges sitting)—courts presumably familiar with the local conditions and needs.

In so far as protection of the applicant is a specific purpose of the statute, a precedent was furnished by the act of Congress, December 21, 1898 (30 Stat. 755), which provides, among other things:

"If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than one hundred dollars."

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington workmen's compensation law (sustained in Mountain Timber Co. *v.* Washington, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. No. 224, p. 252]), whereby the financial burden of industrial accidents is required to be borne by the employers.

As was said in Holden *v.* Hardy, 169 U. S. 366, 387, 18 Sup. Ct. 383 [Bul. No. 17, p. 625]:

In view of the fact that from the day Magna Charta was signed to the present moment amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they arise."

In my opinion, the judgment of the district court should be affirmed.

FACTORY REGULATIONS—FIRE ESCAPES—CRIMINAL RESPONSIBILITY OF TENANT—*People* v. *Shevitz et al., Supreme Court of New York, Appellate Division, First Department (Apr. 13, 1917), 164 New York Supplement, page 603.*—Hyman Shevitz was convicted of having unlawfully conducted a factory in a building which did not conform to the requirements of section 79b of the Labor Law of New York State in respect to fire escapes and exits. The respondent argued on the appeal that, as the exits complained of were outside the workplace occupied by him, it could not be said that there was a failure to observe the provisions of the section " within his holding." The court, however, pointed out that the section provides in its first sentence, " No factory shall be conducted in any building heretofore erected unless such building shall conform to the following requirements." The conviction was affirmed, Judge Scott in the opinion saying further:

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The evidence showed that the loft occupied by defendant had access to no means of exit such as are required by the statute; consequently no point within the loft occupied by defendant and used by him as a factory is or can be within 100 or 150 feet "from the entrance to one such means of exit." It follows that the factory is unlawfully conducted in this loft, and the defect is within the defendant's holding. This makes him responsible and punishable for a violation of section 79b, and under section 1275 of the Penal law his offense is a misdemeanor.

It may be, as urged in defendant's behalf, that the defects in the building were not such as he was called upon or authorized to remedy; but, even so, it does not serve to excuse him. He need not have established his factory in a building which did not comply with the law; but, having done so, he can not escape the consequences.

Hours of Labor of Women—Constitutionality of Statute—Exemption of Railroad Restaurants—*State* v. *Le Barron, Supreme Court of Wyoming* (*Jan. 18, 1917*), *162 Pacific Reporter, page 265.*—William I. Le Barron was charged with having employed a woman in his restaurant for more than 10 hours in one day. The statute prohibits the employment of women in certain establishments, including restaurants, for more than 10 hours, but excepts railroad restaurants. The contention of the respondent was that this was an improper classification, which made the statute void as in contravention of the fourteenth amendment to the Federal Constitution, and similar provisions of the State constitution. It was held that the statute was unconstitutional, in so far as it applied to restaurants, for the reason given, and the case was returned to the district court from which it had been certified for the answering of questions relating to this subject. Judge Beard delivered the opinion, from which the following extracts are taken:

As to classifications which are permitted and which do not violate constitutional provisions, it is the uniform rule that the reason for the classification must inhere in the subject-matter, and must be natural and substantial, and must be one suggested by necessity, by such difference in the situation and circumstances of the subjects as to suggest the necessity or propriety of different legislation with respect to them.

Keeping in mind the purpose of the act under consideration—the protection of the health of females employed in restaurants by a regulation of the hours of their employment—there is nothing appearing either upon the face of the act, the pleadings, or in our own observation (if we may take that into consideration) rendering restaurants operated by railroad companies any more healthful to females therein employed than in those conducted by private individuals or other companies or corporations. It is a matter of common and general knowledge that most of the female employees in restaurants are waitresses, and the kind and character of the labor performed in

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each is the same. A waitress in a restaurant operated by a railroad company is entitled to the same consideration in law and the same safeguards to her health as one employed in a restaurant conducted by a department store or a private individual.

At this point the opinion quotes from other opinions, and points out that the fact that railroad restaurants are a convenience for the traveling public and for railroad employees has no bearing on the classification, which in order to be valid must be based on a difference in the healthfulness of the employment. In the concluding portion Judge Beard says further:

We are of the opinion that the statute in question arbitrarily and without any substantial basis therefor discriminates between those engaged in the same class of business; that it deprives restaurant keepers, other than railroad companies, of the equal protection of the law and imposes upon them and their employees burdens not imposed upon railroad companies engaged in the same class of business and in substantially the same situation; that it is class legislation and does not operate uniformly upon all of the same class, and in so far as it applies to the hours of labor in restaurants—that being the only question before us—it is unconstitutional and void.[1]

Hours of Service—Railroads—Computation of Twenty-four Hour Period—*United States* v. *Missouri Pacific Ry. Co., United States Circuit Court of Appeals, Eighth Circuit (June 15, 1917), 244 Federal Reporter, page 38.*—This action was brought to recover penalties for violations of the Hours of Service Act. The railway company objected to several counts of the complaint on the ground that the prosecution had adopted an erroneous method of computing the 24-hour period. The dispute was illustrated by the facts in the third count. The employee Coughlin's regular hours were from 7 a. m. to 4 p. m., so that he was employed the nine hours which the law fixes as the limit. On September 6, 1914, he remained on duty from 7 a. m. until 1.30 p. m., when he was definitely excused from duty until 3 p. m., at which hour he again went on duty and worked until 5.10 p. m. The next day he worked the regular hours. By starting to compute the 24-hour period at 3 p. m. on the former day, the prosecuting officers calculated that the operator exceeded the legal maximum by 1 hour and 10 minutes. The company contended that the computation should be made from 7 a. m., the time when in regular course the man entered upon his work. Judge Carland, who delivered the opinion of the majority, ruled that the method adopted by the railroad company was the proper one, saying in part:

In the Congressional Record for March 3, 1907, vol. 41, p. 4543, it appears that while Senator Patterson was speaking on this same statute he asked Senator Flint, who was acting as spokesman for the

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[1] An amendment of 1917 extends the law to females employed in restaurants of all classes, thus avoiding the fault of classification pointed out in this case.

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conference committee having the bill in charge, the following questions: "Is the twenty-four hour period to be fixed arbitrarily by the company? Is the twenty-four hour period a calendar day? Is the twenty-four hour period to commence with each individual workman as he enters upon the duties of his twenty-four hours of labor?" Senator Flint answered the questions as follows: "The last statement of the Senator is the correct statement." We are of the opinion that the trial judge did not err in his ruling upon this question.

Hours of Service—Railroads—Night and Day Offices—*Illinois Central R. Co.* v. *United States, United States Circuit Court of Appeals, Eighth Circuit* (*Mar. 14, 1917*), *241 Federal Reporter, page 667.*—The company named was convicted of violations of the Hours of Service Act by employing operators conveying train orders, in an office continuously operated, for more than 9 hours out of the 24. The defense was that the employees were not in an office operated night and day, and as they worked only 12 hours, there was no excess. The cases related to three stations in Iowa, but the facts were similar in each case. The agent and operator worked at the station from 7 a. m. to 7 p. m., when another operator took the train register and order book and carried them to a tower a few hundred feet away, where he was engaged in dispatching from 7 p. m. to 7 a. m., then returning the books to the depot. The court held that the two locations constituted but one office, and that the act had been violated, affirming the judgment of the court below.

Hours of Service—Railroads—Release between Runs of Round Trip—*Minneapolis & St. Louis R. Co.* v. *United States, United States Circuit Court of Appeals, Eighth Circuit* (*July 21, 1917*), *245 Federal Reporter, page 60.*—The railroad company named was convicted in a district court on several counts for violation of the Hours of Service Act. The facts in all the cases were similar, and involved the employment of crews of freight trains on round trips, the time elapsing between the start and finish of these trips being from 17 to 18 hours. At the other end of the line the crews were absolutely released for from 2 to 2½ hours, and if this time were deducted, the total would be less than the 16 hours of service permitted. The facilities for rest during the period of release were not good. The company having waived a jury trial, the judge of the trial court found that the service was continuous; and his judgment of conviction was affirmed, one of the three judges dissenting. The following is from the majority opinion delivered by Judge Carland:

That an employee is absolutely relieved from service is not of controlling importance, if the time is so short or the opportunities for

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rest are so meager that for all practical purposes an employee does not have the opportunity for rest which the law requires.

We are of the opinion that the periods of release were periods of waiting which gave no proper opportunity for rest. The service was what is termed a "turn-around" service. If the train crew can be given an absolute dismissal for the time which elapses at any particular terminal before the return trip is made, with only the opportunity for rest which is shown by the evidence in this case, and such time is held to break the consecutive hours of service, then the purpose of the law will be largely defeated, and the employees permitted to remain on duty for a longer period than is lawful.

Hours of Service—Railroads—Reports of Overtime—Honest Mistake—*United States* v. *Northern Pacific Railway Co., Supreme Court of the United States (Dec. 4, 1916), 37 Supreme Court Reporter, page 22.*—Five employees of the company named were called at 8.10 o'clock p. m., October 29, 1911, to take charge of a wrecking train. Before they reported it was ascertained that the train would not be needed, but they were notified that they should report at 10.35. During the interval they rendered no service except to keep alive the fire in the engine. They then started on a freight run, which was delayed by hot boxes so that they did not arrive at the destination until 1.15 p. m. the next day. If the time were reckoned from 8.10 it would make 17 hours and 5 minutes on duty. The railroad company, in making its next report as required by section 20 of the act to regulate commerce, believing that the time should be reckoned from 10.35, omitted the names of these men from among those who had exceeded the limit of 16 hours. In another suit judgment had been rendered for the Government for the forfeitures for excessive services by these men, thus determining that the employees were on duty from 8.10. The Government then sued for a penalty of $500 as for an omission to report the facts for 5 days, although as a matter of fact they were not reported for 289 days after omission in the report of November 30, 1911. In affirming the judgment of the circuit court of appeals in favor of the company, the Supreme Court assumed that the names were omitted because it was in good faith believed that the hours of service should be computed from 10.35. It was held that it was not the intent of the law in such a case to exact the penalty, Mr. Justice Clarke delivering the opinion and saying in part:

The statute is a penal one and should be applied only to cases coming plainly within its terms. While the reports filed must be truthful reports, yet, since they must be made under oath, the penalties for perjury would seem to be the direct and sufficient sanction relied upon by the law-making power to secure their correctness.

There are, to be sure, many statutes which punish violations of their requirements regardless of the intent of the persons violating

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them; but innocent mistakes, made in reporting facts, where the circumstances are such that candid-minded men may well differ in their conclusions with respect to them, should not be punished by exacting penalties, except where the express letter of the statute so requires; and we conclude that the section under discussion contains no such requirement.

The fact that the Government sues for only one-fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it should make us slow to attribute to Congress a purpose to enact what is thus admitted to be a punishment greatly disproportionate to the offense.

It being very clear that it is not the purpose of the law under discussion to punish honest mistakes, made in a genuinely doubtful case, the decision of the circuit court of appeals is affirmed.

Hours of Service—Railroads—Rest Periods—*Pennsylvania R. Co.* v. *United States, United States Circuit Court of Appeals, Third Circuit (Dec. 19, 1917), 246 Federal Reporter, page 881.*—The company named was convicted in a district court of violation of the Hours of Service Act. The employees alleged to have been employed for more than 16 hours out of 24 were engineers and firemen on extra engines used to push freight trains over the mountain grades of the company's line. After pushing one train a certain distance from the starting point, an engine awaited the arrival of a train going in the opposite direction, which it assisted in the same manner. Hostlers took charge of the engines in the interim, and the crews were allowed to take the time for rest, the company furnishing resthouses at some places, and lodging houses being available at others. The men were subject to call at any time and were paid for the entire time. In one instance cited by the court as typical there were two rest periods of 50 minutes each, spent in a resthouse, and the period of duty exclusive of these periods was 15 hours and 10 minutes. In other cases there was no resthouse, but the men went to lodgings near by and were off duty for two hours. The court found that the nature of the work and the circumstances were exceptional, and held that the rest periods should be deducted in computing the working time. The judgment below was therefore reversed. Judge Buffington, who delivered the opinion, also refers to the importance of transportation during the War, and intimates that some consideration should be given to the unusual conditions, in cases where there is no actual overstrain of the employees. He also makes a suggestion that in view of the large number of prosecutions of railroads in "borderline" cases, the authorization of an administrative officer representing the Interstate Commerce Commission, to consult with the railroad officials and use his discretion in advising them as to the boundaries of permissible practices, would much simplify the problems presented in the enforcement of the law.

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HOURS OF SERVICE—RAILROADS—SWITCH TENDERS—*Chicago & Alton R. Co.* v. *United States, United States Circuit Court of Appeals, Seventh Circuit (July 12, 1917), 244 Federal Reporter, page 945.*—The United States brought action against the railroad company named for violation of the Hours of Service Act by the employment of switch tenders in its Bloomington-Normal yard, which is 7¾ miles long, for 12 hours per day. The company contended that the 16-hour limit instead of that of 9 hours applied to these employees. Judgment for the Government was, however, affirmed in an opinion delivered per curiam, which was for the most part as follows:

The train dispatchers and operators who direct the movement of the trains elsewhere on the road outside of the yard limit have no function within it. Therein the yardmaster has the general direction of all train movements, his orders being communicated to and executed by his subordinates, the switch tenders, who are stationed at various switch shanties within the yard, each switch tender having special charge of certain switches in the immediate vicinity of his particular shanty, and the service being continuous night and day. The orders for the movement of the trains are transmitted by the yardmaster from his central office by telephone to the various switch shanties, where the switch tenders, at phones therein, receive them, and execute them by transmitting them verbally or by signal to the engine or train crews, and by manipulating the switches, so that trains may take their proper tracks without coming in contact with each other or with the various switch engines and cars being switched and moved thereabout. Defendant had a rule requiring trains passing through the yard to reduce speed and proceed only after the way is seen or known to be clear. This use of the telephones by the switch tenders in connection with the movement of the trains was not occasional or exceptional, but was part of their general and usual duties; each train movement so communicated to the crews, or participated in by the switch tender, being preceded by his reception of a telephoned order directing it.

Our decision of August 6, 1915, in Chicago, Rock Island & Pacific Ry. Co. *v.* United States, reported in 226 Fed. 27 [Bul. No. 189, p. 155], and followed by us in Chicago & Northwestern Ry. Co. *v.* United States, 226 Fed. 30, is against the proposition, advanced for plaintiff in error, that the 16-hour limit, and not the 9-hour limit, applies; and upon the authority of those cases the judgment of the district court must be and is affirmed.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR OCCASIONALLY TRANSMITTING ORDERS FOR INTERSTATE TRAINS—*Denver & Interurban Ry. Co.* v. *United States, United States Circuit Court of Appeals, Eighth Circuit (Oct. 11, 1916), 236 Federal Reporter, page 685.*—Prosecution was commenced against the company named for alleged violation of the Hours of Service Act by the employment of its telegraph operator at Globeville, Colo., in a day and night office,

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for more than 9 hours, he having been employed from 3 o'clock p. m., July 4, 1914, to 1.07 a. m., July 5. The company contended that it and the operator were not engaged in interstate commerce, at any rate, not on the day mentioned. The company hauled interstate freight over a part of its line, but such trains did not pass Globeville. The operator was controlled by the chief train dispatcher of the Colorado & Southern Railway. Some of the trains of the Denver & Interurban Co. ran over the interstate highway of the Colorado & Southern road, and occasional orders were transmitted through the Globeville operator relating to the meeting and passing of the Denver & Interurban trains and the interstate trains of the Colorado & Southern Railway. The judgment of the court below, for the Government, was affirmed, the court holding that the facts brought the matter within the Hours of Service Act. Judge Trieber delivered the opinion, in the course of which he said:

The fact that on that particular day this operator at Globeville had received no orders relating to interstate trains is wholly immaterial.

There was a joint traffic arrangement over this line and that of the Colorado & Southern Railway Co., over certain parts of an interstate highway, and all trains using that highway were under the control of one person, the train dispatcher of the Colorado & Southern, admittedly an interstate railway, from whom this operator received his orders, which he was bound to transmit. The courts have been very liberal in construing who are employees of a railroad engaged in interstate transportation. [Cases cited.] And in our opinion the defendant and its operator were clearly engaged in interstate commerce.

Hours of Service—Railroads—Unavoidable Delay—*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States, Supreme Court of the United States* (*June 4, 1917*), *37 Supreme Court Reporter, page 635.*—The company named was convicted of a violation of the Hours of Service Act in permitting the employment of a train crew for more than the statutory limit on a run from Parker to Los Angeles, Cal. A delay of over six hours was caused at one point by the breaking of an axle, which was shown to have been an unavoidable accident; but it appeared that the crew might have been relieved at San Bernardino, which was a division terminal, though not the terminal of the train crew. It was held that the company could not be excused for not making, at that point, a change of crews, which would have prevented the overtime work. The following brief extracts are from the opinion delivered by Mr. Justice Day:

The requirement of continued service after the train reached San Bernardino was not occasioned by the unforeseen accident, but was the direct consequence of the failure of the company to relieve the

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employees by the substitution of a fresh crew, as the record shows could readily have been done.

If the construction contended for by the company be adopted, it would follow that the employees might be kept in service for indefinite periods, until the termination or end of the run should be reached, which it is not difficult to suppose might require many hours of service beyond the limitations prescribed in the body of the act. This construction would defeat the purpose of the act by permitting the employees to endanger themselves and the public by the continued service of tired and exhausted men. We reach the conclusion that in keeping the crew in service beyond San Bernardino the company was guilty of a violation of the statute.

INSURANCE—SUNSTROKE AS ACCIDENT—*Higgins* v. *Midland Casualty Co., Supreme Court of Illinois (Dec. 19, 1918), 118 Northeastern Reporter, page 11.*—Clarence E. Higgins was a traffic policeman in the city of Rockford, Ill. On June 4, 1913, a very warm day, he had been standing at the intersection of Main and State streets for some time, when, at 4.30 p. m., he suffered a sunstroke and was compelled to go home. As a result of this stroke he suffered a complete physical and mental breakdown. The company named had issued to him, about a year earlier, a policy of insurance, indemnifying him "against bodily injury (herein called such injury), sustained solely through accidental means." A clause entitled "Special Indemnities, Section D," was included in the policy, and read as follows:

"Blood poisoning, sunstroke, freezing, hydrophobia, asphyxiation, unprovoked assaults, and choking by swallowing, as the result of such injury, shall be deemed to be included in said term 'such injury.'"

Grace Higgins, as his conservator, brought suit on the policy, and an appellate court affirmed a judgment for the company, sustaining a contention of the company that as the injury was received while the insured was doing just what he intended to do and in the way that he intended, it could not be classed as accidental. The case is said to be the first coming before this supreme court raising the question whether sunstroke might be the result of "accidental means." Under the circumstances involved in this case it was held to be such within the terms of the policy, and the judgment was reversed, Judge Carter, for the court, examining numerous decisions and saying:

Did Higgins, in this case, have any reason to assume that the natural and probable consequence of his acts along the line of his duties in controlling the traffic at the street intersection would be a sunstroke? Plainly not. The briefs show that the place where this sunstroke occurred is a busy street intersection, and we have a right to assume from the evidence that many other people were passing

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back and forth in the line of their regular duties across this street intersection on that day, and that no other people so passing back and forth were stricken because of the heat. It would seem to require no argument, therefore, to conclude that from Higgins' duties at the intersection in question, although they were intentional and voluntary, a sunstroke would not be considered the natural and probable consequence of his course of action.

INTERFERENCE WITH OCCUPATION—PUBLIC INTEREST—MUNICIPAL FUEL YARDS—*Jones* v. *City of Portland, Supreme Court of the United States (Dec. 10, 1917), 38 Supreme Court Reporter, page 112.*—The legislature of the State of Maine passed in 1903 a law, incorporated in the Revised Statutes of 1903 as section 87 of chapter 4, and reading as follows:

Any city or town may establish and maintain, within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants. The term "at cost," as used herein, shall be construed as meaning without financial profit.

The authorities of the city of Portland, in February, 1913, duly passed a vote to establish such a yard, the vote following the language of the statute in all respects. It was provided that the money necessary for the purpose should be raised by taxation, and $1,000 was appropriated. Citizens and taxpayers of the city then brought suit to enjoin the establishment of the yard. The supreme court having decided in favor of the city, sustaining a demurrer to the bill, the case was carried to the Federal Supreme Court on the ground that the statute violated the fourteenth amendment to the Constitution; it was contended that the establishment of municipal fuel yards is not a public purpose, and that therefore taxation to maintain one would be a taking of property without due process of law. Mr. Justice Clarke delivered the opinion of the Supreme Court, and, after stating the facts of the case, said:

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes can not be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. Citizens' Savings & Loan Association *v.* Topeka, 20 Wall. 655.

The act in question has the sanction of the legislative branch of the State Government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the State upon the authority of a previous decision of that court. Laughlin *v.* City of Portland, 111 Me. 486, 90 Atl. 318.

The attitude of this court toward State legislation purporting to be passed in the public interest, and so declared to be by the decision

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of the court of last resort of the State in passing the act, has often been declared. In Union Lime Co. *v.* Chicago & N. W. Ry. Co., 233 U. S. 211, 34 Sup. Ct. 522, this court declared that a decision of the highest court of the State declaring a use to be public in its nature would be accepted unless clearly not well founded. [Cases cited.]

In the case of Laughlin *v.* City of Portland, supra, the matter was fully considered by the Supreme Judicial Court of that State. After reviewing the cases which establish the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such community with water, light, and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the State to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that in the instances in which municipal authority had been sustained the use of the public streets and highways for mains, poles, and wires in the distribution of water, light, and heat had been required under public authority, whereas in supplying fuel to consumers, under the terms of the law in question, no such permission was essential, the court saying:

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if, instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution and, if the legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legislature which is the only question before the court, and not the wisdom of its exercise which is for the legislature alone."

Bearing in mind that it is not the function of this court under the authority of the fourteenth amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision

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for their establishment and operation. The right of a municipality to promote the health, comfort, and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in State of Ohio *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061. We see no reason why the State may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a State authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the State to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed.

LABOR ORGANIZATIONS—BOYCOTT—ADVERTISING THEATER AS UNFAIR—CONSPIRACY—INJUNCTION—*Empire Theater Co.* v. *Cloke et al., Supreme Court of Montana (Jan. 25, 1917), 163 Pacific Reporter, page 107.*—The theater company named sought an injunction against the Musicians' Mutual Union and the Silver Bow Trades Council, their members, and certain named persons, to prevent picketing the theater and publishing it as unfair to organized labor, and carrying on a boycott against the theater. The dispute between the unions and the company was brought about by the refusal of the company to comply with a demand of the musicians' union that five of its members be employed, at a stated rate, at every exhibition of moving pictures. The district court of Silver Bow County dismissed the petition, relying upon previous decisions of the supreme court of the State, which are discussed in the following portion of the opinion delivered by Judge Sanner, affirming the judgment of the court below:

The denial of any relief was expressly based upon the prior decisions of this court in Lindsay & Co. *v.* Montana Federation of Labor, etc., 37 Mont. 264, 96 Pac. 127 [Bul. No. 78, p. 604], and Iverson *v.* Dilno, 44 Mont. 270, 119 Pac. 719 [Bul. No. 99, p. 730], and the plaintiff, contending that the second part of the Lindsay opinion is obiter, insists that so much of both decisions as are really effective, as well as the later case of Peek *v.* Northern Pacific Ry. Co., 51 Mont. 295, 152 Pac. 421 [Bul. No. 189, p. 294], command, upon the facts found, a result exactly opposite.

The court refused to accept this view, however, saying:

The portion of the Lindsay opinion asserted to be obiter holds that injunction does not lie to restrain the publication of a circular denouncing an enterprise as unfair to organized labor, whether such

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publication emanate from one or from many persons, a conclusion which is assailed as altogether wrong. Considering how that case was presented, we can not regard the part referred to as obiter.

As to the matter of constitutional liberty of speech and publication, and the operation of the boycott, Judge Sanner said:

Counsel urge, however, that the conclusion is unsound because the constitutional provision postulated as the basis of it (State Const. art. 3, sec. 10) is addressed to the legislature and not to the courts, because it in some way interferes with the power of courts of equity in cases of nuisance, and because it is contrary to the stand repeatedly taken by the Supreme and other courts of the United States. The answer is not difficult. This court founded its decision upon the language of the provision above cited, which not only forbids the passage of any law impairing the freedom of speech, as does the National Constitution, but which also proclaims, as the National Constitution does not, that "every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." We thought, as we still think, that this second clause of our provision conveys the idea of liberty, unchecked as to what may be published, by anything save penalty, and is therefore so material a departure from the meaning given to the national provision that the Federal cases have little, if any, significance; and we were, as we still are, unable to conceive how any one can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so. It is to be remembered, however, that this court was dealing in the Lindsay case with the right to publish at large, not with the propriety of enjoining acts which, though they be in aid of the right to publish, are brought, or sought to be brought, within the category of nuisances. That subject was considered somewhat in the Dilno case and will be referred to later in this opinion.

So premising, we come to the result common in both the Lindsay and the Dilno cases, which is to declare that labor unions are not unlawful in this State; that such unions may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and that a combination of such unions or their members for such purposes can not be viewed as a conspiracy.

Every person has the right, singly and in combination with others, to deal or refuse to deal with whom he chooses; to reach his decision in that, as in all other matters, upon or without good reason; to regard as unfriendly all those who, with or without justification, refuse to cooperate or sympathize. These rights do not depend upon the character, numbers, or influence of those who seek to exercise them; nor upon the occasion for their exercise; nor upon the consequences which may follow from their legitimate use. They have been recognized by this court as existing in an incorporated railway benefit society (Peek *v.* Northern Pac. Ry. Co., supra), and it may be said in passing that they likewise belong to merchants' associations, to consumers interested in the cost of living, and, in some measure, to all other persons or groups of persons by whom a boycott may be conceived and practiced. The defendants had these rights,

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and, having them, could lawfully announce their intention to assert them. The plaintiff, on the other hand, has no vested right in the patronage of the defendants, or of any one else who may choose to withhold it; and, no more than the plaintiff, have the persons who may choose to patronize it any vested right to such patronage. Such persons may take such patronage on the terms imposed, or not, as they see fit, just as the defendants and their friends may, if they see fit, choose to regard a rejection of these terms as a rejection of their patronage. In short, the "threat" conveyed was to do what the defendants lawfully could do—a mere warning of their intention which they could lawfully give. A combination to do a lawful thing by lawful means is no conspiracy. Counsel for plaintiff point to the occasion for this boycott, and eloquently denounce the effrontery of labor unions in dictating to those who are not held to them by any ties as offensive and as dangerous to our most precious heritage, personal liberty. Offensive such dictation must certainly be, but not more offensive nor more dangerous, we think, than when the like is put forward by agencies of quite a different character. Attempted dictation, more or less disguised, is ever present; but it is not, in contemplation of the law, an invasion of liberty so long as it amounts to nothing more than a demand which one party has a legal right to make, upon the alternative of its displeasure, and the other the legal right to refuse, braving that displeasure. We see nothing in the Peek case to interfere with the conclusions announced in the Lindsay and Dilno cases, but much to confirm them, and we are satisfied that these cases correctly apply the law to present-day conditions. It follows that the judgment must be upheld so far as the boycott and its publication at large are concerned.

As to the complaint that the picketing, etc., constituted a nuisance, it was held that the evidence did not bear out this contention, as there was no proof of intimidation or violence. The judgment of the court below, dismissing the petition for an injunction, was affirmed.

Labor Organizations—Boycott—Advertising Theater as Unfair—Injunction—*Steffes* v. *Motion Picture Machine Operators' Union et al., Supreme Court of Minnesota (Feb. 23, 1917), 161 Northwestern Reporter, page 524.*—Albert Steffes, who carries on a motion picture theater in Minneapolis, petitioned for an injunction against the union named to restrain interference with his business, consisting in part of the hiring of a man to carry back and forth in front of the theater a banner with the words, "This theater is unfair to organized labor." The dispute between him and the union was brought about by his employment of a machine operator who was not a union man. As the decision in the district court of Hennepin County had denied the injunction, Judge Hallam, who delivered the opinion for the supreme court, remarked that the truth of facts which were in

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dispute must be taken to be favorable to the defendants, and that certain acts charged to them, which were distinctly unlawful, would be held not proven. In expressing the court's decision that the order denying the injunction should be affirmed, he said further:

The term "unfair" as used by organized labor has come to have a meaning well understood. It means that the person so designated is unfriendly to organized labor or that he refuses to recognize its rules and regulations. It charges no moral shortcoming and no want of business capacity or integrity. As applied to a theater it signifies nothing as to the merits of its performances. As a rule one man has no right to interfere in the business affairs of another, but if his act in so doing is in pursuit of a just purpose to further his own interests he may be justified in so doing, and so long as he does not act maliciously and does not unreasonably or unnecessarily interfere with the rights of his neighbor he can not be charged with actionable wrong. Grant *v.* St. Paul Building Trades Council, 161 N. W. 520. [See p. 131.]

In Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663 [Bul. No. 53, p. 955], it was said that whether a publication that an employer of labor is "unfair" is or is not unlawful depends on the circumstances of each case, that a notification to customers that plaintiffs are "unfair" may portend a threat or intimidation, in which case it will constitute a boycott and is unlawful, but that a mere notification of that sort without more is not a threat, is not unlawful, and that the trial court was in error in that case in enjoining such conduct.

The decision in the Gray case is controlling and in accordance with it we hold that the court did not err in refusing to enjoin the use of the banner used in this case unless its use upon the public street was unlawful. If the banner itself is lawful we are unable to see how the mere display of it by a pedestrian upon a public street is unlawful. It is plain that one displaying it may easily fall into unlawful practices. If it be accompanied by acts that constitute obstruction of the street or of access to plaintiff's place of business, or if accompanied by any words or acts which constitute intimidation or threats, the whole transaction is unlawful and should be enjoined. There are claims of this kind in plaintiff's complaint and affidavits, but they are all denied. The affidavits on the part of defendants negative any acts of this character. They are to the effect that the banner was displayed on the street and not on the sidewalk, that there has been no interference with patrons of the theater. The trial court has a large measure of discretion in the matter of granting injunctions pendente lite. On this showing we are not disposed to override the order of the trial court in refusing a temporary injunction. This is in harmony with the few decisions we find that bear upon this subject. [Cases cited.]

If, on a full hearing on the trial on evidence produced by the parties, the court shall find that the charges in the complaint are true, proper relief can then be given, but we are of the opinion that in denying an injunction on the pleadings and affidavits submitted there was no abuse of discretion.

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LABOR ORGANIZATIONS—BOYCOTT—ADVERTISING THEATER AS UNFAIR—INJUNCTION—EVIDENCE—*Martin et al.* v. *Francke et al., Supreme Judicial Court of Massachusetts (May 26, 1917), 116 Northeastern Reporter, page 404.*—Martin and Wellbrook, members of the Knights of Labor, and moving picture operators, and Gammon and Harkins, proprietors of the theater in which the operators were employed, sued for an injunction against Wm. C. Francke and others, who, with the exception of two men involved in the display of banners, were members and officers of a local organization of operators affiliated with the American Federation of Labor. It appeared that the defendants attempted to secure the discharge of Martin and Wellbrook, and, when they were unsuccessful in this, published by means of banners statements that the theater was unfair to the organization. Further findings of the master to whom the case was referred for the taking of evidence and determination of facts, also the procedure in the case and the decision in regard to disputed points, are shown in the opinion delivered by Judge Crosby, from which the following is taken:

The master finds:

That "the purpose of the respondents in carrying these banners was to cause, if possible, members of the American Federation of Labor and the public to refrain from purchasing tickets of admission to the Apollo Theater;" that it "was the intention of the respondents in doing the acts hereinbefore described to compel the discharge of the complainants Martin and Wellbrook by the other two complainants, or to cause the complainants Martin and Wellbrook to join the American Federation of Labor, but they were unsuccessful."

It was admitted at the hearing before the master that there had been no diminution in the attendance at the theater due to the acts of the respondents or any of them.

A final decree has been entered in the superior court enjoining the defendants from interfering with rights of the plaintiffs respectively; the only questions presented by the appeal arise from three exceptions to the master's report.

The first exception related to language claimed to have been used by the complainants, characterized as profane, obscene, and vile; but the substance of the same was not stated, so as to enable the master to determine as to its nature. The second exception was as to a finding that the word "unfair" had practically the same meaning as the word "scab," among labor men, which the court held to be a question to be decided on the evidence; while the third point was as to a charge of perjury made against one of the plaintiffs, this exception being overruled on the ground that the master was in the best position to pass upon the credibility of the witnesses. All exceptions being overruled, the decree was affirmed.

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Labor Organizations — Boycott — Conspiracy — Interference with Business—Injunction—*Harvey* v. *Chapman et al., Supreme Judicial Court of Massachusetts (Mar. 5, 1917), 115 Northeastern Reporter, page 304.*—James W. M. Harvey brought suit for an injunction and damages against Walter Chapman and others, alleging an unlawful conspiracy to interfere with his business as a retail grocer. A master having taken the testimony and made findings of fact, the case was reported to the court for decision. The master found that there had been no real trade dispute between the Lynn Grocery and Provision Clerks' Association, of which the defendants were officers, and the plaintiff, but that the entire trouble arose out of the failure of his clerks to pay their dues as members of the association. On July 9, 1915, the association called a strike on the store, but none of the three clerks left. The store was picketed, and the labor unions of the city were notified that it was unfair. It was found that the purpose of all the acts, which were ratified by the association as a whole, was to force the plaintiff to discharge the clerks or compel them to pay the necessary amount and be reinstated. The court granted the injunction and also damages in the small amount allowed by the master, Judge De Courcey stating the findings of fact and saying:

It needs no discussion to show that such intentional and harmful interference with the plaintiff's business renders the defendants liable, unless there appears a legal justification for their conduct. No such justification is disclosed. There was no real trade dispute between the parties. As there was, in fact, no strike at the plaintiff's store at any time since July 9, 1915, it is unnecessary to consider what the defendants properly might do under a legal strike. [Cases cited.] The validity and effect of the alleged agreement between the parties is likewise immaterial, because of the finding that if ever in force it had been terminated by mutual consent. [Cases cited.] The Peaceful Persuasion Act need not be considered, as it does not purport to justify attempts to persuade, which are a part of an unlawful or actionable conspiracy. The boycotting of the plaintiff's business by the defendants was based upon the false statement that his employees were out on a strike, and it was carried on for the purpose of compelling the plaintiff, with whom they had no trade dispute, to discharge his employees or to coerce them to pay the sums of money demanded of them by the association. Plainly it was unlawful. [Cases cited.]

The plaintiff argues that the damages awarded by the master are inadequate. But we can not revise that finding in the absence of the evidence. In view of the persistent unlawful acts of the defendants even while the case was on trial, and their intention to continue the same unless restrained by the court, the plaintiff is entitled to have them enjoined from proclaiming the existence of a strike of the plaintiff's employees, and from interfering with his business by keeping pickets and displaying banners about his store for the purpose of preventing the public from trading with him. He is also to recover from the defendants the sum of $100.

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Labor Organizations—Boycott—Interference with Business—*Bossert et al.* v. *Dhuy et al.*, *Court of Appeals of New York* (*Oct. 9, 1917*), *117 Northeastern Reporter*, *page 582*.—Louis Bossert and John Bossert, copartners as Louis Bossert & Son, brought action against Frederick Dhuy and others, for an injunction against interference with the plaintiffs' business by means of boycotting. The plaintiffs were manufacturers of doors, sash, blinds, trim, and other kinds of woodwork, and maintained an open shop, hiring union and nonunion men indiscriminately. The defendants were officers and agents of the United Brotherhood of Carpenters and Joiners of America. They decided to take nonunion manufacturers of building supplies of this nature one at a time, and, by a boycott, compel them to unionize their factories. In pursuance of this plan they urged builders not to purchase and use the materials of the plaintiffs, and called strikes on jobs where such materials were used. The supreme court in special term granted an injunction against these practices, and its decision was affirmed by the appellate division, 151 N. Y. Supp. 877 (see Bul. No. 189, p. 337). Both parties appealed from the judgment, and in the present decision by the court of appeals the judgment is reversed, thus leaving the representatives of the union free to continue the methods complained of. Judge Chase delivered the opinion, and quoted from the opinion in National Protective Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 (Bul. No. 42, p. 1118), as to the general principles governing the right to strike. Continuing, he said:

It is unnecessary in the case now under consideration to hold that in all cases and under all circumstances whatever a man may do alone he may do in combination with others, but it was clearly established in the National Protective Association case that workingmen may organize for purposes deemed beneficial to themselves, and in that organized capacity may determine that their members shall not work with nonmembers or upon specified work or kinds of work.

It was not illegal, therefore, for the defendants to refuse to allow members of the brotherhood to work in the plaintiffs' mill with nonunion men. The same reasoning results in holding that the brotherhood may, by voluntary act, refuse to allow its members to work in the erection of materials furnished by a nonunion shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon nonunion-made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer. An act when done maliciously and for an illegal purpose may be restrained, and held to be within the bounds of reasonable business competition when done in good faith and for a legal purpose. (See Ruling Case Law, vol. 16, pp. 431, 432, and 433.)

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It appears by findings that are uncontrovertibly established by reason of the unanimous affirmance of the special term by the appellate division that it was not the intent and purpose of the defendants in this case to injure the good will or business of the plaintiffs as individuals or of nonunion manufacturers generally. In refusing to work on nonunion made material, they were conserving their interests as individuals and as members of the brotherhood, and in so doing necessarily interfered to some extent with nonunion manufacturers. Such interference necessarily resulted to some extent also in the National Protective Association case, and such fact did not prevent the court sustaining the action of the defendants therein.

At this point many of the findings of fact by the court below are quoted in support of the proposition that the motive of the union was the furtherance of its own ends rather than the destruction of the plaintiff's business. Judge Chase then went on as follows:

The trial court also found:

"That said brotherhood has adopted and sought to enforce, and in many instances has enforced, rules which forbid and prevent its members from working for any employer who employs any so-called nonunion carpenters and from working on or in connection with any building where materials are used which are purchased from any employer who employs any nonunion carpenters."

In considering this finding of the court we must keep in mind the fact that the action of the brotherhood did not interfere with any contract between employer and employee. Its action was open and clearly defined, and its enforcement was not designed to and did not include any force, fraud, threat, or defamation. Its action was voluntary and concerned labor competition in which the association and its members are vitally interested.

An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action.

Reference was then made to the decision of the United States Supreme Court in the case of Paine Lumber Co. *v.* Neal (see p. 176) as supporting the position taken. Continuing, the court said:

Upon all of the findings before us the statement in the finding that there was a "combination to organize all the nonunion mills of Brooklyn" simply means that the brotherhood determined to carry out the provisions of its constitution relating to nonunion-made material by insisting upon its enforcement and by imposing the penalties provided thereby in case of failure of any of its members to comply therewith. The further statement as to the "orders of the business agents" simply means that the representatives of the brotherhood called the attention of the union carpenters employed on buildings where nonunion material was being erected to the con-

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sequences to them as members of the brotherhood in case they continued such employment.

It is now unanimously found that the defendants did not have a primary intent to injure the plaintiffs.

The conclusions of law of the court below are quoted, after which the opinion continues as follows:

By reading the opinion of the court at the special term, adopted at the appellate division, with the findings and conclusions of law, it appears that it was the intention of the court to hold that the facts found would not justify a judgment in favor of the plaintiffs except so far as the defendants discriminated against the plaintiff's mill and refused to handle the plaintiffs' material while at the same time continuing to handle material from other nonunion mills.

We do not think that the conclusion of the court is sustained by the findings of fact in the case.

The second paragraph [of the judgment entered] adjudges that the defendants shall not direct, require, or compel any person, by by-law, rule, or regulation or any act thereunder, to cease working for another because they use material purchased from nonunion shops. And the third paragraph thereof enjoins the defendants from inducing any workmen in their trades to quit work on any building because nonunion carpenters are there employed to install material which comes from nonunion shops. All of the acts enjoined are under the findings of fact in this case lawful acts done for lawful purposes.

We think that the rules laid down by this court in the National Protective Association case require a reversal of the judgment in favor of the plaintiff upon the findings before us. When it is determined that a labor organization can control the body of its members for the purpose of securing to them higher wages, shorter hours of labor, and better relations with their employers, and as a part of such control may refuse to allow its members to work under conditions unfavorable to it, or with workingmen not in accord with the sentiments of the labor union, the right to refuse to allow them to install nonunion-made material follows as a matter of course, subject to there being no malice, fraud, violence, coercion, intimidation, or defamation in carrying out their resolutions and orders.

Labor Organizations—Conspiracy—Injunction—Restraint of Trade—*George J. Grant Construction Co.* v. *St. Paul Building Trades Council et al., Supreme Court of Minnesota (Feb. 23, 1917), 161 Northwestern Reporter, page 520.*—This case related to a trade dispute between the plaintiff company, engaged in business as a builder and contractor in St. Paul, and the council, composed of delegates from local unions in the building trades. The company petitioned for an injunction, which was denied by the district court of Ramsey County, and this position was approved by the supreme court. The supreme court called attention to the allegations in the complaint, as to a conspiracy to injure the company's business and

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the means taken and threatened to be used to accomplish that purpose. Since the decision in the lower court was for the union, it is pointed out that the facts put in dispute by the complaint and answer must be supposed to have been found favorable to that organization. Judge Hallam, who delivered the opinion, then said:

On the argument in this court, counsel for the plaintiff admitted that no single act done was claimed to be unlawful; his claim was that the entire set of acts, taken together and in connection with the purpose with which they were done, were unlawful on the theory that they constituted what he termed "organized economic oppression." The restraining power of courts of equity has usually been invoked to enjoin some tangible or specific acts. Badger Brass Mfg. Co. *v.* Daly, 137 Wis. 601, 119 N. W. 328. It is not easy to frame an injunction to restrain "organized economic oppression." It is not easy to forbid a course of conduct based upon acts, lawful when taken alone, on the theory that they are unlawful when taken as a whole. Some courts have held that an act lawful if done by one person may be unlawful if cooperated in by many, but we are not aware that it has ever been held that many lawful acts done by the same person or body of persons can constitute an unlawful whole.

Coming to the established facts we find the situation little more or less than this: A labor dispute exists between plaintiff and the defendant unions and their members. Defendants are not employees of plaintiff. The dispute has arisen mainly from the fact that plaintiff runs what is termed an "open shop," that is, it employs nonunion men and it is claimed plaintiff has at some times dealt unfairly with union men and has in some cases refused them employment. It would seem to be a bona fide dispute on both sides. With the merits of it we are not further concerned.

The unions of building trades and their members have agreed among themselves that until these controversies are adjusted they will not work for plaintiff or for any subcontractor on any contract plaintiff may have on hand. We think the lawfulness of this conduct is the one question before the court.

It is not easy to define the point beyond which labor in combination can not go. It is, perhaps, not best that we try to do so. We will do well to confine ourselves to the facts of this case and determine only the rights of the parties arising from those facts. The determination of the questions here involved is not difficult. Plaintiff may employ whom it pleases. It may maintain an open shop if it pleases. It should not be coerced into doing otherwise. Defendants have the right to work for whom they please. It is best that we give to both employer and employee a broad field of action. As said by Judge Cooley:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." Cooley on Torts (2d ed.) 328.

Defendants may, if no contract is involved, refuse to work in an "open shop." They may agree among themselves not to do so. [Cases cited.]

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May they, because planitiff employs nonunion labor in construction of a building, agree not to work for a subcontractor of part of the work who does employ only union men? It seems to us this question was answered yes by this court in Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663 [Bul. No. 53, p. 955]. There, as here, the controversy arose out of the effort of the defendant unions to compel the plaintiffs to employ only union labor. It was held that the defendants had acted within their rights and that they might for the purpose of strengthening their unions either singly or collectively refuse to work in places or on buildings on which nonunion labor was employed. We adhere to this decision.

In denying a petition for reargument, Judge Hallam took up the question of restraint of trade, not considered in the previous opinion. As reported on page 1055 of 161 N. W., he said as to this:

In disposing of this appeal the court did not mention the contention that the acts of defendants were contrary to sections 8595 and 8973 of the General Statutes of 1913. Section 8595 makes unlawful any conspiracy to commit an act injurious to trade or commerce, and section 8973 forbids any combination in restraint of trade.

We do not say that the acts of members of labor unions may not be such as to violate either or both of these statutes, but we are of the opinion that the acts which the original opinion considers as established do not violate either. [Cases cited.]

It seems clear that neither of these statutes was intended to prohibit combinations to strike for the purpose of increasing or maintaining wages. It is expressly provided that the conspiracy statute does not. Section 8596. No decision has ever construed a statute like our antitrust statute as containing any such inhibition.

We are of the further opinion that it was not the intent of either of the statutes mentioned to prohibit members of labor unions who have a bona fide dispute with a building contractor from cooperating to withhold their services from such contractor or his subcontractors until the dispute is settled. [Cases cited.]

We may further add that in the original decision we had no intention of holding that the legislature may not prohibit one or many acts which, in the absence of statute, would be lawful, as held in Aikens *v.* Wisconsin, 195 U. S. 194, 25 Sup. Ct. 3 [Bul. No. 57, p. 678], and Swift & Co. *v.* United States, 196 U. S. 375, 25 Sup. Ct. 276, nor even that an act, ordinarily lawful if taken alone, may not become unlawful when it is part and parcel of an unlawful plot which is "an act in itself," the usually lawful act in such case being likened by Justice Holmes to "voluntary muscular contraction," which "derives all its character from the consequences which will follow it under the circumstances in which it was done." Aikens *v.* Wisconsin, supra.

Labor Organizations—Conspiracy—Murder—Evidence—*People* v. *Schmidt, District Court of Appeals, Second District, California (June 14, 1917), 165 Pacific Reporter, page 555.*—M. A. Schmidt was charged with the murder of Charles Hagerty in the Los Angeles Times Building on October 1, 1910, at which time 21 persons were

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killed by an explosion and the fire which succeeded it. He escaped apprehension and trial until 1915, when he was convicted, sentenced to imprisonment for life in the State penitentiary of California, and his motion for a new trial denied. The decision in the present appeal was an affirmance of the judgment and order of the court below. Judge James delivered the opinion, and first detailed at some length the facts of the crime as the testimony for the prosecution tended to prove them. It was shown that J. J. McNamara was secretary and treasurer of the International Association of Bridge and Structural Iron Workers, which in 1905 declared a general strike against the American Bridge Co., one of the objects being to unionize that company's plant. McNamara, apparently without authority from the union, set on foot the destruction of bridges and other work where nonunion labor was employed. Trouble having arisen in California, he sent his brother, J. B. McNamara, to that State in response to a request from an officer of an ironworkers' union for assistance. The McNamaras had devised an infernal machine, using alarm clocks and dynamite in the construction. The Los Angeles Times and the Merchants' Association of Los Angeles were advocates of the open-shop plan. Schmidt became an assistant to McNamara in advertising for a launch and purchasing dynamite, as appeared from testimony offered. In addition to the Times explosion, infernal machines exploded or were found near the residences of the president of the Times Co. and of the secretary of the Merchants' Association, showing by their construction and the make of the dynamite that they were the work of the same parties.

The court then states that the evidence is ample to prove the connection of the defendant with the crime. One contention was that the defendant's constitutional rights had been violated because an ex post facto law had been applied, the law in question taking away the ground of bias or prejudice of grand jurors as a foundation for a motion to set aside the indictment. This was disposed of as not a right material to the defense, but as relating to procedure merely. Other technical matters unsuccessfully urged as grounds for a new trial related to the proceedings before the grand jury and the selection of the trial jury.

The concluding portion of the opinion, relating to the conspiracy and the evidence introduced in proof of the crime, is, with some omissions, as follows:

It is a fundamental rule long settled by decisions that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. [Cases cited.] It is not denied

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that, after a conspiracy has been established and it has been established that a person is connected therewith as a conspirator, the latter may be prosecuted as for complicity in any unlawful act thereafter committed by any of the conspirators which is within the scope of the general design or plan. "Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. * * * Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part" of the common design for which they combined. [Cases cited.]

For the reasons we have stated, validity can not be granted to any one of the exceptions taken because of the introduction of declarations of any of the conspirators made after any particular [one] of the explosions had been caused, as being declarations inadmissible because made subsequent to the completion or accomplishment of the object of the conspiracy. The conspiracy was still alive and in effect, and the ultimate results had not been attained, when J. B. McNamara came to the State of California for the purpose of assisting in the work. We have before sketched briefly the salient features of the testimony showing that Schmidt, upon McNamara's arrival in San Francisco, took an active part in securing dynamite for McNamara's use. All of the appellant's acts in that connection were performed as secretly as possible, under assumed names, and with every indication of appellant's complete and active cooperation and sympathy with the work of destruction theretofore done, then being planned, and which was thereafter executed. Schmidt, the appellant, immediately before the Times explosion, had been in the city of Los Angeles aiding in the attempt to close the open shops. That he knew for what purpose the dynamite was to be used is indicated when he said to a witness who testified in the case, in the summer of 1910, that:

"They (in Los Angeles) won't give a union man no chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon."

And immediately after the Times explosion Schmidt was not to be found and was not found until a long time thereafter, when he was discovered living at the house of Emma Goldman in New York, a portion of the time, under an assumed name. The length of this opinion would be extended to a greater limit than is warranted, were we to attempt to discuss in detail the testimony as it is shown in the 8,000 pages of the reporter's transcript. While there may be portions of the testimony received which in a detached way could properly have been excluded, the weight of the evidence was so overwhelming in its proof of the conspiracy and its objects as to enforce the conclusion that the defendant in the right secured to him under the Constitution did not suffer substantial prejudice.

Rather unusual stress is laid in support of the claim for error in allowing one particular bit of evidence to come in. Several months after the explosion which occurred at the Times building, a suit case was found in the checking room at a ferry station in San Francisco. The suit case was identified by a Mrs. Ingersoll as being one which

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she had seen in the possession of J. B. McNamara before the 1st of October. The suit case carried a check label, and upon being opened was found to contain an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of San Francisco newspapers dated October 1. The newspapers contained accounts of the destruction of the Times building. These articles were all exhibited to the jury. We think the evidence was competent. The clock and brass pieces were of a similar kind to those used by the McNamaras in the manufacture of their infernal machines. As proof of the fact that an explosion had been produced as "bargained for," J. J. McNamara, the secretary-treasurer of the association, has always required his men to produce newspaper accounts showing that they had performed their work successfully. In a circumstantial way, these articles were all evidence tending to show the execution of the work of the conspirators and to show J. B. McNamara's connection therewith, and incidentally the connection of Schmidt with the same enterprise.

We are satisfied that the defendant received a fair trial and that his conviction should be sustained.

Labor Organizations—Conspiracy—Secondary Boycott—Compelling Use of Union Label.—*Justin Seubert, Inc.*, v. *Reiff et al.*, *Supreme Court of New York*, *Trial Term*, *Onondaga County* (*January, 1917*), *164 New York Supplement*, *page 522*.—The company named sued Charles F. Reiff and others—all the defendants being either individuals or voluntary unincorporated associations—for an injunction and for damages. An injunction was granted against certain of the defendants, and a referee appointed to ascertain the amount of damages, while as to other defendants the complaint was dismissed. The complaint alleged that the defendants combined to compel the use of the union label upon cigars manufactured by the company, and to effect this design by unlawful means. Judge Andrews, in the opinion delivered by him, said for the most part:

If the object to be attained was innocent, and if the means used were also innocent, there was no conspiracy. The plaintiff has no remedy, however greatly it may be damaged. To say that because of fear of such damages it was forced to do this or that, or that the acts that caused the damages were done so it might be forced to adopt a certain course, does not alter this rule. At civil law, with few exceptions, malice does not make an act, otherwise innocent, done to accomplish a result otherwise legal, illegal, even when two or more join in the act.

I must find that certain of the defendants desired the plaintiff to use the union label and did certain things to effect that design. They may have had other purposes in mind. This purpose, also, was behind their acts. But was the design itself illegal? The union label is owned and controlled by the Cigarmakers' International Union. About 10,000 factories in the United States, employing about one-third of all the cigarmakers and producing annually something

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like 30,000,000 boxes of cigars, have entered into an agreement to use this label. The label itself certifies:

"That the cigars contained in this box have been made by a first-class workman, a member of the Cigarmakers' International Union."

The rules for the use of the label are then summarized, and the opinion continues:

The contention of the plaintiff is that the observance of these rules by 10,000 manufacturers through agreement with the International Union constitutes an unlawful combination in restraint of trade. Consequently the scheme to compel the plaintiff to join in its use is a conspiracy within the definitions which I have given. I can not find any sufficient basis for such claim. The authority to adopt such a label is given to the unions by statute. The very purpose of this authorized use is to enable purchasers to determine whether or not goods exposed for sale are made by union labor.

The means used to effectuate their purposes were then discussed briefly, and strikes and picketing were said to be not in themselves unlawful. Continuing, the court said:

Efforts were made to prevent customers of the plaintiff from selling its products. This was done by picketing in one instance, by the distribution of cards calling such customers unfair, by disciplining union men who dealt with them, or who were employed by them, and sold the plaintiff's goods for them, and by threatening those customers with loss of trade. It is said these acts violated both the State and the United States statutes.

A distinction must be drawn here. The statute of New York expressly states that the union may adopt a device "for the purpose of designating the products of the labor of the members thereof." Labor law, sec. 15. I have no doubt that the union owning the label, or any one else, may recommend the purchase of goods on which it is placed, in preference to others.

The trouble arises if a further step is taken, and dealers are threatened with loss or injury in case they sell either unlabeled goods generally or such goods made by a certain manufacturer. That may be an injury to commerce—an effort to create a monopoly.

It is true that it may be difficult to state the distinction between a primary and a secondary boycott. I use the word "boycott" without any implication that it is in itself and under all circumstances illegal. It may be said that, if one may persuade customers not to patronize a certain dealer between whom and the union a quarrel exists, so one may persuade customers not to patronize one who deals with the first, and if this is lawful the dealer himself may be told that such a course is to be adopted. It may be said that the statutes referred to simply codify the common law and do not make wrongful what was not wrongful before their adoption.

But often, when it is sought to draw a line between what is permissible and what is forbidden, it is difficult to say logically why a certain act should be placed on the one side or the other. The courts must be governed in their action by common sense and considerations of public policy. An act may, when committed in concert with others under certain circumstances, cause such injury to the public,

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and may be so useless or so unfair that these conditions will be decisive.

Such an act is a secondary boycott. It must be held to be an unlawful interference with trade and commerce. Those who agree to bring it about are engaged in a conspiracy. One injured by it may come to a court of equity for relief.

Who then engaged in the conspiracy here complained of? As against many of the defendants there is not the slightest proof. As to them the complaint must be dismissed. But Cigarmakers' Union No. 6, the Central Trades and Labor Assembly, Division 580 of the Street Car Men, Machinists' Union No. 381, Charles F. Reiff, Samuel Crouse, Charles A. Yates, William Zeigler, Dennis and Joseph Charles are involved. The mere fact that certain local unions are members of the Trades and Labor Assembly—that they sent delegates to that body—does not make them parties to the conspiracy, if they took no affirmative action in the matter.

As against the defendants mentioned, therefore, the plaintiff is entitled to an interlocutory judgment continuing the injunction so far as is above indicated, and appointing a referee to determine what damages, if any, the plaintiff has suffered by reason of the so-called secondary boycott.

LABOR ORGANIZATIONS—CONTRACT TO EMPLOY ONLY MEMBERS OF A CERTAIN UNION—INDUCING BREACH—*Tracey et al.* v. *Osborne et al., Supreme Judicial Court of Massachusetts (Jan. 26, 1917), 114 Northeastern Reporter, page 959.*—The plaintiffs, members of the United Shoe Workers of America, sued in equity to restrain the defendants, former members of the same union, but now members and representatives of the Lasters' Protective Union of Lynn, to restrain the defendants from causing employers to break agreements to employ members of the United Shoe Workers, and particularly from calling a strike for that purpose. Judge Rugg delivered the opinion, which first states the facts involved, and which is for the most part as follows:

The case was sent to a master, whose findings so far as now material are that, for several years prior to 1915, there existed in the city of Lynn several local branches of the United Shoe Workers. Composed of three delegates from each of these branches was a suborganization known as Joint Council No. 1, designed to secure concentration of authority and efficiency of administration. It was authorized by the constitution of the union "to make agreements with manufacturers when prices and conditions are satisfactory to said joint council. Said agreement [sic] to be of a uniform nature and to be issued by the general executive board." In the early part of 1915, at the initiative of one Enwright, the publisher of a newspaper in Lynn, there was a movement for the purpose of formulating some agreement between manufacturers and workmen to promote industrial peace. As a result an agreement popularly known as the "Peace Pact" was framed. These agreements, identical in form,

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each to be signed by a representative of the Joint Council No. 1 of the United Shoe Workers, and by some manufacturer who chose to adopt it, were to continue in force one year with stipulation for further extension and provided for the adjustment of any differences that might arise between the contracting parties and that there should be no strikes or lockouts or cessation of work pending a decision as to differences, and that all work of the employer in certain designated rooms and departments should be done by members of the United Shoe Workers, and that, so long as there was a sufficient number of these to do the work, no other help be employed. Other clauses regulated different aspects of the relations between the employer and the members of the plaintiff union.

The master found that the agreements were prepared and executed in the manner and by the agencies provided by the constitution of the United Shoe Workers.

The contract in its general outlines is similar to that held legal in Hoban *v.* Dempsey, 217 Mass. 166, 104 N. E. 717 [Bul. No. 169, p. 303]. In this aspect the case at bar is governed by that decision. It is putting in the form of an agreement a stipulation that one named labor union shall have, so long as it is able to do it, all the work of a particular employer, a demand held to be within the limits of allowable competition in Pickett *v.* Walsh, 192 Mass. 572, 584, 78 N. E. 753 [Bul. No. 70, p. 747]. The contract does not appear to have been made for the purpose of injuring the defendants, who then were members of the plaintiff union, or for any purpose other than the mutual advantage of the contracting parties. It was entered into freely and not under compulsion or coercion. It was not entered into with a purpose to harm anybody. This does not infringe upon the principles established in Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603 [Bul. No. 60, p. 702], and Shinsky *v.* Tracey, 114 N. E. 957 [see p. 142], for decisive facts there present are not found in the case at bar.

The finding that the defendants have sought to exert pressure upon some of the employers to break their contracts of employment with members of the plaintiff union is direct and unequivocal and is supported by ample facts set forth in the report. Such conduct was a clear invasion of rights of the plaintiff for which the law will provide a remedy. [Cases cited.]

The rights secured to the plaintiffs under their contracts are such as are protected in the ordinary case by injunction. This principle often has been applied to labor cases and is pertinent to the facts here disclosed. [Cases cited.]

Since the contracts between the manufacturers and the United Shoe Workers were found valid and lawful, the decree granting an injunction against interference with those contracts was affirmed.

LABOR ORGANIZATIONS—EXPULSION OF MEMBER—APPEAL TO COURT—*Fales* v. *Musicians' Protective Union, Local 198, American Federation of Musicians, et al., Supreme Court of Rhode Island (Feb. 14, 1917), 99 Atlantic Reporter, page 823.*—Warren R. Fales

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brought suit in equity against the federation named, praying that its orders fining and expelling him be declared void, and for an injunction. Fales was director of the American Band. A traveling band committee has authority, under the laws of the federation, to try members for violation of certain by-laws. Fales was charged with having violated, during the summer season of 1917, section D of Article V of the traveling band laws of the federation, by paying to the members of his band less than the price stipulated in that section, and of conspiring with the members of the band to violate section L of Article V, relating to the providing of sleeping accommodations.

Mr. Fales was notified that his trial before the traveling band committee would begin on Friday, March 21, 1913. He appeared, and requested to be represented by counsel, to be confronted with the witnesses against him, and to have opportunity to cross-examine them. He was informed that the laws of the federation did not allow counsel in such cases, for either respondents or the committee; this phase of the matter does not appear to have been pressed except as it bears on the general question of a proper trial. After a part of Fales's testimony had been taken, he stated that he was obliged to leave, and did so, the trial being continued, and stenographic notes of the testimony taken and an abstract furnished him. On Saturday morning he furnished a medical certificate that his wife was very sick and his presence was required at home. The trial was continued on that day and Sunday, without notification to him that it would be conducted on Sunday.

On Monday he requested that it be postponed until after the close of a superior court trial in which he was defendant and which opened on that day. This request was refused, and the trial went on without his presence. On Wednesday the judge of the superior court suspended that trial for the day, but Fales did not appear before the committee, and the committee's hearings were concluded on that day. He did not take an appeal to the federation. There was testimony to show that after his expulsion members of the union would not work with him and that he lost opportunities to conduct the American Band, as it took some engagements with another leader. The court held that he had not been granted a fair trial, and that the findings of the band committee were void. It therefore affirmed the decree of the superior court granting to Fales the relief prayed for. Judge Johnson delivered the opinion, from which the following is quoted:

As is implied in the authorities, where the proceeding is not pursuant to the rules and laws of the society, or the proceeding was not in good faith, or where there is anything in the proceeding in violation of the laws of the land, so as to render the proceeding void, the

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exhaustion of the remedy by appeal within the society is not necessary.

We do not think that the notice to appear before the committee on Wednesday, March 26, when the court took a recess to enable the judge to attend a funeral afforded an opportunity to Mr. Fales which cured whatever of illegality there had been in the proceedings up to that time. His request for a continuance till the end of the trial had been ignored. The committee had continued with the hearing when his case in court was on trial, on the assumption, not borne out by the evidence, that it was not on trial on Monday, and with full knowledge that it was on trial on Tuesday. It had proceeded with its trial on Sunday without notice to him. It could not seize upon an occasion when an unexpected happening caused a break in the continuity of the trial in court to summon the complainant to appear before the committee and conclude his testimony, and thereby validate the violations of the complainant's right involved in the previous proceedings. The opportunity to appear before the committee on Wednesday to complete his testimony was not sufficient to cure his lack of opportunity to be confronted with and to cross-examine the witnesses on the days when the trial before the committee proceeded in his absence on Sunday, Monday, and Tuesday.

The presiding justice correctly abstained from any finding upon the merits of the case on trial before the traveling band committee, and based his decision only on the procedure of the committee in the trial.

In our opinion the presiding justice did not err in holding that the findings of the traveling band committee on the trial before it were void, and that therefore the complainant was exempted from exhausting his remedy within the federation by appeal.

Labor Organizations—Expulsion of Member—Conspiracy—Liability of Company Procuring Expulsion—*St. Louis Southwestern Ry. Co. of Texas* v. *Thompson et al., Court of Appeals of Texas (Feb. 22, 1917), 192 Southwestern Reporter, page 1095.*—The suit of W. Z. Thompson against the railroad company named, the Grand International Brotherhood of Locomotive Engineers, and certain individual defendants, to recover damages for wrongfully and maliciously causing him to be expelled from the brotherhood came to the court of civil appeals on this occasion on the third appeal. Previous decisions were reported in 108 S. W. 453, and 113 S. W. 144, and noted in Bul. No. 78, p. 608, and Bul. No. 80, p. 176. The charges made against Thompson at the time of his expulsion were that he advised a widow to sue a railroad company for the death of her husband, and that he testified in another case against a railroad company, to the detriment of the brotherhood. The most important questions of law were determined in the previous decisions. The judgment appealed from at this time was rendered after a verdict in which the jury made certain findings and assessed actual

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damages amounting to $500 against the railroad company and exemplary damages in the sum of $250 against the brotherhood, $1,250 against the railroad company, and $50 against each of the three individual defendants who were still living.

It was decided that the action of the brotherhood in expelling Thompson for the reasons assigned was wrongful and not in good faith, so that it was liable, and could be sued even though it was a voluntary organization and the individuals composing it were not made parties; also that the question of excessiveness of damages raised by the railroad company was foreclosed by a previous decision that a still larger verdict was not too great.

Labor Organizations—Expulsion of Member—Interference with Employment—Boycott—Damages—*Shinsky* v. *Tracey et al.*, *Supreme Judicial Court of Massachusetts* (*Jan. 26, 1917*), *114 Northeastern Reporter, page 957.*—This was an action by David Shinsky against Michael Tracey and others for an injunction and for the damages resulting to him from his expulsion from the United Shoe Workers and the subsequent loss of his employment and inability to secure other work at his trade. A master had made a report assessing the amount of damages, but the superior court of Essex County dismissed the bill. This decision was reversed and a decree ordered in accordance with the master's report. Judge Braley delivered the opinion of the court, as follows:

By becoming a member of the voluntary association known as "the United Shoe Workers of America" the plaintiff engaged to be bound by its rules and subjected himself to its discipline. [Cases cited.] And the trial for alleged infraction of his obligations having been conducted as the master finds in accordance with the constitution, his expulsion is not reviewable and the bill as amended can not be maintained under the first prayer, that the defendants be enjoined "from excluding him from access to their meetings and from membership." But upon severance his interest in the funds and property of the association ended, nor was he bound by the purposes, or amenable to the penal code of the body with which he had been affiliated, and in so far as the defendants were concerned his right to dispose of his own labor according to his own will had not been abrogated or restricted. [Cases cited.]

The first paragraph of the amended bill alleges and the answer admits, that when expelled he had been employed at lasting shoes in a local factory for nearly eight years; and the master reports that his work being satisfactory, he would have been retained except for the concerted action and conduct of the defendants. The dominant purpose and controlling motive in procuring his discharge shortly after expulsion, as well as his discharge when he subsequently obtained employment with another shoe company which knew that he was no longer a member of the United Shoe Workers, is found to have been,

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"to punish him and hold him up as an example before their membership," and the letters which they caused to be sent were "to induce the plaintiff's employer in each instance to discharge" him. The justification pleaded in the sixth paragraph of the answer is, that the plaintiff "had been a party to an agreement a copy of which is hereto annexed, and that the employers mentioned by him in his bill of complaint were also parties to said agreement; that the plaintiff violated his agreement and that if any action was taken by his employer or any other person which resulted in injury to him, * * * said action was the direct result of his own unlawful acts in violating and repudiating his agreement."

It is unnecessary to pass on the validity of the agreement which is an instrument under seal, or to decide whether the manufacturers or the members of the association could have compelled specific performance, for in the light of the findings quoted this defense vanishes.

It is true that the fifth, and in this connection the important, article of this agreement or "Peace Pact" entered into by the association when the plaintiff was a member and certain shoe manufacturers including his employers provides, that "* * * so long as these local unions are in a position to furnish help to do the work no other help may be employed." The defendants nevertheless were not seeking its protection for the economic purpose of furnishing work for their own members, where if this were not done there would not be enough work to keep them employed, which was the motive underlying the strike decided to be lawful in Minasian *v.* Osborne, 210 Mass. 250, 96 N. E. 1036 [Bul. No. 99, p. 727]. Nor were they actuated by a desire to conserve and promote the welfare of the plaintiff and his employers through the offer of friendly advice. But to preserve and to compel discipline in their own ranks they intended to proscribe the plaintiff, who had become a member of a rival organization and business competitor of the association. It may be added, that at the date of the agreement the plaintiff had been employed for many years under a contract at will which does not appear to have been dependent upon a condition that he should be and remain a member of any organization. The plaintiff's expulsion did not automatically terminate this employment, and his continuance at his work until retired solely through their efforts did not as between themselves constitute a breach of the peace pact or agreement for which he would be liable to the defendants in damages. [Cases cited.]

The report while stating that the plaintiff has lost the benefit of his contracts of employment goes further. It is specifically found "that by reason of the control which the defendants and their organization exercise over the shoe industry of the city of Lynn it will be impossible for the plaintiff to obtain work with at least ninety per cent of the shoe manufacturers of Lynn in which the labor is controlled by the United Shoe Workers of America and further as a marked man it is highly improbable that he could obtain and keep employment in the remaining ten per cent of the shoe factories of Lynn."

The plaintiff manifestly is a sufferer from the consequences of an intentional and a successful boycott. If he had ceased to work at his calling and had engaged in trade the attempt to deprive him of his customers and to destroy his business by the methods described

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would have been under the master's findings an actionable wrong. Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841 [Bul. No. 169, p. 270]. The right to acquire property by labor is coequal with the right to acquire property by contract, and, having the same right to sell his labor as he would have had to sell his merchandise to the highest bidder, it is no less an actionable wrong where the right to his handiwork as a means of subsistence has been malevolently taken away or impaired under industrial conditions which the defendants knew would so operate as to make his further employment in the community where he resides extremely precarious if not practically impossible. [Cases cited.] While it is apparent upon the record that the plaintiff can not be effectively aided by injunctive relief he is entitled to damages. [Cases cited.] The decree dismissing the bill is reversed and a decree is to be entered for the amount assessed by the master.

LABOR ORGANIZATIONS—EXPULSION OF MEMBER—POWERS OF OFFICERS—*Pratt* v. *Amalgamated Association of Street and Electric Railway Employees of America et al., Supreme Court of Utah (Oct. 4, 1917), 167 Pacific Reporter, page 830.*—Clarence O. Pratt brought action against the association named for mandamus to bring about his reinstatement as a member. Pratt had been for several years a member of the local division at Detroit, and had been a member of the general executive board of the association. In September, 1911, desiring to become a member of the division at Philadelphia, he secured a withdrawal card, and, on presenting the same to the Philadelphia division, the by-laws were suspended and he was admitted and elected business agent. The executive board, acting upon a protest filed with it, but without a hearing, ruled that the by-laws were improperly suspended, and Pratt withdrew from his position as business agent. He attempted to appeal to the biennial general convention of the association, but the appeal was not considered. His petition for a writ of mandamus was dismissed by the district court of Salt Lake County, and the supreme court affirmed this decision. Judge Frick delivered the opinion, and quoted the opinion of the court below as summarizing the immense bulk of evidence, largely irrelevant, found upon the record. Following this he said in part:

While plaintiff insists that his rights have been trampled upon and ignored by reason that he was not permitted to present his appeal to the convention held at Salt Lake City, Utah, as before stated, yet what he asked the trial court to do, and what he demands at our hands, is, that the defendants be required to reinstate him as a member in good standing of Local Division No. 477 as well as a member in good standing of the association at large.

Courts may not interfere with the acts and proceedings of the officers of beneficial societies or associations to that extent. What the courts are authorized to do, and what they will do, in that regard is

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to compel the officers of such associations, and the associations themselves, to condemn no member and not to forfeit his property or his property rights without a hearing or an opportunity to be heard in his defense according to the laws and rules of the association, and if there are no such rules the court will imply or create such. When such an opportunity is given, however, and the complaining member has been tried and condemned, or has been declared ineligible in accordance with the laws and rules of the order or association, and the acts of the officers of the association in that behalf are free from fraud or duress, courts may not interfere.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—UNIONIZING EMPLOYEES WHO HAVE AGREED NOT TO JOIN UNION—INJUNCTION—*Hitchman Coal & Coke Co.* v. *Mitchell et al., Supreme Court of the United States* (*Dec. 10, 1917*), *38 Supreme Court Reporter, page 65.*—This suit was brought in 1907 to restrain the defendants from interfering with the company's employees in an attempt to organize the mine by inducing them to join the United Mine Workers of America. Decisions of the lower Federal courts arising therefrom are reported 202 Fed. 512 (see Bul. No. 152, p. 137), and 214 Fed. 685 (Bul. No. 169, p. 315). In Bulletin No. 152 the facts leading up to the suit are given quite fully, and they are reviewed in the opinion of the Supreme Court. It appeared that certain defendants named in the bill had not been served with process, being no longer officers of the United Mine Workers, and the court held that they were eliminated as factors in the case. The remainder were at the time of the bringing of the suit officers and leaders of the union. The Hitchman mine was operated "nonunion" from the time it was opened in 1902 until April, 1903, when it became unionized. Strikes occurred between that time and 1906, resulting from disputes having no relation to the affairs of the operator or employees of this particular mine or section. A strike was called April 15, 1906, as a consequence of the failure of the officers of the union to sanction the making of an agreement by the miners themselves with the company, after the expiration of the term for which a previous wage scale had been effective. On the request of the miners in June to be allowed to go back to work, it was agreed that they should do so on a nonunion basis, and at that time and thereafter each man hired agreed that he would not join the union as long as he continued in the company's employ, while the company agreed that it would pay the same wages as the union mines, but would run the mine nonunion. In January, 1907, the international convention of the United Mine Workers favored a policy of supporting strikes in the Panhandle district of West Virginia (in which the Hitchman mine was located) and certain other unorganized sec-

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tions, on the ground that the continuance of production by the unorganized sections, while strikes were in force in other fields, interfered with the securing of desired concessions in the latter. Soon afterwards a meeting of the subdistrict which included the mine voted to take steps toward organization, and Thomas Hughes took up the work as organizer. He began to get secret agreements from some of the men to join the union when a sufficient number should be secured, with the purpose of calling a strike when that was accomplished. The fact that the miners had agreed not to join the union during their employment was known to the organizer. His work was interrupted by a decree of the United States District Court for the Northern District of West Virginia before it was so far completed as to be ready for the calling out of the men. Later the United States circuit court of appeals, fourth circuit, reversed this decree, and it is the opinion of these two courts which are cited above. In the present opinion the Supreme Court, Mr. Justice Pitney delivering the opinion, and Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke dissenting, reversed the decree of the circuit court of appeals and affirmed that of the district court, holding that the interference by the defendants was illegal, and such as might be reached by injunction. From the majority opinion the following is quoted:

The question whether Hughes had "power or authority" to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of ultra vires, but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management, and who lacked the power to carry out that purpose only because they had not as yet persuaded a sufficient number of the Hitchman miners to join with them, and hence employed Hughes as an "organizer" and sent him to the mine with the very object of securing the support of the necessary number of miners. They succeeded with respect to one of the mines threatened (the Richland), and preparations of like character were in progress at the Hitchman and the Glendale at the time the restraining order was made in this cause.

In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence. The methods resorted to by their "organizer" were such as have been described. The legal consequences remain for discussion.

The facts we have recited are either admitted or else proved by clear and undisputed evidence and indubitable inferences therefrom.

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What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "nonunion," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. Adair *v.* United States, 208 U. S. 161, 174, 28 Sup. Ct. 277 [Bul. No. 75, p. 634]; Coppage *v.* Kansas, 236 U. S. 1, 14, 35 Sup. Ct. 240 [Bul. No. 169, p. 147]. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

That the employment was "at will," and terminable by either party at any time, is of no consequence. Truax *v.* Raich, 239 U. S. 33, 38, 36 Sup. Ct. 7, 9 [Bul. No. 189, p. 53].

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating his employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. [Cases cited.]

The right of action for persuading an employee to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers. [Cases cited.]

We return to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike

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would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed nonunion mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: First, that there was no middle ground open to plaintiff; no option to have an "open shop" employing union men and nonunion men indifferently; it was the union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the union, and making the employment of any nonunion man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492 [Bul. No. 95, p. 323]. The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others.

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their union, still they had plain notice that plaintiff's mine was run "nonunion," that none of the men had a right to remain at work there after joining the union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from exercising any care to refrain from unnecessarily injuring plaintiff, deliberately and advisedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employees. Every Hitchman miner who joined Hughes's "secret order" and permitted his name to be entered upon Hughes's list was guilty of a breach of his contract of employment and enacted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the sine qua non of their program.

True, it is suggested that under the existing contract an employee was not called upon to leave plaintiff's employ until he actually joined the union and that the evidence shows only an attempt by Hughes to induce the men to agree to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after actually joining. But in a court of equity,

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which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to agree to join is but a mode of inducing them to join, and that when defendants "had 60 men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the 60 were for practical purposes, and therefore in the sight of equity, already members of the union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employees were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines can not be treated as a bona fide effort to enlarge the membership of the union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the union, unless they could organize the mines. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while nonunion men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership.

In any aspect of the matter, it can not be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—can not be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the Mogul Steamship Case, 23 Q. B. Div. 613:

"Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. [Cases cited.] Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we can not deem the proffered excuse to be a "just cause or excuse," where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights of which defendants have full notice.

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. [Cases cited.]

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine,

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another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the union, that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the Gompers Case [supra], immediately following the recognition of the right to form labor unions:

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, can not be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated.

Respecting the sweep of the injunction, we differ somewhat from the result reached by the district court.

So far as it restrains: (1) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to

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suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the union, or because plaintiff runs a nonunion mine; (2) interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees; (3) knowingly and willfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a nonunion mine, etc.; (4) interfering or attempting to interfere with plaintiff's employees so as knowingly and willfully to bring about the breaking by plaintiff's employees, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and willfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent; (5) trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such; and (6) compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment therein—the decree is fully supported by the proofs. But it goes further, and awards an injunction against picketing and against acts of physical violence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction, but without prejudice to plaintiff's right to obtain an injunction hereafter against these forms of interference if proof shall be produced, either in proceedings supplemental to this action or in an independent action, that such an injunction is needed.

The decree of the Circuit Court of Appeals is reversed, and the decree of the district court is modified as above stated, and as so modified it is affirmed, and the cause is remanded to the district court for further proceedings in conformity with this opinion.

The dissenting opinion was written by Mr. Justice Brandeis, and disagreed with the reasoning of the majority, among other things, in holding that the miners did not violate their contract until they actually joined the union. On this point it is said:

There was no attempt to induce employees to violate their contracts.

The contract created an employment at will, and the employee was free to leave at any time. The contract did not bind the employee not to join the union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ, if he joined the union. There is evidence of an attempt to induce

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plaintiff's employees to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—UNIONIZING EMPLOYEES WHO HAVE AGREED NOT TO JOIN UNION—INJUNCTION—JURISDICTION—*Eagle Glass & Mfg. Co.* v. *Rowe, Supreme Court of the United States (Dec. 10, 1917), 38 Supreme Court Reporter, page 80.*—This is a case of suit for injunction by the company named, and is the same case decided in the circuit court of appeals, fourth circuit, under the title Eagle Glass & Mfg. Co. *v.* Hill, reported 219 Fed. 719, and reviewed in Bul. No. 189, page 334. The controversy was between the company and officers of the American Flint Glass Workers' Union. The bill prayed for an injunction, as in the Hitchman case (see p. 145), against interference with employees under contract not to join the union during their employment by the company. As in that case also, a decree of the district court granting a temporary injunction had been reversed by the circuit court of appeals, whereupon the company procured a writ of certiorari, bringing the case to the Supreme Court. Proceedings subsequent to the decision of the circuit court were reviewed, and the technical questions relating to jurisdiction over the case, which was brought in the Federal courts on the ground of diversity of citizenship, were decided so as to support the jurisdiction of the courts. Coming to the merits of the case, the points were decided largely on the authority of the Hitchman case. The same three justices dissented as in that case. In concluding the opinion delivered by him for the majority, Mr. Justice Pitney said:

The present case, according to the averments of the bill and amended bill, differs from the Hitchman case principally in this: That it appeared that Gillooly, as organizer, had used money and had threatened to use dynamite to reinforce his other efforts to coerce plaintiff into agreeing to the unionization of its works. The system of employment at the Eagle Glass Co. factory was precisely the same as that at the Hitchman mine. The written contract of employment inaugurated at the Eagle Glass Works more than a month

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prior to the filing of the bill in this case followed precisely the form established at the Hitchman mine shortly after the filing of the bill in that case. And the activities of Gillooly among the plaintiff's employees, and the motive and purpose behind those activities, as alleged in the bill, show the same elements of illegality to which we have called attention in our opinion in the Hitchman case. Plaintiff is entitled to an opportunity, on final hearing, to prove these allegations as against those defendants who are within the jurisdiction of the court, and to connect them with the activities of Gillooly.

The decree of the Circuit Court of Appeals, so far as it directed that the temporary injunction be dissolved, will be affirmed, but so far as it directed a dismissal of the bill it must be reversed, and the cause will be remanded to the district court for further proceedings in conformity to this opinion.

Labor Organizations—Picketing—Injunction—*St. Germain et ux.* v. *Bakery & Confectionery Workers' Union, No. 9, of Seattle, et al., Supreme Court of Washington (July 17, 1917), 166 Pacific Reporter, page 665.*—N. H. St. Germain and wife brought action against the labor union named and certain individuals for an injunction. The superior court, King County, issued a decree forbidding certain enumerated practices on the part of the pickets, including the laying of hands upon any person in the effort to prevent his patronizing the bakeries and restaurants of the plaintiffs and the use of certain statements and the words "scab" and "scabs" with reference to such customer. The permissible actions on the part of the defendants were then set forth in the decree, including the maintenance of two pickets before each establishment, the place upon the sidewalks where they might walk being defined in such a manner that they should not actually block the entrance, and authorization being given for the use of badges or scarfs, also of small cards, with the words "St. Germain's Bakeries and Restaurants Unfair to Organized Labor." The cards, however, were not to be placed or thrown inside the stores. The plaintiffs objected to the part of the decree which allowed these practices and appealed. It appeared that the plaintiffs had been engaged in the bakery and dairy-lunch business in Seattle for 16 years, having two establishments, and had employed union labor. A member of the cooks' union in their employ, however, became in arrears as to his dues, and the dispute arose from the failure of the employers, at the request of the union, to either collect the amount of the arrearage or discharge the cook. A strike was called, and the picketing began, the pickets remaining on duty from 11.30 a. m. until the close of business in the evening in numbers as large upon one occasion as between 40 and 50, jostling the customers, and at times, at one of the stores, which was on a crowded street, making it impossible for anyone to enter or leave the store.

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It was shown that the gross receipts had fallen from $4,000 per month to $1,000. Judge Mount delivered the opinion of the court, which held, one judge dissenting, that the injunction should have forbidden the issuance of an injunction as prayed for, with nominal damages. showing merely a diminution of gross business, but nothing definite as to profits, was not sufficient to sustain an award for substantial damages. The case was therefore remanded to the lower court for the issuance of an injunction as prayed for, with nominal damages. The following is quoted from the opinion, showing the court's views with regard to picketing:

In the case at bar the facts, as shown by the record, are clear to the effect that the grievance of the respondents was that St. Germain's bakeries and stores were unfair to organized labor. The respondents, for that reason, maintained pickets on the sidewalk in front of the appellants' places of business. The only object of maintaining these pickets was to intimidate these appellants and their patrons. There could have been no other object, because the union laborers had been called out. They were not working there, and, in order to require these appellants to employ union labor, the respondents sought to, and did, intimidate the public from entering the stores and dealing with the appellants. Whether these facts were alleged in a complaint which was undenied, or were proven upon a trial, makes no difference. Whether the picketing was peaceable or otherwise, under the facts in this case, is entirely immaterial, because the sole object of the respondents was to intimidate, not only the public, but also these appellants, and force them to enter into a contract which they were unwilling to enter into. The books are full of cases to the effect that:

"The right to carry on a lawful business without obstruction is a property right, and its protection is a proper object for the granting of an injunction."

The idea upon which picketing by any means can not be sustained is that it intimidates the public from entering into the place, and doing business with a person before whose store or place of business a line of guards is stationed. Where a line of guards, consisting of one or more, is stationed in front of a place of business, everyone knows that such guard is there for the purpose of intimidating and preventing the public from dealing with the person whose place of business is picketed. That this is contrary to the spirit of our institutions, and the right to conduct a lawful business in a lawful way, without molestation of other persons, needs no argument to sustain it. The cases are numerous to that effect.

Labor Organizations—Picketing—Injunction—Interference with Nonunion Shop—*Heitkamper* v. *Hoffman et al., Supreme Court of New York, Special Term for Trials, Kings County (April 9, 1917), 164 New York Supplement, page 533.*—Theodore Heitkamper brought suit for an injunction against Moritz Hoffman, individually and as treasurer of the Journeyman Bakers' Union and others, to restrain

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them from acts detrimental to his business. After Heitkamper had refused to unionize his shop as requested by representatives of the union, various methods were adopted to persuade customers not to patronize him, including persistent marching up and down the street in front of the shop three times a week, advising people to buy their bread elsewhere, etc. A falling off in his trade was shown. An injunction was granted against these acts, while the right was recognized to circularize the friends of union labor and employ other legitimate means to give information as to the desire of the union that the plaintiff should not be patronized. The following is quoted from the opinion delivered by Judge Callaghan:

The facts in this case satisfactorily establish a conspiracy on the part of the members of the union, stimulated by its officers, to ruin the plaintiff financially. There is nothing particularly wrong in a number of men marching on the sidewalk; but a continuance of that act, three times a week for a number of months, the interviewing upon the sidewalk of intending customers of plaintiff, the advising of them not to purchase bread from the plaintiff, and the gathering of a large number of men in front of the plaintiff's store, can not be regarded as anything but an infringement upon the plaintiff's rights.

The union was within its legal rights in publishing and distributing the circular, soliciting its sympathizers and friends to withdraw their patronage, or to refrain from patronizing the plaintiff. [Cases cited.]

At this point the method of suing the association, through its treasurer as a representative, is shown to be a proper one by reference to the statutes and the decided cases, though no decision was made as to damages. The opinion concludes as follows:

No just complaint can be made by the plaintiff against the union's circularizing the neighborhood, asking the friends of union labor not to patronize the plaintiff, nor can the plaintiff seek to restrain the union, its members, or agents from peaceably persuading proposed patrons of the plaintiff from trading in his shop. The doing of those things will not be restrained. But a judgment will be entered here restraining the individual defendants named here, and the defendant union, its officers, members, agents, and employees, from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of his shop, from blockading the entrance to his store, and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop, or in any manner by threats, violence, intimidation, or force, interfering with plaintiff's employees or those who may seek employment from plaintiff.

LABOR ORGANIZATIONS—PICKETING—MUNICIPAL ORDINANCE—*Ex parte Stout, Court of Criminal Appeals of Texas (Nov. 21, 1917), 198 Southwestern Reporter, page 967.*—Tom O. Stout was convicted of violation of an ordinance of the city of El Paso, Tex., and brought

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habeas corpus proceedings for his release. The ordinance in question forbade walking up and down the sidewalk in front of any place of business, with signs carried for the purpose of persuading any persons from entering such place to transact business therein. Another section of the ordinance specifically provided that it should not be construed as rendering it unlawful for members of trade-unions to attempt to peaceably induce others to quit employment or refuse to enter any particular employment, etc. Stout, being a member of the local body of the Cooks, Waiters, and Waitresses' Union, had walked on the sidewalk before a certain restaurant, bearing "sandwich" signs stating that the establishment was unfair to organized labor, the fact being that nonunion help was employed there. The opinion of the court was delivered by Judge Prendergast, who first examined the city charter and found in it authority to pass ordinances of the kind in question, unless some constitutional or statutory provision should be found to prohibit it. Many decisions are considered, and the conclusion reached that the ordinance does not violate the provisions of the Texas constitution relating to freedom of speech and publication, nor those of the Federal fourteenth amendment. Finally, the ordinance is held not to conflict with the statute of the State making lawful the formation of labor unions, and confirming their right to peaceably persuade, etc., it being shown that the section of the ordinance itself, above referred to, is clearly intended to safeguard the same rights. The ordinance was therefore held valid, and the relator remanded to the custody of the city marshal. From the concluding portion of the opinion the following is quoted:

Such conduct as his would naturally lead to disturbances, and had a tendency to intimidate and prevent all persons from entering said restaurant, and would necessarily injure the proprietor in his business. It was the duty of the city of El Paso by such an ordinance to protect him in the conduct of his business.

LABOR ORGANIZATIONS—PICKETING—MUNICIPAL ORDINANCE—*In re Sweitzer, Criminal Court of Appeals of Oklahoma (Feb. 17, 1917), 162 Pacific Reporter, page 1134.*—Eva Sweitzer was arrested and held in custody by the chief of police of Oklahoma City as a result of picketing in front of the Lyric Theater. There was a trade dispute between this theater and its former employees. No charge was made of violence or disturbance on the part of the respondent, but it was claimed that she violated an ordinance of the city which prohibited loitering about the streets and sidewalks and attempting to induce persons not to patronize any place of business. She sought in this proceeding for a writ of habeas corpus, which was granted and she was discharged. The court held that

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section 3764, Revised Laws 1910, which authorizes labor agreements and declares not criminal acts done in combination, if such acts would not be criminal if committed by one person, governed the matter, and said in regard to it:

The very thing for which the petitioner was arrested and convicted is sanctioned by statute; and the statute further declares that it shall not "be deemed criminal."

We think no other construction can be placed upon this statute than that it stays the hand of both civil and criminal process from interfering with the peaceable and legitimate endeavors of labor to further their interests, in trade disputes between them and their employers.

But counsel for respondent further insist that the statute is not applicable because:

"The ordinance prohibits picketing only incidentally, and its scope and effect are much broader. It prohibits as well the merchant or theatrical manager from filling sidewalks and streets adjacent to his place of business with pedestrians, who annoy passers-by with importunate solicitations."

But the learned counsel certainly know that in law we can not do indirectly that which may not be done directly. If the city commissioners can not directly prohibit picketing in furtherance of a trade dispute, they certainly can not accomplish that end indirectly, or, as counsel puts it, "incidentally."

Labor Organizations—Strikes—Assault—Evidence—*Cranford* v. *State*, *Supreme Court of Arkansas* (*June 25*, *1917*), *197 Southwestern Reporter*, *page 19*.—R. C. Cranford, having been convicted in the circuit court of Saline County on a charge of assault upon H. W. O'Kelly with intent to kill, and sentenced to imprisonment for one year, appealed from the judgment on the ground that evidence had been admitted of his remarks prior to the alleged assault. Cranford was a striker, and O'Kelly one of the class known to the strikers as "scabs." The words of Cranford, to the admission of testimony as to which at the trial he made objection, were to the effect that if the scabs knew what he knew they would be at home with their families. The court had also allowed it to be shown that a sign had been put up at his place, over which there was a commonly used passageway, reading "No scabs allowed to cross this way." It was held that these matters had been properly admitted, as tending to show the feeling of the accused toward the class of persons of which the assaulted man was a member. Testimony as to the action of bloodhounds in tracking Cranford was held also to have been legally admissible, and the evidence as a whole to have been sufficient to sustain the verdict. The judgment and sentence of the lower court was therefore affirmed.

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LABOR ORGANIZATIONS—STRIKES—CONSPIRACY—INJUNCTION—PICKETING—*Tri-City Central Trades Council et al.* v. *American Steel Foundries, United States Circuit Court of Appeals, Seventh Circuit (Jan. 24, 1917), 238 Federal Reporter, page 728.*—Suit was brought by the American Steel Foundries against the Tri-City Trades Council, and individual defendants who were either the company's former employees or members of the Council, to secure an injunction. The object was to prevent alleged threatened injury to the company's business and destruction of its plant at Granite City, Ill., claimed to be worth $1,000,000. It was alleged that pickets had assaulted the present employees and threatened them and prospective employees, and the like. A decree was entered in a district court, which enjoined not only violence, threats, etc., but all picketing. The district judge, in rendering his opinion, said:

This evidence clearly shows that this union, this trades council, by the testimony of its officers, entered upon the work of preventing this complainant from getting men to run its factory, run its plant, except upon the condition that it pay a certain scale, the November scale. That combination was illegal. * * * Upon this question, I should say a word about picketing. There is no such thing as peaceful picketing. You might as well talk about peaceful violence. You may as well think of peaceful war as peaceful picketing.

On appeal to the circuit court of appeals the decree was modified and affirmed. The first point decided was that the Federal courts had jurisdiction, as the necessary diversity of citizenship was shown, and the amount of property threatened with destruction, though not the amount already destroyed, was in excess of $3,000. Judge Evans, who delivered the opinion, then quoted authorities, including the language of a text-writer and a Federal decision affirming the right of peaceful picketing, and cited many other decisions of the same tenor. Continuing, he said:

But it is contended that the decree in these respects was proper because:

(*a*) The restraining order does not prohibit picketing per se, but restrains defendants from carrying out an unlawful conspiracy to destroy plaintiff's business; that in order to prevent the defendants from accomplishing the unlawful object of the conspiracy, it was necessary for the court to restrain the defendants from picketing the plaintiff's works, and prohibit them from arguing their cause with plaintiff's employees.

(*b*) Defendants were not plaintiff's employees, but were mere outsiders, intermeddlers, who were not truly representing the employees, but were trouble makers, fomenting strife and trouble where labor conditions and wages were entirely satisfactory to the employees.

Plaintiff's contention that a court may restrain lawful acts of striking employees, when committed to carry out the purpose of an unlawful conspiracy to destroy the employer's business, is supported

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by many authorities. If the record disclosed the existence of an unlawful conspiracy on the part of the defendants to injure or destroy plaintiff's property the court would be clearly justified in restraining lawful as well as unlawful acts committed in furtherance of such a conspiracy. If the purpose of the undertaking complained of were purely and simply, or even primarily, interference with the plaintiff in the conduct of its business as alleged, no act, however innocent in itself, directed to that end can be said to have a lawful purpose for its doing. Indeed, it may well be said that any act directed to that end is not a lawful act. If, on the other hand, the object of the undertaking is lawful, then the acts calculated to effectuate the object do not necessarily become unlawful merely because they interfere with the plaintiff's conduct of its business.

The right to strike to secure higher wages and improved conditions of labor is too firmly established to necessitate further elucidation. From the record here we can reach no other conclusion than that the object of this strike was to secure for plaintiff's employees the November wage scale of the union. Nothing appears in the record to indicate that this was not in good faith, or to raise the suspicion that the strike was a mere cloak to cover a deliberate purpose to interfere with the plaintiff's conduct of its business, or to injure and destroy its business and property. The purpose being lawful, if unlawful means are used to effectuate it, such means can not be made to reach back and taint the purpose itself with unlawfulness, and thus render unlawful all the acts in its furtherance. In the pursuit of a lawful purpose to secure a raise in wages, picketing may be employed, as this court has held, to ascertain whom the late employer "has persuaded or attempted to persuade to accept employment," and persuasion may be used to induce them to refuse or quit the employment.

Undoubtedly picketing and persuasion would interfere with plaintiff's conduct of its business, in that it would make it more difficult for it to retain old employees and to hire and keep new ones. Indeed, the very act of striking often seriously interferes with that "free and unrestrained control and operation of the employer's business" which the plaintiff here alleges as an object of the conspiracy charged; but the lawfulness or unlawfulness of the strike is not to be tested by such incidental effect of it. And so it is with persuasion and picketing, properly carried on in the interest of a lawful strike. The laborer may be strictly within his rights, although he obstructs "the free and unrestrained control and operation of the employer's business." The right to strike must carry with it by implication the right to interfere with the employer's business to a certain extent. The right to persuade prospective employees by legitimate argument must of necessity interfere with the employer's business. Where labor is essential to the successful conduct of a business, any interference with that labor is an interference with the employer's business. But whether the interference with the business is lawful or unlawful depends upon the facts in each case.

The order in the instant case fails to recognize this difference between the lawful means of interfering with another's business as an incident to the party's own right and unlawful means adopted by the same party. Methods may be considered lawful, even though the employer's business is interfered with, because such methods are inci-

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dental to the right of the employee, which right should be and is recognized as equal to the right of the employer.

Plaintiff's further contention that the defendants were not its employees at the time of the strike, and therefore had no right to picket or persuade by argument those about to enter plaintiff's employment, is not well taken. It is true a striker is not technically an employee. The relation of employer and employee is temporarily suspended during a strike. The situation has been described as:

"A relationship between employer and employee that is neither that of a general employer and employee nor that of employer and employee seeking work from them as strangers."

Neither strike nor lockout fully terminates during the strike the relationship between the parties. Among the defendants in this case there were some former employees. Many of the plaintiff's employees at the time of the strike were members of the defendants' organization, the Tri-City Central Trades Council. These facts disprove the charge that the defendants were merely intermeddling in the affairs of a company in which they had no interest. Under these circumstances it can not be said that the labor organization was an intermeddler or that its course was contrary to the wishes of its members or the wishes of the plaintiff's employees.

In so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business, it transcends the limit of proper restraint, and should be modified, so as to eliminate therefrom any restraint of defendants from doing lawful acts as indicated herein.

LABOR ORGANIZATIONS — STRIKES — CONSPIRACY — PICKETING — INJUNCTION—*Alaska Steamship Co.* v. *International Longshoremen's Association of Puget Sound et al., United States District Court, Western District Washington (Sept. 5, 1916), 236 Federal Reporter, page 964.*—The Alaska Steamship Co., in petitioning for an injunction against the association named and others, alleged that it was a common carrier operating steamships between Puget Sound ports and Alaska, connecting with railroads and with other steamship lines, and subject to the Interstate Commerce Act; that subsequent to the striking of longshoremen employed by it in Seattle in June, 1916, belonging to a local of the association, the strikers, by means of violence and threats, prevented, or attempted to prevent, employees from continuing in the company's service, passengers from taking passage upon the company's steamships, and equipment from being taken on board the vessels. Individual defendants were officers of the local association in Seattle, which has a membership of between 700 and 800, and of the Pacific coast district of the international association. On May 1, 1916, the district body adopted in convention a scale of wages and hours, and "it was decided to enforce a wage scale and working rules." The demands were not complied with, and the employees of this company in Seattle, numbering about

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100, struck on June 1. The company then "granted all the demands that were asked," and the men returned to work June 10. They struck again on June 22 without making any demand, and an employee in the office of the secretary of the district association told an officer of the company that it must guarantee to give the men all the work upon the smelter, which was one at Tacoma with which the company had nothing to do. The violent acts complained of were found to have been committed, and the court, speaking through Judge Neterer, held that the injunction asked for should be granted. With reference to the matters of conspiracy and picketing, he said in part:

A conspiracy is defined as a combination of two or more persons by concerted action to do an unlawful thing or to do a lawful thing in an unlawful manner. Acts of agents and employees in furtherance of the conspiracy are the acts of the principals.

A picket may be considered an agent of a labor organization, and where a picket is established it could go no farther than interviews, peaceable persuasion, and inducements; and slight violence or intimidation will have much weight with a chancellor in determining the character of a picket, or the acts of men under its direction, since a picket, under the most favorable consideration, is for the purpose of interference between one who wishes to employ and those seeking employment. Courts have invariably upheld the right of individuals to form labor organizations for the protection of the interest of the laboring classes, and such right is recognized by the unlawful restraint and monopoly act. Organized labor is organized capital, consisting of brains and muscle, and has as lawful a right to organize as have the stockholders and officers of corporations who associate and confer together with relation to wages of employees or rules of employment, or to devise other means for making their investments more profitable. Organized labor and organized capital have equal lawful rights to associate, consult, and confer with relation to wages and rules of employment. [Cases cited.]

The defendants had the right, if they so desired, to cease to work. Whether they had good cause or not is not for this court to say. On the other hand, the complainant had the right, upon the defendants ceasing to work, to employ whom it elected, and to be protected against overt acts of defendants against such employees, and to have the unobstructed use and enjoyment of its property. The rights of the several parties, as stated, are reciprocal, and are measured by the same rule.

Judge Neterer then says that consideration must be given to section 20 of chapter 323, known as the Clayton Antitrust Act (38 Stat. L., p. 730), relating to injunctions in labor disputes, and to sections 3 and 10 of the Interstate Commerce Act, relating to the facilitating of traffic and imposing penalties for omission or failure to do anything required by the act or causing such omission or failure.

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The sections referred to are quoted, after which the opinion concludes as follows:

Sections 3 and 10 supra [of the Interstate Commerce Act] impose duties on complainant, with penalties attached for violation. The testimony shows that the complainant company is a carrier of interstate commerce. It likewise carries United States mail from the port of Seattle to the various ports and places in the Territory of Alaska, at which ports the commerce and mails are delivered to the various connecting lines of transportation, and as such carrier sustains a special relation to the public. It is clearly established that the defendants did cooperate and confederate together and with others for the purpose of preventing the plaintiff from carrying on its business as a carrier of interstate commerce and United States mail. It is also established that the acts done went beyond the privilege extended and license granted to defendants by section 20, supra [of the Clayton Act], and infringed upon the rights of complainant, and that these acts are attributable to defendants.

While there is no testimony that any of these acts were expressly authorized, there is no evidence that the acts were disapproved, or members disciplined or expelled. The testimony does show that the defendants did have control of the situation, and did not exercise their influence or power to correct the irregularities or disavow the acts until the issuance of the temporary restraining order and service upon the defendants, when all overt acts ceased, which, considered with what defendants did do, confirms the conclusion that the acts were under the authority and within the control of defendants. I think it is clearly shown that the rights of the complainant as an interstate commerce and United States mail carrier were violated, that defendants exceeded the privileges granted by the Antitrust Act, and the duty imposed upon plaintiff by the Commerce Act was jeopardized.

It is not the purpose of this court to undertake the policing of the city of Seattle with relation to the employees of complainant, but the issue here is limited to Piers 2 and A and approaches thereto. Nor is it the purpose of the court to abridge any of the rights given by section 20 of the Antitrust Act. Defendant officers and members of defendant association will be enjoined from unlawfully causing, inducing, or in any way forwarding any of the acts complained of as limited herein, and in accordance with the view here expressed.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—*Cohn & Roth Electric Co.* v. *Bricklayers, Masons, & Plasterers' Local Union No. 1 et al., Supreme Court of Errors of Connecticut (Aug. 2, 1917), 101 Atlantic Reporter, page 659.*—The company named sued for an injunction to restrain the defendants from intimidating by strikes, threats of strikes, boycotts, or otherwise any property owner, builder, or contractor, for the purpose of inducing the latter to cancel contracts with the company or to refrain from entering into contracts with it. The company conducted an open shop, and it appeared that the union had agreed not to work for any general contractor or on

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any job if any open-shop contractor was engaged in furnishing labor or materials. The complaint recited that in one instance the union men had refused to work on all of five buildings in process of erection by one contractor because the electric company's nonunion employees were at work on one of the buildings. The court, however, held that this isolated instance could not be taken into consideration in determining the lawfulness of the acts of the union. The superior court of Hartford County had given judgment in favor of the union, and this is affirmed by the court of errors and appeals in the present opinion, which was delivered by Judge Wheeler, and from which the following is quoted:

The agreement of the defendant unions and their members, that the members would refuse to work with nonunion men, followed by action by the members ceasing to work with the nonunion men of the plaintiff, is the only ground of complaint which the facts found support. Individuals may work for whom they please, and quit work when they please, provided they do not violate their contract of employment.

Combinations of individuals have similar rights, but the liability to injury from the concerted action of members has placed upon their freedom to quit work these additional qualifications: That their action must be taken for their own interest, and not for the primary purpose of injuring another or others, and neither in end sought, nor in means adopted to secure that end, must it be prohibited by law nor in contravention of public policy. Connors *v.* Connolly, 86 Conn. 641, 86 Atl. 600 [Bul. No. 152, p. 289], is an example of an agreement which we hold to be contrary to public policy. The members of a union, acting upon their agreement, may refuse to enter upon employment with nonunion labor, or refuse to continue their employment with nonunion labor, provided their action does not fall within the qualifications of their freedom of action already stated. [Cases cited.]

The end the defendants had in view by their by-laws was the strengthening of their unions. That was a legitimate end. There is no indication that the real purpose of the defendants was injury to the plaintiff or the nonunion men it employed. Whatever injury was done the plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants, begun and prosecuted for their own legitimate interests. The means adopted were lawful; no unlawful compulsion in act or word was present.

Labor Organizations—Strikes—Injunction—Contempt—Punishment—*Flockhart* v. *Local No. 40, International Molders' Union of North America, et al., Court of Chancery of New Jersey (Oct. 11, 1917), 102 Atlantic Reporter, page 658.*—On the application of James Flockhart an injunction was granted restraining the union named and others from unlawful practices in connection with a strike. In the present phase of the proceedings Judge Lane had before him for

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contempt, consisting of violation of the injunction order, one Stevenson, whom he describes as the "head and front not only of the strike, but of the events constituting the violation of the order." The testimony is held to prove such violation on the part of Stevenson. One Schum had already been adjudged guilty of contempt, and the question of the sentence to be given these men was taken up. As to Stevenson's activities Judge Lane said in part:

He assumed that he could in some way or another get rid of being punished for anything that he did which he thought was necessary to be done in order that this strike should be successful, including persistent violence, violence which possibly did not go to actual injury to life or limb, but insulting remarks, attempts by intimidation to prevent workers from exercising their inalienable right to work where they please and when they please.

The conclusion reached was that the only adequate punishment which would actually prevent recurrence of the offense was a jail sentence, and such sentence was imposed upon Stevenson for 40 days and Schum for 20 days. Three weeks later a plea for remission of sentence was before the same judge, and it was granted, he saying that in his opinion the prisoners and their associates "now realize that the law and orders of the court must be obeyed, and that the length of time that they have been in jail has been sufficient to convince them of that fact."

Labor Organizations — Strikes — Injunction — Damages—*Max Ams Machine Co.* v. *International Association of Machinists, Bridgeport Lodge, No. 30, et al., Supreme Court of Errors of Connecticut (Dec. 15, 1917), 102 Atlantic Reporter, page 706.*—The company named sued for an injunction to restrain the labor union mentioned, its business agent, and two other members from picketing its plant and from preventing persons from entering its employment or continuing therein by threats, intimidation, or otherwise. Temporary and permanent injunctions were successively granted, and a jury trial was had as to the amount of the damages which were demanded by the company in the same action. The verdict was for $5,000, but the union objected to certain incidents of the trial and appealed, and in the present decision a new trial was granted. A part of the expenses claimed by the company was for the maintenance of guards to protect its property, and, since evidence was admitted and mention made in the charge to the jury of certain "rumors, reports, newspaper statements, and other items" indicating an intention on the part of the defendants to continue unlawful practices after the issuance of the injunction, it appeared that the jury might have considered that the expenses of such guards after the injunction had been issued, as well as before, were chargeable to the defendants.

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The court shows that there could be no assumption that the injunction would be violated, and that, though prudence might dictate the continued employment of guards, it was the duty of the company itself to bear the expense. The defendants further complained of the instruction that the company was entitled to a verdict for nominal damages in any event, but this was held correct. Certain orders signed with rubber stamps, but authenticated by other means than the signature, had been admitted for the purpose of showing damages, the conditions arising out of the strike having made it necessary to reject these orders. The admission of this evidence was, over the objection of the defendants, held to have been proper; but on account of the error as to the allowance of damages for the maintenance of guards during the entire period, a new trial was ordered as previously indicated.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—PICKETING—CLAYTON ACT—*Stephens* v. *Ohio Telephone Co., United States District Court, Northern District Ohio (Feb. 14, 1917), 240 Federal Reporter, page 759.*—A. C. Stephens and others brought suits against the telephone company named, alleging that they were subscribers and representatives of all the subscribers of the telephone company. It was alleged that the company was obligated by its charter and its contracts with its subscribers to give suitable service, but that for some time it had failed to keep its lines in reasonable repair or its working force complete, and to give reasonable local or long-distance service. The bill asked that the company be ordered to observe its duties and obligations as an interstate carrier and a public utility under the acts of Congress governing interstate carriers and its contracts, and that it be determined and decreed that the rights of the public are paramount to the private interests of the company, its officers and employees, and all other persons whomsoever. Another complaint by a telephone company in Michigan which depended on the Ohio company for its Ohio connections was consolidated with the one brought by the subscribers. A preliminary order was issued finding that the cables of the company had during the previous three weeks been cut and destroyed at places mentioned in the complaint, and ordering that they be repaired and thereafter maintained in good condition for operation. A provision found in the order was as follows:

It is further ordered, adjudged, and decreed that the defendant company, its officers, agents, servants, and employees, those in concert or participating with them, and all persons whatsoever, and particularly all persons having notice of this order, be and are hereby enjoined and restrained from interfering in any way, or in any manner, with the cables hereinbefore enumerated, or with the repair of

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said cables, or with workmen engaged in repairing said cables, or with the employees of defendant company when in the company's service; and all said persons and parties are enjoined and restrained from doing any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier.

The answer of the telephone company was filed after the entering of the preliminary order and set up that the damage to the lines was done by strikers and their sympathizers, who prevented the employment of a force to keep the lines in order and to operate the system properly. Prior to this answer, however, Bert Hoffman, representing Local 245 of the International Brotherhood of Electrical Workers, petitioned to intervene and was allowed to do so. In this petition the union denied participation in the damage to the lines of the company. It was asserted that the strike was being conducted by peaceful and lawful means, and that "until said company shall comply with said demands of its employees this petitioner will, in every peaceable and lawful manner possible, interfere with the business of said telephone company." The temporary restraining order later became a temporary mandatory injunction, and afterwards testimony was taken as to violations of it by various parties, including Hoffman. The returns of the respondents raised the question whether the injunction was too broad and indefinite in attempting to restrain the strikers from actions which were claimed to be lawful under the sections of the Clayton Act relating to labor disputes. Judge Killits, in delivering the opinion, expressed his views as to the effect of that act upon controversies involving public utilities and their employees. He reached the conclusion that the motions by the union members attacking the informations against them should be denied, and the proceedings continued under such informations as stating grounds for holding the respondents guilty if the allegations made therein should be proved. The following quotations are made from the opinion:

The second paragraph of section 20 [of the Clayton Act] we quote in full as the important one. It has sometimes been called "Labor's Bill of Rights." We may as well call it an "Employer's Bill of Rights," and also, when there is a labor controversy involving a public utility as here, the "Public's Bill of Rights." The "rights" guaranteed by it to the employees, "in any case between employer and employees," are to be set up against and limited by certain "rights" of the employer therein written. He has just as much right, under this section, that his employees shall not exceed the limits of their rights under it as they have to enjoy them. The rights of the employer begin where those of the employees stop. The granting of a "right" by statute always involves an obligation upon the favored one not to exceed its limitations. [Paragraph quoted.]

It is well to note, and not to lose sight of, the fact that the words "lawfully," "peacefully," "lawful," "peaceful," dominate the

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thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was "unlawful" or provocative of a disturbed peace. The challenge to the court is to define "peaceful picketing" within the limits of this section. This does not seem to be an occasion for an attempt at an academic formula, which, in any detail, would meet all exigencies possible in labor controversies, if one could be drawn up.

Each case presents its own peculiar questions. An act may be lawful and peaceful, or the opposite, according to its setting. It is easier, and far more practicable, therefore, to deal in prohibitions than in affirmations. Broad generalizations, however, are easily framed, because, if we just keep in mind the prevalence in the statute of the qualifying idea of "peaceful" and "lawful" action, we can not be misled. The best we have seen is one lately appearing in a newspaper devoted to labor interests. It is:

"What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked, 'Would this be lawful if no strike existed?'"

We accept this as a very good test, and apply it to the concrete questions of fact arising in this case, as propounded in the several informations, with conclusions certain to come to every "fair-minded man." Suppose no strike were in progress—

Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others—for one to call another a "rat," a "scab," a "thief," an "outcast," or by any other name commonly accepted as offensive, or degrading, or calculated to provoke the other to break the peace in resentment? [Other questions formulated, based upon the evidence and information.]

Because such occurrences are liable to be the result of passions inflamed by such controversies, there is an insistent and undeniable demand that all persons having part in a strike, who are trying to exercise their rights under the law to maintain a strike, should be persistent in their efforts to keep the controversy within lawful bounds and to guard that these inexcusable results do not follow; otherwise, in the estimate of the public generally, they will be held to some considerable measure of responsibility.

The right of free speech does not give anyone the privilege to force his views upon others, to compel others to listen. The right of the others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

It is a safe and proper generalization that any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is un-

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lawful; every act, of speech, of gesture, or of conduct, which "any fair-minded man" may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable—such must be the verdict of "any fair-minded man"—nothing can be said in justification.

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character.

The labor organization, party to this case through the representation of Hoffman, came here voluntarily and was admitted upon its application and the statement of its counsel, in the presence of the officers of the organization, that the injunction then in force would be observed and respected until it should be modified or vacated by this court. Indeed, we have, as we have observed, exactly the injunction which the labor defendants in this court agreed should be issued. Yet it pleads that it intends to "interfere" by all "lawful means" with the business of the defendant company. It should know, and act upon the knowledge, that the only "interference" which the law permits is that incidental to a strict observance of the terms of section 20 of the Clayton Act. If it goes beyond the privileges of action therein provided, it comes within the court's restraining and punitive processes. Its only safe course, in pursuing its "interference" methods, is to place intelligently and carefully, in word and conduct, the same emphasis which Congress employed on the expressions "lawful" and "lawfully," "peaceful" and "peacefully," as used in the act.

The Ohio State Telephone Co. is a public utility. Its first duty is to serve the public. Its work meets a vital public necessity. The right of its striking employees to "interfere by lawful means" with its business does not mean a right to cripple performance by it of its duties to the public, if it can find people willing to work for it. If labor can be had, the company must employ, and the strikers must permit it to employ and use, labor to perform its public duties, and any one willing to work for it must be allowed by everybody entire freedom to do so. The public, having a great need for services of the character offered by this public utility, has an enforceable right to demand these conditions of both the company and of those associated in controversy with it. This court is empowered to say to the company that it must meet its public obligations. Coupled with that power of the court is the power and duty of laying its prohibitive and punishing hand upon anyone whose willfully unlawful conduct tends to render abortive the exercise of that power. We can no more say to the company that it must yield to the de-

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mands of its striking employees than we can say to them that they must meet the company's exactions. The controversy must be carried on, on both sides, without substantial detriment to the company's public service.

We are unable to agree with respondent's counsel that the order is deficient, because it does not conform to the provision of section 19 of the Clayton Act that an injunction order should specify in "reasonable detail" the things enjoined. That portion most vigorously attacked as too broad and indefinite is the provision restraining the doing of "any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."

This provision is as definite as it is possible to make it. It is this paramount interest in the public which may not suffer interference as the result of the controversy, and it is impossible to set out every act or line of conduct which might work interference. Labor controversies are not unexpected or unusual; courts recognize that they are possible; courts also notice that the existence of one produces some embarrassment to the employer affected in the management of his business. Whether that embarrassment arises to a state of "interference," as that term means in cases of this sort, depends upon how the controversy is conducted on either or both sides. A total cessation of the employer's business, even of that of a public utility, might not indicate an illegal interference under some circumstances. A strike lawfully conducted is not an illegal interference, although it might effect even a total paralysis of a public utility's activities, resulting in great public suffering and loss. The right to abandon employment, by individuals singly or in association, is unquestioned, and the law maintains the right of such late employees, commonly known as strikers, to "peacefully" persuade others to abandon the same employment, or to refrain from engaging in employment, and to that end "peaceful picketing" is permitted for purposes of observation and information and "peaceful persuasion." But no single act, to which we have alluded above, can be possibly considered to be a necessary, and hence an excusable, accompaniment of peaceful picketing. Such acts tend inevitably to that "interference" which the law condemns.

In this view, we suggest that the bald statement in the pleading of the labor organization referred to that its purpose is to "interfere" by lawful means with the business of this public utility comes perilously near a confession that an unlawful conspiracy is in progress, and the only way that such a conclusion can be avoided is a line of conduct during the further continuance of this strike which will secure the public against that interference with the business of this public utility which is the direct result of the unlawful acts of the character of those to which we have alluded. If its members will confine their strike activities within the limits of the Clayton Act, then whatever embarrassment ensues to the company will be no illegal interference.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—PICKETING—LABOR COMMISSIONER AS WITNESS—*White Mtn. Freezer Co.* v. *Murphy et al., Supreme Court of New Hampshire (May 1, 1917), 101 Atlantic*

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Reporter, page 357.—Suits were brought by the company named and two other companies engaged in manufacturing to obtain injunctions against Eugene L. Murphy and others. The defendants were officers and members of Local No. 257 of the International Molders' Union of North America, Murphy being the business agent. The union demanded, on October 11, 1916, that the companies compel their molders not members of the union to join, and that they conduct their factories thereafter as closed shops. This was refused, and the union members struck. The strike was still in effect at the time of the hearing on the cases, and, it was alleged, the strikers were using means to intimidate the remaining employees, including picketing. The cases were sent to a master for the finding of facts, and questions as to evidence arose during the proceedings before him. The superior court of Hillsborough County refused to rule that a strike organized to compel the employment of union men only constituted a conspiracy in law, and likewise refused to hold that organized picketing was unlawful. The cases were transferred to the supreme court for decisions on the questions raised by exceptions to these rulings. Judge Parsons was spokesman for the court, and first stated that the agent, Murphy, though a party to the proceedings, was a competent witness and could be compelled to testify, though not to incriminate himself. He then discussed the matter of the obligation of the labor commissioner to testify as to proceedings before him in an attempted conciliation of the controversy. An examination of the statute showed no provision that such proceedings should be given secrecy prior to the amendment adopted in 1917, which is as follows:

"Neither the proceedings nor any part thereof before the labor commissioner by virtue of this section shall be received in evidence for any purpose in any judicial proceeding before any other court or tribunal whatever."

Mr. Davie, the commissioner, had refused to answer whether at a conference called by him the representatives of the companies had requested of Murphy a statement in writing of the demands of the union. The court held that the commissioner was, previous to the taking effect of the amendment noted, in the same category as a subordinate court and could not claim the privilege of refusing to testify.

The court then took up the two rulings submitted to it, holding as to the implication of a conspiracy in the purpose of the strike that the strikers were called upon to give evidence as to the lawfulness of their motive. With regard to picketing the court agreed with the lower court, holding that picketing in itself is not necessarily unlawful, the matter of legality depending on the actual occurrences which might be shown on the trial.

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LABOR ORGANIZATIONS—STRIKES—INJUNCTION—POWER OF OFFICERS OF UNION TO CONTRACT—DAMAGES—*W. A. Snow Iron Works (Inc.)* v. *Chadwick et al., Supreme Judicial Court of Massachusetts (June 11, 1917), 116 Northeastern Reporter, page 801.*—The company named brought action in equity for an injunction and damages against Leonard B. Chadwick and others, and a decree granting an injunction but denying damages for the most part, entered upon the report of a master to whom the case had been referred, was by this decision affirmed. Chadwick was the business agent of an unincorporated labor union. The eight other defendants were members of this union and had been employed by the company in the installation of wrought-iron work. The manufacturing or inside work was conducted on the open-shop plan, the result being that the employees were nonunion men; but the company was on friendly terms with the union, and customarily employed some union men on its outside work. On a large contract with one Crane the eight union men formed part of a force of 20. There was no complaint about wages or hours. While the job was in process, however, a vote was passed by the union instructing its secretary " to send out new agreements to all the contractors in their line," and another instructing the business agent that " no member be allowed to work for unfair firms until they had been signed up by the business agent." At a conference between the employer and Chadwick the former refused to sign the agreement, which provided for the employment of union labor only on outside work. The eight men then struck. As to their right to do this the court says:

If the right of the employees to cease work of their own volition is unquestioned, the object or motive for which the strike was precipitated is a question of fact.

The findings of fact by the master are then examined, and Judge Braley, who prepared the opinion, goes on as follows:

It is now plain that the paramount motive actuating all the proceedings of the defendants and their fellow members was by means of the strike to force the plaintiff to employ only union men on all of its "outside work" under the penalty, if compliance was refused, that full performance of the contract with Crane would be seriously embarrassed if not rendered impossible, while its name would be published by the union in the labor market, and among architects and contractors for its products, as an employer of nonunion labor, making the obtainment of future contracts and the necessary union labor exceedingly precarious if not practically impossible. The right of the plaintiff to the benefit of its contract and to remain undisturbed by the union during performance, as well as to hire and retain such employees as it might select, unhampered by the interference of the union acting as a body through the instrumentality of a strike or of a secondary boycott or black list, is a primary right which has not been abrogated by any of our decisions. [Cases cited.]

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The claim that there had been a contract with the union to furnish men as required, and that damages might be collected for loss of profits on all other contracts which the plaintiffs might have taken if the amicable relations had continued, was disposed of by showing that the officers had had no power to make such a contract. The court said in part on this subject:

The officers of the union could not create either by word or conduct a binding bargain in behalf of the members of their union to furnish labor to be individually performed, unless they had been authorized expressly or impliedly by the members in some form sufficient to show mutuality of will and consent.

The "custom and practice" of furnishing men when the plaintiff communicated its needs directly, or by its foreman, the defendant Husband, to the responsible officers of the union, even if known to the union, and never formally disapproved, did not constitute a contract for breach of which damages could be recovered or specific performance enforced by either party.

The court added that while losses incurred in the shop by reason of the failure to secure the additional contracts afforded no ground for claiming damages, damages might have been awarded if separately claimed for the loss caused on the job on which the strike was called.

LABOR ORGANIZATIONS—STRIKES—PICKETING—VIOLENCE—INJUNCTION—*Niles-Bement-Pond Co.* v. *Iron Molders' Union, Local No. 68, et al., United States District Court, Southern District Ohio (Oct. 9, 1917), 246 Federal Reporter, page 851.*—About 115 members of the union named, at work for the Niles Tool Co., at Hamilton, Ohio, struck on May 24, 1917. The company was at work on contracts amounting to about $3,000,000, given priority under the National Defense Act, for heavy machinery urgently needed by the United States Government, which it was impracticable for the company to have manufactured elsewhere. The company named as plaintiff in this suit stood in the relation to the tool company of a holding company, and it also secured the contracts and in turn contracted with the tool company to produce the required machinery. The prayer of the company for an injunction was granted by Judge Sater, who stated his findings of fact and commented upon the situation at length. The findings showed much violence on the part of the strikers and their sympathizers and incidentally little effort to prevent such action on the part of the public authorities. It is stated that the strikers returned to work on July 23 for about four days, but again left, claiming that bad faith was exercised by the company in the attempt to arrange the final terms of settlement. It was claimed by the defendants that because of this and because the arrangement between the two companies was a

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violation of antitrust laws the company did not come into court with "clean hands" and was therefore not entitled to its relief. This contention was not upheld by Judge Sater, who, after setting forth the right of workmen to strike and to picket peaceably and to converse with prospective employees who are willing to engage in conversation, added that this gave no right of compulsion or of interference with those unwilling to talk, and that threats, abuse, and intimidation had no place in the conduct of such a strike as the courts held lawful. He then said:

The record shows it was necessary to escort workmen for their protection with guards, and that even then some of them were assaulted and beaten up.

The existence of such a condition shows that there was something radically wrong with the conduct of the strike, with the committee charged with its management, and the enforcement of the law.

A belief that labor can not win a strike without resort to unlawful means does it injustice. A statement that such means are necessary to succeed is a slander. It is the reckless and lawless few (and their like is found in all vocations) that foment trouble, which leads to wrongdoing and often ultimately throws the weight of public opinion against the striker. Labor is entitled to its just deserts, and may lawfully strike to get them; but neither labor nor any other aggregation of beings should permit its cause to be injured by the misbehavior of mischief makers, whether they be merely sympathizers or found within its own ranks. It should stand for the reign of law.

Relief must be granted as prayed for against all of the defendants. Its effect will be to restrain them from doing what any good citizen will not wish to do. The evidence of the active participation of many members of Local No. 68 is abundant. There is also evidence that members of that union were instructed to keep within legal bounds, but neither its officers nor its strike committee enforced the instructions. Indeed, Schalk, a member of that committee, participated in violent conduct. Some of the members of Local No. 283 also actively shared in the matters of which complaint is made. There is no showing that any officer or member of that body by word or deed discouraged the wrongful conduct herein mentioned. The efforts of the plaintiff to bring about a full disclosure of the unhappy occurrences connected with the strike received no assistance from that union, which defended at the hearing. If it deprecated the disorder that prevailed, or disapproved of wrongdoing on the part of its members, as it ought to have done, it should have cleared its skirts when the opportunity offered.

LABOR ORGANIZATIONS—STRIKES—PROSECUTION FOR MURDER—SELECTION OF JURORS—*Zancannelli* v. *People*, *Supreme Court of Colorado* (*June 4, 1917*), *165 Pacific Reporter*, *page 612*.—Louis Zancannelli was convicted of having murdered one Belcher in the city of Trinidad, Colo., during the industrial conflict between the

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coal-mine owners and their employees, and sued for a writ of error to secure a reversal of the judgment. The Attorney General filed a confession of error, and the opinion of the supreme court, delivered per curiam, states that ordinarily under such circumstances it would enter judgment of reversal without comment, but that the nature of the case was such that " we think a good purpose will be served by briefly stating the facts and commenting upon the same."

The deceased man was a detective in the employ of the mine owners. The prosecution introduced evidence to the effect that the defendant had stated that he killed him " for the good of the union," but there was also evidence that one of two men who were seen fleeing from the place was the guilty party, and that the arrest and prosecution of the present defendant was the result of mistaken identity. The judge of the district court of Las Animas County, in which the case was tried, was disqualified for interest and prejudice, and the same objections were unsuccessfully urged with regard to the additional judge appointed by the governor to try the case. However, the occurrences at the trial over which he presided, with relation to the impaneling of the jury and the conduct of certain jurors, were considered as sufficient to invalidate the proceedings. Several jurors were seated after refusal to permit the defense to ask the following question:

" Can you start out on the trial of this case giving to the defendant the benefit of the legal rule that a defendant must be presumed to be innocent until he is proven to be guilty?"

The court refused to permit the putting to the jurors of many other inquiries relating to their bias or prejudice, participation in the troubles connected with the strike, etc. From the opinion the following is quoted as to the principles involved:

While a person is not necessarily disqualified to serve as a juror in a criminal case by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused (sec. 3691 et seq., R. S. 1908), it would seem always important to ascertain the state of the proposed juror's mind as to the defendant's rights under the law, for, without this, how would it be possible for the court, within the meaning of the law, to be satisfied that the juror has no other interest or motive in the case than to render a true, fair, and impartial verdict? However, be that as it may, the defendant had a right to propound questions to the proposed jurors to show not only that there existed proper grounds for a challenge for cause, but also to elicit facts to enable him to decide whether or not he would make a peremptory challenge.

There was testimony that Juror Burkhardt had business relations with the coal companies, that he had said that if he was on the jury there would be "a hung jury or a hung Dago," that he had offered to make bets that the defendant would be convicted, etc. This mat-

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ter is gone into at considerable length, and the opinion concludes as follows:

The errors above noted invalidated the proceedings almost at their very beginning. Moreover, the errors are so numerous, so obvious, and so fatal to the validity of the proceedings that unless they were written into the record as they are, under the seal of the trial court, we could not believe that such things had occurred in the trial of a cause in a court of record.

Labor Organizations—Suspension of Member—Injunction—*Holmes et al.* v. *Brown, Supreme Court of Georgia (Feb. 13, 1917), 91 Southeastern Reporter, page 408.*—A. Brown brought action against Martin Holmes, president of the Bricklayers, Plasterers, and Masons' Union of America, and others for an injunction to restrain them from refusing him the rights and privileges of a member of the local union of the organization in the city of Atlanta. He had been a member for about 14 years. He preferred charges against another member which he was not able to sustain, because, as stated in the court's opinion, the members who furnished the information were intimidated by persons outside the union. He in turn was accused of maliciously preferring an unfounded charge against a member, and was tried and found guilty and fined $50 at a meeting at which he was not present. No notice was given him of the preferring of the charges nor of the trial; in fact, he did not learn of the matter until a month later. He then made complaint, and was informed that he must pay the fine to the local union before an appeal could be taken, although the 30-day limit for appeals would be waived. He was unable to pay the fine, and was not allowed to be heard before the local union, nor to attend the meetings or pay his dues, which he tendered. The superior court of Fulton County entered an interlocutory judgment ordering that he be given the privileges of membership pending a trial, and this judgment was affirmed by the supreme court, Judge Evans delivering the opinion and saying, in part:

The constitution and by-laws of the international union provide that no member shall be tried except upon a written charge stating the specific offense against the accused member, and that the trial shall be had on a stated day; if the member refuse to be present, he shall be notified of the time when the trial shall occur. Upon conviction and sentence the same operates as a suspension of all benefits and privileges until compliance with the terms of the sentence, with a right of appeal to the judiciary board on payment of the fine. The constitution and by-laws further provide for a beneficiary and mortuary fund maintained on a mutual plan, for the benefit of members who have been connected with the union for a period longer than 6 months; for a pension system providing for

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a benefit to members who have reached the age of 60 years, and who have been in continuous good standing for a period of 20 years; and for a disability benefit to members of 10 years' standing.

The court found as a conclusion of fact that the evidence authorized an inference that the plaintiff had been illegally tried and sentenced, and that he had tendered all of his dues in arrears; in other words, his status was that of a lawful member of the union. In the court's order the plaintiff was required to pay these dues to the local union, and upon compliance with this condition by him the union was temporarily enjoined from interference with his rights as a member. The order does not finally adjudicate the plaintiff's status as a member, and should not be construed as so doing.

Labor Organizations—Unlawful Combinations—Restraint of Trade—Injunction—Prevention of Competition—*Paine Lumber Co. (Ltd.) et al.* v. *Neal et al., Supreme Court of the United States (June 11, 1917), 37 Supreme Court Reporter, page 718.*—The company named and other corporations of States other than New York brought a bill in equity against Elbridge H. Neal and others, officers and agents of the United Brotherhood of Carpenters and Joiners of America and its New York branch; union manufacturers who were members of the Manufacturing Woodworkers Association; and master carpenters who were members of the Master Carpenters Association. The bill was dismissed in a Federal district court, and the decree of dismissal was affirmed by the Circuit Court of Appeals for the Second Circuit. (Same case, 214 Fed. 82, Bul. No. 169, p. 164.) The Supreme Court took the same view, four justices dissenting. Mr. Justice Holmes delivered the prevailing opinion, as follows:

The bill alleges a conspiracy of the members of the brotherhood and the New York branch to prevent the exercise of the trade of carpenters by anyone not a member of the brotherhood, and to prevent the plaintiffs and all other employers of carpenters not such members from engaging in interstate commerce and selling their goods outside of the State where the goods are manufactured, and it sets out the usual devices of labor unions as exercised to that end. In 1909 the master carpenters, coerced by the practical necessities of the case, made an agreement with the New York branch, accepting a previously established joint arbitration plan to avoid strikes and lockouts. This agreement provides that "there shall be no restriction against the use of any manufactured material except nonunion or prison-made;" the arbitration plan is confined to shops that use union labor, and the employers agree to employ union labor only. The unions will not erect material made by nonunion mechanics. Another agreement between the manufacturing Woodworkers' Association, the brotherhood, and the New York branch, also adopts the plan of arbitration; the labor unions agree that "none of their members will erect or install nonunion or prison-made material," and the woodworkers undertake that members of the brotherhood shall "be employed exclusively in the mills of the Manufacturing

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Woodworkers' Association." It is found that most of the journeymen carpenters in Manhattan and part of Brooklyn belong to the brotherhood, and that, owing to their refusal to work with nonunion men, and to employers finding it wise to employ union men, it is very generally impracticable to erect carpenter work in those places except by union labor. It also is found that, owing to the above provisions as to nonunion material, the sale of the plaintiff's goods in those places has been made less. The workmen have adopted the policy complained of without malice toward the plaintiffs, as part of a plan to bring about "A nation-wide unionization in their trade."

An injunction is asked against the defendants (other than the master carpenters) conspiring to refuse to work upon material made by the plaintiff, because not made by union labor; or enforcing by-laws intended to prevent working with or upon what is called unfair material; or inducing persons to refuse to work for persons purchasing such material, or taking other enumerated steps to the same general end; or conspiring to restrain the plaintiffs' interstate business in order to compel them to refuse to employ carpenters not members of the brotherhood. It is prayed further that the provision quoted above from the master carpenters' agreement and another ancillary one be declared void and the parties enjoined from carrying them out. No other or alternative relief is prayed. The ground on which the injunction was refused by the district court was that, although it appeared that the agreements above mentioned were parts of a comprehensive plan to restrain commerce among the States, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large. The circuit court of appeals, reserving its opinion as to whether any agreement or combination contrary to law was made out, agreed with the judge below on the ground that no acts directed against the plaintiffs personally were shown.

In the opinion of a majority of the court, if the facts show any violation of the act of July 2, 1890 [Sherman Antitrust Act], a private person can not maintain a suit for an injunction under section 4 of the same (Minnesota *v.* Northern Securities Co., 194 U. S. 48, 70, 71, 24 Sup. Ct. 598); and especially such an injunction as is sought; even if we should go behind what seems to have been the view of both courts below, that no special damage was shown, and reverse their conclusion of fact. No one would maintain that the injunction should be granted to parties not showing special injury to themselves. Personally, I lay those questions on one side because, while the act of October 15, 1914 [Clayton Act], establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning that satisfies me, because upon this point I am in a minority.

As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. National Protective Asso. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 [Bul. No. 42, p. 1118]. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture

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or building, since the more successful it is the more competitors are introduced into the trade.

Decree affirmed.

Mr. Justice Pitney wrote a dissenting opinion, in which Mr. Justice McKenna and Mr. Justice Van Devanter concurred, Mr. Justice McReynolds also dissenting. Mr. Justice Pitney disagreed with the view of the majority that a private person can not maintain a suit for an injunction under the fourth section of the Sherman Act, saying that the case cited, Minnesota *v.* Northern Securities Co., is not "an authority against the right of complainants to an injunction to prevent special and irreparable damage to their property rights through a violation of the Sherman Act, the effect of that decision being merely to deny relief by injunction to individuals not directly and specially injured." He held that a right to apply for such injunction is given, not by any specific provision of the statute, but by the absence of any provision denying it and by the settled principles of equity. The special injury necessary, he thought, was present in this instance. His view of the effect of the provisions of the Clayton Act is shown by the following quotation:

The suggestion, in behalf of defendants, that section 6 of the Clayton Act establishes a policy inconsistent with relief by injunction in such a case as the present, by making legitimate any acts or practices of labor organizations or their members that were unlawful before, is wholly inadmissible. The section prohibits restraining members of such organizations from "lawfully carrying out the legitimate objects thereof." What these are is indicated by the qualifying words: "Instituted for the purpose of mutual help, and not having capital stock or conducted for profit." But these are protected only when "lawfully carried out." The section safeguards these organizations while pursuing their legitimate objects by lawful means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade. The section, fairly construed, has no other or further intent or meaning. A reference to the legislative history of the measure confirms this view. (House Rep. No. 627, 63d Cong., 2d sess., pp. 2, 14–16; Senate Rep. No. 698, 63d Cong., 2d sess., pp. 1, 10, 46.) Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them.

It is altogether fallacious, I think, to say that what is being done by the present defendants is done only for the purpose of strengthening the union. Conceding this purpose to be lawful, it does not justify or excuse the resort to unlawful measures for its accomplishment. A member of a labor union may refuse to work with nonunion men, but this does not entitle him to threaten manufacturers for whom he is not working, and with whom he has no concern, with loss of trade and a closing of the channels of interstate commerce against their

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products if they do not conduct their business in a manner satisfactory to him.

And the suggestion that, before the Clayton Act, unlawful practices of this kind were usually and notoriously resorted to by labor unions, and that for this reason Congress must have intended to describe them as "legitimate objects," and thus render lawful what before was unlawful, is a libel upon the labor organizations and a serious impeachment of Congress.

Nor can I find in section 20 of the Clayton Act anything interfering with the right of complainants to an injunction. It refers only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment." These words evidently relate to suits arising from strikes and similar controversies, and the committee reports upon the bill bear out this view of the scope of the section. But this is not such a suit. There is no relation of employer and employee, either present or prospective, between the parties in this case. Defendants who are employees are in one branch of industry in New York City; complainants are employers of labor in another branch of industry in distant States. Nor is there any dispute between them concerning terms or conditions of employment. Section 20 prohibits an injunction restraining any person "from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; * * * or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

Clearly, this provision is limited to the participants in a dispute of the character just indicated. And, quite as clearly, only "lawful" measures are sanctioned—that is, of course, measures that were lawful before the act. There is no grant, in terms or by necessary inference, of immunity in favor of a boycott of traders in interstate commerce, violative of the provisions of the Sherman Act, to which the Clayton Act is supplemental.

MECHANICS' LIENS—ASSIGNMENT BY CONTRACTOR OF AMOUNT DUE HIM—*London Bros. et al.* v. *National Exchange Bank of Roanoke et al., Supreme Court of Appeals of Virginia (Sept. 20, 1917), 93 Southeastern Reporter, page 699.*—The King Lumber Co. constructed for the city of Roanoke a municipal building, and before the laborers, supply men, and subcontractors had been paid the company assigned $15,000 of the amount due it from the city to the bank named. The city brought a bill of interpleader, praying for a decision directing it as to the distribution of the balance of nearly $21,000 due from it under the contract. The company having become bankrupt, its trustees were among the claimants made parties defendant. The laborers, etc., made their claim under "An act to protect subcontractors, supply men, and laborers," Code of 1904, section 2482a, pro-

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viding that assignments of the amounts due to contractors can not be enforced until the demands of such claimants have been satisfied. The bank contended that this act must be construed in connection with the mechanics' lien law, sections 2475–2481, inclusive, of the Code, so that the claimants, not being able to perfect mechanics' liens because the owner of the building was a municipal corporation, were not protected by the law against assignments. The law and chancery court of the city of Roanoke took a view adverse to the laborers and the other claimants associated with them, and they appealed. The supreme court of appeals, for which Judge Prentis delivered the opinion, reversed the decision and held the assignment invalid until the claims had been met, saying on this point:

The words of the statute are written into such assignments as effectually as if the assignment in terms stated as a condition precedent that it should be void and ineffective until after the payment in full of all debts due by the assignor to subcontractors, supply men, and laborers for the construction of the building, and in its legal effect is a direction to the owner thus to distribute the fund.

MOTHERS' PENSIONS—CONSTITUTIONALITY OF STATUTE—TAXATION—*Denver & R. G. R. Co.* v. *Grand County, Supreme Court of Utah* (*Dec. 21, 1917*), *170 Pacific Reporter, page 74*.—The railroad company named brought suit against the county to recover the sum of $912.66, collected from it during the year 1914 under the mothers' pension act passed by the legislature of Utah in 1913. This tax was levied in addition to a tax for general county expenses, one for school purposes, and one for poor relief. The district court of the county held that the county officers were without authority to levy such a tax, and rendered judgment for the company; this judgment, however, is reversed by the present decision. The law provides for the levying by the counties of taxes sufficient to provide funds for the purpose contemplated. It was first contended that this was not a "public purpose" for which a tax may lawfully be assessed, and that therefore the act provided for the taking of private property for other than a public purpose. As to this Judge Gideon, who delivered the opinion, said:

It will be conceded, we take it, that the proper rearing and bringing up of children, their education, their moral welfare, can all be subserved better by giving to such children the companionship, control, and management of their mothers than by any other system devised by human ingenuity. The object of the act is to provide means whereby mothers who are otherwise unable may be enabled to give such attention and care to their children of tender years as their health, education, and comfort require. The act further provides that no such money shall be appropriated or given unless the mother is a fit person morally and physically to be intrusted with the rear-

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ing of young children, and that only during the years when the children are unable to determine right from wrong or to earn a livelihood. The act having for its object the better care for the training, mental and physical, of children who are to become citizens of the State, would at least leave the constitutionality of such act doubtful, and it is the duty of courts in determining the constitutionality of any act to resolve every doubt in favor of its constitutionality. We are not prepared to hold that the act, in effect, does not define and declare a policy of the State, nor that it is not within the province of the legislature to so define and declare a State policy. Having in mind the public welfare by assisting in surrounding children of tender years with home associations, with the care and nurture of their natural protector, the mother, the legislature, by this act, has determined that to be a policy of the State. Such being the object of the act, this court would not be justified in declaring the act invalid and that the funds so used are not used for a public purpose.

A contention as to the power of the legislature to devolve upon the county commissioners the right to levy the taxes necessary to carry out the provisions of the act was resolved in favor of the act, and it was held constitutional. The judgment of the court below was reversed and the case remanded.

MOTHERS' PENSIONS—DEATH OF HUSBAND—PRESUMPTION FROM ABSENCE—*Commonwealth ex rel. Trustees of Mothers' Assistance Fund of Philadelphia County* v. *Powell, Auditor General, Supreme Court of Pennsylvania (Feb. 12, 1917), 100 Atlantic Reporter, page 964.*—A mothers' pension law of Pennsylvania enacted in 1913 provided for payments to "indigent, widowed, or abandoned mothers, for partial support of their children in their own homes." This was, however, changed in 1915 so that such assistance was to be given "to women who have children under 16 years of age and whose husbands are dead or permanently confined in institutions for the insane." The present proceeding was one in mandamus to compel the auditor general to draw his warrant upon the State treasurer for the payment of a sum to the mother of four children. The father had disappeared in 1906, and had not been heard from since. The trustees of the fund, in view of his unexplained absence for more than seven years, found that he was dead, and approved the application for relief, which action was sustained by a lower court, which granted a mandamus. The supreme court held that the law should not be construed to warrant payment in this case and reversed the award of mandamus on the ground that the act used the word "dead" in its popular sense, without regard to legal presumptions not mentioned in the act.

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OLD-AGE PENSIONS—CONSTITUTIONALITY OF PROPOSED LEGISLATION—*In re Opinion of the Justices, Supreme Court of New Hampshire (Feb. 15, 1917), 100 Atlantic Reporter, page 49.*—New Hampshire, in common with others among the New England States, has a provision of law which permits the branches of the legislature, in cases of importance, to ask the supreme court to pass in advance upon the constitutionality of bills proposed for adoption. The constitution of the State contains the following reservation out of the supreme legislative power granted, being article 36, part 1, of the constitution:

Economy being a most essential virtue in all States, especially in a young one, no pension shall be granted but in consideration of actual services; and such pensions ought to be granted with great caution by the legislature, and never for more than one year at a time.

The house of representatives adopted a resolution calling for an opinion on the following questions:

1. Can the legislature authorize the granting of old-age pensions, for one year at a time, to be paid either (*a*) by the State or (*b*) by any political subdivision thereof?
2. Do the restrictions in the article as to "actual services" and as to "one year at a time" apply to political subdivisions of the State as well as to the State itself?
3. Can the legislature, at one session thereof, authorize the granting of a pension for a year, and by a separate act authorize the granting of a like pension for another year?

The questions propounded were answered in the negative on account of the provisions of the constitution, probably somewhat unusual, above quoted. The opinion is in part as follows:

Pensions are not to be granted except in consideration of actual services and never for more than one year at a time. A pension ordinarily suggests the idea of a bounty or reward for service rendered, but the term might include a grant which was a mere gratuity. This latter is expressly excluded. Pensions are not to be granted except in return for services which are fairly describable as actual, not constructive, or imaginary. * * * If "old-age pensions" means pensions the right to which depends upon age alone, our answer is in the negative.

As the legislature may grant a pension for only one year at a time, legislation in the same year, whether in one bill or several, granting in the whole pensions to the same persons for more than one year, is beyond legislative power, and wholly void. We answer the third question also in the negative.

The nondelegable character of the lawmaking power vested in the legislature is subject to the exception that limited powers of local legislation may be conferred upon minor subdivisions of the State. But "in the nature of things, such legislation must be not inconsistent with the laws of the State." (State *v.* Noyes, 30 N. H. 279, 293.)

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The local legislation of towns and cities is equally subject to a reservation made before any legislative power was granted. Obviously the legislature can not delegate a power it does not possess. Because there is no exception of the power of local legislation from the general reservation limiting the pension-granting power of the State, the second inquiry is answered in the affirmative.

PENSIONS FOR EMPLOYEES—DEDUCTIONS FROM SALARIES OF COUNTY EMPLOYEES—*Helliwell et al.* v. *Sweitzer, Supreme Court of Illinois (Apr. 19, 1917), 115 Northeastern Reporter, page 810.*—The Legislature of Illinois in 1915 enacted a law providing for a pension fund for employees of counties having a population of 150,000 or more. Cook County is such a county, and Sidney L. Helliwell and others, who were appointees of the county treasurer, sheriff, and other county officials, brought a suit against the county clerk to prevent him from deducting from their salaries, in accordance with the act, the sum of $2 per month each for such pension fund. In the superior court of Cook County a decree was entered overruling the demurrer of the county clerk to the bill, and declaring the act void as to all officers and employees provided for in it. The supreme court, however, made a distinction as to the power of the legislature in respect to such employees as the petitioners, over whose salaries the county board has authority by virtue of a constitutional provision, and those over which the legislature itself has power. It therefore ordered the decree modified, but held that the lower court had properly upheld the contention of the petitioners as far as their own cases were concerned. The following extracts are taken from the opinion delivered by Judge Duncan:

It is clear that the "officers and employees" referred to in this statute do not include public county officers, who are elected to their offices by the voters of the county.

It is equally clear from the said provisions of the statute that the words "officers and employees" in the act are broad enough to include all that large class of officers and employees to which appellees belong—i. e., all the officers and employees employed in the various public offices of the county, and designated in section 9 of article 10 of the constitution as "deputies and assistants," whose number shall be determined by rules of the circuit court and whose compensation shall be determined by the county board.

This act is very similar in all its provisions to the Civil Service Pension Fund Act of 1911 (Laws 1911, p. 158) that was sustained by this court in Hughes *v.* Traeger, 264 Ill. 612, 106 N. E. 431 [Bul. No. 169, p. 56]. It was in that case held that the effect of the law was to reduce the salaries of the officers and employees coming within the provisions of the act $2 per month, or $24 per year. The same holding must necessarily be made in this case, as every reason and argument for the holding in that case will be

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found applicable to this case. The rule of law universally obtains that the legislature has complete and absolute power, not only over public officers and officials, but also over the compensation attached to the office and the manner and character of its duties, and their performance, in the absence of a constitutional provision limiting that power or placing it elsewhere. [Cases cited.] The legislature, however, has no such power or right over the class of officers to which appellees belong. Said section 9 of article 10 of the constitution has expressly lodged the power and authority in the county board of Cook County to determine the salaries of appellees and all other deputies and assistants appointed under said section of the constitution, and the legislature has no power or right to fix the salaries of such deputies and assistants or to raise or lower their salaries. The act in question, therefore, can have no binding effect as to appellees, and as to all that class of deputies and assistants provided for by said section of the constitution, and whose salaries the legislature has no power to determine, it is void.

The presumption must be indulged that the legislature only intended the act to apply to those officers and employees whom the legislature had the right or power to control and provide for in such a bill, and we are not warranted, therefore, in holding that it would not have passed the act had it known that the act could not apply to the class of officers to which appellees belong. Appellees, however, have a right to have appellant perpetually enjoined from deducting and retaining $2 per month, or any other sum, from their salaries and the salaries of any of the other officers and employees in the class to which appellees belong; but the act should not be held absolutely void as to all officers and employees of Cook County, as was done by the decree of the court in said cause.

For the reasons aforesaid, the appellees were entitled to equitable relief, as was apparent from the allegations of their bill. The court, therefore, properly overruled the demurrer to the bill. Appellees were not entitled, however, to have the act declared entirely void as to all such officers and employees provided for therein.

PENSIONS FOR EMPLOYEES—REMOVAL FROM PENSION LIST BECAUSE OF ALLOWANCE OF COMPENSATION—*Dickey* v. *Jackson et al.*, *Supreme Court of Iowa* (*Dec. 11, 1917*), *165 Northwestern Reporter, page 387*.—George W. Dickey was a member of the police force of the city of Des Moines, and a contributor to the policemen's pension fund, for which 1 per cent of his wages was regularly deducted. On October 9, 1914, in pursuance of orders, he engaged in certain physical tests, in the course of which he fell and received disabling injuries. He was placed upon the pension roll at the rate of $41.25 per month, which was one-half his salary. This sum was paid until July 7, 1916, when the trustees of the pension fund removed him from the pension roll and refused further payments. The reason for this action was that an award had been made to Dickey under the workmen's compensation act of $10 per week for 52 weeks until

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October 23, 1915; $8 per week from that date until March 23, 1916; and $5 per week until the entire period of compensation should reach 300 weeks. The district court of Polk County, on trial of the suit of Dickey against the trustees and the city treasurer, annulled the order taking him from the roll, and directed the treasurer to make payment of the monthly pension. This judgment was affirmed by the supreme court after a review of the provisions of the pension act, which is compulsory on all cities having an organized police department, and of the compensation law, and the conclusion was reached that the distinction between the forms of benefit was such as to make the rulings against the right to double pensions inapplicable.

Attention was also called to the amendment of the compensation law, effective July 4, 1917, by which officers and employees of cities who are eligible to pensions are excluded from the operation of the act, thus indicating the right of the claimant to both benefits under the law as it existed when his rights arose, but also preventing a continuance of such a situation in cases occurring in the future.

PEONAGE—HOLDING TO WORK BY THREATS AND PUTTING IN FEAR.—*Bernal* v. *United States, United States Circuit Court of Appeals, Fifth Circuit (Apr. 6, 1917), 241 Federal Reporter, page 339.*—Aurelia B. Bernal was convicted on a charge of peonage and sentenced to imprisonment for two and one-half years. It was alleged that when Rosenda Nava, a Mexican alien, was at work as a domestic servant at Laredo, Tex., for $4 per week, the respondent represented to her that she was the proprietor of a small hotel at San Antonio, and engaged her to work as a chambermaid at $6 per week. The respondent paid her railroad fare and took the woman to a house of prostitution operated by her. The witness refused to practice prostitution and was set to work at menial domestic tasks, without pay and with very little to eat, and told that she could not leave the house until she paid back the amount of the fare, and that if she tried to leave the immigration officers would be notified and would imprison her. The employee did not have any money and did not know her way around town and remained in fear of the respondent. Finally she succeeded in sending a note to a cousin, and the latter sent a policeman who removed her from the house and eventually restored her to her family. Her testimony as to these facts were corroborated by two girls at the house, and in part by the respondent herself. The jury which considered the case reported, after deliberating from Saturday until Monday, that they stood 8 to 4. The judge charged them as to their duty to agree, and they finally brought in a verdict

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of guilty. The court, one of the three judges dissenting, affirmed the judgment, Judge Foster saying in the opinion delivered by him:

The law takes no account of the amount of the debt or the means of coercion. It is sufficient to constitute the crime that a person is held against his will and made to work to pay a debt. (Clyatt *v.* U. S., 197 U. S. 207, 25 Sup. Ct. 429 [Bul. No. 60, p. 695].) The court charged the jury clearly and explicitly on the law. The credibility of the witnesses, the weight and sufficiency of the evidence, and the resolving of the conflicts in the testimony were matters for the jury. If they believed the witness Rosenda Nava, her testimony was sufficient to support the indictment.

The defendant complains most loudly, however, because the jury was held from Saturday until Monday, and of the supplemental charge of the court. It is not unusual for juries to be held over Sunday in criminal cases; but, in any event, this was a matter resting in the sound discretion of the court, and no abuse of discretion is shown. Neither was there error committed in giving the supplemental charge.

Railroads—Headlights—Federal and State Laws—*Louisville & Nashville R. Co.* v. *State*, *Court of Appeals of Alabama* (*June 30, 1917*), *76 Southern Reporter*, *page 505*.—The railroad company named was convicted by the criminal court of Jefferson County of violation of the State law enacted in 1915, relating to locomotive headlights. The court of appeals, however, being itself of the opinion that the law was invalid, certified to the supreme court the question of its validity. The supreme court, Judge Thomas delivering the opinion, agreed that the statute had no application to engines engaged in interstate commerce, because, Congress having acted in the field, all State legislation on the subject was of no force.

The act of Congress of March 4, 1915, was by its terms to take effect six months after its passage. It extended the provisions of the act of February 17, 1911, relating to locomotive boilers and their appurtenances, " to apply to and include the entire locomotive and tender and all parts and appurtenances thereof." The inspectors were given the same powers as to these matters as they had had with reference to boilers. The original act provided for the proposal of rules by the chief inspector to be binding upon the carriers after approval by the Interstate Commerce Commission. The commission took under consideration, and finally approved rules similarly proposed under the amendment of 1915, Nos. 29 and 31, relating to headlights, but these were at first objected to by the carriers, and the approval was delayed until after the commission of the offenses under the State law, for which the company was convicted. It was held, however, that Congress had by the passage of the act occupied the field from the time of such enactment.

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Railroads—Safety Appliances—Handholds—Suspension of Operation of Statute—*Illinois Central Railroad Co.* v. *Williams, Supreme Court of the United States* (*Jan. 8, 1917*), *37 Supreme Court Reporter, page 128.*—George R. Williams, a switchman for the company named, brought action against it for injury, alleging as negligence a violation of the Safety Appliance Act. The employee was climbing to the top of a box car by means of a ladder on its side for the purpose of setting the brake, when a handhold at the top of the ladder and on the roof of the car gave way, causing him to fall to the ground. Judgment in his favor in the trial court was affirmed by the Supreme Court of Mississippi, and the company again appealed. The second section of the Safety Appliance Act of April 14, 1910, requires, among other appliances, secure handholds or grab irons at the top of ladders. The third section provides for the fixing by the Interstate Commerce Commission of standards for the appliances mentioned in section 2. By an order of March 13, 1911, the commission set such a standard and allowed an extension of time of five years from July 1, 1911, for conformity to the same. The company contended that this order suspended the operation of section 2 also until the date named. This construction the Supreme Court did not accept, and it affirmed the judgment below. Mr. Justice Clarke delivered the opinion, the concluding portion of which is as follows:

To change these safety appliances on all the cars in the country from what they were as contemplated by sec. 2—" secure," but differing " in number, dimensions, location and manner of application "—to what they must be when standardized to meet the requirements provided for in sec. 3, was regarded by Congress as a work so great and expensive that it wisely committed to the informed discretion of the Interstate Commerce Commission the power and duty of determining the length of time which the carriers should be allowed in which to accomplish it. To give this discretion to the commission is the function, and the only function, of the proviso of sec. 3, and the claim that, by construction, power may be found in it to suspend sec. 2, is too forced and unnatural to be seriously considered.

Seamen—Contracts—Release—*The Moana, United States District Court, Northern District California, First Division* (*Oct. 30, 1916*), *236 Federal Reporter, page 809.*—John Suarez and three others libeled the British steamer *Moana* for their wages on a return trip from New Zealand to San Francisco. They were engaged by the assistant engineer to take the place of four others who had been employed but at the last moment failed to appear. They claimed that they were told by him that the voyage upon which they were entering was to be from San Francisco to New Zealand and return,

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and that otherwise they would not have gone on board. They could not read English, nor speak it to any extent, and on signing articles for the voyage three days later they were again told, as they testified, that the articles were for a round trip; as a matter of fact they were for one way only, and the purser testified that this was explained to them. At New Zealand they were discharged, received their wages, and signed releases accordingly. They wished to return on the boat as employees, but were not permitted to do so, and returned as third-class passengers. They were awarded damages to the amount of their wages on the return, Judge Dooling saying in the opinion written by him:

The only testimony before the court concerning what the engineer's assistant told them at the time he procured them to go on board shortly before the vessel sailed is the testimony of the libelants. From this and the attendant circumstances the court must find that libelants understood before they went aboard the *Moana* that they were shipping for a voyage from San Francisco to New Zealand and return, and under the circumstances the finding will be that such was their contract. That being so, it is not of much materiality to determine just what was done on board ship at the time of signing the articles, although I believe the libelants then understood they were signing articles for the return trip. There was, however, little else that they could then do, save to sign such articles as were presented to them. The ship in San Francisco was short-handed, and the time for her departure was near. It was necessary to have men, and the assistant engineer was apparently authorized to secure them, and did so. Under such circumstances his contract was the contract of the ship. That these seamen, speaking little English, signed off in a distant land before they could get the money then earned, does not seem to me to be a matter of much importance. They were prevented from returning as employees of the ship because of the opposition of the Sailors' Union in New Zealand, of which they were not members. The master, perhaps, did not know just what arrangement the assistant engineer had made with libelants; but, as such assistant was apparently authorized to employ the men, and did so, the ignorance of the master as to the terms of such employment can not lessen the responsibility of the ship. Libelants were employed for a round trip from San Francisco to New Zealand and return, and are entitled to the wages prayed for.

SEAMEN — WRONGFUL DISCHARGE — OVERTIME — WAGES — *Alaska Steamship Co.* v. *Gilbert, United States Circuit Court of Appeals, Ninth Circuit (Oct. 23, 1916), 236 Federal Reporter, page 715.*— Arthur J. Gilbert proceeded by libel against the steamship *Seward* to recover his wages for a voyage beginning and terminating at Seattle, his fare from Juneau, Alaska, to Seattle, his expenses at Juneau, and damages alleged at $500. He was employed on board the vessel as night watchman at Seattle September 25, 1915. No

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hours of service were fixed, but on a previous trip he had been on duty from 6 p. m. to 6 a. m., and he began to observe the same hours on this trip. On October 3, while preparing, at 5.45 p. m., to go on watch, the first mate asked him why he was not on watch. He replied that it was not 6 o'clock yet, and the mate told him he was supposed to be on watch at 5 o'clock. The watchman remarked that that would mean an hour's overtime for him, and before the conversation ended the mate asked him whether he would keep the hours demanded without pay for overtime, and he replied that he would not. He proceeded with his duties, and the next day he was put on shore at Juneau. Wages up to that point were tendered and refused. It was 10 days before he was able to get passage for Seattle. The court adopted the opinion of Judge Neterer, of the district court, which held that the seaman was entitled to his wages, his necessary expenses at Juneau, and his fare back to Seattle. A part of this opinion is as follows:

The fact that no definite hours were prescribed for him by the shipping articles, or by the agreement between the Puget Sound Shipping Association and the Sailors' Union of the Pacific, and the hours of 6 to 6 having been given him on a prior voyage, and he having continued under the same hours upon this voyage, and the first intimation he had that the hours should be changed was at the time of this conversation, would indicate suggestion for extra time, as it would add an hour to the time previously required of him. There is no showing of disqualification or unfitness for service, nor mutinous or rebellious or contumacious conduct. Under the circumstances, the mate should have dealt with the libelant in a more indulgent spirit. Libelant should not have used the expression to his superior officer which he did, and yet there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime, and the mate would not, under the circumstances, have the right to discharge him.

Sunday Labor—"Factory"—Pasteurizing and Bottling Milk—*People* v. *R. F. Stevens Co.* (*Inc.*), *Supreme Court of New York, Appellate Division, Second Department* (*May 11, 1917*), *165 New York Supplement, page 39.*—The company named was convicted in the court of special sessions, city of New York, of a violation of the section of the labor law prohibiting the operation of factories on Sunday. The question was presented whether an establishment for pasteurizing and bottling milk is a factory. Judge Blackmar delivered the opinion, in which the decision of the lower court was reversed, and the employment of a man in pasteurizing was held not to constitute a breach of the statute. The definition of a factory in section 2 of the labor law, as interpreted in a former decision, was first quoted, showing that to bring an establishment within that definition "there must

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be some manufacturing." That the operations referred to are not manufacturing was held to be determined by a previous decision, though it related not to the regulation of labor but to taxation.

One subsection of the act contains an exception of certain establishments, including milk-bottling plants. It was argued that the exception would be useless and meaningless unless such establishments were factories under the act. The court held, however, that this would not be presumed, since the exceptions were not originally included, and "that the exemptions were passed from excess of caution." It was also remarked that the person upon whose employment the charge was based in the present case was engaged in pasteurizing rather than bottling.

Sunday Labor—Necessity—Moving-Picture Theater in City Near Training Camp—*Rosenbaum* v. *State*, *Supreme Court of Arkansas* (*Dec. 10, 1917*), *199 Southwestern Reporter*, *page 388.*—Louis Rosenbaum was convicted of violation of a statute in operating a moving-picture show in the city of Argenta, Ark., on Sunday, July 29, 1917. The statute of the State forbidding Sunday labor is similar to the usual one, and excepts services of "daily necessity, comfort, or charity." It was sought to make the point that the opening of moving-picture houses in Argenta and Little Rock was a necessity under the circumstances existing, since some thousands of soldiers in Camp Pike and Fort Logan H. Roots near by, were at liberty on Sundays only, and in need of such recreation. Judge Wood delivered the opinion, and reviewed at some length the history of the institution of the Sabbath, or Sunday, and the reasons for its observance. The conclusion was that no necessity for the labor done was shown, and the judgment of conviction was affirmed. A brief quotation is made from the concluding portion of the opinion, as follows:

Excluding from our consideration the opinion evidence, reasonable minds under a correct interpretation of the statute could not reach any other conclusion than that the labor performed by appellant and his employees was not that of daily necessity, comfort, or charity. The qualifying word "daily" is significant of the kind of necessity. It must be such as is required to meet a daily need.

In construing the term "necessity," we have given it a liberal rather than a literal interpretation, holding that an absolute unavoidable physical necessity is not meant, but rather an economic and moral necessity. It is said in Shipley *v.* State, 61 Ark. 219, 32 S. W. 489, 33 S. W. 107:

"If there is a moral fitness or propriety for the work done in the accomplishment of a lawful object, under the circumstances of any case, such work may be regarded a necessity, in the sense of the statute."

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Judge Wood then refers to decisions upon facts very closely resembling those in the present case, where necessity was held not to exist.

SUNDAY LABOR—OBSERVANCE OF JEWISH SABBATH—SUIT TO RESTRAIN PROSECUTION—*Cohen* v. *Webb, Court of Appeals of Kentucky (Mar. 23, 1917), 192 Southwestern Reporter, page 828.*—Samuel Cohen brought suit against U. G. Webb, police judge, to obtain an injunction or a writ of prohibition to prevent the latter from enforcing the Sunday law against the former. Cohen, in good faith, kept the Jewish Sabbath, transacting no business from sundown on Friday until sundown on Saturday. Repeated prosecutions were instituted against him, and the judge instructed the jury that such observance did not exempt a person from the operation of the Sunday laws, as it did not constitute the observance of any other calendar day as the Sabbath. On conviction fines were levied, each less than $20, so that no appeal could be taken to a higher court, and on nonpayment Cohen was imprisoned, and sought a remedy as stated. The court held that injunction or prohibition would not lie under the circumstances, but also held that the keeping of the Jewish Sabbath was sufficient to exempt one from keeping Sunday, and remarked that undoubtedly the police judge would be governed in the future by this opinion of the supreme court. Judge Clay, who delivered the opinion, said in part:

Clearly, it was not the purpose of the legislature to interfere with the Jewish conscience and require the members of that sect to continue to rest after their day of rest had ended. Of course, in speaking of Sunday, the statute refers to Sunday according to the Christian calendar and provides for its observance as such. When it comes to provide for an exemption, the controlling feature is the observance of another Sabbath than Sunday and not the observance of a mere statutory day. In other words, the purpose of the statute is to give to each sect its particular Sabbath or day of rest. Any other view of the statute would require the plaintiff not only to observe his own Sabbath for a period of 24 hours, but to observe a period of time not covered either by his Sabbath or the Christian Sabbath. We, therefore, conclude that both the police court and circuit court erred in holding that plaintiff was guilty under the statute, notwithstanding the fact that he regularly observed the Jewish Sabbath from sundown Friday evening to sundown Saturday evening.

WAGES — MINIMUM-WAGE LAW — CONSTITUTIONALITY — *State* v. *Crowe, Supreme Court of Arkansas (June 4, 1917), 197 Southwestern Reporter, page 4.*—The Legislature of Arkansas passed, in 1915, an act, No. 191, "to regulate the hours of labor, safeguard the health,

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and establish a minimum wage for females in the State of Arkansas." In the present case the validity of that part of the statute relating to the minimum wage was in controversy, and the circuit court of Sebastian County had given judgment for the defendant Crowe, against whom proceedings had been instituted by the State, on the ground that the law had not been legally enacted. The supreme court, however, held the law constitutional, and reversed the judgment, remanding the case for further proceedings.

As to the contention that the act violates the fourteenth amendment, Judge Hart cited the Oregon decision in Stettler *v.* O'Hara, 69 Oreg. 519, 139 Pac. 743 (Bul. No. 169, p. 173), and referred to its affirmance by the United States Supreme Court without opinion, awaiting which decision the Arkansas court had deferred the announcement of its own. Decisions were cited and quoted affirming the validity of laws limiting the hours of labor of and otherwise affecting women, as were also decisions of the Supreme Court of the United States and of State courts upholding limitations to the right of free contract, enacted under the police power. The concluding portion of the opinion is for the most part as follows:

It is a matter of common knowledge of which we take judicial notice that conditions have arisen with reference to the employment of women which have made it necessary for many of the States to appoint commissions to make a detailed investigation of the subject of women's work and their wages. Many voluntary societies have made this question the subject of careful investigation. Medical societies and scientists have studied the subject, and have collected carefully prepared data upon which they have prepared written opinions. It has been the consensus of opinion of all these societies, medical and other scientific experts, that inadequate wages tend to impair the health of women in all cases and in some cases to injuriously affect their morals. Indeed, it is a matter of common knowledge that if women are paid inadequate wages so that they are not able to purchase sufficient food to properly nourish their bodies, this will as certainly impair their health as overwork. It is certain that if their wages are not sufficient to purchase proper nourishment for their bodies the deficiency must be supplied by some one else or by the public, if they are to keep their normal strength and health. The investigations above referred to show that it has become absolutely necessary for many women to work to sustain themselves, and that they have no one to assist them. The strength, intelligence, and virtue of each generation depends to a great extent upon the mothers. Therefore the health and morals of the women are a matter of grave concern to the public, and consequently to the State itself.

The members of the legislature come from every county in the State. The presumption is that it passed the statute to meet a condition which it found to exist and to remedy the evil caused thereby.

As said in Stettler *v.* O'Hara, supra, we believe that every argument put forward to sustain the maximum hours law or the restriction of places where women work applies equally in favor of the

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minimum wage law as also being within the police power of the State and as a regulation tending to guard the public morals and the public health. Of course, the legislature could not fix an unreasonable or arbitrary minimum wage, but it must be fair and reasonable. It has been said that as to what is fair and reasonable there is no standard more appropriate than "the normal needs of the average employee, regarded as a human being living in a civilized community."

WAGES—MINIMUM-WAGE LAW—CONSTITUTIONALITY—*Williams* v. *Evans et al., Supreme Court of Minnesota (Dec. 21, 1917), 165 Northwestern Reporter, page 495.*—E. W. Williams instituted a suit to enjoin Eliza P. Evans and others, members of the minimum-wage commission of Minnesota, from enforcing orders fixing minimum wages. Another similar suit by the A. M. Ramer Co. was tried together with the Williams case. The act, passed in 1913, establishes a minimum-wage commission and provides for the determination by it of minimum wages for women and minors. Employers in any occupation are prohibited from employing any worker at less than a minimum wage determined and established by the commission. This determination is made after investigation and public hearings, is effective 30 days after issuance of an order, and may be applicable to the whole State or a portion thereof; but such order may be issued only if the commission finds that one-sixth or more of the women and minors employed in the occupation under consideration are receiving less than living wages. The members of the commission duly issued certain orders fixing wages, and the employers brought these actions to restrain their enforcement, on the ground that the statute is unconstitutional. The district court of Ramsey County held the law void and issued a temporary injunction. The supreme court took the opposite view, upheld the law and reversed the order for an injunction. Judge Hallam, speaking for the court, expressed the opinion that such limitations on legislative power as were contained in the State constitution are not more restrictive than those of the fourteenth amendment to the Federal Constitution, and therefore directed attention to the question whether the act violated the provisions of this amendment. Continuing, the opinion reads as follows:

The pertinent part of the fourteenth amendment reads:

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

This guarantees to the citizen liberty of contract and liberty to conduct his business affairs in his own way. [Cases cited.] This right it is claimed has been infringed by this statute.

The liberty of contract guaranteed by this amendment is not absolute. It is subject to the power of the State to legislate for certain permissible purposes. [Examples given and cases cited.]

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The extent of the police power, giving legislatures authority to restrict liberty of contract, and the principles governing its exercise are examined, and the opinion continues:

Bearing these principles in mind, we must determine whether this statute is within the proper field of legislation.

There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the workers and of future generations as well.

It is a strife for employer and employee to secure proper economic adjustment of their relations, so that each shall receive a just share of the profits of their joint effort. In this economic strife, women as a class are not on an equality with men. Investigating bodies, both of men and of women, taking all these facts into account, have urged legislation designed to assure to women an adequate working wage. The legislatures of 11 States have passed laws having the same purpose as the one here assailed.

It is not a question of what we may ourselves think of the policy or the justification of such legislation. The question is: Is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education, or good order of the people and are "greatly and immediately necessary to the public welfare"? If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem to be solved by the exercise of legislative judgment and discretion. (Holden *v.* Hardy, 169 U. S. 366, 398, 18 Sup. Ct. 383 [Bul. No. 17, p. 625].)

We think sufficient basis exists. It is not necessary that we should hold that statutes of this kind applicable to men would be valid. We think it clear there is such an inequality or difference between men and women in the matter of ability to secure a just wage and in the consequences of an inadequate wage that the legislature may by law compensate for the difference. That there is such difference, has been recognized as an economic fact by the United States Supreme Court. (Muller *v.* Oregon, 208 U. S. 412, 28 Sup. Ct. 324 [Bul. No. 75, p. 631]; Miller *v.* Wilson, 236 U. S. 373, 35 Sup. Ct. 342 [Bul. No. 189, p. 133].) Two cases have arisen in other States involving the constitutionality of minimum-wage laws for women. In both the laws were sustained. Stettler *v.* O'Hara, 69 Oreg. 519, 139 Pac. 743 [Bul. No. 224, p. 220]; State *v.* Crowe (Ark.) 197 S. W. 4 [see p. 191].

We sustain the principle of minimum-wage legislation as applied to women. By like reasoning the principle may be sustained as applied to minors.

The objection that the law embodies an unlawful delegation of legislative power to the commission was taken up and the principles

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governing the question examined by a reference to the decisions, concluding with an extract from the opinion in an Ohio case, quoted in Field *v.* Clark, 143 U. S. 649, 693, 694, 12 Sup. Ct. 495. This quotation and the court's further discussion are given herewith:

"'The true distinction' * * * is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of law. The first can not be done; to the latter no valid objection can be made."

Respondent contends that this act was not a complete law when it left the legislature and that there was no complete law until after the commission made an order and that the power to determine "when and where there shall be any law, and what it shall be, is to be exercised at the whim and caprice of the commission."

Let us address ourselves to this question. As above stated, section 20 defines a living wage. Section 12, in effect, enjoins every employer to pay a living wage "as defined in this act and determined in an order of the commission."

We think this must be construed as establishing a living wage as defined in the act as the lawful minimum wage, and as fixing a living wage as so defined as the standard by which the commission must be guided in determining a minimum wage for any occupation. The determination of a minimum wage by the commission is accordingly a determination of a fact "upon which the law makes * * * its own action depend."

We do not overlook the fact that the statute can not be effectively executed nor its penalties enforced until the commission establishes a minimum wage, nor the fact that the commission is given a discretion as to when to make the investigation into any particular occupation which may result in an order fixing a minimum wage in that occupation. These provisions vest "discretion as to its execution to be exercised under and in pursuance of the law," and they do not prevent the act from being a complete law nor render it invalid. There are abundant instances of the application of this principle. [Illustrations cited.]

The principles stated are now well recognized. The act contains no delegation of legislative power.

Minor objections also were overthrown, with the result, stated above, that the law was affirmed as valid.

WAGES—PAYMENT IN SCRIP—CONSTITUTIONALITY OF STATUTE—FREEDOM OF CONTRACT—NOTE GIVEN FOR ACCRUED WAGES—*Ex parte Ballestra, Supreme Court of California (Nov. 16, 1916), 161 Pacific Reporter, page 120.*—John Ballestra petitioned for a writ of habeas corpus for his release, he having been arrested upon the charge of violating the California statute forbidding payment of wages in scrip or any kind of order, etc., unless redeemable in full and immediately in lawful money. He questioned the constitutionality of this statute,

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but it was upheld and the prisoner remanded to custody for trial. Judge Shaw, in delivering the opinion for the court, said:

The right to make contracts, like other personal and property rights, is subject to reasonable regulation designed and calculated to promote the general convenience, prosperity, and welfare. Laws having a reasonable tendency to accomplish these results, and not imposing unreasonable burdens upon individuals, are valid. The provisions of the statute in question do not transgress this rule. As applied to ordinary transactions between employers and employees, of the kind embraced within its terms, the statute is, in our opinion, valid and constitutional.

The affidavit on which Ballestra is held in custody charged, in the language of the statute, that on October 30, 1915, in Sonoma County, Cal., Ballestra "did willfully and unlawfully issue in payment of and as evidence of indebtedness for wages due an employee, to wit: Pasquale Barbaries," a certain note set forth in the affidavit, for the amount of wages due Barbaries, payable two years after date, and not on demand, no part of which has been paid. This clearly states an offense embraced in the description given in the statute.

WAGES—SECURITY FOR PAYMENT—CONTRACTORS' BONDS—*Northwestern National Bank of Bellingham* v. *Guardian Casualty & Guaranty Co., Supreme Court of Washington (Dec. 12, 1916), 161 Pacific Reporter, page 473.*—Brooks & Olsen contracted with the city of Bellingham for the construction of a water main and gave a bond, with the guaranty company named in the title of the case as surety, conditioned upon the payment of claims for labor and materials. The contractors made an arrangement with the bank named to make loans for the carrying on of the work, agreeing to give the bank as security assignments of all warrants issued by the city under the contract. Such assignments were given and filed with the city comptroller. Certain warrants were paid by the city to the bank, leaving a balance of $2,300 and interest due on the notes given by the contractors to the bank. After a time the bank ceased to make advances to the contractors upon their notes, but cashed time checks and vouchers issued by the contractors for labor and materials, taking the checks and vouchers with a formal assignment upon them. The contract did not, as is often the case, contain a provision for the payment of a certain percentage of the estimated value of work done to the contractors and the withholding of the balance to meet unpaid claims for labor and materials, but did provide that the city might withhold any and all payments until satisfied that wages and claims for materials had been met. Action was brought by the bank to recover from the guaranty company the $2,300 due on the notes and several thousand dollars, the amount of time and material checks cashed. The city showed that after making the payments to the

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bank under the assignments of warrants and paying other claims for labor and materials it still had nearly $3,400, which it paid into court for distribution. Besides claims for materials and those clearly for labor, properly speaking, the bank had purchased those of two subcontractors and of the bookkeeper and stenographer for the contractors. The bank contended for the payment of its $2,300 out of the money paid into court, on the ground that the contractors had assigned to it all moneys to become due, as security for their notes given it. The guaranty company asserted that the bank's claim to the $2,300 was inferior to that of the laborers and material men. The court held that, since the assignments taken from the contractors by the bank were filed with the city comptroller prior to any notice that labor and material claims had not been or would not be paid, and since the contract contained no provision for an absolute reserve of any portion as security for such claims, and since nothing had been withheld at that time for that purpose, the bank's claim was prior.

As to the claims of laborers and material men assigned to the bank, the guaranty company contended that the bank, having agreed with the contractors to advance them money, had a right to pay such claims under this agreement, but none to purchase them; but the court held that the bank had such a right like any one else.

The company next contended that the laborers and material men could assign rights of action against the contractors, but not their rights to proceed against the surety on the bond. The court held that the right under the bond attached to the other right and passed by the assignments. The claims of the subcontractor and the bookkeeper were held not lienable, and the bank, therefore, not entitled to recover for their amount. The net result was that the sum held by the court was applied, first, to the $2,300 and interest, constituting the balance on the notes, and then to the claims for labor and materials held by the bank. The bank was then given judgment against the guaranty company for the balance of these claims, exclusive of those of the subcontractors and the bookkeeper.

WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—*Arizona Power Co.* v. *State, Supreme Court of Arizona* (*June 23, 1917*), *166 Pacific Reporter, page 275.*—The company named was convicted of the offense of refusing to pay one of its employees the wages due him at the time of his quitting its service, as provided in sections 705, 706, Penal Code, 1913. There was no dispute as to the facts, but the company questioned the validity of the law, first, because, as it claimed, while the penalty provided was a fine, imprisonment for debt might be a consequence of proceedings for its collec-

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tion. The court, speaking through Judge Ross, held that the corporation could not sustain this objection, as is shown by the following extracts from the opinion:

It is not possible, in fact or in law, to imprison appellant, either on mesne or final process; it can not, as an individual, be arrested or committed to jail.

If the fine is ever collected, it will not be by jailing the corporation, but by execution against its property. The constitutional inhibition is against imprisonment for debt; it does not prohibit the use of other means to enforce the payment of a just debt. The stigma of imprisonment is forbidden, and while the debtor, honest and dishonest, is thus protected by the Constitution, the legislature is not denied the power to impose penalties or fines as a means of inducing an unwilling and litigious employer to make payment of wages promptly and at short intervals when the public welfare demands and requires it.

The appellant is not in a position to challenge the constitutionality of the law on the ground of its application to individuals; that question can only be raised by parties whose rights are involved or affected thereby.

Arguments that the contract contained in the charter of the corporation was impaired by the law, and that the classification, by which corporations and not other employers similarly situated were affected, was unreasonable and arbitrary, and therefore unconstitutional, were overruled by the court, which then said:

In the case of State *v.* Missouri Pacific Railroad Co., 242 Mo. 339, 147 S. W. 118 [Bul. No. 112, p. 134], every conceivable objection was urged against the constitutionality of the law, which is practically the same as ours. All of these objections were taken up and fully discussed by the court and held to be without merit. We do not deem it necessary to set forth here the reasons given by the court in support of its decision, but suffice it to say that they seem to us to be in line with the general trend of the more recent development and expansion of the law under what is known as the police power of the State.

A further contention was that the act was void for uncertainty because in case the employee quits it is required that the employer shall make payment of wages due "at once." It was claimed that this must mean within a reasonable time, which would make its application uncertain. The question of the proper interpretation is discussed, and the opinion concludes as follows:

The statute does not, in terms, require the employee to demand of the employer to pay, or require a state of facts showing the futility of demand, yet without it no offense is made out, for it is possible that the employee may refuse payment, or can not be found, or is incapacitated. A demand and refusal to pay are essential elements of the crime. So, under our law, notice to the employer by the employee that he has quit, a demand for the payment of his wages, and a refusal to pay are essential elements of the offense defined. There

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can not be a failure or refusal to pay until notice is given by the employee to the employer that he has quit and a demand made for his wages.

The admitted facts of the case are that one T. P. Caughlin, an employee of the appellant, quit work on the 23d day of September, 1915, at which time he notified the appellant that he had quit. The wages due him at that time was the sum of $22.07, the payment of which was then demanded. The appellant failed and refused to pay the wages, and did not pay them until on or about October 5th, appellant's regular pay day. No excuse for failing to pay the wages due Caughlin was offered, other than that the law was invalid.

We think clearly the prosecution made out a case under the law, and that the judgment of conviction should be affirmed; and it is accordingly ordered.

Wages—Ten-hour Law—Overtime—Effect of Settlement and Release—*Sumpter* v. *St. Helens Creosoting Co., Supreme Court of Oregon (May 1, 1917), 164 Pacific Reporter, page 708.*—James L. Sumpter brought action for pay for overtime services from July 1, 1913, to September 27, 1914, as an assistant engineer, his regular wages being $2.50 per 10-hour day. The amount of overtime was 435 hours, and the amount claimed to be due was computed at 37½ cents per hour. The company's claim that the 10-hour law, on which the action was based, was unconstitutional was overthrown, that question having in the meantime been settled by the decision in the case of State *v.* Bunting, 139 Pac. 731 (Bul. No. 169, p. 120), affirmed by the Supreme Court of the United States in Bunting *v.* Oregon, 243 U. S. 426, 37 Sup. Ct. 435 (Bul. No. 224, p. 160). The company then presented in evidence the monthly pay checks, which were so arranged as to embody statements of the account and to make the indorsements a satisfaction of the accounts; also the time checks, which when signed constituted receipts in full for labor to date. The judgment in the circuit court of Columbia County had been for the employee, but this was reversed, the supreme court holding that it was competent for an employee, by settlement on the basis of the regular pay without objection, to bar his rights for pay for the overtime. Judge Benson delivered the opinion, in concluding which he said:

It appears to us that this state of the pleadings and the evidence establishes beyond any question that there was an account stated and a settlement which constitutes a bar to this action. Plaintiff argues that such a conclusion is calculated to render the statute ineffective, but we can not agree with this contention. The law provides for a remedy in the shape of a criminal prosecution, but it nowhere prohibits the laborer from waiving his civil remedy after the labor is performed. It must be conceded that there is no power to compel plaintiff to prosecute this action and neglect to do so would be a complete waiver. An accounting and settlement is another way of

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reaching the same result. We conclude that the defendant was entitled to a directed verdict, and a judgment will accordingly be entered here in its favor.

WEEKLY DAY OF REST—"FACTORY"—MACHINE SHOP OF TRANSIT COMPANY—*People* v. *Transit Development Co., Supreme Court of New York, Appellate Division, Second Department* (*May 25, 1917*), *165 New York Supplement, page 114.*—The court of special sessions of the city of New York found the company named guilty of the employment of one Machiels, a machinist, for seven days without a rest period of 24 consecutive hours, as required by statute. The company was fined $20, and appealed. The decision turned upon the question whether the place of employment was a factory under section 2 of the labor law. Power houses, etc., other than construction or repair shops, owned and operated by public-service corporations, are exempted. The company involved was auxiliary to a street railway company. The judgment of conviction was affirmed, the establishment where the work was performed being held to be a construction or repair shop. Judge Stapleton concluded the opinion delivered by him as follows:

The appellant argues that the fair and reasonable meaning of the words "construction or repair shops" should be limited to those repair and construction shops where general construction and repair work is carried on, and should not be extended to include purely maintenance work in a generating plant. It further argues that the phrase "other than construction and repair shops" modifies "other structures" and does not refer back to power houses, generating plants, barns, storage houses, sheds." We are not convinced by either argument.

From the operation of the statute, the legislature, by definition, specifically exempted power houses and generating plants owned or operated by a public-service corporation; but then, with particularity, it excludes repair shops from the benefit of the exemption. No distinction is expressed between a shop in which emergency repairs are made and a shop in which general repairs are made. The workshop in which Machiels was employed is a repair shop. Had it been housed in a building separate and apart from the power house, there would not, we think, be any question that those employed in it are entitled to 24 consecutive hours of rest in every calendar week. Why should the circumstance that it is operated under the same roof make a difference? We can not reason why.

WORKMEN'S COMPENSATION — ACCIDENT — FIREMAN CONTRACTING PNEUMONIA FROM WETTING—*Landers* v. *City of Muskegon, Supreme Court of Michigan* (*June 1, 1917*), *163 Northwestern Reporter, page 43.*—Mary B. Landers, widow of William Landers, instituted proceedings to secure compensation for the death of her husband, who

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had been employed as a fireman by the city named. On the morning of December 30, 1915, he was engaged in assisting to put out a fire in the hold of a steamer wintering in the port. The boat stood out of the water 40 feet, and much water from the hose rebounded upon the firemen, so that Landers became very wet. Twelve hours were required to extinguish the fire. He was taken ill the next morning, quit work on January 2, and died of pneumonia January 13. The claimant was awarded the expense of medical and hospital treatment and medicines, and $7.81 per week for 300 weeks. The award was reversed by the court on the ground that the occurrence was not an accident under the law, Judge Bird for the court saying in part:

Landers was employed as a fireman. It was a part of his regular duties to go to fires and help extinguish them. In doing so, it was not an unusual thing for him to get wet. Not only does the proof show, but we think it is a matter of common knowledge, that firemen are subjected to exposure and drenching while attempting to extinguish fires.

We must therefore conclude that pneumonia was brought on, not by an unexpected event, but by an event which was an incident to his regular employment.

At about 11 o'clock in the forenoon, there was a sudden rush of water from the upper deck, which fell onto and drenched the firemen as they were working around the boat. This is assigned as the unexpected event which constituted the accident. The uncontradicted proof is that they were wet through two or three hours before this took place. We think this incident should be classed among the ordinary ones attending the duties of a fireman, and not as an accident.

If it can be said in the present case that the diplococcus germ was dormant in the system of the deceased, and that it was aroused to activity by his exposure at the fire, the case must fail, because the thing which aroused the germ into activity was caused by events which were incident to his regular employment, and not by the unusual and unexpected event.

WORKMEN'S COMPENSATION—ACCIDENT—TYPHOID FEVER FROM DRINKING INFECTED WATER—*State ex rel. Faribault Woolen Mills Co. et al.* v. *District Court, Rice County, et al., Supreme Court of Minnesota (Oct. 26, 1917), 164 Northwestern Reporter, page 810.*—An employee of the company named was awarded compensation by the district court, the injury alleged being typhoid fever said to have been contracted from drinking infected water furnished in the factory for the use of the employees. It is stated that if this constituted an "accident" within the definition contained in the law, the evidence was probably sufficient to sustain the findings of the district court. The law provides that the word "accident" shall "be construed to mean an unexpected or unforseen event, happening suddenly and violently, with or without human fault and producing at

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the time injury to the physical structure of the body." After reciting this definition, the opinion, written by Judge Taylor and reversing the award, says:

The evidence shows that typhoid fever is a germ disease; that it is produced by taking typhoid bacilli into the alimentary canal; that no deleterious effects result until the bacilli taken into this canal have multiplied enormously; and that it requires more than a week after the infection for the disease to develop sufficiently for its symptoms to be discernible. The disease does not result from an event which happens "suddenly and violently," nor from an event which produces "injury to the physical structure of the body" at the time it happens.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—FREEZING—*State ex rel. Nelson* v. *District Court, Ramsey County, et al., Supreme Court of Minnesota (Nov. 2, 1917), 164 Northwestern Reporter, page 917.*—C. N. Nelson was a janitor employed by the Northwestern Telephone Exchange Co. On February 22, 1916, he shoveled snow for about 1½ hours during very cold weather, and froze his big toe; the ultimate result of this injury was the amputation of his leg. The district court denied the compensation claimed by Nelson, holding that the injury arose out of his employment but was not an accident. He then carried the matter to the supreme court by writ of certiorari, where the decision was reversed and he was held entitled to compensation. It was first pointed out that since the trial the court, following the great weight of authority in other States, had decided, in the case of the State ex rel. Virginia & Rainy Lake Co. *v.* District Court, 164 N. W. 585, that freezing was an accident. The inquiry was therefore narrowed to the question whether the accident arose out of the employment. The majority of the few cases found in other States led to the conclusion that such was the fact, and the previous decisions in the Rau case relating to sunstroke (see below), and in one where the injury was caused by lightning, pointed in the same direction.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF THE EMPLOYMENT—SUNSTROKE—*State ex rel. Rau* v. *District Court, Ramsey County, Supreme Court of Minnesota (Nov. 2, 1917), 164 Northwestern Reporter, page 916.*—George Rau died as a result of sunstroke incurred while working as a street laborer for the city of St. Paul, and the district court named denied compensation to his widow, Lena Rau. This decision was reversed, the supreme court holding her entitled to compensation on the facts found which, with the

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court's conclusions, are sufficiently presented in the following quotations from the opinions delivered by Judge Quinn:

The conditions surrounding decedent at the time of his injury exposed him to an unusual danger, different from that to which the masses engaged in like employment were subjected. It had rained the night before; the sand was wet; the sun's rays direct, thereby enhancing liability to sunstroke. Decedent was exposed to the direct rays of the sun, in addition to the humid atmosphere emanating from the wet street.

That the injury was sustained in the course of the employment is not denied; that it was an "unexpected and unforeseen event" is not questioned; and we have no difficulty in arriving at the conclusion that it was an event "producing at the time injury to the physical structure of the body happening suddenly and violently." It is undisputed that the day was extremely hot. The men had rested for three-quarters of an hour in the shade and had returned to their labor. Decedent was at work near the middle of the street, when, all at once, he was seen to stagger. He had been overcome; had suffered a sunstroke. This was a violent injury produced by an external power, not natural.

Where the work and the conditions of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an accident arising out of the employment.

WORKMEN'S COMPENSATION—ADMIRALTY—FEDERAL AND STATE JURISDICTION—*Clyde Steamship Co.* v. *Walker, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 545.*—William Alfred Walker was injured on July 1, 1914, while at work as a longshoreman for the company named. An award to him was affirmed by the court of appeals (215 N. Y. 529, 109 N. E. 604; see Bul. No. 189, p. 249). This was reversed on the same principle as governed in Southern Pacific Co. *v.* Jensen, decided on the same date (see next case below).

WORKMEN'S COMPENSATION—ADMIRALTY—FEDERAL AND STATE JURISDICTION—*Southern Pacific Co.* v. *Jensen, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 525.*—Christen Jensen was killed on August 25, 1914, while employed as a longshoreman in unloading the steamship *El Oriente*, belonging to the company named and plying between the ports of New York and Galveston. His average weekly wages were found by the workmen's compensation commission to be $19.60, and an award was made to his widow of $5.87 weekly, and to each of his two young children of $1.96 weekly; also $100 for funeral expenses. The company objected to the award on the ground that the Workmen's Compensation Act did not apply, first, because the employment was in interstate com-

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merce, and second, because such application would be in conflict with the constitutional jurisdiction of Congress as to matters of admiralty. The award was affirmed by the courts of New York State, the opinion of the court of appeals being reported in 215 N. Y. 514, 109 N. E. 600; see Bul. No. 189, p. 221. However, the Supreme Court held the ground of contention relating to admiralty to be a valid one, and reversed the judgment, by a divided court standing 5 to 4. Mr. Justice McReynolds delivered the majority opinion, and after stating the findings of the commission and reviewing the proceedings below he said in part:

In New York C. R. Co. *v.* White, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232], we held the [New York compensation] statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error, being an interstate common carrier by railroad, is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908, and no State statute can impose any other or different liability. Second. As here applied, the workmen's compensation act conflicts with the general maritime law, which constitutes an integral part of the Federal law under article 3, section 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Co., a Kentucky corporation, owns and operates a railroad as a common carrier; also the steamship *El Oriente*, plying between New York and Galveston, Tex. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that act is not applicable in the circumstances.

The fundamental purpose of the compensation law, as declared by the court of appeals, is "the creation of a State fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments," among them being "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same, on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in New York C. R. Co. *v.* White, supra, and need not be repeated. Under the construction adopted by the State courts no ship may load or discharge her cargo at a dock therein without incurring a penalty, unless her owners comply with the act, which, in order to secure payment of compensation for accidents, generally without regard to fault, and based upon annual wages, provides (sec. 50) that—"an employer shall secure compensation to his employees in one of the following ways:" [Act quoted as to methods of security required and penalties for failure to comply.]

Article 3, section 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction;" and article 1, section 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by

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this Constitution in the Government of the United States, or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. [Cases cited.] And further that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. (The *Lottawanna* (Rodd *v.* Heartt), 21 Wall. 558 [other cases cited].)

By section 9, judiciary act of 1789, the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. (Judicial Code, secs. 24 and 256.)

The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. [Cases cited.]

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. [Cases cited.] And finally, this remedy is not consistent with the policy of Congress to encourage investments in ships, manifested in the acts of 1851 and 1884, which declare a limitation upon the liability of their owners.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes and Mr. Justice Pitney delivered dissenting opinions, the latter presenting considerations additional to those given in the former opinion, while Mr. Justice Brandeis and Mr. Justice Clarke based their dissent upon the grounds expressed by both the others. From Mr. Justice Holmes' opinion the following quotations are taken:

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the State courts, and leaves some power of legislation, at least, to the

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States. For the latter I need do no more than refer to State pilotage statutes, and to liens created by State laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the State courts, although the death was due to a collision upon the high seas. [Cases cited.]

Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source—that is, from the United States. There is no such law. The maritime law is not a corpus juris; it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. (The *Osceola*, 189 U. S. 158, 23 Sup. Ct. 483.) One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master and to apply the common-law principles of tort.

Now, however, common-law principles have been applied to sustain a libel by a stevedore in personam against the master for personal injuries suffered while unloading a ship. Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, and the *Osceola* recognizes that in some cases at least seamen may have similar relief.

Such cases as American S. B. Co. *v.* Chase, 16 Wall. 522; The *Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, and Atlantic Transport Co. *v.* Imbrovek, supra, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a State from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

Mr. Justice Pitney also confined his dissent to the matter of admiralty, and short extracts only are given from the somewhat lengthy opinion:

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York act but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in New York C. R. Co. *v.* White.

The argument is that, even in the absence of any act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the Federal courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by State courts of common law when passing upon any case that might have been brought in the admiralty; and that, just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so nonaction by Congress amounts to an imperative limitation upon the power of the States to interpose where maritime matters are involved.

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This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that before the Constitution were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts.

Nor is the reservation of a common-law remedy limited to such causes of action as were known to the common law at the time of the passage of the judiciary act. It includes statutory changes.[1]

WORKMEN'S COMPENSATION—BENEFICIARIES—WIFE LIVING APART FROM HUSBAND—LEGAL OBLIGATION TO SUPPORT—LUMP SUM—*H. G. Goelitz Co.* v. *Industrial Board*, *Supreme Court of Illinois* (*Apr. 19, 1917*), *115 Northeastern Reporter*, *page 855.*—Henry Hunley was killed by an accident in the course of his employment with the company named. The industrial board found that he left surviving him his lawful wife, Florence Hunley, and made an award of $5.20 a week for 416 weeks, which was afterward commuted to the lump sum of $1,925.91. The employing company took the matter to the circuit court, which affirmed the award, but certified the case to the supreme court as one proper to be reviewed by it. It appeared that Hunley had married Florence Taylor in 1885, and a son and daughter were born; that the mother and son were living in Calgary, Canada, at the time of Hunley's death; that for a time between 1893 and 1896 he had lived with another woman. The company contended that Florence Hunley was not dependent upon Hunley and could not recover compensation. Paragraph (a) of section 7 provides that compensation shall be payable for death in a certain amount "if the employee leaves any widow, child, or children whom he was under legal obligation to support at the time of his injury." It was held that under the circumstances the wife was included as a beneficiary, the fact that the son contributed to her support, and that she was the owner of a home, not being material. Judge Carter for the court said in part:

There can be no question, from the evidence, but that the husband was under legal obligation to support his wife.

The evidence on the hearing before the industrial board shows, without contradiction, that the applicant, Florence Hunley, was legally married to the deceased and had never been divorced. Hunley's unfaithfulness to his wife would undoubtedly justify the wife in living separate and apart from him therafter, unless she condoned

[1] As a consequence of the decision in this case, the sections of the judicial code referred to by Mr. Justice McReynolds were amended by Congress (Oct. 6, 1917), so as to save to claimants "the rights and remedies under the compensation law of any State" in cases of admiralty and maritime jurisdiction, thus adopting by legislative action the position taken by the courts of New York and the minority of the Supreme Court.

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the offense. There was no evidence or attempt by counsel to prove that she did condone his unfaithfulness.

The duty to support his wife is imposed by law on the husband. This duty does not depend on the inadequacy of the wife's means, but on the marriage relation. 13 R. C. L. 1188. Some of the statutes as to workmen's compensation in other jurisdictions provide that the wife must be living with the husband at the time of the injury, but our act does not so provide.

The award of a lump sum, however, was overthrown, since the record did not disclose evidence that it was for the best interests of the parties, but contained simply a statement by the attorneys for Mrs. Hunley.

WORKMEN'S COMPENSATION—BENEFITS—LOSS OF EYE ALREADY DEFECTIVE—*Purchase* v. *Grand Rapids Refrigerator Co., Supreme Court of Michigan (Dec. 21, 1916), 160 Northwestern Reporter, page 391.*—Clarence C. Purchase became a claimant for compensation, and an award was made against his employer, the company named. On March 17, 1915, Purchase, then 29 years of age, got hot sand in his right eye, and after treatment it was deemed necessary, on April 1, to remove the eye. During his childhood the eye had been severely injured, with the result that thereafter it was only capable of distinguishing light and perceiving the fact that an object was approaching it. He was able to return to work and earn undiminished wages after a few weeks, and the company contended that an award of the schedule rate for the loss of an eye, i. e., 50 per cent of wages for 100 weeks, was not warranted by the circumstances. In an opinion delivered by Judge Ostrander the court held that the law did not warrant the making of any distinction because of the previous impairment of the eye where some degree of usefulness had existed. The concluding portion of the opinion is as follows:

The legislature has not attempted a definition, or made a declaration, applicable to the case at bar, except in terms of the loss of an eye. It has not specified a normal eye, although it may be concluded that the law refers to an eye which performs in some degree the functions of a normal eye. A mere sightless organ might perhaps be considered no eye at all. Claimant has lost an eye, although an infirm one. It was not wholly useless as an eye. On the contrary, the testimony is that he could with it distinguish light and see approaching objects. As a result of the injury, there was disability, and the disability is "deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified. * * *"

The conclusion of the board will not be disturbed.

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WORKMEN'S COMPENSATION — BENEFITS — PARTIAL DISABILITY— EMPLOYEE EARNING MORE THAN BEFORE INJURY—*Dennis* v. *Cafferty et al., Supreme Court of Kansas (Mar. 16, 1917), 163 Pacific Reporter, page 461.*—Thomas E. Dennis was injured while employed by W. H. Cafferty and another, doing business as the Kansas City Sand Co. His work was to load cars with sand, moving them with a pinch bar, and on November 28, 1914, while tightening a brake on top of a car, he received an injury to his hand. He wore splints on it for eight weeks, and afterwards a leather strap. The court found that his average earnings at the time of the injury were $13.50 per week, and that his probable weekly earnings would be $12 a week; also that his total disability lasted for 42 weeks and partial disability for 80 weeks. He was allowed $6.75 per week, or one-half his earnings, for 42 weeks, and $3 per week, the minimum compensation, for 80 weeks. It was contended that the finding that his probable earnings would be $12 a week was contrary to the evidence. He went to work at first on a "boy's job" for $10.50 per week for three months. Then he operated a power punch, work which favored the injured hand, for some time up to March 11, 1916, when he was given another job for the same company at $16.50, which he held until about the end of the month, the work still not being of a heavy nature. He resigned to accept a position as an overseer, on the duties of which he entered April 3, 1916, at $36 a week, and was holding this position at the time of the trial, May 23. He testified that this position was temporary, but that he expected to be transferred to another place at the same wages. There was evidence to the effect that the hand was not strong, and that he would not be able to do such work as he was doing when injured. The court said that it was impossible to justify the finding as to the amount of probable earnings, but took the view that the language of the statute provides a minimum for partial disability, and not for partial wage loss. The line of reasoning followed is apparent from the following quotation from the opinion delivered by Judge West:

In framing the present act the legislature was providing for payment on account of death or injury occurring in certain hazardous employments, with the general view of compensation at the ultimate expense of the public patronizing the industry in which the disaster occurred. Certain boundary lines must needs be fixed to make the act practicable. Instead of 50 per cent any other per cent could have been designated in case of total incapacity. A minimum of $3 a week was prescribed, not because it would in each case be in accord with precise justice, but because as a general thing this was deemed a fair lower rung for the ladder of allowances. While aiming at a thing named compensation, no way was found to avoid in every instance certain inequities, or to provide in advance that judgments of courts might never turn out to be, in the light of subsequent develop-

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ments, slightly excessive or slightly lacking in sufficiency. Although the method of settlement and adjustment should have been, and was doubtless intended usually to be, without resort to the courts, it seems to have been considered that in any case of partial incapacity the traffic, otherwise the public, could and should bear at least $3 a week. While partially disabled, should a workman by some happy revolution of the wheel of fortune, by entering a profession, or by obtaining a light, but lucrative position, be placed beyond the need of the $3 allowance, no means has been provided for its detachment from the aggregate of his income. But this occasional plethora must be of comparatively short duration, and no serious results can follow.

WORKMEN'S COMPENSATION—BENEFITS—PERMANENT IMPAIRMENT OF USE OF FOOT—*Underhill* v. *Central Hospital for the Insane, Appellate Court of Indiana, Division No. 2* (*Dec. 4, 1917*), *117 Northeastern Reporter, page 870.*—Eugene Kellum received an injury on May 16, 1916, while in the employ of the Central Hospital, and claimed compensation. His pay had been $30 per month, plus room, board, and laundry estimated to be of the value of $2.50 per week. The industrial board found that he had received a permanent impairment of the use of his left foot amounting to 75 per cent, and awarded him $5.50 per week (55 per cent of earnings) for 93¾ weeks (75 per cent of the schedule period for severance of foot at the ankle). As the hospital had furnished board, room, and laundry covering the larger part of this amount, the balance was directed to be paid in a lump sum. The employee claimed benefits under section 29, relating to total disability, and having a maximum limit of 500 weeks. The court held, however, that compensation should properly be awarded under the general provisions of section 31, which gives the board discretionary power to make awards for permanent partial disability for a period not exceeding 200 weeks; but, as the same section provides among its specific rates 125 weeks for the severance of a foot, and it is said in the opinion that "The facts of this case do not disclose a severance of appellant's foot or any part thereof," a limitation of the possible award in this instance to 125 weeks would seem to be implied. There was held to be nothing to show that the award of benefits for 93¾ weeks was not a reasonable one, and it was affirmed.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—PLASTERING SINGLE ROOM, DURING THREE OR FOUR DAYS—*Aurora Brewing Co.* v. *Industrial Board of Illinois et al., Supreme Court of Illinois* (*Feb. 21, 1917*), *115 Northeastern Reporter, page 207.*—Gottlieb Mack was killed June 10, 1914, while in the employ of the company named, and while engaged in plastering a room in a building being erected as an

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addition to the company's bottle shop. His widow made claim for compensation, and it was granted by the industrial board. At the time of his fatal injury by the slipping of a ladder he had been at work on the job about three days, and had practically completed it. He was paid a wage of $4 per day, and worked alone, except for a helper. He had done work for the company in previous years, once for a month, and at other times for shorter periods. The court reversed the award, holding that such employment was casual and that the claimant was therefore not entitled to compensation. The following extracts are taken from the opinion delivered by Judge Carter:

It would seem that the legislature intended the word "casual" to be used as meaning "occasional," "irregular," or "incidental," in contradistinction from stated or regular. Each case, however, must be decided quite largely upon its special facts.

In our judgment the legislature never intended an employee who was engaged for one job, lasting only three or four days, to be within the terms of the act, even though the same employee had been employed at irregular intervals during several previous years to perform similar jobs.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—USUAL COURSE OF BUSINESS—FARM LABOR—CARPENTER BUILDING HOUSE ON RANCH.—*Miller & Lux (Inc.)* v. *Industrial Accident Commission, District Court of Appeals of California, First District (Dec. 5, 1916), 162 Pacific Reporter, page 651.*—Sidney Eligh was injured while in the employ of the company named, and was awarded compensation by the industrial accident commission. The matter was taken to the court by a petition for a writ of review. At the time of the injury Eligh had been at work for 57 days as foreman of carpenters building a cottage on a ranch owned by the company and containing 100,000 acres. The company's charter allowed it to hold all kinds of property, to erect buildings, etc., and it was in fact engaged in carrying on ranches, as well as other kinds of business, and constantly employed carpenters in constructing and repairing buildings on its property. The court held that the occupation was neither casual nor out of the ordinary course of the employer's business. It also denied the defense set up by the company that it was, as to this work, a farmer, and included in the exemption of farm labor from the provisions of the act. The writ of review was dismissed, and the award allowed to stand.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—DUE PROCESS OF LAW—TRIAL BY JURY—POLICE POWER—*Anderson* v. *Hawaiian Dredging Co. (Ltd.), Supreme Court of Hawaii (Dec. 11,*

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1917), 24 Hawaii Supreme Court Reports, page 97.—One Anderson having claimed compensation from the company named, a circuit court of the Territory gave judgment for the company on demurrer, on the ground that the compensation statute was unconstitutional. The supreme court, however, upheld the law, and reversed the judgment. As to the matter of notice it was said, in the opinion delivered by Judge Robertson, that the lower court "fell into error in thinking that 'there must be a positive provision for the giving of notice * * * in order to constitute due process of law.'" The constitutional provision that trial by jury in actions at common law should be preserved was not applicable to proceedings other than at common law, and in the case of compensation proceedings, where the benefits are fixed, there is no necessity for a jury to assess damages. The case of New York Central R. R. Co. *v.* White and the other decisions of the United States Supreme Court sustaining compensation laws are discussed, likewise some of the State decisions; and with regard to the Ives decision in New York it is said that, though decided as recently as 1911, it "has already become obsolete."

The counsel for the defendant contended that where compulsory laws had been upheld it was because, as in New York, industries were classified and the law made applicable only to the more hazardous, or because, as in California, all employers contributed to a State fund from which benefits were paid. The opinion said as to this:

The acts in which classifications have been made have not been sustained because of them, but in spite of them. Nor does the legislative power depend on the inclusion of a provision for a governmental compensation fund to which all employers shall contribute. In our view the theory of the statute of this Territory that each employer should provide for the compensation of the employees injured in his own employ is every whit as reasonable as that of the California act. Its natural tendency would be to cause greater care and better management on the part of employers of labor.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ELECTION OF EMPLOYEE TO SUE OR RECOVER COMPENSATION FROM EMPLOYER NOT COMPLYING WITH LAW—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Fassig* v. *State, Supreme Court of Ohio (Jan. 23, 1917), 116 Northeastern Reporter, page 104.*—Frank Pond was injured while in the employ of Percy Fassig, in an establishment having five or more employees. The employer had not contributed to the State insurance fund, nor received permission to become a self-insurer. The employee made application to the industrial commission, under the provisions of section 27, to fix the amount of compensation, and it did so. It then gave the employer notice to pay the amount within 10 days, and when such payment was not made,

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the State, through the attorney general, brought suit to recover the amount plus the statutory penalty of 50 per cent. The employer contested the validity of section 27, which applies to employers not complying with the provisions of the law, and gives to the employee the right to proceed for compensation, as was done in this instance, as an alternative to bringing a liability suit with the common-law defenses barred. The court of common pleas rendered judgment for the defendant, holding this section of the law unconstitutional, but the court of appeals reversed this, giving judgment for the State for the benefit of the employee; the supreme court also held the law valid and affirmed the latter judgment. Judge Johnson delivered the opinion, first quoting the constitutional amendment permitting the enactment of a compulsory compensation law, referring to the decision upholding the former elective law of the State and to the progressive sentiment leading to the passage of the compulsory law. Section 27 is quoted in full, its relations with preceding sections discussed, the option given to the employee to sue or to apply for a determination of the amount of compensation pointed out, and the procedure outlined. Judge Johnson then said:

The grant of power to the general assembly to pass a compulsory law carries with it, as incident thereto, the power to include all such reasonable provisions as are necessary to make the law effective. The procedure laid down is in full keeping with the provisions of section 35 of article 2 of the constitution, and is one to compel the employer to perform his part in the general scheme of industrial protection.

It is claimed first that the right of trial by jury is violated.

It is at once manifest that the provisions of the section whose validity is attacked are important and essential steps in the administration of the law itself and are vital to the accomplishment of its beneficent purpose. The suit for the liquidated or stipulated amount is not a suit as at common law by the employee for the damages sustained. The employee has waived the right to bring such a suit by claiming compensation. A suit for damages is one for the recovery of an unliquidated sum in an action at law. The suit by the State for the amount of the compensation under section 27 is not one for negligence of any kind. It has no regard for such a thing. It is simply based on the fact of injury in the course of employment. The recovery in the damage suit is presumed to wholly compensate the injured person, but when he elects to accept compensation it is fixed in accordance with the schedule. The action to recover it is a statutory action, and under the amendment the statute properly fixes the measure of recovery. The action against the employer to recover the amount so ascertained and fixed must be brought in a court of general jurisdiction, and the defendant employer is entitled to a trial by jury. He is entitled to make the defense that he is not an employer of five or more employees, etc.; that the injury to the beneficiary was not received in the course of employment, or that it was willfully self-inflicted; or he might show that he had paid his premium into the insurance fund. The defense that he would not be

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entitled to make in the case simply goes to the amount of compensation, for that is fixed pursuant to the statute. If the issues stated are found against him, and he pays the amount fixed by the board, he has only paid what other employers pay who comply with the provisions of the law, together with the penalty which the law imposes on him for not obeying it. Inasmuch as the amount recovered is not determined by proof of the actual damages sustained, but is such an amount as is fixed by the statute when the administrative board has ascertained the facts to which the statute would apply, there is nothing for the jury to pass upon on that question. It is a sum that is liquidated or stipulated by the statute.

There is no denial of trial by jury as to any issue which the employer is entitled to raise.

It is also claimed that the section under examination infringes on the judicial power of the State in that it confers upon an administrative board judicial functions.

From what has been already shown it will be seen that the proceedings before the commission, and its order, are merely administrative, and simply lay the foundation for a suit in a court of competent jurisdiction in which the employer has due process and all rights reserved.

At this point authorities are cited bearing upon the point under discussion. The opinion goes on as follows:

Much that has been already said applies with equal force to the remaining claims of plaintiff in error that the section in question denies to the employer in question the due process of law and the equal protection of the law, in violation of the provisions of the State and Federal Constitutions referred to.

An additional objection is made against the validity of section 27. It is said that the provision with reference to an injury "in the course of employment" permits an award to one whose injury did not arise out of the employment. We do not think this contention is well taken. The language is found in the constitutional amendment as well as in the statute. It was plainly the intention of the framers of the amendment, and of the statute, to provide for compensation only to one whose injury was the result of or connected with the employment, and would not cover any case which had its cause outside of and disconnected with the employment, although the employee may at the time have been actually engaged in doing the work of his employer in the usual way.

Counsel for some employees of employers who have elected to make compensation under the statute have filed a brief in this case in which they assert that section 22 of the act under consideration, which authorizes employers under the conditions named therein to directly compensate their injured employees, is invalid because there is no provision in the act itself by which an employee of such an employer, who makes application to the board for compensation and is refused, may have any relief whatever.

The validity of section 22 has been considered in another case not yet reported [see Turner case, p. 284], and the court is unanimously of opinion that it is a valid provision.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—AGREEMENT TO ASSUME RISKS—*Chicago Rys. Co.* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Dec. 21, 1916), 114 Northeastern Reporter, page 534.*—James Balla was killed on October 17, 1913, while employed by the company named as a motorman. He was in front of his car, attempting to adjust the trolley so as to move into the barn, when the car suddenly started and crushed him between it and the car ahead. The industrial board affirmed an award of an arbitration committee in favor of his estate and against the company, and it was again affirmed by the circuit court of Cook County, which, however, certified that the cause was one proper to be reviewed by the supreme court. The latter in the present decision again affirmed the award in an opinion delivered by Judge Farmer. On the questions of constitutionality, injury arising out of and in the course of employment, and agreement to assume risks, the language of the opinion is as follows:

It is first contended that the act of 1913 is unconstitutional, because it interferes with the freedom of contract, and because it is special and class legislation, granting special and exclusive privileges and immunities to certain individuals, which are denied to others. The plantiff in error insists the act of 1913 is different from the act of 1911 (Laws 1911, p. 314), which was held constitutional in Deibeikis *v.* Link-Belt Co., 261 Ill. 454, 104 N. E. 211 [Bul. No. 169, p. 216], and not in violation of the provisions of the Constitution it is claimed the act of 1913 violates. The differences between the two acts relied on are that the 1911 act applied only to employers engaged in especially hazardous or dangerous employments or occupations, while the 1913 act provides "that any employer in this State may elect to provide and pay compensation" under the act. Under the 1911 act every employer within the provisions of that act was presumed to have elected to provide and pay compensation according to the act, unless and until he filed a notice in writing to the contrary with the State bureau of labor statistics. Under the 1913 act the employer engaged in an extrahazardous occupation is likewise conclusively presumed to be under the act unless he filed a written election to the contrary, but employers in other than extrahazardous occupations are not under the provisions of the act unless they file an election to provide and pay compensation under the act. Plaintiff in error is engaged in an occupation which is brought under the provisions of the 1913 act, unless notice of an election to the contrary is filed in writing. In the Deibeikis case it was held such a provision in the act of 1911 did not violate the constitutional right of freedom to contract. There is no material distinction between the two acts with regard to employers engaged in hazardous occupations. We have held the former act was not subject to the objection here made, and it must follow, for the reasons given in the Deibeikis case, that the 1913 act is not subject to such objections. There is no merit in the contention of plaintiff in error that the act is invalid, because it is special and class legislation, and grants special and exclusive privi-

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leges and immunities to some individuals, which are denied others, or that it is invalid because it deprives plaintiff in error of the right of trial by jury. The Deibeikis case substantially answers every constitutional objection raised in this case by plaintiff in error.

The facts appear to show that if deceased had observed the rules of plaintiff in error, with which he was familiar, the accident might not have occurred. If the deceased had obeyed the rules of the plaintiff in error company, he would have left his car in such condition that it would not have started when he adjusted the trolley, and plaintiff in error contends that the injury which caused his death was not an accidental one sustained by deceased, arising out of and in the course of his employment. What he was doing arose out of and was being done by him in the course of his employment. The fact that he acted negligently in doing it did not take him out of the employment of plaintiff in error, nor the act which resulted in the injury out of the course of his employment.

The deceased was employed August 25, 1913. In his application for employment he agreed to assume all risks of accidents resulting from his own negligence, and agreed, if he entered the employment of plaintiff in error, to assume all risks of accidents happening as the result of his own negligence while in such employment, and to acquit plaintiff in error of all liability for any personal injury suffered by him while in such employ. Plaintiff in error contends that this amounted to a contract between it and deceased that they were not to be subject to the Workmen's Compensation Act, and that no recovery can be had under that act. The Workmen's Compensation Act is the declared public policy of the State upon the subject embraced in the statute, and provides a method by which employers may exempt themselves from providing and paying compensation under the act to employees for accidental injuries sustained and arising out of and in the course of the employment. It is contrary to the policy of the act to allow an employer, while choosing to come under the provisions of the statute by not filing an election in writing to the contrary, to relieve itself from liability under the act by private agreement or contract with the employee.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—JUDICIAL POWERS—*Solvuca* v. *Ryan & Reilly Co.*, *Court of Appeals of Maryland* (*June 28, 1917*), *101 Atlantic Reporter*, *page 710.*—Antoni Solvuca brought suit against the company named for damages for injuries sustained as its employee. The company pleaded that it had conformed with the provisions of the workmen's compensation act, having secured permission to carry its risk as a self-insurer. The plaintiff demurred to this plea, claiming that it was insufficient because the compensation act was unconstitutional. The Baltimore Court of Common Pleas upheld the law as valid, and rendered judgment for the defendant company. The court of appeals affirmed this judgment, Judge Thomas delivering the opinion. He first examined the provisions of the act, and stated that the court had

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often held that "the law of the land" in the State constitution, and "due process of law" in the Constitution of the United States, mean the same thing. The contention as to violation of that provision in the State constitution was therefore held to be settled by the recent decisions of the Supreme Court of the United States, and quotation was freely made from the opinion in New York Central R. Co. *v.* White, 243 U. S. 188, 37 Sup. Ct. 247 (Bul. No. 224, p. 232). The case of Am. Coal Co. *v.* Allegany Co., 128 Md. 564, 98 Atl. 143 (Bul. No. 224, p. 208), holding valid a law creating a miners' relief fund, was also quoted as sustaining the present law against many of the grounds urged against it. The constitutional provision for jury trials was held to be satisfied by the provision for such trial on appeal if requested by the parties.

The final objection answered was that the act violated the section of the State constitution which vested all judicial powers in certain courts named therein. Authorities were quoted as to what constitute judicial powers, and an excerpt made from the decision of the Wisconsin Supreme Court sustaining the act of that State against the same objection (Borgnis *v.* Falk, 147 Wis. 327, 133 N. W. 209 [Bul. No. 96, p. 799]). In concluding its discussion of this matter the court said:

> The workmen's compensation law, which was passed in the exercise of the police power of this State, creates a commission known as the State industrial accident commission to administer the provisions of the act. In the discharge of its duties and the exertion of its powers it is required to exercise judgment and discretion, and to apply the law to the facts in each particular case, but it is clear that the legislature never intended to constitute the commission a court, or to confer upon it the judicial power of the State within the meaning of the constitutional provisions referred to.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—WILLFUL INJURY—DISFIGUREMENT IN ADDITION TO DISABILITY—*Adams* v. *Iten Biscuit Co., Supreme Court of Oklahoma (Jan. 9, 1917), 162 Pacific Reporter, page 938.*—B. L. Adams brought action for damages for personal injuries against the company named, his employer, and the company demurred to the complaint on the ground that the injuries were covered by the workmen's compensation act. The demurrer being sustained, the employee carried the case to the supreme court, claiming that the compensation act was unconstitutional, and that even if constitutional it did not fully cover his injuries. The act was, however, declared valid, and the judgment sustaining the demurrer was affirmed. Judge Hardy delivered the opinion, first outlining the provisions of the act, which is compulsory. A somewhat novel contention raised was that the act

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is so revolutionary in character as to amount to an amendment to the State constitution, which could not be put in force by mere legislative enactment. The court admitted the importance of the law, but after reviewing the history of such legislation in this and other countries and the findings of commissions as to the evils and inadequacy of the liability system, concludes that the law is within the police power of the State and the authority of the legislative body. With a thorough examination of the decisions, the other usual objections to constitutionality are disposed of, including failure of the title of the act to cover its subject matter and conflict with the provisions of the Federal and State constitutions in respect to trial by jury, due process, and equal protection of the law. As to deprivation of all remedy for willful injuries by the employer, Judge Hardy says in part:

The act does not undertake to regulate willful injuries of the character mentioned, but leaves the injured employee to his remedy as it existed when the act was passed.

Considering the various provisions of the act together, there does not seem to be any ambiguity as to its meaning. It embraces all kinds of accidental injuries not resulting in death, whether occurring from the negligence of the employer or not, arising out of and in the course of employment, but does not include willful or intentional injuries inflicted by the employer, nor injuries resulting from an intent upon the part of the employee to injure himself or another or for a willful failure to use a guard or other protection against accident required by statute or furnished pursuant to an order of the State labor commissioner. A willful or intentional injury, whether inflicted by the employer or employee, could not be considered as accidental, and therefore is not covered by the act. The compensation afforded by the act and the procedure by which the same is determined was intended to be exclusive as to all of the injuries therein embraced, and the right of action theretofore possessed by the injured employee was abolished, leaving to him such right of action in the courts for willful injuries as he may have had prior to its passage, and the act, as thus construed, does not deprive plaintiff of the equal protection of the laws.

The injury occurred through negligence of the company's foreman in causing an explosion of natural gas when Adams was at a table about 12 feet from and directly in front of the oven. His hands and arms were so badly burned as to totally and permanently disable him from work at his trade as a baker, and permanent scars were also left on his face, head, and entire body. It was urged that he should at least have an action for additional damages for the disfigurement, for which no compensation is allowed by the act. Taking up this question and concluding the opinion Judge Hardy said:

The legislative intent was evident to award compensation for all accidental injuries arising out of or in the course of employment,

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and not to divide up such injuries and award compensation for a portion thereof and leave to the injured employee a remedy for the remainder. All of plaintiff's injuries were received in the course of his employment, were accidental, and were the result of the same negligent act of defendant. The compensation provided was intended to be exclusive, and a right of action in the courts therefor was abolished.

WORKMEN'S COMPENSATION—DEPENDENCE—FATHER AND MOTHER HAVING OTHER MEANS—*Fennimore et al.* v. *Pittsburg-Scammon Coal Co., Supreme Court of Kansas (Apr. 7, 1917), 164 Pacific Reporter, page 265.*—Rue Fennimore, 19 years of age, was killed while an employee of the company named, and his parents claimed compensation. The son's earnings were $50 per month, of which he turned over perhaps $35 per month to his mother, and the finding of the district court was that the father and mother were dependent upon such earnings to the extent of $25 per month, or five-tenths of his earnings; it awarded $900 as compensation. There was evidence that the father owned the dwelling house, which cost $1,450, farm lands, from which he received a gross income of $400 or $500 in the year 1915, and one-fourth the stock of the coal company, which was capitalized at $30,000; and that he worked for the company at $125 per month. No household servants were kept, and the son had helped with the family washings and the like. The supreme court held that the finding of partial dependence was justified, noting that the language of the law is indefinite, and that it is very difficult to set up any rules or standards of dependency. Judge Burch said in concluding the opinion:

Accepting the statute just as it came from the legislature, the court is of the opinion that the question before the district court was not one of how the domestic economies of the Fennimore family might have been arranged, or ought to have been arranged, but how they were arranged; and if the father and mother did in fact depend in part on the son's earnings, so that they suffered injury by being deprived of what they had relied on, they were entitled to recover. This being true, the finding of partial dependency is abundantly sustained.

WORKMEN'S COMPENSATION — DEPENDENCE — FATHER PARTIALLY DEPENDENT, RECEIVING ALL OF SON'S EARNINGS—*In re Peters, Appellate Court of Indiana, Division No. 1 (June 28, 1917), 116 Northeastern Reporter, page 848.*—The father of a minor son accidentally killed in course of his employment having made claim for compensation, the industrial board of Indiana submitted to the court the questions, first, whether the father was a dependent, and second, whether he was entitled to full compensation, viz, 55 per cent of

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$12.75 (the son's wages) for 300 weeks. The son lived with the family, consisting of father, mother, and two younger brothers. The father received a weekly wage of $15, and had no property or other income. The son's wages went into the family fund. The court held that the father was a partial dependent; and, holding that no deduction from the amount of the wages should be made for the son's support, it answered the second question also in the affirmative, as appears from the following extract from the opinion delivered by Judge Batman:

As the father was receiving all his deceased son's earnings at the time of his death, or 100 per cent thereof, it follows that he will be entitled to receive 100 per cent of what he would have received had he been wholly dependent. In other words, there is no difference in the amount a total dependent and a partial dependent is entitled to receive under such section, where such partial dependent receives all the earnings of such injured employee.

Workmen's Compensation—Dependence—Marriage After Injury Which Results in Death—*Kuetbach* v. *Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (Dec. 4, 1917), 165 Northwestern Reporter, page 302.*—Ferdinand Kuetbach was injured December 18, 1915, under conditions which made his employer liable for compensation. At that time he was living with his father, who was dependent upon him. He died June 5, 1916, leaving a widow, Etta Kuetbach, whose marriage to him had taken place May 18, 1916. On June 21, 1916, a child was born to her, the result of illicit relations with Kuetbach occurring before the time of the accident. The widow and the child through his guardian made separate claims for compensation, each claiming that the other was not entitled thereto. The industrial commission made an award to the father of the deceased employee, but the district court of Kane County reversed this action and made an allowance to the widow, and her only. Under the provisions of the act a widow is conclusively presumed to be dependent upon a husband with whom she was living at the time of his death, and the same is provided with reference to a minor child, there being no surviving dependent parent; while in all other cases questions of dependency are to be determined as of the date of the injury. On appeal, the supreme court reversed the district court's judgment, deciding, as did the commission, that the father alone was entitled to benefits. In the opinion by Judge Rosenberry the ground is taken that whether a person is a dependent at all is determined by the status at the time of the accident, while the conclusive presumptions noted above relate only to the degree of dependency as total. The widow not having been a

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lawful wife at the time of the injury, and the child not legitimate at that time en ventre sa mere, no dependence whatever could be presumed, and therefore they were held not to be rightful claimants.

WORKMEN'S COMPENSATION—DEPENDENCE—MARRIAGE AFTER INJURY WHICH RESULTS IN DEATH—SURVIVING WIFE—*Crockett* v. *International Ry. Co., Supreme Court of New York, Appellate Division, Third Department (Dec. 28, 1916), 162 New York Supplement, page 357.*—Davie Mayo Crockett was injured in the employ of the company named on November 17, 1914, and died as a result on December 17 of the same year. On November 23, 1914, he was married, and after his death his widow applied for compensation. The State industrial commission certified to the court the question whether she was entitled to an award as the surviving wife in accordance with the provisions of the law. The court drew a distinction between wives and dependents, founded upon the wording of the act, and decided that in such cases as the present one the "surviving wife" is entitled to the benefits of the act. Judge Cochrane delivered the opinion, which is in part as follows:

The argument against the question is based on the last sentence of section 16, which is: "All questions of dependency shall be determined as of the time of the accident."

Undoubtedly the term "dependents" is very frequently used in the statute as including wife and children. Instances to that effect are numerous. Death benefits payable to wife and children, however, in no respect rest upon the question of their dependency. That very clearly appears from said section 16. Death benefits under that section to all other persons rest on the dependency of such person or persons to the deceased employee. That is true of husband, parents, brothers, sisters, grandparents, or grandchildren of the deceased. But a surviving wife and children under 18 years of age are entitled to an award, although they may be wealthy. The distinction exists because of the legal and moral responsibility of a husband and father to support his wife and children, irrespective of their individual means of support. The phraseology of section 16 clearly indicates this distinction, and when, therefore, in the closing sentence of that section, it is stated, "All questions of dependency shall be determined as of the time of the accident," the term "dependency," as there used, should be restricted in its application to the same class of people to whom the term has previously been applied throughout the same section. It does not apply to surviving wife and children, because as to them the question of dependency is immaterial.

WORKMEN'S COMPENSATION—DEPENDENCE—REGULARITY OF CONTRIBUTIONS FOR SUPPORT—*Commonwealth Edison Co.* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Feb. 21, 1917),*

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115 Northeastern Reporter, page 158.—Victor F. Nelson having been killed by electric shock while in the employ of the company named on June 23, 1914, the administrator of his estate made claim for compensation. Nelson was unmarried, and left a father, a stepmother, an adult brother, and a married sister. The industrial board confirmed an award of $3,500 as compensation, made by the committee of arbitration. The company appealed, denying that the father was dependent. The Illinois law authorizes the payment of compensation where the deceased has contributed to the support of any lineal heir within four years previous to the time of his injury. It was in evidence that the deceased in this instance had contributed sums of from $10 to $20 to his father, whose wages were much smaller than his own, sometimes as often as every second month, and more frequently and in larger sums in case of sickness. On one occasion he had paid $25 the first week of an illness, and $35 the third week. The court affirmed the award, saying that regularity of contributions was not required to fulfill the conditions, and that "the statute does not require that the surviving parent or lineal heirs shall be dependent upon the deceased."

WORKMEN'S COMPENSATION—DEPENDENCE—SISTER AS MEMBER OF FAMILY—*In re Murphy, Supreme Judicial Court of Massachusetts (Nov. 27, 1917), 117 Northeastern Reporter, page 794.*—Jeremiah Maloney was killed while in the employ of a subscriber under the Massachusetts Workmen's Compensation Act. The proceedings for compensation instituted by his minor daughter and his sister, Mrs. Agnes M. Murphy, were opposed by the employer's insurer, but an award was made to the sister by the industrial accident board. It appeared that the sister was a widow having a son 15 years of age and attending a high school, and that she, her brother, and her son lived together in a house which had belonged to her mother, and for which she had paid no rent, though six brothers and sisters in all held undivided interests in it. The mother had lived with them until her death in 1912. Mrs. Murphy secured outside work at washing and the like, sufficient to earn some $3 per week. Maloney contributed $5 per week to the expenses, but during the previous winter had been out of work and had fallen behind, and after working two months was still two or three months in arrears at the time of his death. Mrs. Murphy testified that at the time of the hearing she was able to earn about $2 per week, and could not get along on that amount; that she did not get along as well since her brother's death; and that "nothing was ever said about board," that is, as to the payments made by him being regarded as for board. Maloney had also worked about the place and cultivated a vegetable garden. The court held

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that he was not the head of a family of which the sister and her son were members, and the award to her was reversed and a decree entered in favor of the insurer.

WORKMEN'S COMPENSATION—DEPENDENCE—WIFE IN FOREIGN COUNTRY—NOTICE AND CLAIM—*In re Gorski, Supreme Judicial Court of Massachusetts (June 28, 1917), 116 Northeastern Reporter, page 811.*—The administrator of the estate of John Gorski instituted proceedings to recover compensation for the death of the latter against his employer, the Howes Brick Co., and its insurer. The fatal injuries were received June 24, 1914. Gorski had come from Poland the previous November, leaving his wife and two daughters. A minor son roomed with him, but such financial assistance as passed between them was given by the son to the father. The administrator was appointed February 9, 1915, and on March 1 he mailed to the industrial board a form of notice to the employer and of claim for compensation; this, however, was not received by the board. It appeared that the wife lived in the part of Poland affected by the War; but since nearly six weeks intervened between the employee's death and the outbreak of war, and his son was with him, the court held that no sufficient reason under the statute was shown for failure to give notice and file claim within a reasonable time. It also held that a claim not actually received by the board could not be said to have been "filed" with it.

It was found that the wife remained on a farm and hired a man to operate it and that the husband intended to have her come over later on. The court held that she was neither a wife living with her husband nor living apart from him for justifiable cause or because he had deserted her. As the only money sent to her since the separation had been furnished by the son actual dependency was held not to be shown.

WORKMEN'S COMPENSATION—DEPENDENCE—WIFE IN FOREIGN COUNTRY BUT SUPPORTED BY HUSBAND—*Kalcic v. Newport Mining Co., Supreme Court of Michigan (July 26, 1917), 163 Northwestern Reporter, page 962.*—Antonija Kalcic, widow, living in Croatia, Austria, instituted a proceeding for compensation for the death of her husband, Ljudevit or Louis Kalcic. He was killed while employed in a mine of the company named, in May, 1914. Kalcic came to this country in 1907 and worked in the mines until his death, with the exception of a time during 1910, when he visited his old home in Croatia. Besides the widow a son born in 1911 survived him. He regularly sent money to his wife, amounting in the last year of

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his life to $80. Her affidavit stated that she had no other means of support except her earnings of 20 cents a day for two or three days each month and that it had been their intention that she should join her husband in America when sufficient funds had been accumulated. A board of arbitration awarded her $1 a week for 300 weeks, but the industrial accident board modified this award to allow for the same period the full amount for complete dependency; that is, $8.70 per week, a sum equal to one-half the earnings of the deceased. The court affirmed the latter award. It held that she was not entitled to the presumption that she was totally dependent as living with her husband at the time of his death, but that the facts were sufficient to support a finding of actual total dependency.

WORKMEN'S COMPENSATION — DURATION OF PAYMENTS — SUBSEQUENT INSANITY—*In re Walsh, Supreme Judicial Court of Massachusetts (June 4, 1917), 116 Northeastern Reporter, page 496.*—James Walsh was injured on July 1, 1913, while employed by the Wholey Boiler Works as a boiler maker, and as a result his right leg was shortened by 2½ inches. As the work at which he had been employed required him to climb about and work on stagings, a physician whose opinion was adopted by the board took the view that he was incapacitated for his trade, in which his wages were $15 per week, but could do work as a laborer and earn $7.50 per week. The insurance company having refused to pay compensation after his recovery from the original total disability, the board awarded him one-half of his loss of wages, or $3.75 per week, for the balance of the period of 300 weeks. Subsequently the employee became insane from another cause than the injury, and was incapacitated from doing any work. The court held that this did not bar the continued payment of compensation, Judge Loring saying in part:

The insurance company has argued that the subsequent insanity of the employee stands on all fours with the subsequent death of a dependent. It was decided (In Murphy's Case, 224 Mass. 592, 113 N. E. 283 [Bul. No. 224, p. 259]) that the subsequent death of a dependent ends his right to compensation. But none of the considerations upon which that conclusion was reached exist in the case of a permanent partial incapacity to work caused by an injury within the act and a subsequent total disability coming from an outside cause.

WORKMEN'S COMPENSATION — ELECTION — INJURY OCCURRING WITHIN THIRTY DAYS FROM BEGINNING OF EMPLOYMENT—*Woodruff v. Producers' Oil Co., Supreme Court of Arizona (Nov. 26, 1917), 76 Southern Reporter, page 803.*—James Woodruff brought suit for

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damages for injuries suffered by him while employed by the company, caused, as he alleged, by the use of a defective derrick and a worn and defective swivel, and the placing of an inexperienced man in charge of engine and machinery. The first action brought by the employee, based upon a liability statute alone, had been dismissed. The present suit proceeded under the same liability statute (Civil Code, art. 2315); the plaintiff also pleaded in the alternative that if the cause of action should be found to be under act 20 of 1914 (the compensation law, though usually referred to as the "Burke-Roberts Employers' Liability Act") that the latter statute was unconstitutional; and, finally, he asked for compensation if the ultimate decision should be that the compensation law was not only applicable but valid. The pleadings and proceedings were complicated, and the supreme court rendered two opinions, the final one, on rehearing, reversing the first, which had held the compensation act applicable, and ruling that the plaintiff, having no other right of recovery, was not in a position to attack the constitutionality of the compensation law because he had no interest in proving it invalid, and affirming the judgment of somewhat more than $300 as compensation awarded by a district court.

The final decision derives its importance from its construction of two provisions relating to election. Paragraph 1 of section 3 provides that the act shall not apply to any employer or employee unless prior to the injury they shall have elected by agreement, either express or implied, to be so governed. Paragraph 3 of the same section provides that contracts of hiring made subsequent to the taking effect of the act shall be presumed to have been made subject to the provisions of the act, unless there be as a part of said contract an express statement in writing, not less than 30 days prior to the accident, that the provisions of the act are not intended to apply. The trial court held the two paragraphs inconsistent and gave effect to the latter as later in the order of adoption. Since the employeee had not notified the company to the contrary 30 days before the accident, he was held to be under the act. The supreme court called attention to the duty of courts in construing statutes to give effect to all parts if possible and to harmonize them so as to give "a sensible and intelligent effect to each." It therefore held that contracts of employment which have not been running 30 days at the time of the accident are not affected by paragraph 3, but are under paragraph 1, and the compensation law does not govern. It stated that the district court had not adjudicated the rights of the plaintiff under the code section governing liability suits, and remanded the case to it for further action thereunder.

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WORKMEN'S COMPENSATION—ELECTION—MINORS—CONSTITUTIONALITY OF PROVISION—*Young* v. *Sterling Leather Works, Court of Errors and Appeals of New Jersey (Nov. 19, 1917), 102 Atlantic Reporter, page 395.*—Edward Young brought suit through his next friend to recover damages for personal injuries received, as was alleged, through the negligence of the defendant named, which was a corporation and his employer. The defense set up was to the effect that the parties were governed by the New Jersey workmen's compensation act. This act provides that section 2, the compensation provisions of the act, shall be applicable unless there is a written statement to the contrary in the contract, or notice has been given in writing by one party to the other; in case of a minor employee the notice must be given by or to his parent or guardian. On behalf of the plaintiff it was argued that this provision sought to bind minors without their election, and is invalid as denying to them the equal protection of the laws and depriving them of property rights. Judgment in the supreme court had been for the company, and this was affirmed, Judge Kalisch in the opinion holding the provision valid and saying in part:

An infant has no vested right in the disability which the common law has erected as a barrier against his making binding contracts, during his infancy, to the extent that the legislature may not constitutionally remove such disability as to future contracts entered into by him.

At common law, an infant could only legally bind himself, by a contract which was for his benefit, and obligations imposed, by statute, upon an infant were binding. But even if this were otherwise, there is no constitutional provision in the way of the legislature to deal with the disabilities of infancy, as it, in its legislative wisdom or judgment, may see fit.

The provision of section 2, that in the case of a minor the notice shall be given by or to the parent or guardian of the minor if the provisions of that section are not intended to apply, is clearly for the benefit of the minor. The legislative intent is to safeguard the minor's interest and to protect him against his immature act or judgment. And this was clearly within legislative authority. It is, in fact, declaratory of the common-law doctrine relating to transactions with infants.

WORKMEN'S COMPENSATION — ELECTION — NOTICE TO FATHER OF MINOR BY PAY ENVELOPE—*Brost* v. *Whitall Tatum Co., Court of Errors and Appeals of New Jersey (Nov. 20, 1916), 99 Atlantic Reporter, page 315.*—Daniel C. H. Brost, a minor 19 years of age, brought action by his next friend against the company named for damages for personal injuries. The negligence charged was the maintenance, in an unsuitable condition in the company's glass-blowing factory, of a board upon which it was necessary for him to

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walk in crossing a mold hole for the purpose of carrying materials. The board was loose and had a hole in it, which, it was claimed, caused the employee to slip and fall into the mold hole. The company defended, one ground set up being that the matter was governed by the compensation act. It appeared, however, that the company had printed on the boy's pay envelope a warning that the provisions of the compensation act were not intended by the company to apply to him. The act provides that in the case of a minor, notice of election to avoid the act must be given to the parent or guardian. In this case the envelope had been given by the boy to his father, and this was held to be sufficient notice to the latter. The supreme court had held the plaintiff's evidence insufficient and granted a nonsuit, but this judgment was reversed and the case sent back for a jury trial, it being held also that the evidence of the company's negligence was sufficient for the jury's consideration, and that the abrogation of the defense of assumption of risk by the act was valid. Judge Walker examined pertinent decisions as to the matter of notice, and stated the conclusion of the court with regard to it as follows:

> In the case at bar the notice was actually conveyed to and received by the boy's father. We are of opinion that there was due service in this case of the notice that the Workmen's Compensation Act should not apply, and therefore the plaintiff's suit was properly brought at common law.

Workmen's Compensation — Election—Townships—Hazardous Employments—Casual Employment—*McLaughlin, Commissioner of Highways,* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Dec. 5, 1917), 117 Northeastern Reporter, page 819.*—Abraham Hiler was killed October 15, 1913, while dynamiting stumps in clearing out for a new road in the town of Marrowbone, Moultrie County, Ill. Hiler was a common laborer, and not specially employed for the work of blasting. His administratrix was awarded compensation by the circuit court of the county, which certified the case as one proper to be reviewed by the supreme court. The latter court held that townships are, by the terms of the act, conclusively presumed to have elected to be governed by its provisions unless they have elected to the contrary, notwithstanding that no provisions are made as to what officers may make the election, nor as to the method of raising money to pay awards; also that the legislature had the power to make the act applicable to municipalities. It held that a dirt road is not a "structure" under the act, so as to make its building an extrahazardous occupation, but that the use of dynamite in dangerous quantities in blowing out stumps is extrahazardous. The judgment of the circuit court was

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reversed, however, and compensation denied, because the court took the view that the work of dynamiting was casual, or incidental to the main purpose of road building. Judge Duncan in the opinion says as to this:

The work of dynamiting the stumps was a mere casual or incidental employment in connection with the matter of grading and repairing the road, and the evidence does not show that the road district had ever before used dynamite in connection with road grading at any time, and the evidence clearly shows that that work would only continue for a few hours at most. There was no expectancy, so far as the evidence shows, that dynamite would ever be again used by the district in its road work.

After a careful consideration of the question we have concluded that the employment of Hiler in this case in the extrahazardous employment was not a regular or stable employment within the meaning of the statute, but was merely a casual employment. Hiler was therefore not an employee within the meaning of the workmen's compensation act, and the industrial board had no jurisdiction of the case.

WORKMEN'S COMPENSATION—EMPLOYEE—PRESIDENT OF COMPANY PERFORMING MANUAL LABOR—*Bowne* v. *S. W. Bowne Co., Court of Appeals of New York (May 8, 1917), 116 Northeastern Reporter, page 364.*—S. W. Bowne, the president and principal stockholder of the company named, suffered an accident while at work assisting in handling lumber, which resulted in the loss of his left leg. His salary of $70 per week was not affected by the accident, and he had received dividends on his stock, during the preceding year, amounting to $20,000. The industrial commission, on his proceeding for compensation, awarded the maximum, $20 per week, for 288 weeks. The company and the insurer contended that he was not an employee under the law, and this view was taken by the court, Judge Pound, in the opinion delivered by him, saying in part:

The question is plainly presented whether the principal executive officer of a corporation is an employee within the definition of the word contained in the workmen's compensation law.

The words of the statute, construed in the light of the legislative purpose, do not justify the conclusion that the distinction between the higher executive officers of the corporation and its workmen was obliterated. [Cases cited.] The short title of the act, the limitation thereof to employers employing workmen, the evil to be remedied, the method of remedying the evil, the obvious incongruity of applying the law to the principal executive officer of a corporation as an accident insurance at the maximum rate of not to exceed $20 a week based on loss of earning power, all point conclusively to a distinction between such an officer and other employees which the court should not disregard.

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WORKMEN'S COMPENSATION—EMPLOYEE—TEAMSTER ASSISTING IN EXTRICATING MIRED TEAM—CASUAL EMPLOYMENT—*State ex rel. Nienaber* v. *District Court of Ramsey County et al., Supreme Court of Minnesota (Nov. 30, 1917), 165 Northwestern Reporter, page 268.*—George B. Nienaber was a coal dealer in St. Paul. On June 9, 1917, one of his delivery teams, in the suburbs of that city, became mired, and the driver requested the driver of a street sprinkler in the employ of the city, but using his own team, to assist him. The sprinkler teamster did so, hitching his team in front of that attached to the coal wagon, and in urging his horses forward his foot and ankle were stepped on and crushed. The teamster thereupon claimed compensation from Nienaber, and an award in the amount of $9 per week during the period of disability, not exceeding 300 weeks, was made by the district court named, and appeal was taken. Judge Brown delivered the opinion, stating that the majority of the court considered that the injured man was at the time of the injury an employee of the coal merchant, and, though casually employed, was employed in the usual course of the business, so that compensation had properly been awarded.

WORKMEN'S COMPENSATION—EMPLOYEE—WIFE OF EMPLOYER—*In re Humphrey, Supreme Judicial Court of Massachusetts (May 26, 1917), 116 Northeastern Reporter, page 412.*—The claim of Eliza S. Humphrey for compensation for an accidental injury was opposed by the insurance carrier of her employer, a subscriber under the act, who was her husband. She was paid regular wages for her services as cashier and bookkeeper in a store, an arrangement to that effect having been entered into at a time when her husband and his brother carried on the business as partners. She was injured while on the lot occupied by the store when on the way to her home near by. The court, speaking through Judge Rugg, held that a wife can not be her husband's employee, and reversed a decree granting compensation, the opinion being, in part, as follows:

It is provided by St. 1911, c. 751, pt. 5, sec. 2, that "'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written," with exceptions not here material. Plainly a wife working for her husband is not within the scope of this definition. Obviously one can not be an employee without a contract. That is recognized by the words of the act. Employment presupposes a contractual relation. A married woman can not make a contract express or implied with her husband. [Statute and decisions cited.] A married woman can not make a valid contract with a partnership of which her husband is a member. [Cases cited.] Manifestly a wife can not be an employee of her husband outside the Workmen's Compensation Act. She can not be an employee of her husband under the terms of that act.

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WORKMEN'S COMPENSATION — EMPLOYER AND EMPLOYEE — "ENGAGED IN BUSINESS"—REMODELING HOUSE—*Marsh* v. *Groner, Supreme Court of Pennsylvania (June 30, 1917), 102 Atlantic Reporter, page 127.*—Washington N. Marsh, who was injured while at work as a plasterer on the house of Ida Groner, proceeded under the workmen's compensation act against the latter. She was a married woman, living with her husband in the house owned by her, and for the greater part of the year had been remodeling the house. Marsh was employed to do several days' plastering, and sustained the injury complained of as the result of the collapse of a scaffolding. The act provides that the term "employee" shall include persons "who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer." The court of common pleas of Northampton County set aside an award made by the workmen's compensation board, and the supreme court affirmed this action, Judge Stewart saying, in part, in the opinion delivered by him:

We derive from this [the definition of the term "employee" quoted above] by necessary implication that only such employers are made liable under the act as are themselves engaged in regular business. This must be so if any effect whatever is to be given the exclusion clause. If the employer has no regular business, it follows that the employee was not injured within the condition prescribed. What gives rise to the question is the indefiniteness and want of precision of meaning of the word "business" as it occurs in the act.

Statutes are presumed to employ words in their popular sense, and when the words used are susceptible of more than one meaning, the popular meaning will prevail. It would be a very exceptional person who would not understand that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of.

Our conclusion is that the defendant was not engaged in any business within the proper meaning of that term as used in the act, and therefore the claimant when injured was not employed in the manner prescribed by the act. His employment, like that of his employer, was casual in character.

WORKMEN'S COMPENSATION—EMPLOYMENT IN CONNECTION WITH, OR IN PROXIMITY TO, MACHINERY—"MILL, SHOP, OR FACTORY"—*King* v. *Berlin Mills Co., Supreme Court of New Hampshire (Dec. 5, 1916), 99 Atlantic Reporter, page 289.*—One King petitioned for compensation for injury received as an employee of the company named. He was struck in the back by a plank while engaged, with five or more other men, in erecting a carrier, to be used in conveying pulpwood from freight cars on the Grand Trunk Railroad to the

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Dead River, to be from there floated down to the company's mill, 2 miles below on the Androscoggin River. The carrier was to consist, when completed, of a V-shaped trough, through which an endless chain running at its bottom would convey the pulpwood. The men were erecting a wooden horse, one of the supports for the trough. No part of the trough or chain, or of the machinery for propelling the chain, was in position at the time. The apparatus was entirely disconnected with any of the mills of the company, being about a mile from the nearest one. Under these circumstances it was held that the injury was not within the scope of the act, which by its terms applies to "work in any shop, mill, factory, or other place on, in connection with, or in proximity to, any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor."

Judge Plummer concluded the opinion, written by him, with the following statement:

The plaintiff's case is not within the purpose and spirit of the employer's liability and workmen's compensation statute. He was not employed at a place where there was any machinery, but was engaged in manual labor at a place wholly separate and distinct from the defendant's mills where machinery was in use, and at a distance from them, and his employment was not such as to entitle him to protection under the act.

WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—NATURE OF ACT—*North Alaska Salmon Co.* v. *Pillsbury et al., Supreme Court of California (Dec. 14, 1916), 162 Pacific Reporter, page 93.*—Oscar Anderson was awarded compensation by the industrial accident commission of California for an injury suffered while at work in Alaska under a contract of employment made in California. On the first consideration of the company's appeal, which was based on the ground that the commission did not have jurisdiction to make an award for an accident happening outside the State, the Supreme Court held that it did have such jurisdiction, and affirmed the award. That decision was apparently not reported. The present decision was reached on a rehearing of the case, and reversed the former view, the result being an annulment of the award. Judge Sloss delivered the opinion, and said in part:

Our former decision, upholding the jurisdiction of the commission, was based on the theory that the workmen's compensation law entered into and became a part of the contract of employment, and that, where such contract was made in this State, the statute fixed the rights of the parties with respect to any injury arising out of the employment, wherever such injury might occur.

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Upon further study we are satisfied that this view is not tenable. The liability of the employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, i. e., that of employer and employee, and affixes certain rights and obligations to that status. True, the relation of employer and employee has its inception in a contract, but, once the relation is created, its incidents depend, not upon the agreement of the parties, but upon the provisions of the law.

There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 and various statutes in other States, under which the compensation provisions are dependent upon the election or consent of the employer and employee. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract.

The question resolves itself, then, into one of the correct interpretations of our statute. Ordinarily, the statutes of a State have no force beyond its boundaries.

Unquestionably, the legislature of Alaska has full authority to determine the conditions upon which liability shall exist for an injury sustained within the boundaries of that terriory, and this right could not be limited by the circumstances that the injured person might be a nonresident of Alaska, and in the employment of another nonresident under a contract of employment made elsewhere. It will not be supposed that the legislature of this State undertook to pass a law which would trench upon the sovereign powers of any other jurisdiction.

Citing decisions in other States where the laws have been held to have extraterritorial effect, the court differentiates the cases arising in Connecticut, New Jersey, and West Virginia, because in those States the laws are elective, and in the instance of West Virginia the language of the law appears to make it apply to all workmen, except those employed wholly without the State, which was not the fact with reference to the miner whose injury gave rise to the decision. As to New York, it is said that while the statute is compulsory, the fact that payments are made from a State fund, supported by premiums whose amount is calculated on the total pay roll, makes the decision there irrelevant under the circumstances existing in California.

WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—VESSEL IN PORT OF ANOTHER STATE—*Kruse et al* v. *Pillsbury et al., Supreme Court of California (Jan. 19, 1917), 162 Pacific Reporter, page 891.*—Compensation having been ordered by the industrial accident commission to be paid to Emily Sandberg by Emil T. Kruse and others, employers, for the death of her husband, the employers applied for a writ of certiorari. The deceased, Louis Sandberg, was second officer of a vessel and was killed while the vessel was

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in port at Hoquiam, Wash. It had already been settled by the decision in North Alaska Salmon Co. *v.* Pillsbury (see above) that the California compensation law does not have extraterritorial effect, but it was contended that the fiction of admiralty law causes a vessel owned in any jurisdiction to remain a part of the territory of its own State or country wherever it may be. The court held, after an examition of pertinent cases, that this does not hold as to a vessel in port. The award of the commission was therefore annulled. Judge Melvin in the opinion written by him used the following language:

There are many authorities in support of the rule that when a merchant vessel of one country enters the port of another for the purposes of commerce, it subjects itself to the laws of the sovereignty governing such port, unless some different rule has been established by treaty or otherwise.

All nations have equal authority upon the high seas, and therefore a ship upon the waters of the open ocean is subject to the laws of the home port, being for all purposes a part of the substance of the country from which she sails. But in the port of a foreign country the laws of that country are in full force, and must operate to the exclusion of the statutes of the sovereignty governing the ship's home port.

WORKMEN'S COMPENSATION—FARM LABOR—LABORER ON THRASHING MACHINE—*In re Boyer, Appellate Court of Indiana, Division No. 1 (Oct. 25, 1917), 117 Northeastern Reporter, page 507.*—William Boyer was a separator man on a thrashing machine operated by Edward A. Lane, who went about from farm to farm thrashing oats and wheat at a fixed price per bushel. The employer opposed an application for compensation on the ground that the employee was a farm laborer, and so belonged to a class excepted from the operation of the compensation law. The industrial board certified the disputed question of law to the court, which decided in favor of the employee. It was pointed out that the thrashing is seldom done by the farmer himself, and that the thrashing and milling of grain are equally pursuits distinct from farming, the fact that the thrashing machine travels about and operates upon the farms not making any difference in the classification.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—BRICKLAYER POINTING WALL OF LITHOGRAPHIC ESTABLISHMENT—*Dose* v. *Moehle Lithographic Co., Court of Appeals of New York (Oct. 23, 1917), 117 Northeastern Reporter, page 616.*—Jacob Dose was employed by the company named, whose business, that of lithographing and printing, is classed as a hazardous one under the New York workmen's compensation act, to point up and repair the wall of its

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building. He worked at day wages, and the company furnished all materials and apparatus. On June 22, 1916, while he was at work, a rope supporting a scaffold broke, and he was thrown 30 feet to the ground and suffered injuries for which he claimed compensation. The industrial commission made an award in the claimant's favor, but this was reversed by the supreme court, appellate division, on the authority of Bargey *v.* Massaro Macaroni Co., 155 N. Y. Supp. 1076, affirmed 113 N. E. 407 (Bul. No. 224, p. 270). The court of appeals reversed the judgment of the supreme court, holding the employee entitled to compensation. Judge Hogan, who delivered the opinion, reviewed the Bargey Case, and called attention to the provision in chapter 622, Laws of 1916, amending the definition of the term "employee." The following is quoted from the opinion:

It is obvious from a comparison of the earlier law with the amended statute, that under the statute, before the amendment, an employee to be entitled to an award must have been engaged in a hazardous employment in the service of an employer conducting a hazardous employment. Such was the construction of the law in the Bargey Case. The amendment of 1916 was intended to, and does, embrace an additional class of employees, viz, those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment. The claimant, Dose, was clearly within the class embraced in the amended law.

The appellate division held that the injury to Dose did not arise out of, and in the course of, an employment "carried on by the employer for pecuniary gain," that Dose had no connection whatever with the hazardous employment conducted in the building, that his injury arose not out of and in the course of the work of lithographing and printing, but of bricklaying, and that the employment of bricklaying was not carried on by the employer for pecuniary gain. That conclusion would render meaningless the amendment of 1916. The company was an employer of workmen. It conducted a hazardous business for pecuniary gain, which term, as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain in order to come within the act. Matter of Mulford, 220 N. Y. 543, 116 N. E. 344 [see p. 236]. The injury received by Dose was accidental, and sustained by him as an employee in the service of the company which carried on a hazardous employment. The position that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not, in justice to itself, its business, or its employees, continue business in a plant which was actually unsafe or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company; and, under the law as amended, was clearly entitled to compensation.

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WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—DRIVER FOR FLORIST, INJURED IN ARRANGING WINDOW BOX.—*Glatzl* v. *Stumpp, Court of Appeals of New York (Jan. 30, 1917), 114 Northeastern Reporter, page 1053.*—Franz Glatzl having suffered fatal injuries while in the employ of G. E. M. Stumpp, a florist, proceedings for compensation were brought by his widow, Eugenie Glatzl, and his minor children, and an award was made in their favor by the industrial commission. The employee was a driver engaged in making deliveries, and on November 8, 1915, he drove to a certain house, and the other man on the wagon delivered flowers there. They then attempted to arrange a window box, Glatzl climbing upon a ladder in front of the house. He lost his balance and fell upon the ground, and the window box, falling upon him, fractured and lacerated his thumb. Tetanus developed and caused his death on November 24. The court, reversing decisions of the board and of the appellate division of the supreme court, held that the injury was not in the course of a hazardous employment as driver, Judge Cuddeback delivering the opinion and saying in part:

It has been said that the employer of Franz Glatzl was engaged in carrying on the business of a florist, which is not a hazardous employment under the act, and that Glatzl, his employee, was not, therefore, protected in any degree by the statute. We do not accept that view. It is true that the business of florist is not mentioned in the act as a hazardous employment; but in this case, as incident to his business, the florist undertook to deliver to his customers the flowers which they purchased, and in carrying on that branch of the business he operated a wagon on the streets and highways of the city. That was within the words of the statute a hazardous employment, and Glatzl was hired to drive the wagon. If the injury which he received had arisen out of and in the course of that employment, it would seem plain that a case under the statute was made out. Then the widow and children would be entitled to the award; but Glatzl was not engaged in such service when he fell.

I can observe no connection between the driving of the delivery wagon by Glatzl and his fall from the ladder which resulted in his death. It was not because Glatzl was the driver of the delivery wagon that he fell from the ladder. Any other person adjusting the window box might have been injured in the same manner.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—OPERATING ENSILAGE CUTTER ON FARM—*Raney* v. *State Industrial Commission, Supreme Court of Oregon (July 17, 1917), 166 Pacific Reporter, page 523.*—Wesley Raney was injured in the employ of D. R. Tinnerstet, while engaged in operating an ensilage cutter propelled by a gasoline engine. His hand was caught by the knives and torn off at the wrist. The employer's business was that of a farmer. The industrial accident commission refused compensation, but the circuit court of Tilla-

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mook County reversed this and gave judgment in the employee's favor. This was affirmed by the supreme court, which held that the occupation was included within the compensation law, the cutter used being a "feed mill" under its provisions. The court said further that—

The fact that the operation of an ensilage cutter may have been merely incidental to farming, the business in which plaintiff's employer was generally engaged, did not make the management of the "feed mill" a less hazardous occupation.

The compensation law was amended by the legislature of 1917 so as to exempt farmers from liability for compensation for injuries received in the cutting of ensilage or other work done by power-driven machinery when incidental to farming operations. Since the injury in the present case occurred in 1916, compensation to the claimant is, of course, not affected by this subsequent enactment.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—SALESMAN FOR NONHAZARDOUS BUSINESS, RIDING MOTORCYCLE—*Mulford et al* v. *A. S. Pettit & Sons, Inc., Court of Appeals of New York (May 1, 1917), 116 Northeastern Reporter, page 344.*—Norma S. Mulford instituted proceedings under the compensation law for the death of her husband, Edward S. Mulford, which was opposed by the employer, the company named, and by the insurance carrier. The employer dealt in lumber, coal and feed, not a hazardous business under the compensation law. The claim was made, however, under group 41 of section 2, which covers the operation of vehicles by gasoline and other power. The appellate division affirmed an award made by the industrial commission in favor of the claimant, and this judgment was affirmed by the court of appeals, Judge Pound, in the opinion, comparing with this case similar cases decided in the State, and saying:

Of course, the employer in this case was not in the business of operating a motorcycle for gain. Its business was not the operation of motorcycles in any sense. I think, however, that "pecuniary gain," as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain in order to come within the act. If, in that connection, the purpose of using the motorcycle is profit, that is enough. Herbert *v.* Shanley Co., 242 U. S. 591, 37 Sup. Ct. 232. The deceased in this case operated the motorcycle as an incident to his employer's business. In the Bargey Case [218 N. Y. 410, 113 N. E. 407; Bul. No. 224, p. 270] we held that deceased, a carpenter making repairs on a building used in the manufacture of macaroni, was not covered by the act, because the employer's occupation was the preparation of macaroni, and that the employee was not engaged therein. The question presented in this

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case was not considered in the opinion, although it was said that the macaroni company was not engaged in the repair of buildings for pecuniary gain.[1]

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STORAGE—RETAIL COAL DEALER—*In re Roberto, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 397.*—Berhardina Roberto applied for compensation for the death of an employee of John F. Schmadeke (Inc.), which conducted a large retail coal business. The capacity of its pockets was between 10,000 and 12,000 tons, and the daily sales amounted to not far from 1,000 tons. On December 15, 1916, the supply of coal was small, and it was necessary for the employee to "trim" the coal by moving coal out of the corners of the pocket, so that it would run by gravity down a chute into automobile trucks for delivery to customers. The employee was walking along a corridor around the pocket when he fell, sustaining fatal injuries. The court reversed an award to the applicant, and dismissed the claim. It held that the business of an employer does not come within the meaning of the term "storage" in the law, even though his business may be an extensive one, where goods are kept on hand with no other purpose than their delivery as fast as sales can be made.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STORAGE—RETAIL STORE—*Walsh v. F. W. Woolworth Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 394.*—Emmet G. Walsh was awarded compensation by the industrial commission for an injury alleged to have been sustained on October 21, 1916, in the form of a strain of the employee's back. He was a boy of 16, and his duties were to take merchandise delivered on the sidewalk in front of the employer's 5 and 10 cent store and place it in the basement, and to take the goods to the salesroom above at the request of the salesmen. He claimed that the injury happened while he was rolling a barrel of peanuts up an incline. The question of fact as to the injury having been settled by the decision of the commission, the only point at issue was whether it occurred in the hazardous employment of "storage." The employer was held not to be engaged in this business, and the award was reversed and the claim dismissed. The following is taken from the opinion delivered by Judge Woodward:

The most obvious thing about group 29, in connection with the scheme of the workmen's compensation law generally, is the fact that it deals with wholesale matters. When the statute refers to ware-

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[1] For a repudiation of the doctrine in the Bargey Case see Dose *v.* Moehle Lithographic Co., p. 233.

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housing or "storage of all kinds and storage for hire," we are to understand, not purely incidental storage of the goods necessary to keep up a retail stock, but the wholesale storage of merchandise in large packages, involving special dangers in their handling and storage. Formerly an employee was defined to be "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same," but now it is "a person engaged in one of the occupations enumerated," or one "who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises," etc., and this clearly excludes the claimant in this case, for it can not be contended that the employer's "principal business" was that of a warehouseman or storage man, in the light of the record now before us.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—WEIGHING HIDES UNLOADED FROM VESSELS—INJURY—ANTHRAX CONTRACTED THROUGH ABRASION OF SKIN—*Hiers* v. *John A. Hall & Co., Supreme Court of New York, Appellate Division, Third Department (May 2, 1917), 164 New York Supplement, page 767.*—Eugene H. Hiers was awarded compensation by the State industrial commission against his employer, the company named, and its insurer. His occupation was weighing hides on the piers in Brooklyn, the hides constituting parts of the cargoes unloaded from vessels. Such unloading and handling is one of the occupations designated as hazardous under the compensation law. His gloves became permeated with moisture and salt from the hides and a swelling was caused on the back of one of his hands, resulting in an abrasion of the skin upon this swelling. On February 10, 1916, anthrax germs contained in the hides were communicated to his system through this fissure, and the award was made for the disease resulting. A compensable injury is defined by the act as including:

"Only accidental injuries arising out of and in the course of employment, and such disease or infection as may naturally and unavoidably result therefrom."

The award in favor of the employee was affirmed, Judge Cochrane saying:

There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation, or is a natural outcome thereof. It is expected, usual, and ordinary. This disease incurred by the claimant was unexpected, unusual, and extraordinary, as much so as if a serpent concealed in the hides had attacked him. There is no difference in principle because the attack, instead of being made unexpectedly by a concealed serpent, was made unexpectedly by a concealed disease germ. We think the circumstances constitute an accidental injury, within the meaning of the statute.

However, there is another theory on which this award may be upheld. The claimant, in the course of his employment and as a result

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thereof, had received an abrasion on his hand or a fissure therein. This may properly be deemed an accidental injury arising out of and in the course of his employment, and the disease or infection caused by the anthrax germ may be deemed "such disease or infection as may naturally and unavoidably result" from such injury, within the meaning of the statute.

WORKMEN'S COMPENSATION — HORTICULTURAL LABOR — JANITOR PRUNING TREE—*Kramer* v. *Industrial Accident Commission of California, California District Court of Appeals (Oct. 12, 1916), 161 Pacific Reporter, page 278.*—The industrial accident commission awarded compensation to Oscar Ohlsson for injury received while in the employ of Henry J. Kramer. The former was janitor of a building used by his employer as a dancing academy and dwelling house. On the adjoining lot was a garage used by Kramer, and the serious disability of the employee resulted from the piercing of his ankle by a palm thorn while he was pruning a fig tree on this lot. Horticultural labor is excluded from compensation, and the court reversed the award on the ground that he was engaged in such labor. In the course of the opinion delivered by Judge Shaw, he said:

It appears that Ohlsson was employed in a dual capacity; that is, in the capacity of a janitor for a dancing hall and a house and garden laborer. In the light of the evidence we construe the finding that Ohlsson was employed as a house and garden laborer as referring to household domestic service mentioned in section 14, and the caring for the flowers, grass, trees, and shrubbery growing upon the two lots. In other words, the service performed by Ohlsson as a house laborer consisted of household domestic service, while that performed by him in the capacity of a garden laborer consisted in horticultural labor. Clearly the labor of caring for grass lawns, trees, shrubbery, and flowers is horticultural in character. The pruning of this fig tree without specific instructions so to do might well be regarded as within the scope of his employment as gardener, since the proper care thereof required such work to be done. It did not interfere with the use of the driveway, and the pruning thereof had no connection with the work of janitor which by any stretch of the imagination could render it incidental thereto. Therefore the conclusion of law as found by the commission that at the time of the injury "the applicant employee was not engaged in any of the occupations or employments excepted by section 14 of the workmen's compensation, insurance, and safety act from the provisions of said act" is without support in the facts found.

New York decisions are discussed and found to be in agreement with this view.

WORKMEN'S COMPENSATION—INJURY—ACTINOMYCOSIS FROM PULVERIZED GRAIN—*Hartford Accident & Indemnity Co.* v. *Industrial Commission et al., Supreme Court of California (Jan. 4, 1917), 163*

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Pacific Reporter, page 225.—H. A. Burris, an employee of the Perkins Grain & Milling Co. during the months of October, November, and December, 1915, became afflicted with an affection of the nose and mouth which was diagnosed as actinomycosis. His work was filling sacks with ground barley and wheat, and the evidence, from physicians who testified and medical works to which they referred, was conflicting as to the causes of the disease and as to whether it could be contracted from grain. The commission's decision, awarding compensation to the employee, was upheld by the court, the opinion, delivered per curiam, concluding as follows:

The commission resolved this conflict in opinion and authority in favor of the applicant for compensation by its finding that "the applicant's employment in and about the handling of grain caused him to contract the disease known as actinomycosis." The evidence in support of this finding consists, not only in the opinion evidence of the physicians who treated the applicant and diagnosed his case, but also in the testimony of the applicant himself that he had not theretofore suffered from any such disorder, but that it had become acutely developed whilst he was engaged in the work of sacking and handling pulverized grain for his employer. We think this evidence was sufficient to warrant the commission in arriving at its aforesaid conclusion, and this being so, we have no power to interfere with its discretion in making said award.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ANSWERING TELEPHONE CALL—*Holland-St. Louis Sugar Co. v. Shraluka, Appellate Court of Indiana, Division No. 2 (May 28, 1917), 116 Northeastern Reporter, page 330.*—Compensation was awarded Barton Shraluka by the industrial board of Indiana, and the company named, his employer, appealed from the award. The employee worked in the sugar factory from 6 a. m. to 6 p. m., 7 days a week, without opportunity to go outside the factory or allowance of time for lunch. While at work on the third floor he was informed by the company's chemist that he was wanted on the telephone. He started to walk down stairs, but near the top slipped on some pieces of beet and fell to the floor below, sustaining several injuries. It proved that the telephone call was for another employee. The principal question was whether the injury was one arising out of the employment. The court decided that it was and affirmed the award. Judge Dausman delivered the opinion, stating the principles set up by the apposite cases, which are cited, and saying that even if the call had been one from his family or friends, it would have been presumable that it was under the circumstances an incident of his employment, especially as he had been summoned by a superior, and had a right to assume that the call pertained to his employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ATTEMPT TO RAISE WINDOW INTENTIONALLY NAILED DOWN—*In re Borin, Supreme Judicial Court of Massachusetts (June 27, 1917), 116 Northeastern Reporter, page 817.*—John Borin was injured while in the employ of the William Ryde Co. Certain windows in the room had been nailed down, because to reach them for the purpose of opening and closing involved dangerous climbing over dye tubs filled with hot water and steam. The need of fresh air being great, the employee climbed over the tubs and attempted to detach with a hammer and chisel the slat with which one of the windows was fastened. A piece of the chisel flew and struck him in the eye, causing the injury for which he claimed compensation. In reversing an award made in his favor the court held that this injury did not arise out of the employment, Judge Braley concluding the opinion written by him as follows:

The claimant therefore must be held to have worked in the dye house as fitted for use by his employer, who had the absolute right to close the windows temporarily, or permanently, so that the premises should be used as if those windows formed no part of the construction or equipment; of which conditions he had implied or constructive notice. The fastened window spoke as plainly to him that it was to remain closed as if a printed notice had been posted, or an oral order had been given, the intentional violation of which ordinarily would have precluded compensation.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DOMESTIC SERVANT LIGHTING FIRE WITH ALCOHOL—*Kolasynski* v. *Klie, Supreme Court of New Jersey (Oct. 8, 1917), 102 Atlantic Reporter, page 5.*—Antoni Kolasynski claimed compensation for the death of a servant in the family of John H. Klie, this employee having been burned to death while lighting a fire. She had been warned not to use kerosene "or anything like that" for the purpose, but the accident occurred while she was using wood alcohol. The court, speaking through Judge Swayze, said that the only question was whether the accident was one arising out of and in the course of the employment, and affirmed a judgment for the petitioner, saying in part:

That it was by accident is not questioned. It was a fortuitous event, which might indeed be expected but might never happen. We must conclude that it arose out of and in the course of the employment unless the disobedience of orders prevents that conclusion. The disobedience of orders in this case was a disobedience of orders as to the way in which the work should be done. The work itself was the very work decedent was expected to do. It was done at the very place where it was meant to be done.

The measure of disobedience found was held not to bar the claim, and the judgment was affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EATING LUNCH—*Manor* v. *Pennington, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 424.*—Alfred Pennington was a contractor doing some construction work on the main and second floors of a garage in Plattsburg, N. Y., and had in his employ William Manor. The employer had no control over the basement of the garage. Manor and three other men went into the cellar at noon to eat their dinner, and just as they were about to go upstairs to resume work the boiler exploded, and Manor received burns from which he died the same day. John Manor made claim for compensation, and the industrial commission made an award in his favor. The court, however, held that the injury did not arise out of and in the course of the employment, Judge Woodward, for the court, saying in part:

Manor was not an employee because he was not engaged in performing any of the work for which he was employed (Bargey *v.* Massaro Macaroni Co., 218 N. Y. 410, 413, 113 N. E. 407 [Bul. No. 224, p. 270]); his injuries did not arise out of his employment in any other sense than that he was, probably, in that locality because he was employed upon the first and second stories of the building, but he was not at the time doing anything for the employer, any more than he would have been if he had been waiting in the office of a local hotel for the expiring of the dinner hour.

The accident which happened was not due to any risk growing out of the performance of the employer's contract; it was such a risk as arose from the conduct of the garage by its owners, with which the employer had no relation, and the employee could have been performing no service for the master. He was performing no work whatever; he was awaiting the hour to return to his employment in a part of the premises which were in the possession and control of third persons; and the law does not extend its protection to one thus situated.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYEE IN FACTORY ON BOTH SIDES OF STREET, SLIPPING ON ICE—*Redner* v. *H. C. Faber & Son, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 242.*—Charles W. Redner was employed as a general utility man by the H. C. Faber & Son Co., manufacturer of trunks. Across the street is a second trunk factory, operated by the A. W. Winship Co., a corporation having the same stockholders as the Faber company and carried on as a single executive organization with it. It was Redner's duty to perform services for both concerns, including the lettering of trunks. On January 20, 1916, he went, at the direction of the superintendent of the Faber company, to letter a trunk in the building of the Winship

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company. On attempting to return he slipped upon the snow and ice in the street, and from the effects of the fall received he died six months later. The question upon which the decision turned was whether the injury was one arising out of the employment, it being contended on the part of the employer and insurer, who appealed from an award of compensation to the widow, that it was the result of a street accident, to which all persons using the highway were equally liable. The court, speaking through Judge Woodward, affirmed the award, saying that some English decisions would seem to sustain the contention mentioned, and that some of our own have refused to sustain awards in cases where injuries occurred in highways after the termination of the hours of employment, but had not gone to the extent to which the court was asked to go in the present case. Continuing, the opinion says in part:

The evidence indicates that, while the location of the accident was technically a public highway, it was in fact practically a part of the premises of these two corporations; it was not generally used for street purposes. The determining factor is, not whether the accident occurred in a public highway, but whether the employee was there in the performance of his duties. If he was there in the discharge of the obligations of his employment, the accident would arise out of such employment as certainly as though he had reached a point within the factory and had there slipped and sustained his injuries. This highway was a part of the place provided for him to work in. Under the circumstances here disclosed, it was a matter of absolute indifference who owned or controlled the highway. It was as necessary for the decedent to cross this highway in doing the work appointed as it was for him to cross the room in which he was employed in the factory, and the liability would clearly extend to him if injured in either case while actually employed.

On appeal the judgment in this case was affirmed by the State court of appeals (May 14, 1918, 119 N. E. 842).

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—BURDEN OF PROOF—*Bloomington, D. & C. R. Co.* v. *Industrial Board, Supreme Court of Illinois (Feb. 7, 1917), 114 Northeastern Reporter, page 939.*—Compensation was awarded by the industrial board to the administratrix of Henry Yanda for his death in the employ of the company named on July 9, 1914. The deceased, a carpenter, and one Albeitz were working at that time on the top of a car. There were iron frames about ventilators on the top, and Yanda was near the end of an uninsulated live cable. The other workman was looking down at his work and had his cap over his eyes. His first knowledge of any accident came when he saw Yanda falling over. He caught Yanda, and the latter was taken down from the car dead. The testimony as to whether or not there were

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burns upon the body was conflicting, as was that as to whether death from electric shock could occur without the presence of such burns. The court held that although the burden of proving that death was the result of an injury occurring in the course of employment rested upon the administratrix, there was sufficient evidence to sustain the view taken by the board that such was the fact. The concluding portion of the opinion, which was delivered by Judge Cartwright, is in part as follows:

The burden of proof that Yanda's death was an accident arising out of his employment rested upon the administratrix, and such proof must amount to something more than mere guess and conjecture. The evidence was that Yanda was, and for 21 years had been, in perfect physical condition, and the reasonable presumption is that he was killed by some external, efficient agency. The agency was present if it became operative through contact with the iron plate and exposed end of the cable. The rational explanation is that the death was caused by an electric shock.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FALL FROM SCAFFOLD DUE TO EPILEPSY—*Van Gorder* v. *Packard Motor Car Co., Supreme Court of Michigan (Mar. 30, 1917), 162 Northwestern Reporter, page 107.*—Mildred Van Gorder instituted proceedings to obtain compensation for the death of Frank Van Gorder, and an award was made to her by the industrial accident board. Van Gorder was a steam fitter employed by the company named, and when standing upon a scaffold 6 feet in height he fell from it to the floor, fracturing his skull, and died from the effects of the fall within 24 hours. The board found upon evidence which the court deemed sufficient that the fall was the result of epilepsy, and also found that the injury was one arising out of and in course of the employment. The company contended that it was not one arising out of the employment, and the supreme court on appeal adopted this view, reversing the award on the ground that the fall was caused only by the fit, and that this was the sole cause of the injury.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FALL FROM STAIRS WHILE LEAVING PREMISES.—*In re O'Brien, Supreme Judicial Court of Massachusetts (Nov. 2, 1917), 117 Northeastern Reporter, page 619.*—John O'Brien, an employee of the Standard Comb Co., received injuries while leaving the premises in which he worked. O'Brien was 64 years of age, and practically blind in his right eye, but his vision was sufficient to enable him to do his work properly, and to descend the outside stairs which

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led to the place of his employment. On September 12, 1916, while he was going down the stairs after completing his day's work, and while other employees were rushing down the stairs, he took his hand momentarily from the railing along them. He reached again for the railing, but made a misstep or lost his balance while on the ninth step from the bottom, and as a result fell over the railing to the ground. The superior court of Worcester County affirmed an award of compensation made by the industrial accident board, and from this court's decree the insurer appealed. The supreme judicial court affirmed the decree, resolving in favor of the claimant the disputed point as to whether the injury arose out of the employment. Judge Pierce said as to this, in the concluding portion of the opinion delivered by him:

We are of opinion that there is a reasonable probability that some employee in the course of his employment will fall and receive an injury while descending a stairway of an employer, constructed and used as the stairway was in the case at bar. It follows that the likelihood of such a fall is a risk and hazard of that business.

Workmen's Compensation—Injury Arising Out of and in Course of Employment—Horseplay Acquiesced in by Employer—*In re Loper, Appellate Court of Indiana, Division No. 2 (June 1, 1917), 116 Northeastern Reporter, page 324.*—The industrial board, in the case of one Loper, certified to the court the question of law as to whether his injury and death arose out of his employment within the meaning of the compensation act. Loper was at work as a drill-press operator. The assistant superintendent, as a matter of sport, attempted to apply to Loper's person the nozzle of a compressed-air hose, when the employee, in jerking away his body, ruptured an abscess in the region of the gall bladder, causing acute general peritonitis, and death two days after the injury. The employees, as was found by the board, were accustomed to use the hose to clean their clothes, and to turn the air from it upon one another. The employee injured had participated in this at other times, but on this occasion was attending to his work. The assistant superintendent had also participated before, and neither he nor any other representative of the employer had objected to the practice. The court held that under the circumstances the injury arose out of the employment. It calls attention to the cases of other kinds of "horseplay," in the majority of which compensation has been denied.

We are not dealing here with a sporadic, occasional, or unanticipated use of the air hose in play. It had become a habit here for the employees to turn the hose against one another. That the habit was a perilous one, see the following, where similar accidents occurred: [Cases cited].

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The employer, with knowledge of the facts, permitted such practice to continue. It was within his power to have prohibited it. By failing to do so, it became an element of the conditions under which the employee was required to work.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—MINER SHOT AFTER GOING BACK TO ATTEND TO UNEXPLODED CHARGES—*Atolia Mining Co. et al.* v. *Industrial Accident Commission et al., Supreme Court of California (Aug. 10, 1917), 167 Pacific Reporter, page 148.*—J. D. Mason was a shot firer for the company named. It was the custom in small mines, such as this was, for some one of each shift of shot firers, after it appeared that some shots had not exploded, to return and make the place safe for the next shift. This could not well be done immediately on account of smoke and gas left by the explosion. The shift which included Mason finished work at 2 a. m. He and his two fellows had drilled 14 holes and loaded them. They lighted the fuses and went up the shaft about 100 feet, where they listened and counted 12 explosions. The other men lived some distance from the mine and went home. Mason went to his tent, about 200 yards away, washed his face and hair, and returned to the mine about 20 minutes after leaving it. He found that all the shots had been fired, the deficiency in the number of reports doubtless resulting from simultaneous explosions, this being a not uncommon occurrence. As he once more went to his tent with his miner's light one of the guards stationed to prevent theft of ores, without inquiry or warning, shot him in the back, inflicting an injury for which he claimed compensation. An award was made by the Industrial Accident Commission, and the employer and the insurance company, praying for a writ of error, contended that he was not an employee at the time of the injury, but a volunteer, his hours of service having expired; also that the shooting was a premeditated and unjustifiable assault. Overturning these contentions and affirming the award, the court, through Judge Henshaw, said:

Upon neither of these grounds can this award be annulled. The recognized custom of miners, carried out with the knowledge and approval of the mine owners (a custom which manifestly makes for the protection of the mine owners themselves, in lessening the liability of injury from unexploded blasts by the oncoming new shift, ignorant of the conditions), becomes in all essentials for this award a part of the duty of the miner in the performance of his work, and his injuries thus resulting grew out of and occurred in the course of his employment.

Upon the second proposition, while unquestionably it was a heedless and reckless thing for the guards thus to have shot a man without more investigation as to his character and intentions than was here shown to have taken place, yet every legal presumption favoring

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innocence, the argument will not be sustained that these guards deliberately perpetrated an assault to commit murder. To the contrary, it will be held that the man who fired the shot, himself the chief guard, believed that the circumstances justified him in so doing, and that thus he was acting within the line of his own employment, and under this view Mason, having been injured by the negligent performance of an act within the general scope of the duties of the employee inflicting the injury, is entitled to his recovery.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—MOVING BEAMS TO REACH STEAM GAUGES—ACCIDENT—OBJECTIVE SYMPTOMS OF INJURY—*Manning* v. *Pomerene, Supreme Court of Nebraska (Apr. 14, 1917), 162 Northwestern Reporter, page 492.*—Chapin E. Manning brought an action for compensation against Louis W. Pomerene for injury suffered while engaged in attending to a boiler for the latter. It was necessary, in order to read the steam gauges, to go into a narrow passageway. Manning found this obstructed by some steel I-beams about 3 feet above the floor and pushed against them in an effort to move them out of the way. He felt faint and sick and had pain in his stomach and nausea, was obliged to sit down, and was unable to work the remainder of the day. He acted as overseer of other men on the next day, which was Saturday, but on Monday and afterwards he was unable to work, vomiting blood and having a slight paralytic shock. He was 63 years old, and there was a contention that the sickness was due to arteriosclerosis. Other contentions on the part of the defense were that the removal of the beams was not within the scope of the employment and that the occurrence was not "an unexpected or unforeseen event, happening suddenly and violently," and "producing at the time objective symptoms of an injury." These questions were resolved in favor of the employee, Judge Letton delivering the opinion, from which extracts are quoted as follows:

It seems there was a narrow passageway in which he was required to walk in order to reach the gauges showing the steam pressure in the boiler. The end of these beams projected over and obstructed the passageway, and while there were steam fitters near whom he might have called from their work to move the beams far enough to allow him to pass, it was perfectly natural and to be expected that in order to perform his duties he should move or attempt to move them himself. They were lying upon a projecting part of the boiler, and the testimony is that beams resting upon iron, as these were, usually slide easily when pushed. In our view he was acting within the scope of his employment.

It is insisted that no "unexpected or unforeseen event, happening suddenly and violently" occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back

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and forwards could not reasonably be said to be "an unforeseen event"; and that it did not happen suddenly and violently except as it was produced by the plaintiff himself. It is said that this language "was clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding of employee's person by some breaking or falling or exploding of apparatus, machinery, or tools." To hold this would unduly limit the meaning of this clause. The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen event happening suddenly. It is also said that no "objective symptoms" of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce "at the time objective symptoms of an injury," but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PRESUMPTION—EVIDENCE—*Chludzinski et al.* v. *Standard Oil Co., Supreme Court of New York, Appellate Division, Third Department (Dec. 28, 1916), 162 New York Supplement, page 225.*—This decision arose out of a claim for compensation by Catherine Chludzinski and others for the death of her husband, an employee of the company named. Death was caused by fire catching his flannel shirt, which, as in the case of all the workmen, was saturated with oil and was very inflammable. During working hours he went into a locker room adjoining the workroom, in which there was a lighted Bunsen burner protected by a hood. A few minutes later he came out with his clothes aflame, and died the same day from the effect of burns. The company argued that there was proof that the injury was not one arising out of and in the course of the employment. The court held to the contrary, and affirmed an award in favor of the widow and children, Judge Kellogg saying in the opinion delivered by him:

In the absence of a rule prohibiting the men from going to the locker room during working hours, it can not be said that the decedent had no right to enter that room, or that he ceased to have all the benefits of an employee while there. Many reasons might have made it proper, and in the due course of his employment, for him to enter the room at the time. We can not, under the law, indulge in any presumption against him.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PRESUMPTION—EVIDENCE—*Ohio Building Safety Vault Co.* v. *Industrial Board et al., Supreme Court of Illinois (Feb. 21, 1917), 115 Northeastern Reporter, page 149.*—The company named was directed to pay compensation to the widow of Jens Christensen, at the rate of $31 per month for 96 months, on account of the death of her husband on December 23, 1914. He was a night watchman in the employ of the company, and on the night of December 19 received injuries which resulted in his death. There was evidence tending to show that he was assaulted with an iron pipe by some unknown person. The coroner's verdict was to that effect, and it was admitted as evidence before the board, and on appeal was held to have been competent evidence. The court also held that the circumstantial evidence was sufficient to sustain the findings of fact on which the board based its award, and affirmed the same. It appeared that the employee was of a peaceable disposition and had no personal enemies, but it was contended by the employer that the injury did not arise out of the employment. This contention was rejected by the court in its opinion delivered by Judge Carter, who, in the course of his quite thorough discussion of this point, said:

The deceased, because of his employment, was required to guard the building from trespassers or other intruders, and on this account he necessarily might have to deal with persons more or less regardless of the rights of others. Those required to deal with such persons run a risk of encountering violence. Under the evidence in this case, the injury is fairly traced to the employment of the deceased as the proximate cause—an injury which came from a hazard to which Christensen would not have been equally exposed apart from his employment. The danger of this injury was peculiar to his line of work and not common with all other kinds of employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—RETURNING FROM WORK—*Swanson* v. *Latham & Crane et al., Supreme Court of Errors and Appeals of Connecticut (July 6, 1917), 101 Atlantic Reporter, page 492.*—Alice May Swanson was a claimant to compensation against the firm of employers named, and the company carrying their insurance. The employers were building contractors engaged upon a house in Stafford Springs, and employed six men, one of them Andrew S. Swanson, the husband of the claimant. The men were paid their regular wages and in addition transportation charges, amounting to 90 cents per day, from Willimantic to Stafford Springs and return. They were at liberty to use this money for board and remain at Stafford Springs, or to expend it for transportation to Willimantic

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and back. It was arranged that one of the employees, Osterhout by name, should carry the men back and forth in his automobile and be paid the transportation money directly by the contractors. On December 7, 1916, as the men were returning from Stafford Springs to their homes in Willimantic, the automobile collided with a railroad train at a crossing, and all of the six men were killed. The court affirmed an award of a compensation commissioner holding that the injury arose out of and in the course of the employment. From the opinion delivered by Judge Wheeler the following is quoted:

Transportation to and from his work was incidental to his employment; hence the employment continued during the transportation in the same way as during the work. The injury occurring during the transportation occurred within the period of his employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment, because contemplated by it. The case falls clearly within the construction we have heretofore placed upon the terms of the statute "arising in the course of the employment." Larke *v.* Hancock Mutual Life Insurance Co., 90 Conn. 303, 308, 97 Atl. 320 [Bul. No. 224, p. 302]. An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment.

Workmen's Compensation—Injury Arising Out of and in Course of Employment—Traveling Agent Slipping on Ice—*In re Harraden, Appellate Court of Indiana (Dec. 20, 1917), 118 Northeastern Reporter, page 142.*—Charles H. Harraden was an employee of the Columbia Insurance Co., as a fire insurance agent. On March 20, 1917, he was sent from Detroit to Boyne City, Mich., on business and arrived there after dark. While going from the railway station to a hotel he slipped upon the icy sidewalk and fractured his femur. The industrial board found that he had been totally disabled from work up to the time of the hearing before it and might be permanently partially incapacitated. The board certified to the court the question whether the injury was one arising out of the employment. The court replied in the affirmative, after examining pertinent cases. The following is quoted from the opinion delivered by Judge Felt:

The facts show that Harraden's employment exposed him to increased hazards generally, among which was the one which caused his injury. The admitted facts compel the inference that the injury of Harraden resulted from conditions produced by the weather, and likewise because he was in the particular locality at the time in question. The latter fact is due to his employment. The facts admit of no other inference but that for his employment he would

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not have been in that locality at the time of his injury. His employment was therefore a contributing proximate cause of his injury. By reason of it he was exposed to a hazard which in all reasonable probability he would not otherwise have encountered. The work he was employed to do required travel and made him particularly subject to hazards to an extent far greater than like hazards encountered by the general public.

Such being the case, the facts not only warrant the conclusion that the injury of Harraden was received in the course of his employment, but they likewise compel the inference that his injury arose out of his employment within the spirit, purpose and meaning of the workmen's compensation act.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—TRAVELING SALESMAN SLIPPING ON ICE—*Donahue* v. *Maryland Casualty Co., Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 226.*—Patrick M. Donahue was a traveling salesman for Thomas J. Flynn & Co., engaged in the sale of church goods. On February 21, 1916, he went from the employer's place of business in Boston to Lowell, and from there by electric car to the village of Collinsville, and to the house of a clergyman, distant about 10 minutes' walk. After completing the business he started to walk back to the car line, and slipped on the ice and fell, breaking his ankle. This occurred at a point where he was obliged to walk in the middle of the street, the sidewalk being impassable on account of the ice. He intended to take a car to a place where he could visit another prospective customer. The insurer appealed from an award of compensation made by the industrial accident board, and on which the superior court of Suffolk County had rendered judgment. The supreme judicial court reversed this judgment on the ground that the injury was due to a risk common to the public, the employment not being a contributing, proximate cause.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VOLUNTEER—*Eugene Dietzen Co.* v. *Industrial Board of Illinois, Supreme Court of Illinois (June 21, 1917), 116 Northeastern Reporter, page 684.*—Giuseppe Cappucio was injured while in the employ of the company named on July 15, 1914, and an award was entered in his favor by the committee of arbitration and sustained by the industrial board, granting him $5 a week for 112 weeks. The circuit court of Cook County affirmed the award, certifying, however, that it was a case proper to be reviewed by the supreme court. The employee's work was the polishing of small metal handles for tapelines by holding them against a buffing wheel. He had to take these from one box and, after polishing,

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place them into another. The dust from the operation fell into a boxlike receptacle, connecting with a pipe to an exhaust fan. The employee dropped one of the handles into the receptacle, and, going a few feet away from his working place, removed a cover near the fan, and reached in for the purpose of getting the article. In doing this his hand was caught by the fan and severely injured. It was proven that another man was responsible for the exhaust system, and that the injured employee had nothing to do with it, and should have called for assistance in case of need. There was a conflict of evidence as to whether he had received specific warning on another occasion when he had taken the cover off the hole. The court held that, the scope of his employment having nothing to do with the exhaust system, the injury did not arise out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WILLFUL MISCONDUCT—*Inland Steel Co.* v. *Lambert, Appellate Court of Indiana, Division No. 2 (Dec. 19, 1917), 118 Northeastern Reporter, page 162.*—Harold B. Lambert proceeded against the company named for compensation for an injury sustained while employed by the company. From the findings of fact of the board it appeared that he was a switchman, that his duties were in connection with the operation of a switch engine about the yards, and that his hours were from 6 p. m. to 6 a. m. After quitting work he changed his working clothes for street clothes, and then had to go a distance equal to five city blocks to the entrance of the plant to deposit a card in the time clock. On the morning of March 7, 1916, when the injury occurred, the path along which he usually went was impassable for more than 70 feet, because of an excavation 10 feet deep. Before he reached this excavation the engine came along, in charge of the day crew, running in the direction in which he was going, and to avoid the excavation and save time he attempted to board it, and received the injury, which resulted in the loss of a foot above the ankle joint. He had been at work as a switchman for two months, and the company had in force during that time a rule that no one not at the time connected with its operation should board a switch engine. He had been given a book of rules on entering the employment, but it was in a foreign language which he could not read, and on his returning it he was told that there were none on hand in English, but that one would be furnished to him later. He was in the office several times, but was not given a book, nor did he ask for one. He had not previously ridden on the engine going out in the morning, but had done so on several occasions at night. The board found that he received his injuries by an accident arising out of and in the course of the employment, and that it was not due

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to his own willful misconduct; and it awarded him compensation for 125 weeks at $11.06 per week. The court reversed the award and ordered a rehearing. Judge Caldwell delivered the opinion, and first pointed out that, while it was proper for the board to state its conclusions as to whether the injury was an accident, whether it arose out of and in the course of the employment, and whether it was the result of willful misconduct, these were matters involving conclusions of law and were reviewable by the court, and such findings should not be upheld unless supported by the findings of ultimate fact. It was agreed that the injury was the result of an accident in the course of the employment, but the court held that under the facts as found it did not arise out of the employment, Judge Caldwell saying on this point:

In the case at bar we are impressed that the accident arose from a peril added by the conduct of the appellee; that the act of attempting to get on the engine in motion while proceeding to the time clock was not reasonably incidental to his employment, but rather was an act done purely for his own convenience. In our judgment the facts do not present a situation wherein the employee negligently performed a duty, or was guilty of negligence in the performance of a duty, but rather a case wherein he attempted unnecessarily to do a perilous act, not reasonably incident to his employment. We therefore conclude, under the finding, that the accident did not arise out of the employment.

Workmen's Compensation—Injury by Negligence of Third Party—Deduction of Amounts Paid by Assailants Under Order in Criminal Proceedings—*Dietz* v. *Solomonwitz et al., Supreme Court of New York, Appellate Division, Third Department (Sept. 13, 1917), 166 New York Supplement, page 849.*—Charles B. Dietz was a paper hanger employed by Harry Solomonwitz. While thus at work in April, 1916, he was told by two members of a rival labor union that there was a strike upon the work and was asked to quit. When he refused to do so, the men assaulted him, inflicting injuries from which he had not sufficiently recovered to be able to work up to August 14, 1916. On that date an award was made to him by the industrial commission, he having in his proceeding for compensation expressed his election to take compensation rather than any damages obtainable from any person, and assigned his right to any such damages to the person or institution who should be liable for compensation. The criminal court which tried the assailants sentenced them to terms of imprisonment, but suspended the sentences and paroled them on condition not only of good behavior, but of payment by them to Dietz of $100 immediately and $15 per week during his disability. This weekly payment was the same as the amount of weekly compensation awarded to Dietz to run from May 8 to August

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14, 1916, and for such further period as might be determined on a later hearing. The industrial commission decided that the employer and insurance carrier were entitled to no credit for the amounts paid by the parties responsible for the injury; but the court held that these amounts should be deducted from the compensation. In concluding the opinion written by him Judge Lyon, for the court, said:

The provision of section 29 requiring the employer to contribute only the deficiency should the employee elect to proceed against the wrongdoer impliedly requires the application in reduction of the employer's liability of any amounts received from the third party. The effect of the acceptance of these payments by the claimant was to correspondingly reduce the liability of the employer to the claimant. Hence the award should have been only for the balance which existed up to the time the award was made.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—ELECTION OF REMEDY—AGREEMENT BETWEEN WIDOW, EMPLOYER, AND INSURER AS TO SUIT—*Detloff* v. *Hammond, Standish & Co., Supreme Court of Michigan (Mar. 29, 1917), 161 Northwestern Reporter, page 949.*—Joseph Detloff was killed July 7, 1914, while driving a milk wagon as an employee of the Detroit Creamery Co., by a collision with a motor truck of Hammond, Standish & Co., claimed to be due to the negligence of the truck driver. His widow, as administrator, sued the latter company and recovered judgment in the amount of $10,000. The defendant appealed and set up a contract, evidence as to which had been rejected at the trial. The widow, the creamery company, and its insurer were the parties to this contract, and under it the widow was to sue the third party, and if she recovered $3,000 or more was to receive no compensation, while otherwise the deficit between the amount recovered and $3,000 was to be made up to her. This agreement was not filed with the industrial accident commission nor approved by it. The defendant in the suit claimed that the agreement constituted an election of the compensation remedy. The court, however, held that the contract was void, and the bringing of the suit was the only effective election which had been made, and affirmed the judgment of the court below. Judge Stone delivered the opinion and in the concluding portion said:

A contract is void if it contemplates acts that are illegal or contrary to public policy. A contract which in its execution contravenes the policy and spirit of a statute is equally void as if made against its positive provisions. [Cases cited.]

We are impressed with the claim that the agreement in question was void ab initio, because opposed to public policy and express statute. If not void in the beginning, it became so when this suit was instituted, and therefore was immaterial and irrelevant to the issue upon the trial.

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WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—LIMITATION OF RECOVERY—CONSTITUTIONALITY OF STATUTE—HAZARDOUS EMPLOYMENT—STORAGE—*Friebel* v. *Chicago City Ry. Co. et al., Supreme Court of Illinois* (*Oct. 23, 1917*), *117 Northeastern Reporter, page 467*.—Karl Friebel was injured, as was claimed, by the negligence of the company named and other street railway companies operating a line, one of the cars on which injured him while he was driving a truck for his employer, the Hartman Furniture & Carpet Co. He sued the railway companies, which defended in part on the ground that the suit was barred by section 29 of the workmen's compensation law. This section provides for the recovery of compensation from the employer even when the injury is caused by the negligence of third parties, provided all three parties are under the compensation act—the employer being subrogated to the rights of the employee to the extent of recovery from the third party of the amount paid as compensation. Judgment was for the defendants in the circuit court of Cook County, and this was affirmed by the supreme court. It was first held that the furniture company, which maintained a warehouse for the storage of its furniture, was engaged in the operating of a warehouse, listed as one of the hazardous occupations to which the law applies, and that the employee, who assisted in loading the truck at the warehouse and unloading it at the houses of its customers, was engaged in a part of this enterprise. The injury was held to have arisen out of and in the course of the employment, although it happened on the return from the last delivery of goods for the day. Interpreting section 29, the court held that the employee could receive, in cases like the present, where employer, employee, and third party were all under the act, only the amount provided by the compensation act for the injury received; that the employer is the one directly liable for compensation and that the employee can not maintain an action against the third party. As thus construed, the section was held to be valid, as against a contention that the employers have not given up anything in return for the benefits they receive under the section, nor do the employees receive any benefit under it to compensate for the limitation of the amount recoverable. It is pointed out that the employer may be liable to pay compensation for injury caused by a third person in the course of the employment, when nothing can be recovered by any one from the third person, and that the employee is not required in such cases to depend wholly on the solvency of his employer, nor, on the other hand, on a possibility of recovery from the third party, uncertain because it may not be possible to prove negligence. The opinion is expressed that if, after compensation has been awarded, the employer should prove to be insolvent and should refuse to bring suit for the benefit of the employee, the latter might do so in his

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employer's name. In conclusion the statement is made that the section is valid, and a final objection relating to the insufficiency of the recovery is removed, by Judge Duncan as spokesman for the court, in the following words:

We do not think there is any single objection raised to the constitutionality or validity of this section of the statute that can be sustained. It may be true, as appellant insists, that under the compensation act he will not receive sufficient compensation to adequately compensate him for his real damages. We think it is certainly true in this case. The answer to that is, that he had the option, before he was injured, to have elected not to be bound by the compensation act. The fact that it has happened that he has chosen the course that realizes him the least money must be charged to his unfortunate judgment or choice. It is no ground for invalidating the statute. In case he should finally fail to recover in his common-law action against the party causing his injury—i. e., in case his employer should be unable to prove that appellant has any right of action against appellees—his action that brought him under the compensation act will result in a pure benefit to the amount of compensation he will receive from his employer.

We are clearly of the opinion that section 29 is legal and valid, and that the court was right in holding, under the facts in this case, that appellant has no right of action against appellees.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—SUBROGATION OF EMPLOYER TO RIGHTS—AMOUNT OF RECOVERY—*Otis Elevator Co.* v. *Miller & Paine, United States Circuit Court of Appeals, Eighth Circuit* (*Feb. 28, 1917*), *240 Federal Reporter, page 376.*—Harry D. Pettengill, who was an employee of Miller & Paine, a corporation, and was engaged in their service in the construction of a building in the State of Nebraska, was killed on September 14, 1915. He having left a dependent wife and child, his administrator proceeded for the purpose of securing compensation under the State law, and an award was made. The employing company then brought action against the Otis Elevator Co., to whose negligence the injury was claimed to have been due, and judgment was recovered for $10,000, a sum larger than the total amount of compensation to be paid by the employer, the excess, under the law, to go to the dependents of the deceased employee. The elevator company contended that it should have been permitted to show that the negligence of the employer concurred with its own in causing the injury, in which case, it claimed, there could be no recovery by the employer from the elevator company. This point of view was held not to be tenable, and other issues were decided in favor of the employer. Judgment in favor of the employer was therefore sustained. Extracts from the opinion delivered by Justice Carland are as follows:

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The liability of Miller & Paine was positively fixed by law, regardless of the question of negligence on its part. The law then provided that Miller & Paine should be subrogated to the rights of the dependents of Pettengill against the elevator company, providing it was the negligence of the elevator company that caused his death. To construe section 109 as not permitting Miller & Paine to prosecute an action for the benefit of itself and the dependents of Pettengill, if the negligence of Miller & Paine concurred with that of the elevator company in causing his death, would destroy the section. The object of the section, as clearly appears from its language, was to permit the employer to reimburse himself by an action against the party whose negligence caused the death and also to allow the dependents of the deceased employee to recover a sum over and above the amount for which the employer was absolutely liable regardless of negligence, if the evidence should permit such recovery.

The action brought by Miller & Paine against the elevator company under its right of subrogation must be treated, so far as the right to recover is concerned, just as if the action had been brought by the administrator of the estate of Pettengill. To decide that the concurring negligence of Miller & Paine could defeat such an action would not only permit one wrongdoer to plead the fault of a joint wrongdoer in defense, but would, as heretofore said, destroy the right of subrogation granted by the statute. The liability to compensate an employee, imposed by law upon the employer regardless of negligence, is in lieu of his liability for all other reasons. The trial court did not err in its rulings in reference to this proposition.

The second proposition advanced by counsel for the elevator company is based on the fact that the elevator company at the trial below offered to show that the liability of Miller & Paine under the compensation act had been insured by an insurance company licensed to do such business in the State of Nebraska, and that therefore, as Miller & Paine would suffer no damage, it could not recover any damages against the elevator company. But this argument involves a misconception of the action brought by Miller & Paine. That action was to be tried just the same as if it had been brought by the administrator of the estate of Pettengill. If nothing had been paid by Miller & Paine, or other person for them, the whole recovery would go to the dependents of Pettengill. Just how the amount recovered in this action shall be divided as between the dependents, Miller & Paine, or the insurance company, is no concern of the elevator company.

Some suggestion has been made in reference to the excess of the recovery in this action over and above the compensation fixed by the statute being considered as an advance payment upon the amount due as compensation from Miller & Paine to the dependents of Pettengill. The compensation in this case might be $10 per week for 350 weeks, or a period of about 7 years. Under the statute Miller & Paine are entitled to deduct from the amount of the recovery in this action the expense of recovering the same and the amount already paid for compensation and the expense of last sickness and burial, the balance to be paid forthwith to the dependents. The law says this balance shall be treated as an advance payment by Miller & Paine on account of any future installments of compensation. We

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think a fair construction of the law is that this excess, in so far as the unpaid installments are concerned, shall be considered as an advance payment; but where, as in this case, the recovery exceeds the whole compensation to be paid, the law by its language did not intend to limit the recovery allowed by the first clause of section 109, which specifically provides that the amount of recovery shall not be limited to the amount payable as compensation.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—SUITS—PARTIES—*Book* v. *City of Henderson, Court of Appeals of Kentucky (Oct. 2, 1917), 197 Southwestern Reporter, page 449.*—H. H. Book, a lineman for the Henderson Telephone & Telegraph Co., sued the city of Henderson for damages for its alleged negligence in failing to properly insulate an electric light wire. While he was engaged in work on the telephone wires one of them came in contact with the electric light wire, and the resulting shock threw him 20 feet from the pole upon which he was working, and severe and permanent injuries were inflicted. He had, before bringing this suit, recovered compensation from the company, and he made the company a party to the present suit. The statute provides for subrogation of the employer to the employee's rights to the extent of the amount of compensation, if that much is recovered. In the present decision it is held that the employee is not limited in his recovery to the amount paid him as compensation, but may recover actual damages as in other liability suits, the amount of the compensation paid to be, of course, for the benefit of the employer. It was said that the employer was properly made a party to the suit, but that in order to secure his recovery from the third party he must interplead and set up his cause of action. If this is done, it is the duty of the court to apportion the amount awarded between the employer and employee according to their rights therein; and if the employer should not seek to recover, the defendant would still be entitled to credit upon the judgment for the amount paid as compensation. A circuit court had dismissed the petition in the present case, but the court of appeals remanded the case for further proceedings in accordance with the opinion.

WORKMEN'S COMPENSATION—INJURY "ON, IN, OR ABOUT" A FACTORY, ETC.—TRUCK USED FOR DELIVERY—*Hicks* v. *Swift & Co., Supreme Court of Kansas (Nov. 10, 1917), 168 Pacific Reporter, page 905.*—Oliver E. Hicks was awarded compensation by the district court of Wyandotte county for an injury received in the employ of the company named, and the company appealed from the judgment. Hicks was driver of a truck used in delivering meat, and was injured by a box of meat falling upon him while he was attempting

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to make a delivery in Kansas City, Mo., at a place about 12 miles from the packing house. The company contested the judgment on the ground that the injury was not received in Kansas, where the packing house is located, and under whose compensation act and in whose courts he proceeded; and, secondly, that the accident did not occur "on, in, or about" a factory or one of the other establishments mentioned in the act. The court held that it was not necessary to discuss the first point, as the second was well taken, and the judgment was reversed. Judge Mason in the opinion said:

No recovery can be had by the plaintiff in this proceeding unless he was injured "on, in, or about" the factory or packing house of the defendant. That the word "about" is one of locality and not of mere association or connection has been determined in a recent case.

An effort is made to bring the case within the statute, as it has already been construed, by the argument that the truck which the plaintiff was driving, being a portion of the equipment used in conducting the defendant's business, was itself a part of the factory. To support this view expressions are quoted tending to show that the truck was a part of the plant. The term "plant," however, is quite different from "factory." It may well apply to appliances used in carrying on the business, wherever situated. "Factory" by the statute is restricted to the premises where (mechanical) power is used in manufacturing or preparing articles for sale. The truck was an instrument for the distribution of the finished product, rather than of its manufacture or preparation. While in charge of the truck, after leaving the premises where the meat had been prepared, the plaintiff was not "within the danger zone necessarily created by those peculiar hazards to workmen which inhere in the business of operating" the packing house.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—ELECTION OF REMEDIES—*Jackson* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Dec. 5, 1917), 117 Northeastern Reporter, page 705.*—William J. Jackson, receiver of a railroad company, in the employment of whom Nathaniel Raney was killed, sought by writ of error to overthrow an award made by arbitrators to the administratrix of Raney and affirmed by the industrial board and by the circuit court of Vermillion County. Raney's work was the painting of railway bridges, towers, and other structures. At the time he was injured he was on his way with a "speeder" or motor car to a work train to get a supply of paint to use in painting an interlocking tower. He attempted to remove the speeder from the track to allow an interstate train to pass and was killed by the train. The administratrix first gave notice of a claim under the workmen's compensation act, and then sued under the Federal Employers' Liability Act. In that suit the receiver demurred to the complaint on the ground that the employee was not engaged in interstate com-

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merce, and the demurrer was sustained. The administratrix then prosecuted her claim under the compensation provisions, and an award was made in the sum of $573.20.

The receiver contended that the administratrix was estopped from claiming compensation by her election to sue under the liability act, but this was overruled by the court, Judge Duncan, who delivered the opinion, saying on this point:

The doctrine does not apply to concurrent remedies that are not inconsistent with each other and has no application to an election between suits based upon different statutes. Where one has a right of action at common law and also under the statute for the same injury the bringing of either of said suits is not a bar to the other, and particularly where no recovery has been had under the one or the other.

The court held, on the other hand, that the employer was now estopped from defending on the ground that the employment was in interstate commerce, saying:

The court by its judgment in that case determined one question of fact that necessarily defeated the administratrix in that suit—i. e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability Act. That judgment completely estops plaintiff in error, as well as the administratrix, from contending in any other suit between the same parties that the deceased was injured while employed by the plaintiff in error in interstate commerce.

Finally the court held that it is the employment and not the act of the employee at the time of the injury which determines whether or not an injury is within the purview of the liability act, and that the fact that the employee was removing an obstruction to interstate commerce at the moment did not prevent the application of compensation provisions. The award was therefore affirmed.

WORKMEN'S COMPENSATION — INTERSTATE COMMERCE — INJURY WITHOUT NEGLIGENCE OF EMPLOYER—FEDERAL AND STATE STATUTES—*New York Central R. Co.* v. *Winfield*, *Supreme Court of the United States* (*May 21, 1917*), *37 Supreme Court Reporter*, *page 546*.—James Winfield was tamping ties upon the track of the company named, when a stone flew up and destroyed the sight of one of his eyes, for which injury he claimed compensation under the New York law. There was no dispute that the employment was in interstate commerce, so that if the employer had been negligent the employee would have been not only entitled to seek a remedy under the Federal Employers' Liability Act, but confined to such remedy. The majority of the New York Supreme Court, Appellate Division, held that, no negligence being alleged, the award of compensation made

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to him by the State commission should stand. Its decision was reported in 153 N. Y. Supp. 499, and noted in Bul. No. 189, p. 256. This judgment was affirmed by the court of appeals of the State, and an appeal was taken to the United States Supreme Court, which, two judges dissenting, reversed the judgment, holding that the Employers' Liability Act is exclusive in the entire field of injuries to railroad employees engaged in interstate commerce. Mr. Justice Van Devanter delivered the majority opinion, which, after stating the facts, proceeds as follows:

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all State laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. The State decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in Winfield *v.* Erie R. Co., 88 N. J. L. 619, 96 Atl. 394 [Bul. No. 224, p. 330], hold that the act relates only to injuries resulting from negligence, while the California court in Smith *v.* Industrial Accident Commission, 26 Cal. App. 560, 147 Pac. 600 [Bul. No. 189, p. 98], and the Illinois court in Staley *v.* Illinois C. R. Co., 268 Ill. 356, 109 N. E. 342 [Bul. No. 189, p. 253], hold that it has a broader scope and makes negligence a test—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every State line. Baltimore & O. R. Co. *v.* Baugh, 149 U. S. 368, 378, 379, 13 Sup. Ct. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. Second Employers' Liability Cases (Mondow *v.* New York, N. H. & H. R. Co.), 223 U. S. 1, 51, 32 Sup Ct. 169 [Bul. No. 98, p. 470]. It was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. (Cong. Rec., 60th Cong., 1st sess., 1347.) And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying State laws, and to apply to them a national law having a uniform operation throughout all the States. (House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st sess.)

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True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the States free to require compensation where the act withholds it.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress.

It follows that, in the present case, the award under the State law can not be sustained.

Mr. Justice Brandeis wrote the dissenting opinion, in which Mr. Justice Clarke concurred. The first part of this opinion is as follows:

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908, Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad companies engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of State action. In other words, the majority of the court declares that Congress, by passing the Employers' Liability Act, prohibited States from including within the protection of their general workmen's compensation laws employees who, without fault on the railroad's part, are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress could have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The workmen's compensation law of New York here in question has been declared by this court to be among those which "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." (New York C. R. Co. *v.* White, 243 U. S. 188, 207, 37 Sup. Ct. 247 [Bul. No. 224, p. 232].) And this court has definitely formulated the rules which should govern in determining when a Federal statute regulating commerce will be held to supersede State legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though

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the legislation might indirectly affect the commerce of the country." (Sherlock *v.* Alling, 93 U. S. 99, 103.)

2. "If the purpose of the act can not otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to regulation of Congress within the sphere of its delegated power. * * *

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State." (Savage *v.* Jones, 225 U. S. 501, 533, 32 Sup. Ct. 715.)

3. "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts can not be reconciled or stand together." (Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 623, 18 Sup. Ct. 488.)

Guided by these rules and the cases in which they have been applied, we endeavor to determine whether Congress, in enacting the Employers' Liability Act, intended to prevent States from entering the specific field of compensation for injuries to employees arising without fault on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope, and purpose; and, on the other, at the nature, methods, and means of State workmen's compensation laws. If the will is not clearly expressed in words, we must consider all these in order to determine what Congress intended.

First. As to words used: The act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of that act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An act relative to the liability of common carriers by railroad in certain cases."

Second. As to specific action taken: The power exercised by Congress is not such that, when exercised, it necessarily excludes the State action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be

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sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the workmen's compensation laws of the States. Between the Federal and the State law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third. As to origin, purpose, and scope of the Employers' Liability Act and the nature, methods, and means of State workmen's compensation laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

Mr. Justice Brandeis then discusses under separate heads the origin, scope, and purpose of the Federal Employers' Liability Act, and the nature, method, and means of the workmen's compensation laws. The question of whether or not the Federal and State legislation conflict is then taken up, as follows:

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a State compensation law, affords, of course, no reason for imputing to Congress the will to deny to the States power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce. Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the States (which alone can deal comprehensively with it) the whole subject of indemnity and compensation for injuries to employees, whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the States this power. The subject of compensation for accidents in industry is one peculiarly appropriate for State legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. In a large majority of instances they reside in the State in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, preempted the whole field

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has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to State action was far less clear than under the circumstances here considered. Tested by those decisions and by rules which this court has framed for its guidance, I am of opinion, as was said in Atlantic Coast Line *v.* Georgia, 234 U. S. 280, 294, 34 Sup. Ct. 829 [Bul. No. 169, p. 182], that "the intent to supersede the exercise of the State police power with respect to this subject can not be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation and otherwise unprovided for, the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for State action.

WORKMEN'S COMPENSATION — INTERSTATE COMMERCE — INJURY WITHOUT NEGLIGENCE OF EMPLOYER—FEDERAL AND STATE STATUTES—*Erie R. Co.* v. *Winfield, Supreme Court of the United States* (*May 21, 1917*), *37 Supreme Court Reporter, page 556.*—Amy Winfield proceeded for compensation under the law of New Jersey for the death of her husband, employed as engineer of a switch engine. The cars handled contained freight, some of them interstate, some intrastate, and some both, but the accident occurred while he was leaving the yard after completing his day's work. It was assumed by both parties that there was no negligence of the company causing the injury. The court of common pleas of Hudson County, New Jersey, rendered judgment in her favor, and the supreme court and the court of appeals of the State entered successive reversals, the final result being that the award stood. (See Bul. No. 224, p. 330.) This case contains a point additional to the one settled in the New York case above—New York Central Railway Co. *v.* Winfield—involving the scope of Federal and State laws as to injuries on railroads. The same two justices dissented as in that case. Mr. Justice Van Devanter delivered the opinion, holding that compensation could not be granted under the circumstances of the case, and spoke as follows:

The questions presented for decision are these: First, whether the Federal act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether, by reason of the State statute, the carrier became bound contractually to make compensation in this instance, even though it came within the Federal act.

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The first question is fully considered in New York C. R. Co. *v.* Winfield, the opinion in which has been just announced, 244 U. S. 147, 37 Sup. Ct. 546 [see p. 260], and it suffices here to say that, for the reasons there given, we are of opinion that the Federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.

The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. (See North Carolina R. Co. *v.* Zachary, 232 U. S. 248, 260, 34 Sup. Ct. 305 [Bul. No. 169, p. 83].) Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance.

The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability, and excludes liability in the absence of negligence. In its details, however, that part differs materially from the Federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer whenever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective," and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form, or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute, and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption can not be indulged here, and this for the reason that by the Federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of State laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a State statute, or by imputing

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such an election to them by means of a statutory presumption. The third question, therefore, must be answered in the negative.

It follows that the court of errors and appeals erred in failing to give controlling effect to the Federal act.

WORKMEN'S COMPENSATION — INTERSTATE COMMERCE — INJURY WITHOUT NEGLIGENCE OF EMPLOYER—FEDERAL AND STATE STATUTES—*Rounsaville* v. *Central R. R. of New Jersey, Court of Errors and Appeals of New Jersey* (*June 18, 1917*), *101 Atlantic Reporter, page 182.*—George A. Rounsaville brought proceedings to obtain compensation for injuries suffered by him as an employee of the company named. The court of common pleas of Warren County held that the remedy was not under the compensation law, but under the Federal Employers' Liability Act of 1908, 1910. Its judgment was reversed by the New Jersey Supreme Court (87 N. J. Law 371, 94 Atl. 392; Bul. No. 189, p. 258), which held that, there being no negligence alleged, proved, or admitted on the part of the railroad company, the State courts had jurisdiction under the compensation law. In the meantime the case of Winfield *v.* Erie R. R. Co., arising in the same State and identical in principle with the Rounsaville case, had been decided by the Supreme Court of the United States (see p. 265); and in the present decision the court of errors and appeals, since the State courts are bound by the decisions of the Supreme Court in matters involving the Federal Constitution and statutes, reversed the judgment of the State supreme court and affirmed that of the court of common pleas, the claimant thus failing to secure any compensation for his injuries.

WORKMEN'S COMPENSATION — INTERSTATE COMMERCE — MOWING WEEDS ON RAILROAD RIGHT OF WAY—*Plass* v. *Central New England Ry. Co., Court of Appeals of New York* (*Nov. 13, 1917*), *117 Northeastern Reporter, page 952.*—Jane Plass was a claimant for compensation for the death of her husband, a section laborer for the railway company named. He contracted ivy poisoning through cutting grass and weeds along the right of way—which work was a part of his duty—and this was followed by blood poisoning, bronchitis, congestion of the lungs, and death. The decision of the supreme court, which held that such poisoning was an accident, and affirmed an award to the widow, is reported in 155 N. Y. Supp. 854, and noted in Bul. No. 189, p. 203. On further appeal the court of appeals reversed the decree and ordered a new hearing, to give an opportunity for a determination by the industrial commission as to whether the employee was engaged in interstate commerce at the time of his

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injury, holding that such a determination was necessary. Judge Collin, for the court, said:

If there was any evidence that the work contributed to the safety and integrity of the railroad, the work was connected with and a part of interstate commerce by the railroad [quoting from the Pedersen Case].

If the deceased was engaged in services pertaining to and a part of interstate commerce, the claimant was not entitled to an award. N. Y. Central R. R. Co. *v.* Winfield, 244 U. S. 147, 37 Sup. Ct. 546 [see p. 260].

A witness on behalf of the employer testified that the object of the work was the safety of the bridges of the railroad and of the adjoining property, and to keep fires from spreading; if the grass and weeds caught fire it might destroy parts of the railroad, and the weeds and grass, not cut and removed, would to a certain extent destroy the track; would come upon the track and cause the engines to slip. This testimony could not be wholly disregarded by the commission. It constituted some evidence, demanding a determination, that the work of the deceased was or was not within interstate commerce. The employer, by the evidence, objections, request to find, and argument, directed the attention of the commission to its claim that an award could not be made because the deceased was engaged in interstate commerce. It was necessary to a lawful hearing and award that the commission should pass, under the evidence, upon the nature of the employment in which the deceased received his injuries.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—PLUMBER IN MAINTENANCE OF WAY DEPARTMENT—*Vollmers* v. *New York Central R. Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 426.*—Conrad H. Vollmers having been killed in the employ of the railroad company named, Ethel H. Vollmers applied for compensation for herself and children. Vollmers was a plumber employed in the maintenance of way department of the railroad, and, while repairing pipes beneath the station at Hillside, he had occasion to cross the tracks in front of the station, and was struck by an engine and killed. The industrial commission having made an award to the widow, the court reversed it and dismissed the claim on the ground that the employee was engaged in interstate commerce. Judge Woodward, in the course of the opinion delivered by him, said:

The fact is found that his crossing of the tracks was in connection with his employment. It seems clear, under the rule prevailing in the Supreme Court of the United States, that Vollmers was engaged in the maintenance of an instrumentality of interstate commerce; he was doing the work necessarily involved in the maintenance of ways department. The stations actually in use in the carrying on of interstate commerce are clearly instrumentalities of such commerce, and it is necessary to their proper maintenance that the plumbing should be kept in repair. The position of Vollmers was not merely

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of a plumber called in to do an incidental job; he was in the employ of a department of the corporation devoted, not to the construction, but to the maintenance of ways, and this required him to be in and about the railroad properties generally, doing such repairs as were needed, whether in the station houses or outside of them. To say that such a man, identified with a department for the particular purpose, is not engaged in interstate commerce is to ignore the facts and the rulings of law made by the courts of last resort, and may not be sustained.

WORKMEN'S COMPENSATION—INTOXICATION AS CAUSE OF INJURY—*Collins* v. *Cole, Supreme Court of Rhode Island (Feb. 20, 1917), 99 Atlantic Reporter, page 830.*—Nora Collins began proceedings for compensation for the death of her husband, James Collins, while in the employ of C. M. Cole. The superior court of Newport County denied compensation on the ground that the fatal injury was due to the intoxication of the employee. He was watchman on a dredge, and went on duty at 6 p. m. On July 7, 1914, the dredge was not at work on account of rough weather. During the afternoon Collins drank heavily, and came on duty in such a condition that he had some one else attend the fires. He rowed back and forth to the shore two or three times, with some assistance in maintaining the proper direction, to carry members of the crew, as was his duty. On the last trip back they brought a quart bottle of whisky, from which he had two very large drinks. A little later the cook came from the shore to the dredge, and he and Collins were heard talking about going to the shore for more whisky. Soon the deck hands heard shouting, and found the cook struggling in the water and Collins standing in a very small and unstable skiff, which belonged to a yacht. This almost immediately tipped over, and in spite of efforts to save them both men were drowned. The decree denying compensation was affirmed in an opinion by Judge Vincent, who said after stating the facts:

The petitioner argues that, in order to defeat the petition, the respondent must prove that the death resulted solely and exclusively from intoxication while on duty. If the petitioner means by that that the respondent must exclude every possibility that death might have resulted otherwise than from intoxication, we can not agree with her. If Collins was in an intoxicated condition, that is, a condition in which he would be unable to look out for his own safety with that degree of care which a person would otherwise naturally exercise, and that, while so influenced, he did something which a person in a normal condition would not be likely to attempt and which brought about the accident, the trial court would be warranted in finding that the accident resulted from the condition into which he had voluntarily brought himself. We do not think that the statute requires that every possibility should be excluded before the evidence becomes sufficient to support the finding that the result was due to intoxication.

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WORKMEN'S COMPENSATION—INTRASTATE OR INTERSTATE COMMERCE—MOVING CARS TO STORAGE TRACKS TO BE ICED—*Chicago Junction R. Co.* v. *Industrial Board of Illinois et al., Supreme Court of Illinois (Apr. 6, 1917), 115 Northeastern Reporter, page 647.*—William S. Peterson, a switchman employed by the company named, was killed in the course of his employment October 9, 1913. He was assisting in the movement of cars onto a storage track, where they were to be iced for the shipment of meats. The later history of the cars showed that the greater part of them eventually were loaded for interstate shipment, after four had been in a collision and become disabled for use. It was agreed that if the employee was not engaged in interstate commerce he was entitled to the compensation which the industrial board had awarded him, while if he was in interstate commerce the Federal Employers' Liability Act would govern. The award of compensation was affirmed, Judge Cooke for the court saying in part:

It was not until these cars were again moved to the loading platform, and it was known what material was ready to be loaded, that it was determined that 10 of them should be loaded for destinations outside the State and 1 to carry a shipment to a point within the State. The movement of the string of cars by the switching crew of which the deceased was a member was a local movement, and, as none of these cars had at that time been selected to participate in an interstate shipment, the deceased was not engaged in interstate commerce, and the circuit court properly approved and confirmed the award and decision of the industrial board. The icing of the cars does not change the situation. The same procedure in icing was required in all the shipments made by Armour & Co., whether interstate or intrastate, and was, in effect, a part of the equipment of the cars themselves.

WORKMEN'S COMPENSATION—INTRASTATE OR INTERSTATE COMMERCE—REPAIRING PRIVATE SPUR TRACK—*In re Liberti, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 478.*—Carmella Liberti instituted proceedings for compensation for the death of Rosario Liberti, and an award was made by the industrial commission. The deceased was an employee of the railway company named, and suffered a fatal injury when he fell from a hand car, which he and a number of other laborers were running upon a spur track to the grounds of the Mission of the Immaculate Virgin. The track was owned by the mission, and maintained by the company at the expense of the mission. The railway is entirely within the State, but carries interstate freight, and goods from without the State were taken to the mission over this track about once a week, while cars with intrastate freight went in daily. The court held that the employment at

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the time of the injury was not in interstate commerce, so that the industrial commission had jurisdiction to award compensation; and the award was affirmed, Judge Kellogg, in the opinion saying:

The mission's track was solely for its use and for the carrying of freight from the station to the mission, as a convenience to the company and the mission. The property of the mission, its spur track, and those who are working upon it, are subject to the State law and are not governed by the Federal Employers' Liability Act. If the company was drawing interstate freight over the spur for delivery at the mission, and the accident had occurred to an employee engaged therein, a different question might arise; but this case seems to be entirely outside of the question of interstate commerce, and is purely a matter of domestic concern and arrangement.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—COMPUTATION OF "THIRTY DAYS AFTER INJURY"—*In re McCaskey, Appellate Court of Indiana, Division No. 1 (Oct. 10, 1917), 117 Northeastern Reporter, page 268.*—Lewis Grabhorn was employed by the Cotton-Wiebke Co., when on February 17, 1916, he was accidentally struck in the forehead by a sledge hammer in the hands of a fellow employee. The accident was witnessed by the president and manager of the corporation, which did away with the necessity for notice. At the time an abrasion of the skin of the forehead was produced, but no wound requiring medical or surgical treatment. In the evening of March 18 he was taken with a violent pain in his forehead, and on the next day consulted one McCaskey, a practicing physician, who on the 20th diagnosed the trouble as an abscess, requiring an operation and draining for a number of days. Dr. McCaskey rendered the necessary services, and presented a claim for $50, which was admitted to be a fair compensation. The company, however, refused to pay this bill because, as it contended, the services were not rendered within 30 days after the injury. The industrial board certified this question to the court, and the latter decided that the claim was a valid one, the injury not being in such a case contemporaneous with the accident, but occurring at the time results developed which amounted to disability.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—EMPLOYER'S LIABILITY FOR OPERATION BECOMING NECESSARY BEFORE EXPIRATION OF THIRTY DAYS, BUT POSTPONED—*In re Henderson, Appellate Court of Indiana (June 1, 1917), 116 Northeastern Reporter, page 315.*—The employee Henderson was injured on October 16, 1916, and a part of his left foot was amputated. The foot did not heal properly, gangrene set in, and on the 28th day it was evident that within four or five days another amputation would be necessary to save his life. On

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that day the employer and insurance carrier notified the hospital that they would not be responsible for treatment after the 30 days. On the 29th day the employee filed an application asking the Industrial Board to make an order requiring the employer to continue the surgical and hospital services beyond the first 30 days. The board certified to the court the question whether it had, under section 25 of the act, authority to require such continuation. The court answered the question in the affirmative, showing that the language of the section was somewhat ambiguous, but placing an interpretation upon it, and saying in the concluding part of the opinion delivered by Judge Hottel:

We deem it proper to say that, if an emergency arose for either of the services provided for in said act at a time when the same was required to be rendered under said act, the employer by mere delay in rendering the service could not escape liability for any service which should have been and could have been rendered within the period during which the act makes it his duty to perform the service.

Workmen's Compensation—Medical Services—Liability of Insurer for Services Furnished by Employer After Thirty Days—*In re Kelley, Appellate Court of Indiana, Division No. 1 (June 1, 1917), 116 Northeastern Reporter, page 306.*—John Kelley was injured under circumstances which made compensation payable under the Indiana law, and the industrial board found that the physician furnished by the employer rendered a bill for $90 for services during the first 30 days after the injury; that at the expiration of 30 days the employee was in such serious condition that further medical services were necessary in order to save his life; that the employer directed the physician to continue his services, and his bill for the further services was $90; and that the charges were reasonable. The contest was as to the liability of the insurer for the additional medical services, and the board certified to the court the question whether the physician was entitled to have the last-mentioned claim approved as against the insurer. This was answered in the affirmative, the court calling attention to the provisions of the act giving the employer the option of furnishing additional medical attendance where necessary, and to the provisions requiring that policies shall cover all benefits conferred by the act; also to the fact that the additional medical treatment in suitable cases would be to the advantage of the employer and the insurance carrier as well as of the injured employee.

Workmen's Compensation—Modification of Awards—Incapacity—*Safety Insulated Wire & Cable Co.* v. *Court of Common Pleas in and for Hudson County et al., Supreme Court of New Jersey (Apr.*

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7, 1917), 100 Atlantic Reporter, page 846.—Philip Kress received injuries to both hands about April 1, 1912, while in the employ of the company named. He was awarded as compensation $6.21 per week, or one-half his earnings at the time of the injury, for 400 weeks, it appearing at the time of the hearing, nearly a year after the injury, that he was not able to do any work. Early in 1916 the company applied for modification of the award, which was refused by the court of common pleas on the ground that the original award of the full 400 weeks must have been made on the basis of a finding of total and permanent disability, and that action on the application would involve a review of that award. On the rendering of this decision the case was taken to the supreme court. It appeared that after being incapacitated from work for about a year and a half, the injured man began to do light work at $9 a week, and later became watchman in a factory at $12 per week, and at the time of the hearing was getting $14, or more than his wages when injured. The supreme court thereupon decided that a modification of the award might be had on the showing of change in conditions, the statute providing for such adjustment after a year from the date of the original award. Judge Kalisch in the concluding portion of the opinion said as to the interpretation of the term "incapacity":

It is to be observed that the term "incapacity of the injured employee" is used. The legislature has thereby established the test of "incapacity" as the determining factor whether an award shall be diminished or increased, as the case may be. The incapacity which the legislature had in mind was the incapacity to perform labor. This, of course, is not applicable to the class of cases which the legislature has expressly declared to be that of total disability, such as the loss of both legs, etc., and for which there is a fixed period of compensation.

It must be borne in mind that the basic principle of the compensation act is indemnity. Therefore when it appears in a case where an award had been made that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court upon a proper application to interfere and grant relief.

Workmen's Compensation—Notice—*In re Dorb, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 415.*—Leo Dorb was an employee of Frederick Stearns & Co., manufacturing pharmacists. On June 23, 1916, while lifting heavy boxes containing the manufactured products, he sustained a hernia, but continued at work until July 3. He consulted a physician and was told the nature of the injury and telephoned to the department where he worked that he was sick, but did not inform them that there had been an accident, nor what the nature

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of the illness was. Three or four days later he went to his assistant foreman and told him the nature of his injury, without giving information as to the time, place, and circumstances, or stating that he would make a claim for compensation. It was the duty of the assistant foreman to report accidents to the employer, but he did not do so in this case, nor did the employee give any other notice. The law provides that failure to give notice may be excused by the commission because it could not have been given, or if the employer or insurer has not been prejudiced by the failure. The court reversed the award of the commission in favor of the claimant, saying that to justify failure to give notice whenever oral notice had been given to an agent of a corporation would completely nullify the provision of the law for written notice, and its object, to afford the employer opportunity to investigate the circumstances of the alleged accident.

WORKMEN'S COMPENSATION—NOTICE AND CLAIM—"REASONABLE CAUSE"—IGNORANCE—*In re Fells, Supreme Judicial Court of Massachusetts (Mar. 15, 1917), 115 Northeastern Reporter, page 430.*—The employee Fells was injured, and his claim for compensation was opposed by the insurer, on the ground that the claim was not made until nine months after the injury, while the law provides that it must be made within six months, unless failure to do so is occasioned by mistake or other reasonable cause. It was shown that in this case the employee was illiterate and ignorant of the requirements of the compensation law, and supposed that his foreman or the attending physician was safeguarding his interests, though he did not ask either to do so and was not assured that it would be done. An award in his favor was affirmed by the superior court of Suffolk County, but this was reversed by the supreme judicial court, Judge Carroll delivering the opinion, and saying in part:

If the legislature thought it wise when it amended the act, it could have provided that a failure to file a claim within six months would not bar proceedings under the act if occasioned by ignorance, mistake or other reasonable cause. But it apparently did not consider ignorance a sufficient excuse for this delay.

A mere anticipation that some one will fulfill the law on behalf of the employee, especially where there is no promise or assurance that this will be done, is not a mistake or other reasonable cause within the meaning of these words as used in this section.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE AS "PERSONAL INJURY"—NEUROSIS FROM STOOPING POSITION—*In re Maggelet, Supreme Judicial Court of Massachusetts (July 25, 1917), 116 Northeastern Reporter, page 972.*—Frank Maggelet proceeded under the

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workmen's compensation act to recover compensation for injuries. He had worked for 25 years for his employers, who were subscribers under the compensation act, as a cigarmaker. In March, 1916, he stopped work, and according to the finding of the industrial accident board was totally incapacitated for work by reason of a condition of occupational neurosis which arose out of and in the course of employment. There was medical testimony that the disease probably was caused by the stooping position of the employee at his work, which produced pressure upon the brachial plexus. The court held that this disease did not constitute a "personal injury" within the meaning of the act and reversed the decree in favor of the claimant entered by the superior court of Suffolk County upon the decision of the commission. The following is a part of the opinion delivered by Judge Rugg:

The act does not mention disease or occupational disease. It awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need not be a single definite act but may extend over a continuous period of time. Poisoning, blindness, pneumonia, or the giving way of heart muscle, all induced by the necessary exposure or exertion of the employment, fall well within recognized classes of personal injuries. On the other hand the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act. A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition can not fairly be described as a personal injury. The disease must be, or be traceable directly to, a personal injury peculiar to the employment. A nervous condition dependent upon poor posture of the body in our opinion does not constitute a commonly known and well recognized personal injury consequent upon employment.

There is not enough in this record to show that the condition of the employee is a necessary result of his work. It arose on all the evidence from a bad posture of the body while at work. This record is bare of any evidence to show that it is a reasonably necessary result of the employment that those following it should have neurosis or that the inducing proximate cause of that condition is the employment.

WORKMEN'S COMPENSATION—PERMANENT TOTAL DISABILITY—PARALYSIS OF LEGS—CONDUCTING BUSINESS—*McDonald et al. v. Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (Apr. 4, 1917), 162 Northwestern Reporter, page 345.*—Fred Edwards proceeded for compensation against C. S. McDonald, as employer, and the insurance company which carried the latter's risk. An order was entered by the industrial commission, making an award

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to Edwards. The award was of a lump sum, equal to six times the amount of annual earnings, this being the amount provided for total permanent disability. The injury, caused by a fall from a pile driver, resulted in fracture of a vertebra and deformity of the spinal column, which produced pressure upon the spinal cord, and paralysis, though not total, of the lower limbs and lower part of the back. There was medical testimony that he could do no work requiring walking or stooping. He had not been fitted for any work except as a carpenter or laborer. Attention is called to the amendment of the language of the statute in 1915, by which, as a requisite for a finding of total disability, there must be inability to engage in "other suitable employment" as well as "in the employment that he was working at at the time of the accident." However, it was held that the finding was justified, Judge Eschweiler, for the court, saying on this point:

We can not say that there is no support for the determination arrived at by the commission and confirmed by the circuit court. The testimony warrants the conclusion that this man is permanently and totally disabled from performing labor at his trade as a carpenter or such labor as he was employed in at the time of the accident as well as being permanently and totally disabled from performing manual or other labor in any other suitable employment.

As to the effect of an intention to engage in a small business the judge said:

It is urged that because the record discloses that the respondent desired to have the award in a lump sum so that he might undertake some small business to be conducted by him and his wife, that therefore, by his own admission, he could not be considered as permanently and totally disabled. We do not think this distinction can be properly taken. There is a substantial difference between a man's wage-earning capacity, the foundation of the workmen's compensation act, and his capacity to make money in a business conducted under his supervision or direction and with the use or investment of other capital than that which arises from his own labor. Success in such an undertaking is so evidently dependent upon manifold conditions other than the capacity to work that it can not, as the law is now written, be considered to be a condition that must militate against his right to compensation for permanent total disability to carry on the work which he was employed in at the time of the accident or other suitable employment. Such distinction is pointed out in the case of Moore *v.* Peet Bros. Mfg. Co. (Kans.), 162 Pac. 295. [See p. 291.]

It was also held that the fact that the lump-sum award was made before the expiration of six months from the date of the injury was not material, no objection having been made at the time of the award to such procedure, and the award was affirmed.

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WORKMEN'S COMPENSATION—PERSONAL INJURY BY ACCIDENT—NEPHRITIS FOLLOWING EXPOSURE—*United Paper Board Co.* v. *Lewis, Appellate Court of Indiana, Division No. 1* (*Oct. 11, 1917*), *117 Northeastern Reporter, page 276.*—Amberson Lewis, while in the employ of the company named, was required to flush out with hot water running from a hose a large quantity of hot pulp which had escaped from a broken pipe into the basement of the factory. In doing this work, which took several hours, he became excessively heated and damp, and in going home to dinner he became chilled. The chills lasted several days and developed into nephritis, causing a disability of eight weeks. It was held that this constituted a personal injury by accident under the act, Judge Batman, who delivered the opinion, saying:

In the instant case it is clearly apparent that appellee contracted the disease which caused the disability for which he seeks compensation, as the direct result of an unusual circumstance connected with his employment. His duties required him to keep the basement room clean, but this did not ordinarily require him to flush hot steaming pulp into the sewer with hot water from the exhaust of the engine. It is evident that this was only required when the iron pipe through which such pulp was conducted broke and allowed it to escape to the floor. Hence the industrial board may have very properly found that the breaking of the pipe created an unusual condition under which appellee was required to work at the time in question, resulting in enforced exposure. In such event, any disease, of which such exposure is shown to have been the cause, may properly be said, under the rule stated, to constitute a personal injury by accident, and to come within the provisions of the workmen's compensation act of this State.

The court further held that the possible negligence of the employee in exposing himself to chill on leaving the factory could not be a determining factor; also that the injury was one arising out of and in the course of the employment.

WORKMEN'S COMPENSATION—PERSONAL INJURY BY ACCIDENT—PNEUMONIA RESULTING FROM EXHAUSTION AND EXPOSURE—*Linnane* v. *Aetna Brewing Co., Supreme Court of Errors and Appeals of Connecticut* (*Dec. 19, 1916*), *99 Atlantic Reporter, page 507.*—The dependent claimed compensation in this case and was given an award by the compensation commissioner, which was affirmed by the superior court of Hartford County. The deceased was a fireman for the company named. His regular shift was from 7 a. m. to 3 p. m. One of the other firemen being unable to reach his work because of a storm, Linnane was called upon at 2 a. m. on December 14, 1915, to go to work, and without any breakfast he made his way for

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three-fourths mile through deep snow to the brewery. He arrived out of breath and exhausted and wet nearly to his waist. He then worked for 12 hours in his wet clothing, his work being heavy and requiring him at times to be before the open mouth of the furnace and at other times to wheel ashes and clinkers out into the yard. He returned home exhausted and without appetite. Though ill he worked a few days, but pneumonia developed and he died on December 22. The judgment in the claimant's favor was reversed because the court held that the death was not the result of accidental "personal injury" as required by the act in order that compensation may be granted. Reference is made to the decision of the court in the case Miller *v.* American Steel & Wire Co., 90 Conn. 349, 97 Atl. 345 (see Bul. No. 224, p. 306); and the case is said to be controlled by the principles laid down therein, for, while the unusual weather conditions might be classed as accidental, at least as concurring with the untimely and prolonged hours of labor, the resultant exhaustion, though accidentally incurred, could not be said to be "in and of itself a bodily injury" within the meaning of the act.

WORKMEN'S COMPENSATION—PROCEDURE—APPEAL—*Union Sanitary Mfg. Co.* v. *Davis, Appellate Court of Indiana (Jan. 23, 1917), 114 Northeastern Reporter, page 872.*—Frank L. Davis was awarded compensation by the industrial board of Indiana under the provisions of the workmen's compensation act of that State, and the employer, the company named, appealed. Davis filed a motion to dismiss the appeal, claiming that it was not properly taken, as no motion for a new trial had been made, as is necessary in ordinary civil suits as a preliminary to appeal. Judge Felt delivered the opinion of the court, and overruled the motion to dismiss the appeal. It was held that a motion for a new trial was not necessary, at least where, as in the present instance, there had been a review of the award by the full board; also that there was no necessity for a motion to set aside the award of the full board, the attitude of the court being expressed by the following, quoted from Judge Felt's opinion:

An examination of the whole act shows clearly that the intention of the legislature was to provide compensation and the proper award with a minimum of legal procedure. The provisions for a review afford opportunity of presenting to the full board all questions relied upon by the aggrieved party, and in the main serve the same purpose that a motion for a new trial serves in a civil action.

WORKMEN'S COMPENSATION—PUBLIC EMPLOYMENT—CONSTITUTIONALITY OF PROVISION—*State ex rel. Fletcher et al.* v. *Carroll, Supreme Court of Washington (Feb. 2, 1917), 162 Pacific Reporter, page 593.*—Stephen Fletcher and Josiah E. Rhoads were employees in the light-

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ing department of the city of Seattle and were severely injured by burning by electric current. They made claim for large common-law damages, and the sum of $3,500 was recommended by the city's finance committee to be paid to them in full settlement, which they signified a willingness to accept. Ordinances were passed over the mayor's veto directing the city comptroller to draw warrants for such payments. Acting upon legal advice, the comptroller refused to issue the warrants, and the employees began proceedings in mandamus to compel him to issue them. In defense it was contended that the provisions of the workmen's compensation act afforded the sole remedy against the city. The superior court, which was the first to consider the action for mandamus, held that an injured person had a right of election between common-law damages and acceptance of the provision of the city charter, which allows, in cases of permanent disability, a pension to be fixed by the city council, but not to exceed 20 per cent of the wages received at the time of injury. The compensation act provides that it shall not apply to public employees where State law or city charter or ordinance makes other provision. The supreme court held that the lower court had erroneously interpreted this provision, and that it simply removed such employees from the operation of the provisions for payment from the State fund, without reviving common-law liability as to them. Reviewing the purpose of the act and the reasons for its enactment, Judge Fullerton, who delivered the opinion, said in conclusion on this point:

Having in view the declarations concerning the purposes of the act and the evils it was sought thereby to remedy, we can not conclude that the legislature meant to subject municipalities, merely because they had themselves made provision for the care of their employees injured while in the course of their employment, to the burdens and hazards of a common-law action in damages. We think it was meant rather to substitute the remedy afforded by the city for the remedy afforded by the act, and to leave the provisions which take away the common-law action in force.

It was claimed that this interpretation would deny equal protection of the laws, since the State and various municipalities made unequal provisions for their employees. This contention was not sustained, the opinion saying:

But the law itself makes no discrimination in the respect mentioned. On the contrary, it operates alike upon all municipalities throughout the State. It simply provides that, where a municipality has itself made provision for a person injured in a hazardous occupation, the injured person must take under the municipal provision rather than under the provision made by the law itself. It is true that the result may be different recoveries in different municipalities for similar injuries, but that is not to deny to the individual the equal protection of the laws.

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It was said that if the provision made by the city was merely nominal, it was possible that the employee would be allowed to take under the compensation act; but where the provision was in fact a substantial one, it must govern.

WORKMEN'S COMPENSATION — PUBLIC EMPLOYMENT — COUNTY BUILDING ROAD—*Gray* v. *Board of County Commissioners of Sedgwick County, Supreme Court of Kansas (June 9, 1917), 165 Pacific Reporter, page 867.*—G. S. Gray brought suit under the workmen's compensation act against the board mentioned in the title because of an injury suffered by him while employed by the commissioners to haul gravel for use on a county road, which was being graded and surfaced. The court assumed, without deciding, that the employment was within the act as being " on, in, or about a mine or quarry," but held that the act applies, in relation to county or municipal work as well as that of private employers, to employment in the employer's trade or business, in the hazardous occupations mentioned therein, only when " conducted for the purpose of business, trade, or gain." As a county, in its opinion, can not be said to build roads for such a purpose, it held that the county was not liable to the injured employee for compensation.

WORKMEN'S COMPENSATION — PUBLIC EMPLOYMENT — LABORERS, WORKMEN, AND MECHANICS—JANITOR UNDER CIVIL SERVICE—*White* v. *City of Boston, Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 481.*—Compensation was awarded to Agnes White, whose husband, a schoolhouse janitor, fell while washing a window and was killed. On appeal it was contended that White, being an appointee under the civil-service act, was in the " official service," and was therefore not within the class of " laborers, workmen, and mechanics " to whom the compensation law applies. The court through Judge Loring said that the matter of civil-service appointment was not decisive, but rather the nature of the work; that a head janitor of a city hall or large office building, whose duties were those of superintendence and who did not personally work with his hands, might not be a laborer or mechanic, but that this instance presented a different aspect. The decree awarding compensation was affirmed, Judge Loring saying further:

But the janitor here in question was not that kind of a janitor. In the case at bar the fact was or at least evidence warranted a finding that the fact was that the deceased with his own hands did all the work of cleaning, heating, washing windows, care of yards, sidewalks and lawns in case of the two schoolhouses in question, and that

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work included everything from keeping the water-closets clean to running the steam boiler in the school building of the Abby W. May School (for which he had to have a fireman's license) and the furnace in the other school building.

Not only was it the duty of the deceased to do all the work, but the evidence warrants a finding that he did it and all of it with his own hands.

WORKMEN'S COMPENSATION — PUBLIC EMPLOYMENT — LABORERS, WORKMEN, AND MECHANICS—TEACHER OF AUTOMOBILE REPAIRING IN VOCATIONAL SCHOOL—*Lesuer* v. *City of Lowell, Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 483.*—Clarence C. Lesuer was accidentally killed while in the employ of the city of Lowell. He was a teacher, among other subjects, of automobile repairing, in the industrial and vocational school conducted by the city, his duty being to show the boys how to do repair work and on occasion to demonstrate methods, his death being caused by some unknown act or omission on the part of one of the boys whom he was instructing. His father and administratrix made claim for compensation, which was denied by the industrial accident board; and the decree entered on that decision was affirmed, on the ground that the employee was not a laborer, workman, or mechanic within the meaning of the law.

WORKMEN'S COMPENSATION—PUBLIC EMPLOYMENT—POLICE OFFICERS—*Griswold et al.* v. *City of Wichita, Supreme Court of Kansas (Jan. 6, 1917), 162 Pacific Reporter, page 276.*—Frank Griswold, a police captain of the city named, was killed by a pistol shot from some person who had broken into a store in the nighttime, and whom he was attempting to arrest. Suit was brought under the compensation law for the benefit of his family, and in the district court judgment was for the defendant city, on the ground that a police officer is not a workman and that the compensation provisions do not apply to him. This judgment was affirmed by the supreme court, Judge Porter delivering the opinion, from which the following is quoted:

Many good reasons might be suggested for including within the scope of the act workmen employed in hazardous enterprises by cities engaged in conducting a business for profit, as electric light or waterworks plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden by adding to the cost of the service. But where a city is engaged merely in the exercise of its governmental functions, we think it clear that the workman, no matter how hazardous his employment, would not come within the spirit and purpose of the compensation act.

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WORKMEN'S COMPENSATION—RELEASE—MISTAKE AS TO EXTENT OF INJURY—*Weathers* v. *Kansas City Bridge Co., Supreme Court of Kansas (Jan. 18, 1917), 162 Pacific Reporter, page 957.*—Judgment was rendered in favor of W. P. Weathers in the district court of Wyandotte County, Kans., in his proceeding under the workmen's compensation act. Two weeks after an injury to this employee he went to the office of the general manager of the bridge company, his employer. They talked over the matter of the amount of compensation and agreed that the employee would probably be able to go to work in two weeks longer, and he was given a check for $24, being $6 per week for four weeks, or 50 per cent of his wages for that time, and signed a release. It appears that a bone in his foot was broken, which fact was not known to either party at the time, and it was actually several months before disability ceased. The judgment for plaintiff was set aside and a new trial ordered because there had been no allegation that the mistake of fact was mutual, and the instruction to the jury had been to the effect that a release could be set aside because of inadequacy of the consideration and a mistake on the part of the signer. The court held, however, that where inadequacy of consideration and mutual mistake of fact concur, a release is not binding. The employee should, therefore, it was said, have an opportunity in another trial to prove these facts, if they existed. The following is quoted from the opinion of Judge Marshall:

That part of the instruction which says, in substance, that the plaintiff can recover if he signed the release under a mistaken belief as to the extent of his injuries is not correct. He can recover when he proves that the agreement and release were executed under a mistake of both the plaintiff and the defendant as to the extent of the plaintiff's injuries, if he also proves that the amount already paid him is not adequate compensation under the law.

WORKMEN'S COMPENSATION—REVIEW AFTER LUMP-SUM SETTLEMENT—*In re McCarthy, Supreme Judicial Court of Massachusetts (April 7, 1917), 115 Northeastern Reporter, page 764.*—Patrick McCarthy was injured on December 22, 1913. On April 1, 1915, an agreement, entered into for the settlement of the remaining liability of the insurer by the payment of $500, was affirmed by the industrial accident board. Later, application was made for the loss of sight, which, at the time of making the settlement, was not anticipated. This was denied by the board, and its decision affirmed by the superior court of Suffolk County. The supreme judicial court also affirmed the decree, Judge Carroll, discussing for the court the effect of lump-sum payments in part, as follows:

The workmen's compensation act was intended to compensate employees during the period of incapacity for labor; and, in case of

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death, to help their dependents by the payment of a weekly sum during a stated period. Its purpose was not to compensate by the payment of a lump sum unless the case presented features which made it unusual; and this fact was to be found by the industrial accident board. Weekly payments must have continued for six months and the agreement of settlement must be found to be for the best interests of the employee or his dependents. When these findings are once made, the payment is in full settlement for all compensation, general and specific, under the act. Both parties are bound by it. The insurer can not complain if the amount is thought to be too large, nor the employee, if too small.

Even if blindness developed after the six months' period, and it was caused by the injury and was unknown at the time of the settlement, the employee is nevertheless bound by the terms of his agreement, which state:

"Said payments are received in redemption of the liability for all weekly payments now or in the future due me * * * for all injuries received by me on or about the 22d day of December, 1913."

WORKMEN'S COMPENSATION—REVIEW BY COURT—EFFECT OF RELEASE—*Odrowski* v. *Swift & Co., Supreme Court of Kansas* (*Nov. 11, 1916*), *162 Pacific Reporter, page 268.*—Stanley Odrowski was awarded compensation by the district court of Wyandotte County for injury suffered while in the employ of Swift & Co. The company appealed, claiming that a release which had been signed by the employee about four months after his injury and which the district court had set aside was binding. This release was given in consideration of $45 paid him at the time and $103.50 which he had previously received. These sums made a total which, according to the findings of the jury, exactly equalled the amount then due him. It was claimed on his behalf that the release was secured through false statements made by a physician in the employ of the company as to the extent of the injuries. The court said, however, that the employee's own testimony not only did not bear out the view that he executed the release in reliance on such statements, but, on the other hand, negatived it, since he testified that he signed the paper without reading it or knowing that it was a release. It was pointed out that in the absence of any proof of fraud the mere fact that a person, having every opportunity to do so, does not read a paper which he signs, does not give the court power to permit him to avoid its effect. The specific provision for the setting aside of "agreements for compensation" and "awards" is held not to apply, because by the terms of the act an agreement can only be set aside for fraud or undue influence and because the word "award" is used throughout in the sense of an arbitration. Finally, it is held that the judgment must be reversed and remanded with directions to enter a judgment for the company rather than for a new trial.

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WORKMEN'S COMPENSATION—REVISION OF AWARDS—MARRIAGE OF DEPENDENT SISTER—*Adleman* v. *Ocean Accident & Guarantee Corp. (Ltd.) et al., Court of Appeals of Maryland (June 26, 1917), 101 Atlantic Reporter, page 529.*—Morris Brenner, an employee of the Reliable Junk Co., of Hagerstown, Md., died December 5, 1914, as the result of an accidental injury. Compensation was awarded in the sum of $12.50 per week for 4 years and 32 weeks from the date of death, and this sum was apportioned equally between his mother and a sister, Mary Brenner, each receiving $6.25 per week. In June, 1916, the insurer, the company named in the title of the case, filed a petition praying that compensation to the sister be abated as of the date of June 19, 1915, on which date she had married one Adleman, but, as it was alleged, had concealed this fact, so that the company was not aware of it until June 1, 1916. The commission dismissed this petition, but on appeal by the company the circuit court for Washington County ordered the compensation abated. The claimant in turn appealed, and under the present decision she was successful in having the compensation ordered continued according to the original award. The compensation act provides that compensation shall cease on the marriage of a widow, and section 54 provides for modification of awards by the commission in the way of a reapportionment among the beneficiaries. It was argued by the insurance company that this gave the commission power to deprive one beneficiary of compensation altogether, but the court held that the section conferred no power upon the commission to annul the compensation to a beneficiary who was a dependent at the time of the employee's death.

WORKMEN'S COMPENSATION — SELF-INSURANCE — CONSTITUTIONALITY OF STATUTE—*State ex rel. Turner* v. *United States Fidelity & Guaranty Co. of Baltimore, Md., Supreme Court of Ohio (Apr. 17, 1917), 117 Northeastern Reporter, page 232.*—This was a proceeding in quo warranto to oust certain insurance companies from exercising the franchise of writing in Ohio insurance to indemnify employers who, under section 22 of the workmen's compensation act, take upon themselves direct liability to pay compensation to workmen. With the exception of employers who become self-insurers under this section, all employers coming under the act are required to contribute to the State fund by paying premiums for insurance of their compensation liability therein. Certain employers, having satisfied the industrial commission of their financial ability to carry their own risks, secured permission to do so, and then obtained contracts from

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the private insurance companies indemnifying them against possible losses. The attack against this method of avoiding the monopoly which the State fund otherwise would exercise was based on the ground that section 22 was unconstitutional; the court, however, held that it was valid, and that the employers given that privilege by the commission might become self-insurers, with an indemnification from other sources if desired. It may be noted that the legislature in 1917 has limited the privilege of becoming self-insurers to those who desire to be such without any provision for indemnification.

The first reason assigned for the alleged invalidity of the section was that it was violative of the section of the constitution of the State authorizing the passage of a compulsory workmen's compensation act. The court remarked that the provision was permissive and not mandatory, and that the details of the law and the method of its administration were largely left to the good sense of the general assembly. Judge Nichols delivered the opinion, and said further on this point:

The law could have been framed, no doubt, so that all employers would have been compelled to participate in the one fund to be administered wholly by the State board; but the law's departure from that exclusive method is not of such palpable nature as to suggest to this court that it should destroy such portion of the law.

Further objections to the section were of the nature of complaint that there was a denial of the equal protection of the laws. The opinion shows that there is no real discrimination between the employers, since all have an equal opportunity to become self-insurers if they can qualify. As to the equality among employees, Judge Nichols concludes as follows:

So far as we can see, the only difference is in the person of the paymaster—in the one case the State, and in the other the employer. The law expressly provides that the compensation, when paid direct, shall in no event be less than that paid out of the State insurance fund. As heretofore stated, the board of award must be satisfied of the financial ability of the noncontributing employer, and is further authorized to require such security or bond from such employers as it may deem proper, adequate, and sufficient to secure to injured employees the payment of compensation. In other words, the State board of awards is clothed with full authority to make certain the payment of compensation, just as certain in fact as if the State fund itself was to be drawn upon. If, then, the compensation in the one case is to be as great as in the other, and if the prompt payment is as certain in the one case as in the other, the claim of inequality before the law is dissipated to the very vanishing point.

The wisdom or unwisdom of permitting indemnity insurance contracts is declared not to be connected with the question presented to the court.

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WORKMEN'S COMPENSATION—SERIOUS AND WILLFUL MISCONDUCT OF EMPLOYER—MAINTAINING ELEVATOR IN UNSAFE CONDITION—DOUBLE COMPENSATION—*Riley* v. *Standard Accident Ins. Co. et al., Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 259.*—William Riley was injured in the employ of the Home Soap Co., and the employer and insurer appealed from an award of compensation made to him. The amount awarded was doubled on the ground that the employer was guilty of serious and willful misconduct in maintaining an elevator which was badly out of repair, and whose condition resulted in the injury. The court held that this did not constitute willful misconduct under the act, and modified the award by eliminating the doubling of the amount, affirming it as so modified. Judge Braley in delivering the opinion said in part:

The negligence of the subscriber in furnishing for the use of its employees an elevator so thoroughly out of repair as to be unsafe, and in permitting the use of the elevator which the board could find the superintendent considered was in a "dangerous condition," while abundantly shown by the evidence, does not rise to the degree of serious and willful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, for which under section 3 as amended, the injured employee shall be awarded double compensation. As said by Sheldon, J.:

"Serious and willful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequence." (Burns's Case, 218 Mass. 8, 10, 105 N. E. 601, 602 [Bul. No. 169, p. 212].)

WORKMEN'S COMPENSATION—SUITS—FAILURE OF EMPLOYERS TO OBSERVE LAWFUL REQUIREMENTS—*American Woodenware Mfg. Co.* v. *Schorling, Supreme Court of Ohio (May 22, 1917), 117 Northeastern Reporter, page 366.*—Fred W. Schorling brought action for damages against the company named, and secured a judgment in his favor in the court of common pleas, which was affirmed by the court of appeals of Lucas County. The company contended that, as it employed more than five persons and had complied with the requirements of the workmen's compensation act, any remedy which the employee had was given by that statute. The amendment to the constitution, section 35 of Article II, which empowered the legislature to enact the compulsory compensation law, provides that—

No right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees.

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The suit was based upon alleged negligence of the company in permitting conditions of employment which resulted in the falling of a load of lumber upon him. A failure to provide a safe method of transporting the lumber was alleged, as was a negligent manner of piling the lumber too high upon a small car and the maintenance of the track in a defective state of repair. The supreme court reversed the judgments of the courts below, holding that the suit could not be maintained in the present case. Referring to the portion of the constitutional amendment quoted above, with particular reference to the phrase "lawful requirement," Judge Johnson, who delivered the opinion, said, in part:

At the time this amendment was adopted by the convention in May, 1912, the act of May 31, 1911 (102 Ohio Laws, p. 524, which was the original workmen's compensation law), was in force. It was provided by section 21-2 of that act that where a personal injury was suffered by an employee, or when death resulted to an employee from personal injuries while in the employ of an employer in the course of employment, and such employer had paid into the State insurance fund the premium provided in the act, and in case such injury had arisen from the willful act of such employer, or any of the employer's officers or agents, or from the failure of such employer or his agents to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees, then in such event nothing in the act contained should affect the civil liability of such employer. It will be observed that in the original act the elements which should constitute lawful requirements for the protection of the life or safety of employees were specifically enumerated. If the failure to comply "with a lawful requirement" includes an act which was actionable negligence simply because of the rules of common law, then the portion of the section which authorizes the taking away of any or all rights of action or defenses of employees and employers would be practically meaningless and inoperative. We should be holding that embodied in the same section was power to take away all rights of actions or defenses of employees and employers, and also a practical denial of power to take away any right of action.

Reference was then made to the enactment of the new law in 1913 (103 Ohio Laws, 72), in pursuance of the authority given by the amendment to the constitution to provide for a compulsory system. Section 29 of this act contains practically the same provisions as section 21-2 of the earlier act, but was amended in 1915 so as to define the term "willful act" as meaning an "act done knowingly and purposely with the direct object of injuring another." Continuing the court said:

Here again we meet a distinct conflict between different provisions in the same section, if the construction above referred to be correct. We have a provision preserving to the employee the right to sue his

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employer for an injury which has arisen from the willful act of the employer, provided the willful act was "done knowingly and purposely with the direct object of injuring him," while in the same sentence we have a provision that the employee may sue his employer for simple negligence in failing to provide for his safety, as such negligence might be ascertained and fixed by the rules of the common law, and without reference to whether it was willful or unintentional—such as the falling of the lumber alleged to be negligently piled in this case. We think it clear that no such result was intended in the adoption of the amendment to the constitution referred to.

A particular contention of the employee was that the "lawful requirements" of the constitutional amendment, and the "legal requirements" of section 21-2 of the compensation act, would include all those specified in sections 15 and 16 of the Industrial Commission Act as being duties of the employer. The court's view was that only the failure to comply with specified orders of the commission would be so classified. The portion of the opinion relating to this point reads, in part, as follows:

When the provisions of sections 13, 15, 16, 18, 21, 22, and 25 are considered together, in the light of the declared purpose of the enactment creating the industrial commission, we think it clear that the purpose and the effect of sections 15 and 16 was to bring all employers within the scope of the jurisdiction and authority of the commission, and to impose upon them the obligation to comply with the orders and requirements of the commission when duly made.

The commission might through its authorized officials visit an industrial plant and after thorough inspection and investigation make an order requiring certain specific precautions to be taken and safeguards to be provided, all of which it is expressly empowered and directed to do by the terms of the act here involved; yet if an injury was sustained by an employee, after the employer had fully complied with the order, and had incurred expenses, arranged his plant, and conducted his business with reference thereto, the injured employee could assert in an action against him that the precaution ordered by the commission was not reasonable and safe and did not meet the requirements of sections 15 and 16; that in fact this action had no relation to any order of the commission, because his right of action rested upon the general terms of those sections to be determined as at common law. The employer would, in such case, be put upon his defense exactly as if the old common-law rule and the antiquated and unsatisfactory methods of dealing with accidents in industrial pursuits still prevailed, and as if no law had been passed and no effort made by the State to respond to the sentiment of the people, created by long and harsh experiences, that a more humane and satisfactory system should be erected. On the other hand, if the construction we have indicated be correct, then, when an order of the commission has been made and complied with, the injured workman will receive at once the compensation provided by the law out of the insurance fund. This could result only in doing justice between the parties, because if the employer has complied with the orders of an impartial official commission, after having posted notice to the em-

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ployee that he was proceeding under the law and subject to the commission's order, he has done all that in justice should be required. But if he has failed to obey the order or requirement of the commission, made under these general provisions, or has failed to comply with the requirements of any statute or ordinance defining safety devices or safeguards required to be used, he is by that act guilty of negligence per se and liable to the injured workman as provided in the act.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY—AWARD FOR CONSECUTIVE PERIODS—*Marhoffer v. Marhoffer, Court of Appeals of New York (May 1, 1917), 116 Northeastern Reporter, page 379.*—August Marhoffer, employee, proceeded against Alexander Marhoffer, employer, and his insurance carrier, for compensation for an injury suffered by the former. The second finger of his right hand was cut off, and the thumb and index finger lacerated. The State industrial accident commission found that he was totally disabled for 10 weeks from the date of the injury, and awarded him medical treatment for 2 weeks, 66⅔ per cent of his wages for the succeeding 8 weeks for the total disability, and compensation at the same rate for 30 weeks additional for the partial disability caused by the loss of the second finger. The propriety under the law of thus awarding compensation for both total and partial disability for the same injury was questioned, and the court held that such award was not in accordance with the law; it therefore set aside the award for the eight-week period. Judge Pound delivered the opinion and said in part:

Concurrent awards and consecutive awards, based on separate items of physical impairment, disconnected from earning power, alike ignore the fundamental principle that the basis of compensation is a sum payable weekly for a fixed time during which the employee is actually or presumptively totally or partially disabled and nonproductive.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY—"IN LIEU OF ALL OTHER COMPENSATION"—*In re Denton, Appellate Court of Indiana, Division No. 2 (Oct. 30, 1917), 117 Northeastern Reporter, page 520.*—Two cases were considered together, involving the construction of the workmen's compensation law of Indiana. The claimant Denton suffered an accident which resulted in the amputation of his left arm above the elbow, and a fracture of the sacrum which, it appeared at the time of a hearing before the board, would disable him totally for 100 weeks, and partially for 50 weeks longer. Good, the claimant in the other case, also suffered a single accident, which caused a permanent loss

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of use of the right arm amounting to 75 per cent, and a fracture of the femur, which resulted in total disability for 22 weeks. The circumstances in both cases were such as to entitle the employees to benefits under the compensation act. The board certified to the court the question whether the claimants were entitled to benefits for the specific periods given in the schedule of section 31 for the permanent partial disabilities, and in addition for the periods of total disability due to the other injuries. This question was answered in the affirmative by the court, which held that the words "in lieu of all other compensation" in section 31 refer only to all compensation for permanent partial disabilities, so that additional compensation might be claimed for a period of total disability due to another injury, even though incurred at the same time, the awards to run, not concurrently, but consecutively.

Workmen's Compensation—Total Disability—Inability to Get Work—*In re Lacione, Supreme Judicial Court of Massachusetts (May 26, 1917), 116 Northeastern Reporter, page 485.*—Agdio Lacione, 16 years of age, was employed as a water boy by the Hanscom Construction Co. On September 24, 1915, his right hand was caught in the gears of a stone crusher. Compensation was paid him up to October 28; he then returned to work at his regular wages of $9 per week until December 27, shortly before the work closed. The middle finger of the right hand had been amputated, and the index and ring fingers were stiffened. The boy was unable to understand orders given in English, and the industrial accident board found that, the right hand being permanently disabled, he was totally incapacitated for work from December 27, 1915, and awarded compensation accordingly. He did no work from that date until the hearing the following May, but it did not appear that he had attempted to secure work. The decree granting compensation for total disability was reversed, with instructions that the board should make such award as the evidence already taken would warrant. Judge De Courcey, in the opinion, said in part:

As the evidence does not show a total inability to perform work or to secure work to do, the finding of a total loss of wage-earning ability by the employee at the time of the hearing, and for the four months preceding was not warranted by the evidence.

It well may be that on the evidence the employee is entitled to compensation for partial incapacity, and to some additional specific compensation under part 2, section 11, of the act [providing fixed awards for specific injuries]. He should be given an opportunity to move for a further hearing before the board, on the testimony already heard, and to apply for such compensation as he is legally entitled to.

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WORKMEN'S COMPENSATION—TOTAL DISABILITY—INCOME FROM CONDUCT OF BUSINESS—*Moore* v. *Peet Bros. Mfg. Co., Supreme Court of Kansas (Jan. 6, 1917), 162 Pacific Reporter, page 295.*—Warren L. Moore was awarded a lump sum of $2,710 as compensation for the full term of 8 years for an injury suffered in the employ of the company named, which injury was found to have resulted in permanent total incapacity. The company moved that the enforcement of this judgment be enjoined, and the judgment modified, on the ground that his total incapacity had ceased, since he was conducting a cleaning, pressing, and tailoring business in the basement of his home, from which he was making $12 to $15 per week. The court, Judge Mason delivering the opinion, held that the profits of the business did not constitute earnings under the law, and affirmed the decision of the district court overruling the motion. The following is quoted from the opinion:

The question is presented whether the fact that an injured workman is able to, and does, conduct a business of his own, which returns him an income, is inconsistent with a finding that his injury resulted in his permanent "total incapacity for work" within the meaning of the compensation act.

The phrase quoted does not imply an absolute disability to perform any kind of labor. It requires a practical and reasonable interpretation, as is illustrated by the familiar rule that inability to obtain work, caused by an injury, is classed as total incapacity. One who is disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as totally incapacitated. The Scotch Court of Session has held that the profits of a business owned by the injured workman are not to be classed as earnings.

We find no American cases in which the question has been referred to. If it had been shown in this instance that the plaintiff personally performed a part of the work of cleaning, pressing, and tailoring, a very different question would be presented. Possibly any portion of his income that could be traceable to such work on his part should be given the same effect as though he received it as wages. But the showing made is merely that he is "making" a certain sum weekly out of the business which he is "conducting" as owner, and this might be the case, although he were a complete physical wreck. A judgment based on a finding that a workman's injury has resulted in his total disability to work can not be said to be inequitable or against conscience because he has the thrift and intelligence to provide for his support by investing such means as he has in a business carried on by the labor of others under his direction.

WORKMEN'S COMPENSATION—WAGE LOSS—EARNING POWER—WAGE ADVANCE DUE TO EDUCATIONAL TRAINING—*Epsten* v. *Hancock-Epsten Co., Supreme Court of Nebraska (July 3, 1917), 163 North-*

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western Reporter, page 767.—Edward J. Epsten, a minor, had the great toe of his left foot crushed under the plunger of a press in the establishment of the company named, on April 29, 1915. Medical attention was furnished by the company, and he returned to work May 18; but about a week later blood poisoning developed, he went to a hospital, and the injured toe was amputated. That fall he attended a business college, and the next May returned to work for the company in a different capacity at $10 per week, his previous wages having been $7. At the time of the hearing he was earning $15 per week. The district court awarded him $5 per week until May 20, 1916, when he returned to work, and in addition $1 per week for 245 weeks, as 50 per cent of wage loss, payable as a lump sum; the Nebraska statute does not have a specific award for loss of fingers or toes, unless there is a permanent loss of use of the hand or foot. The claimant applied also for additional cost of medical treatment, but the court held this limited to the three weeks already adjusted. The award was sustained except that the award for permanent partial disability was made payable in weekly payments instead of as a lump sum. As to the matter of loss of earning power Judge Rose for the court said:

If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury. A general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. In the present case it is a reasonable inference from the evidence that plaintiff received higher wages because he had by education and training fitted himself for more remunerative employment. There is evidence tending to show that he is unable to perform the duties of his former employment. The evidence justifies a finding that his earning capacity has been impaired.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—OPERATION OF ELEVATOR IN VIOLATION OF RULES—*Pacific Coast Casualty Co. v. Pillsbury et al., District Court of Appeal, First District, California (Nov. 16, 1916), 162 Pacific Reporter, page 1040.*—Simon Cassell, a messenger boy in the employ of the Simon Millinery Co., of San Francisco, was killed by accident, and his dependent was awarded compensation by the industrial accident commission. The casualty company, insurer of the millinery company, petitioned for a writ of review, and the award was annulled in the court of appeal because it was held that the fatal injury was caused by the willful misconduct of the boy. He had been out of the building to secure some piping,

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and on return operated a freight elevator in order to ascend to the upper floors, and was crushed by it. It appeared that he had been warned when he entered the employment not to ride in or operate the freight elevators under penalty of immediate discharge, but it was claimed that the rules with regard to elevators were not strictly enforced. The following is quoted from the opinion, delivered per curiam:

We are of the opinion that the undisputed evidence in the case showed that the deceased had been expressly warned not to ride in, or attempt to operate, the freight elevators in the building in which he met his death, under penalty of discharge and that notices were posted at, or near, the entrance of such elevators of similar import, and that the disregard of such warning by the employee must, in the absence of evidence mitigating such disobedience, be held to constitute such willful misconduct as would prevent a recovery before the commission, where, as in the instant case, there is no evidence tending to show that the disregard of its warnings, orders, and notices was condoned by the employer.

WORKMEN'S COMPENSATION INSURANCE—MEDICAL, ETC., EXPENSES—INDEMNITY—*State ex rel. Turner v. Employers' Liability Assurance Corporation (Ltd.), Supreme Court of Ohio (Jan. 31, 1917), 116 Northeastern Reporter, page 513.*—The State of Ohio, through its attorney general, brought this action of quo warranto against the insurance company named to enforce an act of 1913, page 91 of the laws of that year, which provided that contracts indemnifying an employer for loss on account of injury to employees must specifically cover medical expenses, and in case of death funeral expenses and compensation to dependents. It was held that this law was not in conflict with and did not repeal section 9510 of the General Code, defining the powers of insurance companies but simply limited the kind of contract that might be written in certain cases. A similar holding was made with regard to the provision that no contract should be made to indemnify an employer for loss or damages resulting from his negligence or that of his agents or servants, unless the employer is a contributor to the State fund or has legally exercised the option of carrying his own insurance, under section 22 of the compensation act. Judgment of ouster was rendered as to the exercise of the franchise of the company, as to writing indemnity insurance policies other than those permitted by the opinion of the court. The operation of ouster was suspended for 100 days in order to permit the company to conform to the court's holdings.

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