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**DECISIONS OF COURTS AND  
OPINIONS AFFECTING LABOR  
1918**

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AND  
MARTIN C. FRINCKE, JR.**



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## REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1918.

### INTRODUCTION.

This bulletin is the seventh in the series devoted exclusively to the presentation of court decisions, the preceding numbers being 112, 152, 169, 189, 224, and 246. 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 of the most important cases are given in the **MONTHLY LABOR REVIEW** of the Bureau as soon as they come to the knowledge of the office, but these cases are also 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, such 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. Opinions of the Attorney General of the United States construing Federal labor legislation are also reproduced.

The opinions and decisions are presented in abridged form, the facts being stated in most cases in the language of the editors, with quotations from the language of the court, 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 1918, the volumes covered being as follows:

Opinions of the Attorney General, volume 30, page 241 et seq.

Supreme Court Reporter, volume 38, page 65, to volume 39, page 20.

Federal Reporter, volume 245, page 817, to volume 253, page 480.  
Northeastern Reporter, volume 117, page 849, to volume 121,  
page 80.

Northwestern Reporter, volume 165, page 305, to volume 169, page  
576.

Pacific Reporter, volume 168, page 1121, to volume-176, page 320.

Atlantic Reporter, volume 102, page 337, to volume 104, page 895.

Southwestern Reporter, volume 198, page 817, to volume 206,  
page 576.

Southeastern Reporter, volume 94, page 481, to volume 97,  
page 608.

Southern Reporter, volume 76, page 825, to volume 80, page 24.

New York Supplement, volume 167, page 705, to volume 172,  
page 816.

Washington Law Reporter, volume 46.

Decisions of particular interest are one of the Supreme Court declaring unconstitutional the Federal child-labor law; those sustaining the minimum-wage laws of Massachusetts and Washington, and those sustaining acts creating a workmen's compensation aid board in New Jersey, and establishing a special fund to compensate for second injuries in New York; also, decisions penalizing sabotage, one a common-law decision and the other under a statute; an application of the Clayton Act as authorizing secondary boycotts; and various others granting injunctions on the basis of war emergencies. The anti-tipping law of California was declared unconstitutional.

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 is referred to under more than one head because of the fact that more than one point is involved in the discussion.

### OPINIONS OF THE ATTORNEY GENERAL.

Only two opinions of the Attorney General seem to be of sufficient general interest to warrant mention. One of these relates to the eight-hour law of June 19, 1912, the Secretary of War submitting the question whether or not it was applicable to the work of preparing marble for the Lincoln Memorial (p. 45). The opinion is suggestive rather than decisive, and after giving expression to the principles involved leaves their application to the Secretary. The second opinion relates to the powers of the United States Employees' Compensation Commission (p. 46). This body submitted an inquiry as to its authority to pass upon the inclusion or exclusion of

employees of the United States Shipping Board Emergency Fleet Corporation. Citing the provision of the law that the commission has power to "decide all questions arising under this act," the Attorney General declared that, upon the presentation of the question, the power of deciding the point submitted rested with the commission.

## DECISIONS OF THE COURTS.

### ALIENS.

The construction of the immigration law was involved in two cases, one (*Ex parte Prout*, p. 49) calling for an interpretation of the term "offers or promises of employment." Officials of the Department of Labor had held that statements by agents of steamship companies that there were great opportunities for work in the United States were such solicitation as made the immigrants liable to deportation as contract laborers, a view which the United States district court refused to accept, and the order for deportation was revoked. In the second case (*United States v. Royal Dutch West India Mail*, p. 48), an employee of the company named was directed to proceed from his working place in Amsterdam to a branch office in New York for employment there for a short time. In this case also the district court ruled that there was no inducement to immigrate in consequence of any agreement to perform labor in this country, so that the case was not within the act.

Another aspect of the subject of alienage is involved in the case of *Morin v. Nunan* (p. 49). *Morin* was an alien and had procured a license to drive an automobile, but was fined for driving in the township of Weehawken, N. J., which had a local ordinance forbidding the operation of motor vehicles for hire by one not a citizen of the United States. The conviction was contested on the ground that the ordinance was unconstitutional, but it was declared valid by the supreme court of the State.

### CONTRACT OF EMPLOYMENT.

#### ENFORCEMENT.

Hardly classifiable as a labor contract, but involving identical principles, is the case of *Tribune Association v. Simonds* (p. 53). *Simonds* was a newspaper correspondent engaged to do editorial work for the plaintiff association. Following some disagreement as to the conduct of affairs, *Simonds* undertook to engage in work for another corporation, disregarding his covenant not to write for any other publication or periodical during the term of the contract, and the Chancery Court of New Jersey held that an injunction was properly issuable prohibiting the rendition of any service except that

agreed to under the original contract, and that the alleged injuries were not a sufficient warrant for a breach of contract.

A second case before the same court (*Driver v. Smith*, p. 55) involved an interference with the business of a manufacturing company. One member of the company undertook to withdraw and to establish a competing business, proposing to take with him three skilled workers from the old plant. Injunction was sought against the withdrawing official to prevent his interfering with the original business and also against the three workmen to prevent their carrying out their new contracts and violating agreements to work for none but the original company. The court ruled that, as a general principle, the original contract should be observed, the employer being entitled above others to the services of the workmen. When the workmen had learned the facts regarding the new employment, they sought to withdraw from the new contracts, and in a cross bill asked that they be canceled, a petition which the court allowed. However, the circumstances did not warrant the issue of any injunctions under the circumstances as they had developed.

#### BREACH.

In the case of *Ressig v. Waldorf Astoria Hotel Company* (p. 50) a cook, who had agreed not to join a labor union and not to strike, but to give eight days' notice of his desire to terminate his employment, joined a union and went on strike at the dinner hour, putting his employer to much difficulty and expense. The contract provided that if *Ressig* should violate it he should forfeit any unpaid wages due him. In spite of this he sued to recover the balance claimed, whereupon the employer interposed a counterclaim for his outlay in hiring another cook. The contention of the employer was maintained by the Supreme Court of New York, Appellate Division, on the ground that there was no excuse for the breach, but that it was rather a willful violation calculated to injure the employer.

That a breach was justified was held in the Massachusetts case of *MacIntosh v. Abbot* (p. 57). *MacIntosh* was a farm laborer and with his wife and two children was to reside, by the terms of the contract, with his employer. Being disturbed by *Abbot* after he had retired *MacIntosh* angrily protested, whereupon his employer demanded an apology. This was refused in rather disrespectful language, and *Abbot* then discharged the plaintiff. The judgment in behalf of the plaintiff was affirmed on the ground that there was not such insubordination as warranted the discharge, and that the reciprocal obligation of the employer to avoid offensive acts should also be observed.

The discharge of a foreman was held to be warranted in a case (*Ackerman v. Siegel*, p. 61), where it was shown that the plaintiff



had been guilty of asking workmen under him to pay him a commission on their wages. This was held by the Supreme Court of New York, Appellate Term, to be conduct tending to imperil the morals and success of the shop.

Involving more unusual conditions was the contract entered into by which it was agreed to protect a workman employed during a strike against acts of violence (*Hansen v. Dodwell Dock & Warehouse Co.*, p. 51). The strikers rioted and severely injured Hansen, who sued for damages, claiming an oral agreement to furnish ample protection and a safe place to work. The company contested on the ground of impossibility of performance, claiming also that such an agreement was against public policy, and that it would amount to a contract of insurance, but was not in conformity with the statutes on that subject. The Supreme Court of Washington rejected all these grounds, and also limited the effect of a receipt for money paid, holding that it was not a release; a judgment for damages was therefore affirmed.

Another case that may be noted here (*Sloss-Sheffield Steel & Iron Co. v. Taylor*, p. 59) is one in which a company doctor refused to render a service claimed by a workman to be due him under his contract. Deductions were made from the wages of the workmen in return for which medical service was to be rendered to them and, in the case of married employees, to their families. Taylor's wife fell ill and the services of the physician were requested but not given until five days after. In the meantime, the case had become acute and another physician had been called in. An action for damages by the woman as beneficiary of her husband's contract was held by the Court of Appeals of Alabama to have been properly brought, and judgment in her favor was affirmed.

#### INTERFERENCE WITH EMPLOYMENT.

In the first case to be noted under this head (*Oxner v. Seaboard Air Line Railway Co.*, p. 56) a judgment for damages was affirmed by the Supreme Court of South Carolina, where the company had enticed away four of the plaintiff's employees, who were known to be under contract for a year's work. This was held to be a common-law offense, so that the improper citation of an inapplicable statute did not affect the validity of the decision in the court below.

The second case (*S. C. Posner Co. (Inc.) v. Jackson, et al.*, p. 58) might also have been considered under the heading "Enforcement." Sarah C. Posner was an expert designer of women's clothing, her skill being the main asset of the plaintiff company. This company had been organized on the basis of a five-year contract for her services. She was induced to breach this contract by an offer of

increased compensation, whereupon the original company sued her new employer and recover a judgment for damages. This judgment was affirmed, the Court of Appeals of New York adding that if such remedy should be inadequate, an injunction to prevent her from rendering service to the rival organization could properly be had. As action was brought, it was a proper proceeding against one knowingly interfering with an existing contract.

#### REGULATION.

In the case *Ex parte Farb* (p. 60) the validity of a California statute regulating the disposition to be made of tips was up for consideration. The law undertook to make tips the property of the employee, but Farb arranged to receive them for himself as employer. He was convicted but secured his release on the ground that there was no authority in the legislature to interfere with any contract made between an employer and his employee not in conflict with public safety or morals, the law being declared unconstitutional.

#### WAGES.

##### MINIMUM WAGES.

Of principal interest under the heading of wages are the decisions of the Supreme Courts of Massachusetts and Washington, sustaining the validity of the laws of these States providing minimum wages for women and minors. The point involved in the Massachusetts case (*Holcombe v. Creamer*, p. 144) was as to the authority of the minimum wage commissioners to require information to be given by employers as to the wages paid women and children, as provided for in the act. The act was held to be constitutional and the employers were directed to furnish the information.

In the Washington case (*Larsen v. Rice*, p. 145) it was held that the minimum wage fixed by the commission is beyond the power of parties in interest to modify by contract, so that a settlement on a basis of a lower wage payment than that fixed by the commission was no defense against a claim for the unpaid balance. The act in general was held to be constitutional on the basis of the reasoning in the Oregon cases.

#### PAYMENT.

The Supreme Court of the United States held (*Sandberg v. McDonald*, p. 141) that the seamen's law forbidding the payment of advances at the time of hiring could not be held to invalidate advances legally made on a British vessel, under British law, and in a British port.

The California statute continuing wages for 30 days as a penalty for nonpayment on the termination of contract was held to be con-

stitutional in *Moore v. Indian Spring Channel Gold Mining Co.* (p. 147). A similar law of Arkansas was appealed to in the case of *Dickinson v. Atkins* (p. 148), and recovery was allowed for 16 days' pay accruing between the date of the discharge and the time when payment was tendered.

A New York statute fixes the rate of wages for employment on public works at the current rate in the locality for work of the same nature. Under this statute recovery was allowed a lock tender for services rendered during the seasons of 1893 and 1894 (*Wright v. State*, p. 149). Allowance for overtime was also made for part of a period during which 8 hours was a legal day's work, while 12 hours' service was rendered.

#### SECURITY.

It was held by the Supreme Court of Washington in *National Market Co. v. Maryland Casualty Co.* (p. 149) that checks given to laborers in payment for services and indorsed by them to a supply company were protected by the usual contractor's bond to secure the payment of claims for labor and materials. Such a bond was held by the Supreme Court of the United States (*Brogan v. National Surety Co.*, p. 150) to cover food supplies furnished for workmen whom the contractor was compelled to board and lodge by reason of the isolation of the place of work.

#### HOURS OF LABOR.

The application of the Federal eight-hour law for railway employees was involved in the case of *Nelson v. St. Joseph & G. I. Ry. Co.* (p. 103). The law was held by the Kansas City Court of Appeals, Missouri, to apply both as limiting the hours of service per day and as requiring overtime payment, although the contract was on a basis of a monthly salary and made no allusion to overtime. The earlier Hours of Service Act was held by the Supreme Court to apply to employees in charge of switches, receiving instructions by telephone connected with the yardmaster's office, such service being limited by the act to nine hours per day (*Chicago & A. R. Co. v. United States*, p. 104).

An act of the Alaska Legislature limiting the hours of labor of workmen in mines, smelters, etc., was held unconstitutional by the District Court of Alaska by reason of a defective title (*United States v. Howell*, p. 104).

#### SUNDAY LABOR.

The Kentucky statute forbidding work other than that of charity or necessity on Sunday was held to forbid the operation of a moving picture theater on that day in the case of *Capital Theater Co. v. Commonwealth* (p. 143).

**EMPLOYMENT OF CHILDREN.**

The Supreme Court of the United States by a vote of five to four held unconstitutional the Federal statute denying admission into interstate commerce of goods produced by children under 14 years of age, or by those between 14 and 16 years of age working more than 48 hours per week (*Hammer v. Dagenhart et al.*, p. 96). It may be noted that the end in view in this act is embodied in a new statute levying a special tax upon goods produced under such circumstances and offered for shipment in interstate commerce.

A Pennsylvania statute forbidding work at night by children under 16 years of age and requiring the procuring of an employment certificate was held constitutional in a case (*Commonwealth v. Wormser*, p. 95) in which the constitutionality of the statute was the only point involved.

**RESTRICTIONS ON EMPLOYMENT.**

The Illinois statute requiring barbers to pass an examination after three years' preparation was held constitutional by the supreme court of the State (*People v. Logan*, p. 130). However, the court admitted that the term of preparation seemed long, but not so unreasonable as to void the statute.

A city ordinance requiring cement contractors, before a license to do business was issued, to give bond that their work would stand five years was held unconstitutional by the Supreme Court of Wyoming (*State ex rel. Sampson v. City of Sheridan et al.*, p. 130).

A restriction directed against aliens is noted on page 49.

**LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.****ASSUMPTION OF RISK.**

A laborer trimming coal cars and injured by the negligent switching of other cars onto the track where he was working was held by the Supreme Court of Missouri not to have assumed the risk of such injury, nor was he guilty of contributory negligence by standing with his back to the approaching train (*Johnson v. Waverly Brick & Coal Co.*, p. 61). Similarly a workman injured by a drill defectively welded was held by the United States circuit court of appeals to be entitled to damages, since he had not assumed a risk of injury from such a cause (*Gold Hunter Mining & Smelting Co. v. Bowden*, p. 62). In the same case a release signed under the impression that the injuries were but slight was held not to bar recovery in the light of a subsequently developed permanent total disability.

**NEGLIGENCE.**

An unusual case was that of *Manwell v. Durst Bros.* (p. 91), in which suit was brought to recover damages for the death of an employee who had been secured to clear the employer's premises of strikers. The hazardous nature of the employment was held by the Supreme Court of California to be so evident as to put Manwell on his guard, so that in the absence of a pleading that what was done was done negligently, no cause of action was shown.

The power of State legislatures to enact laws shifting the burden of proof with regard to negligence, at least so far as Federal courts are concerned, was denied in *New Orleans & N. E. R. Co. et al. v. Harris* (p. 80).

A seaman injured on board ship waived his maritime rights and sought to recover in a common-law action for damages, claiming negligence. This was not allowed, the Supreme Court declaring that the rights and liabilities in the case must be determined in admiralty (*Chelentis v. Luckenbach S. S. Co. (Inc.)*, p. 139).

**FELLOW SERVANTS.**

Car repairers working on the same car are held to be fellow servants, and the Louisiana statute abolishing the doctrine of fellow service as affecting employees of public service corporations was held to be unconstitutional (*Mason v. New Orleans Terminal Co.*, p. 66)—this on the ground that by including all employees in one class no distinction was made between hazardous and nonhazardous operations, and that it affected public service corporations unfairly.

That a fellow workman may be a vice principal in the discharge of a specific duty was held in *Bradshaw v. Standard Oil Co.* (p. 67), and a judgment against the employer was accordingly affirmed by the Kansas City Court of Appeals, Missouri. The liability of the employer for supplying an incompetent fellow workman was affirmed by the Supreme Court of Oklahoma in *Lusk et al. v. Phelps* (p. 69). In this case a man was put to work with dynamite on the promise that an experienced helper would be given, and relying on this promise, which was not kept, the workman was fatally injured.

**SAFE PLACE AND APPLIANCES.**

Failure to furnish a guard for a shaping machine was held in *Camenzind v. Freeland Furniture Co.* (p. 68) to make the employer liable for an injury to the plaintiff's hand, but the Supreme Court of Oregon ruled that damages should not be allowed for embarrassment that might result from the changed appearance of an injured man, since this was regarded as a sentimental doctrine, "too remote and indefinite to constitute a possible element of damage."

In contrast with the foregoing is the case of *Boyer v. Crescent Paper Box Factory (Inc.)* (p. 93), in which the Supreme Court of Louisiana held that a woman whose scalp was entirely removed by her hair being caught in negligently exposed machinery was entitled to damages because of the injury sustained, "greater than a temporary disability." The State of Louisiana has a compensation law and the employer claimed that the case should be settled in accordance with its provisions. The court below rejected this contention and awarded damages, whereupon the case was appealed. The supreme court first ruled that the case came under the compensation law which it declared constitutional, but subsequently ruled that its provisions did not cover an injury of this nature and a judgment for damages was affirmed.

Furnishing a miner a more sensitive grade of dynamite than that to which he was accustomed, without notice of the change, was held by the Supreme Court of Kansas to be negligence on the part of the employer in *Terleski v. Carr Coal Mining & Mfg. Co.* (p. 85). That an employer is not responsible for injuries following the diversion of appliances from their intended use was the decision of the Supreme Court of Mississippi in *Ten Mile Lumber Co. v. Garner* (p. 86). Where, however, the tools furnished are defectively dangerous, it was decided by the Court of Appeals of the District of Columbia that the fact that it is a simple tool, in the use of which the employee would normally be required to assume the risks, does not relieve the employer of liability where his representative directs its use as necessary (*Cooper v. Penn Bridge Co.*, p. 90). The same holds true in regard to an assurance of safety as to the place of work (*Chess & Wymond Co. v. Wallis*, p. 87). In this case, a laborer called attention to a hanging limb over the place where he was directed to work, but was assured that there was no danger. The contention that the danger was equally open and known to the employee was not allowed by the Supreme Court of Arkansas, as the foreman's assurance and greater experience were held to charge the employer with liability. An inexperienced workman uninstructed as to the dangers of an electrical shock from contact with charged wires, was given judgment for damages, the employer being regarded as negligent in failing to instruct as to the dangers of the place, and the workman not assuming the risks, according to a decision affirmed by the Kansas City Court of Appeals, Missouri (*Kimberlin v. Southwestern Bell Telephone Co.*, p. 87).

Where an employee was compelled by his foreman, over his own protest, to remove a guard for dangerous machinery, the employer was held liable by the Supreme Court of California, even though he had himself approved the installation originally (*Scherer v. Danziger*, p. 88). On the other hand, the Supreme Court of Iowa ruled that

the employer can not be held responsible for an injury alleged to be due to the lack of a guard when a suitable equipment is provided and the workman is familiar with its use, its adjustment being necessary with the changing conditions of the work (*Kancevich v. Cudahy Packing Co.*, p. 89).

An Arizona statute requiring warning to be given before the discharge of blasts in a mine was held to impose that duty on the employer, even though not so stated in the act, this duty being imposed in general terms by the constitution of the State (*United Verde Copper Co. v. Kuchan*, p. 89). Failure of a mine operator to provide efficient ventilation was held to be negligence, and the resultant injury as truly actionable as if it had been traumatic (*Gay v. Hocking Coal Co.*, p. 63).

#### UNLAWFUL EMPLOYMENT OF CHILDREN.

The Supreme Court of Wisconsin held (*Reiten v. J. S. Stearns Lumber Co.*, p. 65) that the unlawful employing of a boy under 16 years of age in a dangerous occupation, without a permit, made the company absolutely liable for injuries received by him while so employed. This doctrine was rejected, however, by the Supreme Court of New York, Appellate Division, which denied liability for injury to a boy under 14 years of age, operating an elevator, because of his contributory negligence (*Karpeles v. Heine et al.*, p. 64). The statute makes the age of legal employment 16 years. More technical grounds furnished the basis for a judgment against the employer in *Chabot v. Pittsburgh Plate Glass Co.* (p. 66). In this case a boy 14 years of age was employed in an establishment which had properly procured an employment certificate, but had not kept or posted lists of the children employed, as prescribed by the Pennsylvania law. Failure to do this was held to render the company unable to plead compliance with the child-labor law, and a judgment for damages was affirmed.

#### RAILROADS—FEDERAL STATUTE.

*Assumption of risk.*—The Federal employer's liability law applicable to railroads limits the doctrine of assumption of risk, but, contrary to the opinion of some, it does not abolish it. Thus, where a fireman undertook to board a moving train and was killed, it was held that the injury followed his own choice of a course of action, he being an experienced railroad man and aware of all the risks involved. Damages were therefore denied by the Supreme Court of Kansas (*Briggs v. Union Pacific R. Co.*, p. 70). A similar conclusion was reached by the Supreme Court of the United States, in a case where an experienced yard conductor was killed while between two cars attempting to adjust a faulty coupler, having gone to the place without

observing the prescribed precautions (*Boldt v. Pennsylvania R. Co.*, p. 71). Where, however, equipment actually defective appears to have been used, the same court ruled that the fact that it has been passed as approved by a Government inspector is not an adequate defense (*Great Northern R. Co. v. Donaldson*, p. 72).

*Negligence.*—A railroad company was held not liable for negligence when an experienced civil engineer stepped on a rotten crosstie, causing him to fall and suffer injury (*Nelson v. Southern R. Co.*, p. 80). The defect was not of a character to impair safety in operation, so that the company was declared by the Supreme Court not to be negligent in permitting its existence. On the other hand, where a brakeman was found dead in the engine tender, under circumstances indicating that he had been struck by a low bridge, it was held by the United States Circuit Court of Appeals that there was negligence, despite the fact that certain telltales were provided, since the bridge to which the injury was attributable offered unlooked-for dangers requiring specific warning (*Marland v. Philadelphia & R. Ry. Co.*, p. 81).

*Interstate commerce.*—The perennial problem of determining between interstate and intrastate service was involved in the case of *Kenna v. Calumet, H. & S. E. R. Co.* (p. 74). It was there held by the Supreme Court of Illinois that a factory switching system, connecting up with two belt lines by which cars are sent into interstate commerce was under the Federal statute and not under the compensation law of the State. Another case in which the relation of the principles of compensation and liability was involved was decided by the Supreme Court of Washington (*Spokane & I. E. R. Co. et al. v. Wilson et al.*, p. 82). The injured men were employed by electric railway companies, doing both interstate and intrastate business, and had obtained awards under the compensation law of the State. The companies opposed the award on the ground that the case came under the Federal law. The supreme court reversed the award without deciding as to the nature of the commerce, on the ground that the State compensation law did not cover railroad service of any kind that involved questions of interstate and intrastate distinctions, but relegated such employees to a suit for damages either under the Federal statute or under a State law of identical provisions.

A cook in a camp car, injured while the car was on a siding where the gang was repairing a bridge, was held to come under the Federal statute by the Court of Appeals of Maryland, as being engaged in interstate commerce (*Philadelphia B. & W. R. Co. v. Smith*, p. 75). A similar view was taken by the Supreme Court of Missouri in the case of a timekeeper for a gang of men engaged in repairing the main track of an interstate railway, though killed after work hours



by an intrastate work train (*Crecelius v. Chicago, M. & St. P. R. Co.*, p. 78).

The removing of old ties and throwing them into a fill with the object of strengthening and reinforcing the roadway was held to be work in interstate commerce by the Court of Appeals of Kentucky (*Ohio Valley Electric R. Co. v. Brumfield's Admr.*, p. 79). Where, however, the work of removing old rails from the right of way in no respect affected the safety of the roadway, it was held by the Supreme Court of Utah that the Federal statute had no application (*Perez v. Union Pacific R. Co.*, p. 77).

The interrelation of the State and Federal laws was discussed in an Iowa case (*Breen v. Iowa Central R. Co.*, p. 76), where a suit had been prosecuted through three trials under the State law. At the final trial it developed that the parties were probably at the time of the injury engaged in interstate commerce, and the company sought to make this fact a defense. This was not permitted by the supreme court of the State on the ground that the issue had not been raised and that it would not be in accordance with the principles of justice to permit alternative remedies to be played one against the other.

#### RELEASES.

A release signed under a misrepresentation of the facts by the employing company, the injured workman being in a state of mental debility due to the injury, was held by the District Court of Appeal of California not to be binding in the case of *Carr v. Sacramento Clay Products Co.* (p. 83). Where, however, there was no evidence of physical or mental incompetency, the employee was not permitted by the Supreme Court of New Mexico to void his release, even though he claimed to have signed it without knowing its contents (*Morstad v. Atchison, T. & S. F. Ry. Co.*, p. 84). In another case, *Swan v. Great Northern R. Co.* (p. 85), decided by the Supreme Court of North Dakota, there was no question raised as to the knowledge by the employee of the contents of the release signed by him. However, failure of the company to carry out an agreement orally made was held to sustain the right of action for damages, but not without tendering a return of the money accepted under the repudiated release. Changed physical conditions due to the injury, not apparent at the time a release was signed, afford a ground for setting aside a release, according to the United States Circuit Court of Appeals (*Gold Hunter Mining & Smelting Co. v. Bowden*, p. 62).

#### RELATION TO WORKMEN'S COMPENSATION ACTS.

A Louisiana case (*Philps v. Guy Drilling Co.*, p. 92) involved alternative actions, either under the liability doctrine embodied in the Civil Code or under the compensation law of the State. The

constitutionality of the compensation law was challenged on technical grounds, but was affirmed by the supreme court. The decision covered a situation in which the employee had not been in the employer's service for 30 days, which is the time allowed for election. The compensation law was held to apply, and that a suit for damages must therefore fall, reversing the decision in the Woodruff case (Bul. 246, p. 224).

### WORKMEN'S COMPENSATION.

#### CONSTITUTIONALITY OF STATUTE.

Besides the incidental contest noted in the Philips case above, questions of constitutionality were raised in regard to the compensation laws of Alaska, Nevada, and Wyoming. In the Alaska case (*Johnston v. Kennecott Copper Corp.*, p. 173), the employer attacked the constitutionality of the act as being class legislation, since it applies to mining only. The classification was held by the court to be proper and the act was upheld.

In Nevada *Industrial Commission v. Washoe County* (p. 174) the law of Nevada was sustained as compulsorily applicable to public corporations, the money for compensation benefits being a proper charge upon the counties of the State as for a public use. Private rights were involved in the Wyoming case (*Zancanelli v. Central Coal & Coke Co.*, p. 175). The plaintiff sued for damages, but the employer opposed on the ground that he was under the compensation act. Plaintiff then claimed that the act was unconstitutional and called for a decision of the court on the point. The law was sustained on the ground of an amendment to the State constitution providing for its enactment and of decisions of the Supreme Court of the United States upholding such laws.

A supplementary act of the New Jersey Legislature was objected to in *Murphy v. George Brown & Co.* (p. 163), the act in question being one providing for an administrative board to have charge of the compensation law. The objections raised were overruled and the act sustained. An amendment to the New York law provides for a special fund to be made up of contributions by employers in cases where workmen leave no dependents, this fund to go for compensating cases of second injuries. The validity of this act was sustained in the face of adverse contentions in the case of *State Industrial Commission v. Newman* (p. 223).

#### PARTICULAR PROVISIONS OF THE LAW.

##### INJURIES COMPENSATED.

*Accidents.*—The Supreme Court of Michigan maintains a strictness of interpretation that was in evidence in the Bischoff case (“Arising out of and in course of employment,” see Bul. No. 224,

p. 303; Bul. No. 203, p. 236), in cases involving the definition of the term "accident," as used in the law. In *Roach v. Kelsey Wheel Co.* (p. 153) an award was reversed which had been made in behalf of a workman who died from heat prostration after having worked for four days in a boiler room where the temperature was said to be for part of the time 136°. It was said that "he was doing the work which he and his associates were employed to do exactly in the manner he expected to do it. To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler, in the performance of his ordinary and accustomed labor, succumbed to heat prostration." Fortunately, a more humane view is taken in other jurisdictions. The Supreme Court of Pennsylvania (*Lane v. Horn & Hardart Baking Co.*, p. 156) and that of Rhode Island (*Walsh v. River Spinning Co.*, p. 154) regard heat prostration attributable to the conditions of employment to be a casualty compensable under their acts.

Heart failure in the form of mitral regurgitation, following prolonged effort, was held not to be compensable as an accidental injury in another Michigan case (*Guthrie v. Detroit Steamship Co.*, p. 151); so also in a case of inguinal hernia developed while lifting a heavy timber, though two judges concurred only because they felt bound by the majority decision in the *Roach* case noted above (*Tackles v. Bryant & Detweiler Co. et al.*, p. 156). In contrast with the latter decision is one by the Appellate Court of Indiana (*Puritan Bed Spring Co. v. Wolfe*, p. 157), in which there was a preexisting condition favorable to the rupture; the fact of the greater susceptibility was held, however, not to bar the right to a claim, since the accident actually occurred and was the real cause of the ensuing disability. A similar conclusion was reached by the same court in the case, *Indian Creek Coal & Mining Co. v. Calvert et al.* (p. 162), in which a diseased aorta was ruptured by strain, the ruling being that although the disease would ultimately have resulted fatally, even without severe exertion, the case was one of compensable injury under the law.

*Occupational diseases.*—Few States recognize occupational diseases, as such, as grounds for compensation. However, opinions were handed down in a number of cases last year, involving conditions closely approximating what are known as diseases of occupation or industrial diseases.

Thus in a Pennsylvania case (*McCauley v. Imperial Woolen Co.*, p. 158), an anthrax germ finding access to the system through an abrasion on the neck of a wool sorter, received while at his work, was held to be an accidental injury and compensated. Similarly, a case of arsenical poisoning from the fumes from the scum of molten zinc was held to be an accidental injury and not an occupational dis-

ease by the Supreme Court of Illinois (*Matthiessen & Hegeler Zinc Co. v. Industrial Board*, p. 159), and this though the poisoning was said to have been the accumulation of a number of years, the death resulting from a sort of climax. Another fatal case, though more rapidly developed, was that of the poisoning of a painter who on a cold day had warmed some paint in a small unventilated building so that it might flow more freely. The Supreme Court of Ohio did not regard this as an occupational disease but as an accident due merely to the man's presence in the room where injurious fumes were being developed (*Industrial Commission v. Roth*, p. 160).

California is one of the few States in which the term "accident" was not so strictly defined, and now by its law includes occupational diseases. Prior to this amendment, however, a sign writer used large quantities of wood alcohol as a solvent, applying the colors by the use of compressed air. This resulted in such an affection of the eyes that he was no longer able to use them for any work. This was held to be a compensable injury by the supreme court of the State in *Fidelity & Casualty Co. v. Industrial Accident Commission* (p. 161).

*Proximate cause.*—The Wolfe and Calvert cases already noted involved the question of proximate cause, i. e., whether the accidental injury claimed or the preexisting condition afforded the real ground of the disability. The question stands out more prominently, however, in a case decided by the Supreme Court of Louisiana (*Behan v. John B. Honor Co. (Ltd.)*, p. 208), in which the injured man developed locomotor ataxia, which had been latent but entirely unknown. Admitting that the resultant disability was worse than it would have been in the case of a well man, the court held that the accident was none the less the proximate cause of the existing disability and affirmed an award for compensation.

#### EMPLOYMENT STATUS.

Several cases were noted involving the right of the injured party to claim the status of an employee within the meaning of the act. Thus in *McNally v. Diamond Mills Paper Co.* (p. 181) a person engaged in installing an engine for the company was injured, and the question was raised whether or not his work was that of an independent contractor. An examination of the facts led the Court of Appeals of New York to reverse the court below and affirm an award made by the State industrial commission in behalf of the injured man as an employee. It was admitted that the employment was both temporary and casual, but since the amendment of 1916 casual employees are entitled to recovery under the law of the State. In another case before the same court a painter furnishing his own rigging and simply agreeing to do a specific piece of work for a fixed sum was held to be outside the law, as an independent contractor (*Litts v.*

Risley Lumber Co., p. 182). The same question was involved in a California case. (*Rosedale Cemetery Association v. Industrial Accident Commission*, p. 183), in which a man skilled in the use of dynamite was employed to do some work at a daily rate. He was not supervised by his employers, since it was assumed that he knew better how to do the work than they did. However, the court held that this was but natural in view of his superior knowledge and did not indicate a different status from that of an employee.

A workman injured on the first day of his employment, during which he was to demonstrate his ability for continued service, was held by the Supreme Court of Illinois to be an employee, since he was at least for that day in the service of his employer, with a prospect of continuance (*Marshall Field & Co. v. Industrial Commission*, p. 182).

The claim of a partner in a firm to be regarded as an employee because he did work in the furtherance of its undertakings was rejected by the Supreme Court of California (*Cooper v. Industrial Commission*, p. 184) on the ground that the law did not contemplate such a mixed relationship, involving practically self-employment.

#### CASUAL EMPLOYEES.

The exemption of casual employees from the purview of the laws generally leads to a continued discussion as to the meaning and effect of this provision. Much depends upon the use of the conjunction in the phrase "casual and (or) not in the usual course of the employer's business," as appears from the decision in a California case, *Walker v. Industrial Accident Commission* (p. 172). In this State the conjunction "and" is used, and work done by a casual employee but in the usual course of the employer's business was held to be within the act and an injury arising in the course of employment was held compensable. In Illinois the conjunction "or" is used instead of the conjunction "and" in the corresponding clause, so that a structural-iron worker employed for a specific piece of work, although in the customary line of the employer's business, was held to be a casual employee and not entitled to the benefits of the law (*Chicago Great Western R. Co. v. Industrial Commission*, p. 172). The law of this State has since been amended by striking out the clause as to the exclusion of casual employees. A third case involved the construction of the Wisconsin statute, which also used the disjunctive "or." However, this was held not to bar the claim of a carpenter hired from time to time to make repairs on a creamery building, since the work must be done on occasion, even though irregularly, and was a necessary part of the business (*Holman Creamery Association v. Industrial Commission*, p. 171). As in Illinois, the excluding phrase as to casual workmen has been stricken out in Wisconsin.

A decision as to the usual course of the employer's business, made by a lower court, was reversed by the Supreme Court of Minnesota, and compensation was allowed in the case of a carpenter building a shed for an extension of the employer's business (*State ex rel. Lundgren v. District Court*, p. 229).

#### HAZARDOUS EMPLOYMENT.

The cases noted under this head are complicated with other factors, the first (*Hahnemann Hospital v. Industrial Board et al.*, p. 188), being brought within the Illinois statute by reason of the equipment of the building with an elevator which was an instrumentality subject to regulation by statutory or municipal ordinance—this without regard to the nature of the business carried on therein. In a second case (*State v. Postal-Telegraph Cable Co.*, p. 189), the contention of the employers that they were not engaged in hazardous work was said by the Supreme Court of Washington to be of no effect "because it is a denial of a legislative declaration."

Farm labor is excluded from most acts, either as nonhazardous or for other reasons, and a thresher man injured in the course of his duties was held not to be within the scope of the Minnesota law (*State ex rel. Bykle v. District Court*, p. 187).

#### EXTRATERRITORIALITY.

Where the employment requires a workman to go from point to point in the discharge of his duties, the Supreme Court of Colorado held that the law of the place of contract followed him beyond the boundaries of the State, so as to entitle his beneficiaries to an award under the Colorado statute, even though the death took place in another State (*Industrial Commission v. Aetna Life Ins. Co.*, p. 185). A similar view was taken by the Supreme Court of Minnesota, where the employee was required to travel outside the State in the prosecution of his business (*State ex rel. Chambers v. District Court*, p. 186).

#### JURISDICTION.

A company constructing and operating a telegraph system claimed that all its employees were engaged in interstate commerce, and that to compel them to pay compensation benefits would be placing a burden on interstate business in violation of Federal law. The Washington Supreme Court held (*State v. Postal Telegraph-Cable Co.*, p. 189) that even though sending messages was interstate business the construction of a line not yet in use was not such business, but was within the provisions of the State law.

A similar conclusion was reached by the Supreme Court of California in a case (*Southern Pacific Co. v. Industrial Accident Commission*, p. 221) where work was being done on the main line which

conveyed electricity for use in moving both interstate and intrastate cars.

The question of maritime jurisdiction was involved in a California case where work had been done on a vessel prior to its launching. There had been a stipulation that the employment was within the scope of the State compensation law, and the court refused to hear the objection subsequently raised that the Federal law had exclusive control (*Employers' Liability Assurance Corporation (Ltd.) v. Industrial Accident Commission*, p. 213). The right of the State to enforce its law was also held in a Texas case (*Southern Surety Co. v. Stubbs et al.*, p. 212) where the widow of an employee on a dredge boat was awarded compensation for his death. The court held that the decision in the Jensen case did not rule against the right of State courts to entertain suits in personam simply because the cause of action was of maritime origin.

#### NONRESIDENT ALIENS.

A single case is noted under this head, the Court of Civil Appeals of Texas holding that neither the compensation act nor the general law of the State excluded nonresident aliens from the right to inherit, so that there was no bar to the claim of such persons simply on the ground of their nonresidence (*Southwestern Surety Ins. Co. et al. v. Vickstrom et al.*, p. 163).

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

In general the compensation laws of the various States require the double test of arising out of and in course of employment. Obviously not every injury arising while at work is due to the employment. Thus the Supreme Court of Michigan (*Cennell v. Oscar Daniels Co.*, p. 165) set aside an award in behalf of workmen who were compelled to wait for a little time before proceeding with their duties and went to an adjacent locality to see other activities which were being carried on. While there they were injured, one fatally. Compensation was denied on the ground that they were where they were simply in the gratification of curiosity and not by reason of their employment. On the other hand, the Supreme Court of Errors of Connecticut reversed the court below and affirmed an award in favor of a claimant where the injury occurred after work, the injured man not having gone as promptly from the danger zone as he might (*Merlino v. Connecticut Quarries Co.*, p. 167). The court held that his delay in leaving was tacitly consented to so that the accident practically arose out of employment and was within its scope. Similarly liberal was the ruling of the Supreme Court of California in a case where a man whose injured hand had been wrapped in a bandage

saturated with turpentine was burned by striking a match to light a cigarette (*Whiting-Mead Commercial Co. v. Industrial Accident Commission*, p. 164). Declining to answer the question as to the necessity of the use of tobacco, the court remarked that it was a common habit, and that the facts must be dealt with as they are. A similar view was taken by the Supreme Court of Pennsylvania (*Dzikowska v. Superior Steel Co.*, p. 176). In this case the workman's clothing was saturated with oil from the material handled, and, lighting a match in order to smoke during an interval of relaxation, he was burned fatally. The court held that his conduct had not been unreasonable and was in the course of his employment. The law of this State does not require that the injury should arise out of the employment.

A case of heat prostration was declared by the Supreme Court of New York, Appellate Division, to be an accidental injury, but was denied compensation on the ground that it did not arise out of the employment, there being no special or increased hazard involved therein not common to the public in general (*Campbell v. Clausen-Flanagan Brewery*, p. 165). Where, however, it appears that the nature of the employment causes a special exposure, an injury due to excessive temperature may be found compensable. Thus in *Ellingson Lumber Co. v. Industrial Commission* (p. 195), a lumberman was awarded compensation for frozen feet where it appeared that he had made extra exertions in the line of his employment, and his feet becoming wet with perspiration were frozen while he was returning to camp, the award being affirmed by the Supreme Court of Wisconsin.

Where a workman was chilled from exposure to cold and wearied by his labor, according to a decision of the Supreme Court of Connecticut, there was neither willful negligence nor a departure from the line of duty in seating himself near the fire box of a boiler while waiting for an elevator to become available for his further work. It followed that the injuries by burning received from his greasy apron catching fire while dozing were compensable (*Richards v. Indianapolis Abattoir Co.*, p. 193).

Drinking acid by mistake for water with fatal results was said by the Supreme Judicial Court of Massachusetts to be a compensable injury where the bottle containing the acid was placed in a position customarily used by the employee for storing his drinking water, a causal connection being found between the employment and the accident (*In re Osterbrink*, p. 195).

Where, however, there is a departure from the service on a personal errand, as for the purchase of tobacco, resulting in a fatal street accident, it was held that the hazard was not due to the employment and the injury not compensable (*In re Betts et al.*, p. 204). The same court (Indiana Appellate Court) refused to extend this



doctrine so far as to bar the claim of a workman injured while undertaking to heat water to wash himself after completing his work, the custom being acquiesced in by the employer, although there was some deviation in the instant case (*In re Ayers*, p. 201). So, also, the Supreme Court of Errors of Connecticut (*Robinson v. State*, p. 201) allowed compensation where a foreman on highway work was struck by an automobile while crossing the road to speak to a friend, there being nothing to show that the act would interfere with his employment.

The eating of lunch on the premises was shown to be a custom in the case of *Humphrey v. Industrial Commission* (p. 202), so that an employee injured during the lunch hour while operating an elevator which he was permitted to use was held by the Supreme Court of Illinois not to have departed from the course of employment, and compensation was awarded. Where, however, a workman undertook to leave his work place for lunch by an unusual route when a safe method had been provided by his employers, a resultant injury was said by the District Court of Appeal of California not to arise out of the employment, nor to have occurred in its course (*Moore & Scott Iron Works et al. v. Industrial Accident Commission et al.*, p. 203).

Injuries received while going to and from work are compensable or not according to the conditions surrounding the individual case. Thus, where an employee on his way to work was invited into his employer's automobile to aid in procuring material, and was injured while on the trip, it was ruled by the Supreme Court of Illinois that he was within the course of his employment and the injury arose out of it (*Scully v. Industrial Commission*, p. 197). So, also, where a workman used his motorcycle to procure supplies and was injured on the trip, the injury came within the terms of the Nebraska statute (*Coster v. Thompson Hotel Co.*, p. 198); and a salesman who may have been either on his way home at the close of the day's work or intending to visit another customer and was fatally injured while crossing the street, was held by the Appellate Court of Indiana to be within the scope of his employment, since his duties led him to be in just such places as the one in which the accident occurred (*Bachman v. Waterman*, p. 199). However, the principle was not allowed by the Supreme Court of Illinois to cover an employee who was sent on an errand and did not complete his work until after the end of the working day in his employer's establishment and was killed by a street accident while on his way home from the place to which he had been sent (*N. K. Fairbanks Co. v. Industrial Commission*, p. 200). So, also, where an employee was absent from home and was killed while returning for a week-end sojourn, the same court denied compensation since the injury was not one arising out of and in the course of employment (*International Harvester Co. v. Industrial*

Board et al., p. 200). A contrary position was taken by the Supreme Court of Minnesota in the case of *State ex rel. McCarthy Bros. Co. v. District Court* (p. 196), in which an award for compensation was affirmed where a traveling salesman was drowned while attempting to return to his home to spend Sunday in accordance with his regular custom.

An injury inflicted in anger or malice was compensated in a case passed upon by the Supreme Court of Illinois (*Pekin Cooperage Co. v. Industrial Commission*, p. 191), where a quarrel had arisen concerning the work in hand and one of the men assaulted the other with serious results.

A contrary doctrine was adopted in a Connecticut case (*Jacquemin et al. v. Seymour Mfg. Co.*, p. 192) where workmen quarreled over the possession of a tool, the court saying that the fact that quarrels sometimes occur does not make the injury one arising out of the employment. Compensation was awarded in a New Jersey case and affirmed by the supreme court of the State, but reversed by the Court of Errors and Appeals, where skylarking was followed by a serious assault (*Mountain Ice Co. v. McNeil et al.*, p. 193). It was held that the fact that officials had observed the skylarking did not give them notice of the possibility "of an atrocious assault." A different situation arises when the assault is due to the employment, as the murder of a watchman by a trespasser, and if the injury is found to be due to the status and not to personal enmity, compensation will be awarded (*Supreme Court of Illinois: Mechanics' Furniture Co. v. Industrial Board*, p. 204).

It was held in a California case (*Williamson v. Industrial Accident Commission*, p. 194) that a person volunteering to perform work outside the scope of employment is not covered by the act, the particular case being that of a chambermaid attempting to do a difficult task usually performed by the janitor, the work being undertaken without the employer's consent and against the advice of a superior fellow employee.

#### INJURIES DUE TO THIRD PARTIES.

An injury due to the negligence of a third party was compensated for by the employer, the latter thereupon suing for the damages to the employee. The suit was for a larger sum than the amount awarded as compensation, and a verdict allowing the same amount was rendered. The Supreme Court of Michigan held (*Albert A. Albrecht Co. v. Whitehead & Kales Iron Works*, p. 205) that recovery must be limited to the compensation awarded and that only the amount paid as compensation at any time could be recovered by the employer; neither could there be any excess recovery to go to the employee.

In another case in the same court (*Verecke v. City of Grand Rapids*, p. 207) the mother of a deceased employee was granted an award under the compensation law of the State, while the father undertook to arrange to sue the third party, to whose negligence the death of his son was due. A suit was brought and damages recovered, whereupon the employer sought to have the amount accredited in its favor on the amount of compensation to be paid by it, making its claim under the act that forbids an employee to claim compensation and sue for damages for the same injury. The court held, however, that this restriction did not apply in the case of dependents where the injury was fatal.

The Kansas statute does not allow both compensation and damages in any case, but an employer can not by tendering compensation bar an action against the negligent third party, where the dependent has not elected which course of procedure to follow (*Swader v. Kansas Flour Mills Co.*, p. 206). Likewise the Supreme Court of Washington refused to interfere with a claimant's right to elect between a suit for damages and a claim for compensation by extending the term "plant" to include the entire trackage of a street car company. In the instant case (*Carlson v. Mock*, p. 208), a track oiler of the company was injured by an automobile driven by a third party, who thought to prevent the action by citing the compensation statute, which forbids suits where the injury occurs at or about the employer's plant.

#### AWARDS.

Concurrent awards were allowed by the Court of Appeals of New York in the case of a woman whose hair was caught in a revolving shaft, producing disfiguring injuries, allowance being made for both the disfigurement and for any proved disability or loss of earning power that might be subsequently proved (*Erickson v. Preuss et al.*, p. 167). In Colorado (*Employers' Mutual Insurance Co. v. Industrial Commission*, p. 169) successive awards were held valid in the case of an injury the results of which were not determinable at the time of the preliminary award; neither could an injunction be secured to suspend payments during an appeal, since one of the prime objects of the law was to secure prompt relief. The right of review was held by the Supreme Court of California (*Georgia Casualty Co. et al. v. Industrial Accident Commission*, p. 168) to be limited to cases in which causative facts arose warranting a change in the awards originally made. The increase of disability, through infection, of a compensated injury was held (*Enterprise Fence & Foundry Co. v. Majors*, p. 169) to warrant a revision of the award in accordance with the increased disability. The injured man's insistence against an operation unless absolutely necessary was said by the Appellate Court of Indiana not to be willful misconduct barring his claim for the increased benefits.

Noted here for lack of a better classification is a Kansas case (*Vogler v. Bowersock*, p. 222), in which a collective insurance system, to which the workmen contributed, was held to be independent of any award due an injured workman under the compensation law, and a general release was subject to proof of its real scope, the question of fraud not being necessarily involved.

#### DEPENDENCE.

In a Minnesota case (*State ex rel. London & Lancashire Indemnity Co. v. District Court et al.*, p. 177) a widow was allowed compensation for the death of her husband in spite of the fact that she had lived apart from him for about 12 years, the evidence showing that the separation was not voluntary, but due to threats of violence. Partial ability to support herself apart from her husband was held by the Supreme Court of Appeals of West Virginia not to bar the claim of a widow resident in Italy for the death of her husband in this country (*Poccardi v. Ott*, p. 178).

The Illinois statute of 1913 did not require actual dependence but made certain relatives beneficiaries if the deceased workman had contributed to their support within four years of his injuries. An award was therefore affirmed in a case (*Mechanics' Furniture Co. v. Industrial Board et al.*, p. 204) in which an adult daughter had been cared for by her father for various periods during illness within the preceding three years. The law at present requires actual dependence.

In this connection may be noted a decision under its original act by the Supreme Court of New Jersey, relative to the rights of widows upon remarriage, in which it was held (*Hansen v. Brann & Stewart Co.*, p. 170) that an award once made was a vested right, unaffected by subsequent marriage. This provision has been changed by an amendment of 1913.

#### DISABILITY.

The distinction between the loss of an eye and the loss of sight was considered by the Court of Appeals of Kentucky in *Nelson v. Kentucky River Stone & Sand Co.* (p. 179), in which the court held that loss of an eye should be compensated on the general basis, and not in accordance with the schedule provision for the loss of sight. A rather narrow distinction was involved in the New York case of *Frings v. Pierce Arrow Motor Car Co.* (p. 180). An injury to the eye necessitated the removal of a lens, but by the use of a correcting glass the sight of this eye was rendered normal. It would not, however, focus with the other eye, so that but one eye could be used at any given time. A claim for compensation as for the loss of the use of the eye was denied; however, by the Supreme Court, Appellate Division, the court holding that if an injury should destroy the vision

of either eye, a useful eye would still remain. This case was distinguished from the case of *Smith v. F. & B. Construction Co.* (p. 181) decided by the same court, where the aid of glasses restored but one-third of the normal vision of the injured eye and it could not then be used in conjunction with the good eye. In this case there was an award for the loss of the use of the injured eye "equivalent to the loss of the eye."

The Supreme Court of Errors of Connecticut had before it a case (*Franko v. William Shollhorn Co.*, p. 224) in which an injury to the hand caused temporary total disability, while a necessary amputation of a finger caused permanent partial disability. The total disability involving loss of use was held to be compensable by a separate award from that due on account of the later loss of the member. Where, however, there was an injury with immediate amputation, the period of total incapacity was held to merge in the schedule period fixed by law for the permanent partial disability (*Kramer v. Sargent & Co.*, p. 225). A third case (*Olmstead v. Lamphier*, p. 226) before the same court involved multiple injuries, consisting of a partial disability of the shoulder, and an injury involving amputation of the leg. An award was made for the partial disability due to the shoulder injury and for the loss of the leg in two separate amounts; an award was made also to supply the cost of an artificial leg. The employer claimed that he was responsible only for the major award, that is, for the permanent partial disability due to the loss of the leg and not for the shoulder injury or for the artificial leg. The court held that the two injuries were each compensable, the payments to be consecutive and not simultaneous, and that the requirement for surgical aid and service was broad enough to include the supplying of artificial limbs.

A case of total disability due to the loss of the second eye was considered by the Supreme Court of Rhode Island (*In re J. & P. Coats (Inc.) et al.*, p. 228), where the employee had lost an eye some years before in military service. The court ruled that it was a total disability due to the loss of his single eye, and compensable as such; but that special additional compensation was payable under the schedule only for the loss of one eye and not for the loss of both.

#### MEDICAL SERVICES.

The provision of law fixing the period during which medical treatment may be rendered was construed by the Supreme Judicial Court of Maine (*In re McKenna*, p. 213) in a case where the disability began a week after the receipt of the causative injury; the law allows medical services for two weeks from the injury, and the board awarded two weeks' benefits, starting from the inception of the disability. This was reversed by the court, which held that the injury should date from the accident and not from a subsequent period when the disability might

develop. A contrary rule has been adopted in Indiana, but where any medical attention is given immediately following the accident, a subsequently developing disability after the time limit has expired will not warrant a renewal of the medical treatment; in other words, the period for medical treatment can not be divided and apportioned to different dates (*John A. Shumaker Co. v. Kendrew*, p. 214).

The supply of an artificial limb was held to come within the scope of the surgical aid prescribed by the law of Connecticut (*Olmstead v. Lamphier*, p. 226).

#### INSURANCE.

The provision of the law of Utah requiring employers within the act to take out insurance or otherwise give security for the payments that may become due was contested in a case (*Industrial Commission v. Daly Mining Co.*, p. 209). The court upheld the commission's demand that the company should make the provision required, and also approved the method of collecting the tax proposed by it, i. e., by mandate and not by a suit at law. The third contention that no insurance was necessary since the employees were sufficiently protected, was disposed of by saying that the commission had decided otherwise, and its authority must prevail. The same court sustained the authority of the commission to reject policies not requiring a payment of the premium rates fixed by it as adequate (*Scranton Leasing Co. v. Industrial Commission*, p. 211). An evasion of the law by the incorporation of a participating clause was also condemned.

In a California case (*Employers' Liability Assurance Corporation (Ltd.) v. Industrial Accident Commission*, p. 213) the question of the validity of a policy was held to be subject to the jurisdiction of the commission, so that the insuring company could not avoid its duties by a mere denial of such validity.

#### NOTICE AND CLAIM.

Where a supposedly slight injury was received and there was actual knowledge of the fact on the part of both the employer's representative and the company physician, the Appellate Court of Indiana holds that such notice is valid as regards all subsequent developments (*Vandalia Coal Co. v. Holtz*, p. 218). In this case an apparently slight injury to the eye was pronounced by the company physician as but temporary, but after the time for notice had elapsed it was discovered that the vision was lost. However, the original knowledge of the accident was held to be adequate notice. Quite similar circumstances were involved in a Michigan case (*Cooke v. Holland Furnace Co.*, p. 219). In this case a man was struck on the head and was given first-aid treatment by his foreman. About two months later unfavorable symptoms developed

and nearly a year afterward an operation became necessary. An award for the medical treatment was reversed by the court as not having been preceded by proper notice, the period having expired. As decided in the McKenna case above (under "Medical services"), the accident producing the injury was taken as a starting point, and not some later date when the injurious results became manifest. Notice to the foreman was held by the Supreme Judicial Court of Maine to be sufficient notice as to an agent of the employer where a claim for an infected wound was presented without the submission of a written notice of the injury (In re Simmons, p. 220).

Under this head may be noticed a decision of the Appellate Court of Indiana (In re Burk, p. 222), in which it was held that reports of injuries must be furnished by all employers, whether or not they accept the compensation provision of the act.

#### MINOR ILLEGALLY EMPLOYED.

The employment of a minor in an occupation forbidden by law was held by the Court of Civil Appeals of Texas, in *Waterman Lumber Co. v. Beatty* (p. 215), to take him outside the scope of the compensation law of the State, which relates only to valid employment contracts, and also outside the insurance policy of the employer which covered only employees legally employed. A suit for damages was therefore said to have been brought properly.

The question of the effect of unlawful employment has not been passed upon by the State court of last resort in New York, but an appellate court has awarded compensation in case of illegal employment. Following this the trial court in *Robilotto v. Bartholdi Realty Co.* (p. 216) denied the right of an administrator to sue for damages for the death of a minor illegally employed in operating an elevator, relegating the parties to their rights under the compensation law of the State; this action was said to be taken by the judge against his own opinion that the better rule would bar the compensation rights and leave the settlement of the question to a suit for damages.

The Supreme Court of Ohio enforced the rule of liability of the employer in the case of *Acklin Stamping Co. v. Kutz* (p. 217), holding that the compensation law did not apply where employment was illegal.

#### WILLFUL MISCONDUCT.

The laws of most of the States do not apply to injuries due to the willful misconduct of the injured party. The Court of Appeals of Maryland (*Baltimore Car Foundry Co. v. Ruzicka*, p. 229) ruled that while in the instant case the injury was due to the injured man's negligence, willful misconduct could not be charged even though warning of danger had been given and another mode of procedure

was available. In Indiana also (*Haskell & Barker Car Co. v. Kay*, p. 230) the failure of a workman to use an available safety device, more efficient than the one employed by him, was held not to be classifiable as willful misconduct.

Quite similar was the decision of the Supreme Court of Oklahoma in the case of *Wick et al. v. Gunn et al.* (p. 232), where the safety device was complicated and difficult to apply. On the other hand an appellate court of California held (*Bay Shore Laundry Co. v. Industrial Accident Commission et al.*, p. 231) that the removal of an appropriate safety device by an experienced workman, resulting in his injury, was a willful act, barring the right of recovery under the compensation law.

#### PENSIONS.

The city of West Chicago Park had established a pension fund for its police, but denied the right to a claimant to receive his pension because he had been discharged from service for violation of the civil-service rules. It was held by the Supreme Court of Illinois (*Stiles v. Board of Trustees*, p. 132) that the reasons for his discharge were not the reasons fixed by the pension law as grounds for withholding payment, and since the legislature had prescribed the basis, the claimant could not be deprived of his rights for other reasons.

An initiated act of Arizona undertook to establish a system of old-age and mothers' pensions, but the supreme court of the State held it unconstitutional because of certain conflicts of principle as well as for technical reasons (*State Board of Control v. Buckstegge*, p. 131). Under this head may be noted the action of a railroad employee to recover from his employer the money retained by it under a contract for membership in a relief association. It was claimed that the law of Indiana invalidated such contracts, but the supreme court of the State construed the law differently and refused to order the amount returned (*Pittsburgh, C. C. & St. L. R. Co. v. Miller*, p. 133).

#### EMPLOYMENT OFFICES.

A law of Mississippi levies an annual license fee of \$500 for each county in which an agent does business in the way of securing workmen to go beyond the limits of the State. The constitutionality of the act was challenged in the case of *Garbutt v. State* (p. 101), but was upheld by the supreme court as a proper tax on an occupation and not a burden on interstate commerce. The application of a similar law of Georgia was passed upon in *Chambers v. State* (p. 101), in which it was held that an individual merely making a statement that the inquirer could get a job, but without promising him any employment or offering to pay his way, was not acting as an emigrant agent in violation of the law. In Alabama also, it was



held (*Braxton v. City of Selma*, p. 102) that a section hand who picked up some workmen at the request of his employer to take with him for work outside of the State was not engaged in the business of emigrant agent, and had not violated the law by his contact.

## LABOR ORGANIZATIONS.

### INTERFERENCE WITH EMPLOYMENT.

An injunction was granted by the Supreme Court of New York, trial term, against persons seeking to unionize employees of a shoe manufacturer for the purpose of promoting a strike for a closed shop (*Rosenwasser Bros. (Inc.) v. Pepper*, p. 105). Prior differences had been adjusted, and a contract between employers and workmen procured by a representative of the War Department, for which the manufacturer was working, and the injunction was based in large part on the obligations incumbent on the parties to maintain production during the emergency of the war against Germany. There was also the ground of preventing the promoters of the union from inducing a breach of the contract, which was said to be a basis for an injunction. Threatened breach of contract by striking was also enjoined by the Supreme Court of Georgia (*Burgess v. Georgia F. & A. R. Co.*, p. 106), but a general injunction was limited to the period for which the contract was entered into. Another case arising out of the same events, and having the same title (p. 107), led to an injunction against workmen who had resigned, forbidding them to go upon or near to the premises of their former employer to persuade others not to take jobs with the company. However, this did not interfere with such persuasion as the presentation of fair argument elsewhere.

A somewhat different aspect of the general question was involved in a Massachusetts case (*Haverhill Strand Theater (Inc.) v. Gillen et al.*, p. 108). In this case the union had adopted a rule that no union musician would be allowed to play in any theater which employed less than five musicians, and this was held to be an interference with the individual's right to carry on his business in accordance with his own judgment and preventing the free flow of labor to which an employer is entitled.

### BOYCOTTS.

Where the interference with employment takes the form of a boycott, the courts have rendered quite diverse decisions as to the propriety of issuing a restraining order. This situation is in evidence in two cases here considered. In one (*Thomson Mach. Co. v. Brown*, p. 115), the Court of Chancery of New Jersey issued an injunction where there was very definite interference with the flow

of labor to the employment and threats open and implied made against users of the machinery and employees working thereon in other establishments. In the other case (*Duplex Printing Press Co. v. Deering et al.*, p. 109), the United States Circuit Court of Appeals regarded the Clayton Act as legalizing acts done by way of enforcing a secondary boycott against a manufacturer of printing presses, pressure being brought to bear on buyers and workmen, including teamsters, expressmen, installation men, etc. Earlier decisions, including one of the Supreme Court of the United States, which had declared unlawful interference with interstate commerce, were held to be set aside by the new legislation so that no injunction would issue to prevent the action complained of. There was a strong dissenting opinion, in which the ground was taken that the acts complained of were illegal in themselves, and that nothing illegal was legitimated by the Clayton Act.

#### STRIKES.

Not the promotion of a strike, as in the Rosenwasser case, but the actual engaging in one was held by a United States District Court to be enjoinable where it involved the bringing about of conditions unfavorable to the prosecution of the war (*Kroger Grocery & Baking Co. v. Retail Clerks I. P. A.*, p. 116). The success of the strike would have caused the loss of large amounts of perishable food, and this was an important factor, in view of the Food Conservation Act of Congress, in leading to a decision in favor of granting an injunction. However, violence and also insulting and intimidating language were indulged in. The same district court claimed jurisdiction in a labor dispute because of the fact that the company seeking an injunction to prevent strikes was engaged in the production of war material (*Wagner Electric Mfg. Co. v. District Lodge*, p. 119).

The legality or illegality of the purpose of a strike will decide whether or not it may be enjoined, and where both aspects appear, individual strikers can not clear themselves by repudiating the illegal purpose involved and claiming that for their part they are striking only for legitimate ends (*Baush Machine Tool Co. v. Hill et al.*, p. 127).

#### PICKETING.

In a strike to secure changes in wages and hours in a restaurant picketing was resorted to, but an injunction against its continuance was refused by the Supreme Court of Arizona on the ground that there was no coercion or intimidation, but a mere publication of the facts in dispute (*Truax et al. v. Bisbee Local No. 280*, p. 121). Similar circumstances were considered by the Supreme Court of Washington in the case of *Baasch v. Cooks' Union, Local No. 33 et al.* (p. 122). Active annoyance of patrons and threats of secondary boycotts had

marked the course of the proceedings and damages in the amount of \$1,500 were claimed to have been inflicted. When the matter came to trial the strikers offered no defense but asked that the action be dismissed since they had ceased picketing and would not resume it. The lower court dismissed the action accordingly, but the supreme court ordered it reinstated with a requirement that the defendant plead and that the question of damages receive proper consideration.

Picketing was limited but not forbidden in an injunction approved by the Supreme Court of Arkansas (*Local Union No. 313 v. Stathakis*, p. 124). Like the foregoing, this was a strike against a café, seeking to unionize its employees. The right to give notice to the public was upheld, but not in such a way as to offer physical interference or prevent access to the employer's place of business. Picketing "at or near the appellee's premises" was therefore held to be properly enjoined. A cessation of picketing activities was ordered by the Court of Civil Appeals of Texas in the fourth case of a like nature with the foregoing, the picketing being done entirely by outside parties, the employees of the café being satisfied with their employment and continuing to work. The legitimacy of the end in view was held not to validate the course of conduct engaged in, which was held to be a malicious invasion of the complainant's rights (*Webb v. Cooks', Waiters', & Waitresses' Union*, p. 125).

A less common feature was involved in the case passed upon by the Supreme Court of Minnesota (*Roraback v. Motion Picture Machine Operators Union*, p. 123), in which the owner of a motion-picture theater was a qualified picture machine operator, but was not eligible to union membership because of the fact that he was the owner of the business. Then because he was not a union member, union members were not permitted to work with him, so that he was forbidden to work in his own business. A preliminary injunction against picketing the place as unfair was refused by the Supreme Court, owing to some doubt in the evidence, and the case was sent back for trial. It was pointed out that one could not be arbitrarily deprived of the right to work in his own business, and if the claims made by the proprietor were supported at the trial he would then be entitled to relief.

#### CONTEMPT.

An effort was made in the case of *Tosh et al. v. West Kentucky Coal Co.* (p. 128) to bring strikers in 1917 within the purview of an injunction issued 10 years earlier, so as to charge them with contempt for its violation. That the injunction might be still valid under certain conditions was definitely maintained by the United States Circuit Court of Appeals, but it was likewise held that it could not be made to apply to persons not properly connected with either the

events or the parties affected by the original injunction. The judgment for contempt was therefore reversed.

#### SABOTAGE.

This term of rather recent adoption in this country may properly be held to cover the mode of procedure proposed in a labor dispute resulting from an attempt to unionize a plant engaged at the time in war production. Plans for disabling an essential tool were formulated, but suspicion and watchfulness prevented their accomplishment. An indictment was drawn charging an attempt to commit sabotage in violation of the Federal enactment (*United States v. De Bolt et al.*, p. 138). The claim was advanced that the statute only penalized sabotage and that attempts were not properly the subject of an indictment. This contention was rejected by the United States District Court, the indictment being declared sufficient, and the case was directed to be proceeded with.

A State law forbidding the advocacy of syndicalism and sabotage was attacked as unconstitutional in *State v. Moilen et al.* (p. 134). The Supreme Court of Minnesota discussed the various constitutional points involved at some length, upholding the statute. Then passing to the nature of the acts charged, it was held that they constituted a violation of the law, so that a conviction was affirmed.

## OPINIONS OF THE ATTORNEY GENERAL.

EIGHT-HOUR LAW—MARBLE FOR LINCOLN MEMORIAL—*30 Op., p.*—(*May 12, 1915*).—The Secretary of War is charged with the erection of a marble structure in the City of Washington, designated as the Lincoln Memorial. A subcontractor undertook to furnish Colorado marble of certain quality and dimensions, and the question was submitted by the Secretary to the Attorney General as to the application of the act of June 19, 1912 (37 Stat. 137), commonly known as the Federal eight-hour law, to the work of cutting and preparing the marble.

It was stated that the work of erecting the structure generally was within the act, and that it would apply to this particular undertaking unless the contract was for "such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not." The question therefore resolved itself into one as to "what is the test as to whether materials or articles may be bought in open market."

Cases are cited and quotations made, the conclusion being drawn that—

the exception must be held to embrace materials or articles of the kind which are usually manufactured in standard forms and which producers or dealers usually offer for sale in the course of their business, as distinguished from materials and articles of the kind which are usually made to order or manufactured in a particular manner, shape, or condition, according to the specifications of the person for whom they are made.

The application of this construction of the act was held to be an administrative function, to be discharged by the department interested, the Attorney General saying as to a specific ruling of his predecessor (*30 Op., p. 211*):

I think that, instead of himself deciding that the specific article there in question was within the exception, the Attorney General should have defined the meaning of the exception and then left it to the Treasury Department to apply the definition to that particular case.

The opinion concludes as follows:

If you find that the marble cut and finished for use in building construction is a material or article which is usually manufactured

in standard forms for the general market and which producers or dealers usually offer for sale in the course of their business, the subcontract should be excepted from the operation of the statute. If, on the other hand, you find that it is not such a material or article, but a material or article usually made to order or manufactured in a particular manner, shape, or condition, according to the specifications of the person for whom made, then the subcontract is subject to the operation of the act, and you should compel compliance with its provisions on the part of the contractor.

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**WORKMEN'S COMPENSATION—SCOPE OF ACT—POWERS OF UNITED STATES EMPLOYEES' COMPENSATION COMMISSION—30 Op., p.—***(March 21, 1918).*—The President transmitted to the Attorney General an inquiry of the United States Employees' Compensation Commission as to its authority to pass upon the persons and classes of persons coming within the provisions of the act administered by it (act of Sept. 7, 1916, 39 Stat. 742). By its terms the act is limited to, but includes all, "civil employees of the United States and of the Panama Railroad Company." More specific inquiries being called for, the question was submitted as to the authority of the commission to decide whether employees of the United States Shipping Board Emergency Fleet Corporation are within the act.

The Attorney General first quoted section 32 of the act, which authorizes the commission to make necessary rules and regulations for its enforcement and to "decide all questions arising under this act."

Reviewing briefly the history of the act, and classing it with similar legislation in many of the States of the Union, the opinion declares that the language of section 32 is clearly employed in no narrow or technical sense and is to be taken in its ordinary and colloquial meaning.

It is the commission, therefore, which must determine whether the claimant has or has not been injured while in the performance of his duty or as a result of his own willful misconduct or intoxication; whether his disability is total or partial in character; whether upon review the amount awarded shall be increased or diminished; how it shall be apportioned among the beneficiaries; and when it may be commuted for cash, etc. But before any of these questions can come on for disposal, it must first of all appear that the claimant is an employee of the United States, and this basic fact the commission must decide at the very threshold.

I have no hesitation, therefore, in concluding that the commission has power when the question is properly presented to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of the act.

A word of caution is added as to the propriety of making any general decision or mass rule in advance of the presentation of a specific claim, the opinion concluding:

In view of the diversities which constantly appear among cases which upon first impression seem of the same general character the unwisdom of dealing with them in the mass would seem to be apparent.

I express no opinion, none being requested, as to the merits of the questions with which the commission is confronted nor as to the finality of its decision and the manner in which it could be reviewed, if at all, either by the Government or by a rejected claimant.

## DECISIONS OF COURTS AFFECTING LABOR.

ALIENS — CONTRACT LABORERS — INDUCEMENT TO IMMIGRATE —  
*United States v. Royal Dutch West India Mail, United States District Court, Southern Division of New York (Apr. 22, 1918), 250 Federal Reporter, page 913.*—The defendant had employed one Sjoerd Mook for three years as a clerk in its offices in Amsterdam; then, requiring his services in its New York branch offices, it sent him to New York, paying his passage and expenses, with the intention of sending him, in time, to its offices in Dutch Guiana. The United States charged the defendant with the violation of a Federal statute which lays a fine of \$1,000 on any person “who shall induce the importation or migration of any contract laborer into the United States.” The Government moved for judgment on the pleading. In denying this motion District Judge Learned Hand said:

As I have said, Mook was certainly induced and assisted to migrate to this country. He was also expected to perform labor here of a skilled kind. The question narrows, therefore, to this only: Was he induced to migrate by an offer or promise of employment, or in consequence of an agreement to perform labor here?

In principle it seems to me clear that the case is not within the statute. In no fair sense can it be said Mook was induced to migrate by an offer or promise of employment. He was already employed under a contract which subjected him to the order of his employer in this respect. The statute includes only offers of employment in this country, and the offer itself must include employment here. More is to be said for the plaintiff's position under the second phrase in the statute: “In consequence of agreements \* \* \* to perform labor in this country.”

Yet here, too, the purpose seems to me clearly limited. The agreement must by its terms include the performance of labor in this country. Mook's contract was made in Holland, and did not include such performance, though, it is true, it subjected him to the possibility of being ordered to this country, or to Dutch Guiana, or possibly elsewhere, if the defendant desired. I think that the statute requires that the incentive held out to the alien must be employment here, and this accords with its general purpose, which is to prevent migration of aliens under the attraction of work in the United States. That is the motive which must cause their migration.

Since this was not evident from the pleadings, the motion for judgment at this stage was denied, the court saying that if the defendant could prove the statements made in the pleadings, the case is not within the statute.



**ALIENS—CONTRACT LABORERS—OFFER OR PROMISES OF EMPLOYMENT—***Ex parte Prout, United States District Court, District of Massachusetts (June 26, 1918), 253 Federal Reporter, page 97.*—Nine Portuguese immigrants came to America and were held for deportation at Boston because, as it was alleged, they had been induced or solicited to migrate to this country by offers or promises of employment and were "contract laborers." They had been approached by steamship company agents. No three had been approached by the same agent and no two lived in the same locality. They were simply told that there were great opportunities to procure work in the United States but none of them had been promised any particular job or any definite work. They were all bound for Palmerton, Pa., where a number of their countrymen lived. No employer in Palmerton had engaged any of them or knew anything about them. The Immigration Board and the Secretary of Labor both held the evidence sufficient to warrant exclusion under Comp. St. 1916, sec. 4244 (Bul. 244, p. 375). The district court in deciding that the evidence offered was insufficient to warrant exclusion said:

It seems clear that "offers or promises of employment," in order to come within the statute, must be made by, or with the authority of, the person proposing to furnish the employment. A mere assurance or promise, in general terms, of employment after reaching this country, made to an alien by a foreign steamship or transportation agent, is not ground for exclusion.

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**ALIENS—PROHIBITION OF DRIVING AUTOMOBILES FOR HIRE—CONSTITUTIONALITY OF ORDINANCE—***Morin v. Nunan, Supreme Court of New Jersey (Mar. 21, 1918), 103 Atlantic Reporter, page 378.*—A municipal ordinance of the township of Weehawken regulated jitneys and all motor vehicles operated for hire, and later a supplementary ordinance was passed, which forbids the operation of motor vehicles for hire by anyone not a citizen of the United States. Samuel Morin was convicted before Andrew L. Nunan, recorder of the township, of violation of this ordinance, and fined \$10. The legality of this prosecution was contested on the ground that the ordinance was unconstitutional.

Morin, who was admittedly an alien, had secured a driver's license, and the machine, which he was driving for another, was licensed. The fundamental question was said to be whether the township has the right to discriminate against aliens by refusing them licenses to carry passengers upon its streets for hire, and this turns upon the point whether the use of the public streets for private purposes of gain is a vested right or simply a privilege. The court held that it is the latter, and affirmed the validity of the ordinance and Morin's

conviction. The cases upholding laws denying to aliens in New Jersey the right to hunt and fish, and cases in other States upholding analogous discriminations, are cited. This matter was thought to fall within this class of cases rather than with those which have been held invalid as depriving aliens of the opportunity to labor for a living at the ordinary kinds of business. In concluding the opinion Judge Black for the court said:

We think that the operation of vehicles for the transportation of passengers for hire, on the public streets of the township, is a privilege subject to the control of the township. It is not one of those inalienable rights which belong to human beings, a right to labor for a living. The township of Weehawken had a right to limit the license to citizens of the United States. We find nothing illegal in the ordinance.

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CONTRACT OF EMPLOYMENT—AGREEMENT NOT TO JOIN A UNION OR TO STRIKE—LIQUIDATED DAMAGES—*Ressig v. Waldorf-Astoria Hotel Co., Supreme Court of New York, Appellate Division, First Department (Nov. 22, 1918), 172 New York Supplement, page 616.*—Ressig was employed by the hotel company as a sauce cook. He entered into a contract in writing of hiring from month to month whereby he was to receive \$75 per month. He agreed to observe the rules and regulations of his employer and, among other things, he agreed that he would not become affiliated with the International Hotel Workers' Union, or any kindred organization, and that he would not strike, but would give eight days' notice before the end of the month when he wanted to leave. He, without notice and during the dinner hour, went on a strike at the order of the union called the "Enterprise Federation of the Culinary and Alimentary Syndicates," of which he was a member. The hotel company had to hire another cook at \$10 per day for 10 days and \$5 per day for 4 days thereafter. Part of the contract provided that if it was violated by the employee he should forfeit as liquidated damages all wages then due. He then sued for wages for the month preceding his breach of the contract, and the employer interposed a counterclaim for the hire of the substitute cook. The lower court allowed Ressig judgment and dismissed the hotel company's counterclaim. In reversing this judgment, Judge Laughlin, expressing the opinion of the court, stated that by joining the union, leaving without cause, and failing to give notice, the defendant had been guilty of breaches any one of which was a ground for a claim in damages. Continuing, Judge Laughlin said:

The contract is to receive a reasonable construction, and, so construed, I think it means that the employee, in the event of such breaches of the contract by him, should forfeit any claim for services

rendered down to the time of the breaches, which had not theretofore become due and payable, and had not remained unpaid through the failure of the employer to perform the contract on its part. So construed, the contract could in no event require a forfeiture of the plaintiff's wages for more than a month and 10 days, or wages aggregating not to exceed \$100. If, therefore, the provision be regarded as only for liquidated damages, it would not, I think, be unreasonable, and would bar a recovery by the plaintiff.

There is, however, another theory on which I think the complaint should have been dismissed. At the time the plaintiff joined in the strike and left defendant's employ no wages were due him under the contract. He could not recover wages without showing performance of the contract on his part \* \* \*.

There is no particular hardship to the plaintiff in the construction of the contract I have indicated. We are not now concerned with an excusable violation of the contract by the employee, such as sickness, accident, or otherwise, but with a willful violation calculated to result in damage to his employer. The courts of this State have never allowed a recovery by an employee for services rendered under contract where he has abandoned performance during the entire period, performance during which was prerequisite to a recovery, and I am of the opinion that, if the provisions of the contract could not be sustained on the theory of forfeiture of wages as liquidated damages, they should in any event be construed as an agreement on the part of the plaintiff that the wages for the period now in question should not become due and payable in the event of such breaches of the contract on his part.

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CONTRACT OF EMPLOYMENT—AGREEMENT TO PROTECT EMPLOYEE AGAINST VIOLENCE BY STRIKERS—LEGALITY—RELEASE—*Hansen v. Dodwell Dock & Warehouse Co., Supreme Court of Washington (Jan. 31, 1918), 170 Pacific Reporter, page 346.*—Nels Hansen was a longshoreman employed by the company named, and was severely injured in a riot participated in by striking longshoremen and their sympathizers. The employee brought suit against the company for damages, basing the action upon an oral contract alleged to have been made when he entered upon the employment, under which the company agreed to afford him "ample protection from violence, injury, or hurt from said union longshoremen" and to "furnish plaintiff a safe place in which to work free from assault on the part of any person whatsoever." A verdict was rendered in the plaintiff's favor, and the company appealed. The first ground taken up was that the evidence was insufficient to establish the making of the contract. The court showed that the plaintiff and another witness testified positively to the alleged facts, and that, while there was a denial by the person who did the hiring, it was clearly for the jury to decide where the truth lay in the conflicting evidence.

The company further claimed the contract to be void for three reasons:

(1) Because it is impossible of performance; (2) because it is against public policy; and (3) because it is a contract of insurance and was not entered into in conformity with the statutes regulating insurance.

It was held that the contract was not invalid for any of these reasons. The general principles of the law having to do with impossibility of performance were discussed by Judge Fullerton, who then said:

The contract was not impossible of performance within itself, nor is such a contract forbidden by any legal principle or by any statute law, nor was there any change of condition in the subject matter of the contract which rendered its performance impossible. It may have been impossible of performance by the appellant, in whose behalf the promise was made, but manifestly its inability to perform it as an individual or corporation did not relieve it from liability for its breach so long as the contract was capable of being legally performed.

The argument with regard to public policy was based on the assumption that protection could only be given by the employment of private armed guards, which is contrary to the policy of the law. The court shows that there is no such implication in the contract, and that other means might have been employed:

The appellant might have done effectively what it attempted to do and did ineffectively; it might have erected an impassable barrier across the way of approach which the rioters were obliged to take in order to reach the respondent's place of work. Again, it might have called upon the public authorities for protection.

The fact that some police protection was given, which proved inadequate, it is said, "does not prove an exhaustion of the possible means of protection." It is further held that the contract was not one of insurance, Judge Fullerton saying as to this:

Assuredly, when a master employs a servant, he may enter into a binding agreement with him to protect him against the hazards of the employment, or the hazards surrounding the employment, without resorting to the forms of contract prescribed by the insurance code.

There was introduced in evidence a document signed by Hansen after the occurrence of the injury, acknowledging the receipt of "\$11 in full of the amount due me to date." It also contained a statement of the number of hours worked as regular time and as overtime, with the rates of wages, the total being \$11. That this was not a release of the claim for damages for the injury was held by the court, the opinion including the following statement:

No evidence was offered showing or tending to show that the receipt was intended as a full settlement of the demand the respondent might have against the appellant for his injury, or that it was anything other than it purported on its face to be, namely, a receipt for wages theretofore earned.

The failure to give certain instructions requested by the company was held not to be reversible error and the damages assessed at \$500 not excessive. The judgment in favor of the plaintiff was therefore affirmed.

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CONTRACT OF EMPLOYMENT—ENFORCEMENT—GROUNDS FOR INJUNCTION.—*Tribune Assn. v. Simonds, Court of Chancery of New Jersey (May 2, 1918), 104 Atlantic Reporter, page 386.*—The defendant, Frank H. Simonds, is a writer who is especially versed in the subject of the great European war of 1914. The Tribune Association is a syndicate for the publication of news in the New York Tribune and other newspapers over the country who affiliate with it for this purpose: In January, 1915, Simonds entered into a written contract with the Tribune Association whereby he was to act, for a period of four years, as an editorial writer and was to have charge of the editorial page of the New York Tribune. As a part of his undertaking, Mr. Simonds covenanted that he "will not write for or contribute to any other publication or periodical during the term of this agreement, except that he shall have the right to contribute to monthly magazines or to weekly magazines, which are not to be published in connection with or as a part of any newspaper." After entering upon his work Mr. Simonds made an additional agreement whereby he was to write war articles for the Sunday edition of the New York Tribune, which were to be syndicated. He was to and did continue his other work under the original contract, this work also being syndicated. The Tribune spent a large sum of money in sending Simonds to the seat of the war and another large sum in exploiting him and his work. On January 15, 1918, Simonds severed his connection with the Tribune by a formal letter of resignation and later went to work for the McClure Syndicate, whereupon suit was brought to restrain the breach of the Tribune contract. In granting the injunction as to Simonds, Judge Backes spoke in part as follows:

Mr. Simonds is manifestly violating his covenant, unless it is made to appear that his contract of employment is at an end, by a mutual rescission, which, of course, is not pretended, or that he is absolved from further performance because of such violation of the contract by the Tribune Association as evinced an intention not to be further bound by its terms, or because of such misconduct of the association, inimical to the relation of master and servant, as to make further performance on the part of Mr. Simonds reasonably impossible.

Mr. Simonds made two objections to the injunction besides his attempted justification for leaving his employer. He said that the Tribune Association syndicated his editorial writings and that the contract to write for the Sunday Tribune superseded the original contract. The court's opinion was:

While this [syndicating the editorials] may not have been a part of the arrangement, it does appear that he at all times acquiesced, and I fail to see how it can now be seized upon as having violated his rights.

It [the second contract] was a new contract, but as such it was distinct and independent of the existing one and in no respect took its place.

The court then took up the causes that led to the break, the culminating one being the printing of certain articles in a different order than intended by Mr. Simonds. As to this, Judge Backes said:

He [Simonds] was oversensitive, and he possibly fancied that he was being overridden by some one else, but a sensible man would have inquired and investigated and put the blame where it belonged; he would not have thought himself injured to the point of resigning. Had he inquired he would have readily discovered that the transposition of the editorials was the result of a misunderstanding and not of disobedience of his orders.

I find that the rupture was not brought about by the employer, and that the servant was not justified in quitting his service.

Continuing, the court said:

Now, as to the remedy: Counsel has advanced several reasons why this court should not interfere.

The first is that the complainant has not offered to reinstate Simonds. \* \* \* In circumstances like the present, where the servant left his employment without cause, it is his duty to return without invitation, and the presumption is that upon application of this kind the complainant intends to fulfill its part of the contract. However this may be, when the point was raised in the course of the argument, leave was given to amend the bill by inserting a formal invitation to Mr. Simonds to return to his employment, and thereupon, when asked of counsel whether he would avail himself of it, there came an equivocal answer. So that point is out of the case.

A second reason argued for withholding relief is that complainant has suffered no irreparable injury. \* \* \* For such an injury the legal machinery furnishes no adequate means of measuring the damage, and in such an event equity steps in to prevent the damage from becoming irreparable. \* \* \* Here the services engaged were of a peculiar character, and for the loss of which the damages are unmeasurable at law, hence the preventive remedy.

An injunction was, therefore, granted restraining Mr. Simonds "from writing for or contributing to any other publication other than the New York Tribune."

CONTRACT OF EMPLOYMENT—ENFORCEMENT—PUBLIC POLICY—INTERFERENCE WITH WAR WORK—*Driver v. Smith, Court of Chancery of New Jersey (Aug. 24, 1918), 104 Atlantic Reporter, page 717.*—This was an action brought in equity against Smith, Travers, and Saylor and against the Driver-Harris Co. The action against the first three was for the enforcement of negative covenants in contracts of employment, which would prevent the three men from working for anyone but the plaintiff, Driver. The action against the Driver-Harris Co. was to prevent that company from interfering with Driver's business. The complainant is Wilbur B. Driver, who had once been the vice president and a director of the Driver-Harris Co. He had a disagreement with his brother, who was the president of the company, and determined to establish a business of his own. He resigned his position as vice president and proceeded, for the purpose of injuring and hindering the company, to make contracts with the three defendants who were specially trained and skilled men essential to the satisfactory prosecution of the Driver-Harris Company's contracts, which were to supply the United States with essential materials to aid in the prosecution of the war against Germany. These men after realizing the character of the new contracts refused to comply with them and now, in a cross bill, ask that they be declared invalid. Wilbur Driver agreed to employ these men, but at the time of bringing suit he had not established a plant and the court refused to believe that he needed the men for the work of establishing the said plant. The court first took up the question of enforcing the agreement of the three men not to work for anyone else during the term of the contract with the complainant, Driver, saying in part:

First. Will a court of equity enforce the negative covenants? That the court will, under certain circumstances, enforce negative covenants of this nature is settled. In most of the cases which have been cited in which negative covenants have been enforced it will be found that failure to enforce them would cause loss or damage to complainant other than that occasioned by a mere deprivation of the services of the employees; for instance, cases in which employees under contract to serve for a certain length of time have obtained trade secrets, to permit a disclosure of which to rivals would cause injury to the employer. In the present case there is no such element present. The sole purpose of the suit is to compel the employees to work for the complainant by preventing them from working for anyone else. The suit, therefore, while not so in form, is actually one for specific performance.

In considering the consequences the interests of the Driver-Harris Co. may be taken into account. The three individual defendants were, at the time their contracts were made with Wilbur B. Driver, employees of the Driver-Harris Co., and that company was entitled, as against others, to their continued employment and good will. That the employment was at will does not alter the situation. The

effect of granting the relief asked for by complainant will be to deprive the Driver-Harris Co. of the services of its employees. The three employees are essential to the organization. The public interests require that they should continue employment with the Driver-Harris Co.

The court concluded, therefore, that the enforcement of the covenants would do more injustice than justice, and refused it.

Second. Will the contracts be canceled or will the complainant be permitted to seek such remedy as he may at law?

It must be taken as settled that the employer has a property right in the services of his employees, and is entitled to protection against interference with no sufficient justification. And it is likewise true that an employee at will may at any time leave his employer, and that a stranger may, by an offer of higher wages, induce him to leave his employment and become employed with the stranger. A stranger may not, however, interfere with the employment for no justifiable reason.

While it may be too much to say that there was any public policy which prevented labor from moving from plant to plant of its own volition, induced by offer of higher pay or what not, yet I think it safe to say that there was a public policy which was offended when a person, for his own advantage, deliberately proceeded to demoralize an organization, the continuation of which was essential to the production of necessary war material.

What I hold, and all that I hold, is that contracts obtained as part of a scheme, which, if successful, would have the effect of disrupting the organization of a plant engaged in the manufacture of war material, essential to the prosecution of the war, are voidable so long as they remain executory. And this is so, whether the parties intended to advantage themselves and had in mind no thought of injury to the Government or not.

The employees in repudiating the contracts did only that which a sound public policy required them to do at the time.

Equity, having assumed jurisdiction, will determine the entire controversy in order to prevent a multiplicity of suits. I think the individual defendants are entitled to a cancellation of their contracts.

The court refused to issue a restraining order against the Driver-Harris Co. from interfering in the business of Wilbur B. Driver, holding that such interference as had thus far occurred was justified.

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CONTRACT OF EMPLOYMENT—ENTICING AWAY WORKMEN EMPLOYED UNDER CONTRACT—DAMAGES—*Owner v. Seaboard Air Line Railway Co., Supreme Court of South Carolina (Aug. 15, 1918), 96 South-eastern Reporter, page 559.*—This is an action for damages for the enticing away, by defendant, of plaintiff's servants. The plaintiff had four employees who were under contract to work for him during the year 1917. The agents of the defendant knew of this contract.



On April 22, 1917, an agent of the defendant approached one of plaintiff's servants and after speaking with him induced him to get the other three servants. The agent then placed the laborers on a midnight train so they would not be observed and transported them on a pass to North Carolina. The opinion of the court is in part as follows:

The evidence, as a whole, tends to prove what the plaintiff alleged, that this method of obtaining laborers was in accord with defendant's general policy, a policy which is condemned by law as well as sound morals, and one which justifies the infliction of punitive damages.

The judgment for damages in the court below was therefore affirmed.

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CONTRACT OF EMPLOYMENT—GROUNDS FOR BREACH—INSUBORDINATION—*MacIntosh v. Abbot*, *Supreme Judicial Court of Massachusetts* (Oct. 10, 1918), *120 Northeastern Reporter*, page 383.—Abbot agreed to employ the plaintiff for one year at stipulated wages for himself and his wife. The work was to be done on defendant's farm and MacIntosh, with his wife and two children, was to live in the same house with Abbot and his sister. One July night Abbot and his sister, with a party of guests, came into the house, slamming doors and making considerable noise. Plaintiff, who had been aroused from his sleep, called down the stairs in a disrespectful and angry voice for Abbot to desist, saying if Abbot wanted him to get out to come up and tell him "straight." Abbot demanded an apology. Later MacIntosh came to defendant and told him that he could not apologize, using rather disrespectful language in doing so. Defendant thereupon discharged him. From a finding for plaintiff the defendant excepted and the court in affirming the decision said:

The words of the plaintiff, while lacking in ordinary politeness on both occasions, did not amount to insubordination. They were a breach of courtesy, but did not indubitably manifest a disposition not to perform his contract. No order respecting his work was disregarded. He was acting under some provocation due to the conduct of the defendant, which, although unintentional, might have been construed as designed to cause annoyance.

Hasty utterance of the nature here disclosed touching a single matter is not necessarily a breach of contract or a sufficient ground for ending it.

Among the obligations of the employee as an implied term of the contract is that he shall not be insubordinate, but shall show just regard for the rights of the employer. The reciprocal obligation of the master is that he shall not be arrogant or excite resentment or wantonly wound the feelings of his employees.

CONTRACT OF EMPLOYMENT—INDUCING BREACH—DAMAGES—*S. C. Posner Co. (Inc.) v. Jackson et al.*, *Court of Appeals of New York* (Apr. 23, 1918), 119 *Northeastern Reporter*, page 573.—The complaint in this case stated that Sarah C. Posner was an expert designer of women's clothing, with a high reputation established among those engaged in trade in that line. She had organized the plaintiff company, and become a director and its president. Various persons had been induced to buy stock with the expectation that the company would deal in gowns designed by her, and a contract had been made by the company with her for five years, in which she agreed to devote her time to its work, and not to give her services to any other concern during the life of the contract. E. A. Jackson (Inc.) was a rival company, Emanuel A. Jackson being the principal stockholder and president. He induced the designer, by an offer of increased compensation, to leave the Posner Co. and use her services and skill in the business of the Jackson company, and the former brought suit against the latter, alleging damages at \$25,000. The complaint was demurred to as not sufficiently setting forth a cause of action, and both parties rested their case upon their contentions on this point. The trial court gave judgment for the plaintiff company, which the appellate division of the supreme court reversed. The case was then carried to the court of appeals, which affirmed the original judgment for the Posner Co., holding that it had in the complaint stated a good cause of action. Quotations from the opinion delivered by Judge Chase show the attitude of the court as to the questions involved:

The employee's failure to perform her contract so far as appears was inexcusable. She is liable at law for the damages occasioned by her failure to perform her contract. As the services to be performed by her under the contract were special, unique, and extraordinary, if the remedy at law is inadequate, an action could have been sustained in equity to restrain her from violation of the negative covenants to which she became bound in connection with her employment. [Cases cited.]

The faithful performance of the covenants by the employee was of vital importance to the employer. It is apparent from the allegations of the complaint that if the contract is not performed, serious injury to the plaintiff must necessarily result therefrom. When the defendants induced the employee to break her contract with the plaintiff "it was well known to them that the plaintiff had been organized" by the employee, and "that she was one of the principal persons engaged in its management, that she had loaned to its enterprise her name, and she was then a director and president thereof, and in the employ of the plaintiff, and that she was a party to a written contract of employment for her exclusive services for a period of years to come."

In persuading the employee to break the contract with the plaintiff the defendant Jackson acted for himself and for the defendant cor-

poration. He intended "to injure the plaintiff in its business," and entice such employee from the plaintiff and persuade her to break her contract with the plaintiff for the purpose of "depriving it of her services and of securing such services for a competitor and of thereby injuring this [plaintiff] corporation."

It is alleged that in pursuance of a wrongful, corrupt, and malicious purpose the defendants induced the employee to abandon and break her aforesaid contract and in violation of the same to enter into the employ of the defendant E. A. Jackson (Inc.), "a competing business." Such a contract as that described is a property right. An interference with such a property right by which it is lost to an employer is a wrong in morals, and, when without justification or excuse, may be an actionable tort for which damages can be recovered against the wrongdoer.

If a person knowingly and intentionally interfere with the express contract rights of an employer with his employee and the purpose and intent of such interference is to injure such employer, and it does result in his injury, an action will be sustained to recover damages therefor. [Cases cited.]

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CONTRACT OF EMPLOYMENT—MEDICAL SERVICES—REFUSAL OF COMPANY DOCTOR TO ACT—DAMAGES—*Sloss-Sheffield Steel & Iron Co. v. Taylor, Court of Appeals of Alabama (Nov. 13, 1917), 77 Southern Reporter, page 79.*—Ellen T. Taylor, wife of an employee of the company named, sued the company and also the "company doctor" for damages for injuries suffered by her because of the refusal of the physician to attend her under a contract between the company and the employee, by which medical services were to be furnished to him and his family. The company deducted 75 cents per month from the wages of single employees, and \$1 each from the wages of married employees, agreeing, in the case of a married man, to render medical services to himself and family. Such deduction was made from Taylor's wages on February 9, 1914, of which 90 cents was paid to the company doctor, and 10 cents was retained by the company. Mrs. Taylor was taken ill on March 5, and on that day and the 6th and 7th, according to testimony produced, repeated requests were made that the doctor should visit her at her home about 50 yards from his office. He failed to do this, but sent certain medicine, which, from the nature of the illness as it developed, was useless. On the evening of the 7th Mr. Taylor called in another physician. Mrs. Taylor was suffering from an abscess, which burst before the 10th, on which day the company's physician, after having some conversation with her father, called on her. She had then so far recovered, however, as not to need treatment. After the other physician had been called in, the company doctor gave that fact as his reason for not complying with a request of the sister of the sick woman that he visit her. The court sustained the judgment rendered on the jury's verdict awarding Mrs. Taylor \$300 damages. It was held that the suit was

properly brought in her own name, she being a beneficiary of the contract between the company and the physician, and that the summoning of the other physician did not excuse the nonperformance of the contract by the doctor. Since it was shown that Mrs. Taylor underwent great physical and mental suffering for three or four days, the damages as assessed were held not to be excessive.

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CONTRACT OF EMPLOYMENT—TIPPING—CONSTITUTIONALITY OF STATUTE—*Ex parte Farb, Supreme Court of California (July 30, 1918), 174 Pacific Reporter, page 320.*—Sam Farb entered into a contract as to tips received by his employees which violated a statute (ch. 172, Acts of 1917) which prohibits “an employer from entering into a contract requiring an employee to surrender to the employer all tips or gratuities received for services rendered to the public on behalf of the employer.” On his conviction Farb applied for a writ of habeas corpus on the ground “that this statute permits a violation of the rights of employers and employees freely to enter into contracts, that it is in conflict with the Federal and State constitutions, and that it seeks to make an improper extension of the police power of the State.” The respondent employees contended that the contract is a fraud on the public because the tips do not actually remain with the person to whom given, and that the law is proper as designed to relieve the public from such fraud and imposition, coming under the constitutional provision permitting laws to “provide for the comfort, health, safety, and general welfare of any and all employees.” Judge Melvin, speaking for the court, said, in part:

The statute, if defensible at all, must be upheld therefore as a measure tending reasonably to protect employees in their health, or safety, or to preserve their morals or to promote their general welfare.

“The means adopted to produce the public benefit intended, or to prevent public injury, must be reasonably necessary to accomplish that purpose and not unduly oppressive upon individuals. The determination of the legislature as to these matters is not conclusive, but is subject to the supervision of the courts, and, if the above qualities are wanting, a law arbitrarily interfering with the right of contract, or imposing restrictions upon lawful occupations, will be held void.” (In re Miller, 162 Cal. 687, 124 Pac. 427.)

Upon the principles above announced, courts have not hesitated to sustain statutes enacted in pursuance of the police power having the legitimate function of protecting the health and morals of certain classes, but they have been equally ready to apply constitutional rules to the overthrow of laws which under the guise of such regulation have interfered with the freedom of contract.

Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditure of one's earnings.

The statute under review is void because it is in conflict with the “due process” provision of the Constitution of the United States and with section 12 of Article I of the Constitution of California.

**CONTRACT OF EMPLOYMENT—WRONGFUL DISCHARGE—IMPROPER CONDUCT—FOREMAN ACCEPTING FEES—***Ackerman v. Siegel, Supreme Court of New York, Appellate Term (May 15, 1918), 170 New York Supplement, page 522.*—Plaintiff Ackerman was employed as foreman in defendant's shop under a written contract whereby he agreed that, should he through bad behavior or fast living imperil the morals of the shop and its success, the agreement was to become null and void. Ackerman was discharged and sued his employer for unlawful breach of the contract. Defendant presented evidence that plaintiff solicited and demanded a commission from the various employees under him on the amount of their wages. This testimony was objected to on the ground that it was inadmissible under the pleadings. The objection was overruled and the evidence submitted to the jury, which brought in a verdict for the defendant employer. This verdict was set aside and a new trial ordered, whereupon the defendant appealed. The verdict was reinstated, and the order for a new trial was reversed. The opinion of the court as expressed by Judge Delahanty is, in part, as follows:

The court was correct in its ruling. The conduct of the plaintiff in soliciting the alleged commission was certainly behavior tending to imperil the morals and success of the defendant's shop. If the plaintiff was not prepared to meet that specific charge, it is no fault of the defendant. Plaintiff should have demanded a bill of particulars.

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**EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—RULES OF EMPLOYERS—***Johnson v. Waverly Brick & Coal Co., Supreme Court of Missouri (July 5, 1918), 205 Southwestern Reporter, page 615.*—The coal company maintained a loading chute for the purpose of loading coal on freight cars. The company's chute was located in such a position that a bluff concealed any approaching trains until they were only 180 feet distant. A car was under the chute being loaded and Johnson was trimming it. Other cars were switched onto the same track and bumped the car on which he was working, throwing him under the car and injuring him. Neither the coal company nor the railway company notified Johnson of the intention of switching additional cars onto the track. The supreme court in affirming judgment to plaintiff Johnson said in part:

It is next insisted by the counsel for defendants that the evidence showed that the plaintiff was guilty of such contributory negligence as to prevent a recovery as a matter of law, by standing with his back to the approaching train so he could not see it. This insistence is untenable. The evidence shows the plaintiff did not know that the train was approaching, and, under the rules of the railway company and the custom of the coal company, he had no reason to apprehend

a train would approach him without notice first being given to him. This point is ruled against the defendants.

Counsel for defendants also insist that the plaintiff is not entitled to a recovery in this case because his injury was the result of a risk incident to his employment; that is, he assumed all risks incident to his employment, and that his liability to be knocked off of the car mentioned and being injured is one of those risks. This insistence is untenable for two reasons: First, because this was not a risk incident to his employment. Such risks are purely incidental to the employment, and an injury is liable to occur thereby at any time during the performance of the work undertaken, unaided in any degree by the negligence of the employer. \* \* \* The second reason before suggested why this insistence is untenable is that the evidence tended to show that it was the negligence of the defendants which caused the injury, and not the result of an assumed risk. The evidence presented a question of fact for the jury, and the court properly submitted it to them.

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EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—RELEASE—CHANGED CONDITIONS—*Gold Hunter Mining & Smelting Co. v. Bowden, United States Circuit Court of Appeals, Ninth Circuit (June 3, 1918), 252 Federal Reporter, page 388.*—Bowden was in the employ of the smelting company, operating a steel drill which the company provided, and which had once been broken and repaired by welding. While in operation the drill broke in the weld and caused Bowden to receive certain injuries. The court held that, although Bowden had assumed the risk of operating welded steel drills, it could not be said that he assumed the risk of a defectively welded drill and the question of the quality of the drill was properly left to the jury. Bowden had been treated by a physician for a while, and, on the statement of the latter as to the nature of his injuries, signed a release. Bowden met an agent of the company at the request of the physician in the latter's office. The agent asked the nature of Bowden's injuries and was told that they were not serious and that \$200 would be enough to cover the expenses of treatment. After some discussion a release was signed and a draft for \$200 made out. Later complications developed from the same injuries and Bowden's leg was removed, for which he brought suit and recovered judgment. The release was set up by the company as a defense, but Bowden claimed that the release did not cover the loss of a leg. The court of appeals in the course of its opinion said:

It would be a very strained construction to hold that plaintiff, a healthy man, in the prime of life, dependent upon a calling which requires unusual physical strength, intended to accept \$200 (all of which was paid by the indemnity insurance company to the hospital and physician, for attention to injuries received before the serious injuries to the leg and arm developed) as full compensation for the permanently helpless condition in which he evidently is. A fair con-

struction of the evidence is that the release was made under the belief by both parties that there was no injury other than those specified (strained back and bruised scrotum), and which were deemed not serious.

Judgment for Bowden affirmed.

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EMPLOYERS' LIABILITY — DISEASE — OCCUPATIONAL DISEASE — INJURY—IMPAIRMENT OF HEALTH—VIOLATION OF STATUTE—*Gay v. Hocking Coal Co., Supreme Court of Iowa (Nov. 16, 1918), 169 Northwestern Reporter, page 360.*—Gay was in the employ of the coal company when he was stricken down by reason of breathing foul air as he was working in room No. 10 of the company's mine. The air had become laden with "damps" and other impurities. The result was that plaintiff was unable to work for eight months and then his health was so impaired that he was unable to do the same amount of work as he had formerly done. The company had elected to reject the provisions of the workmen's compensation law and plaintiff accordingly brought suit for damages for personal injuries. The counsel for defendant claimed that the injury sustained by Gay was an occupational disease, and then rather inconsistently argued that as recovery for occupational diseases could not be had under the workmen's compensation act, Gay should not be allowed to recover. The laws of the State of Iowa provide that mines must be ventilated and that a certain amount of pure air must be provided both man and beast working in the mine, and it further provides that the air must not be permitted to become noxious. After reviewing and quoting two instructions of the lower court to the jury where it was stated that the jury, although it found plaintiff had sustained such injuries as he claimed, must also find that they were not the result of an occupational disease, the court reversed the judgment of the lower court in favor of the defendant, saying in part as follows:

We can not avoid the conclusion that the charge so far as quoted is erroneous both in substance and effect. An "occupational disease" suffered by a servant or employee, if it means anything as distinguished from a disease caused or superinduced by an actionable wrong or injury, is nothing more nor less than a disease which is the usual incident or result of a particular employment in which the workman is engaged, as distinguished from one which is caused or brought about by the employers' failure in his duty to furnish him a safe place to work. If the employer fails to provide a reasonably safe place to work, or fails to observe the specific requirements of the statute with respect thereto, and as a result of such neglect the employee is injured, the liability of such employer can not be avoided by calling such injury an "occupational disease" or by showing that disease of that nature is often the accompaniment or result of such employment, even when all due care has been exercised by the

employer. \* \* \* There is no principle or rule of law where, in order to make a *prima facie* case, plaintiff was bound to plead and prove that he was not suffering from an occupational or other variety of disease, except as such negation may be implied from proof that his injury was the proximate result of defendant's failure to perform its statutory duty to expel the gas from the mine or otherwise render it harmless. It may also be added, in view of the argument of counsel, that if defendant did fail in its duty in this respect, and the plaintiff was thereby physically overcome or disabled to a degree causing him to suffer injury or loss, defendant's liability is neither avoided nor lessened by reason of the fact that plaintiff sustained no wound or bruise or other hurt of a traumatic character or origin. A wrongful injury which operates to destroy or undermine or impair the health of another is no less actionable than is a wrong from which the injured person sustains wounds or bruises or broken bones.

The judgment in favor of the mine company was therefore reversed, and the case remanded to the court below for a new trial.

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EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—AGE LIMIT—CONTRIBUTORY NEGLIGENCE—*Karpeles v. Heine et al.*, *Supreme Court of New York, Appellate Division (Dec. 7, 1917)*, *167 New York Supplement, page 925*.—Hans Karpeles, a boy 13 years and 10 months of age, was employed by Marie C. Heine and others to operate an elevator in an apartment house. Section 93 of the Labor Law of the State forbids the employment of children under 16 years in the operation of elevators. After taking a window cleaner to one of the upper floors, as directed, he stepped into the hall, and when he attempted to step back into the elevator cage he was injured by falling down the shaft, as the elevator had moved, apparently through a defect permitting it to move upward when empty, without power. It was shown that there was no light in the elevator, and little in the hall. The trial court charged the jury that the unlawful employment constituted negligence on the part of the employers, but that if the plaintiff was guilty of contributory negligence he could not recover. Under these instructions the jury found for the defendants, but the boy's counsel on appeal contended that the violation of the statute created an absolute liability. The majority of the court took the same view as the trial court, the opinion delivered by Judge Smith citing *Bachman v. Little*, 152 App. Div. 811, 137 N. Y. Supp. 699, and other cases. Two of the five judges hearing the case dissented, Judge Page expressing their views in a dissenting opinion. He distinguishes the present case from the others, and states that the question has not been squarely presented in New York, but that in other States it has been held that unlawful employment makes the employer absolutely liable for injury. Stating that the purpose of the prohibition of the employment of children in the dangerous occupation is for the protection of the children and also of the public



riding in elevators, from the lack of "judgment, discretion, care, and caution" presumed not to exist in persons so young, he points out the inconsistency of requiring the exercise of such judgment and care on the part of a child unlawfully employed, in order that he may recover damages in case of injury.

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EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—*Reiten v. J. S. Stearns Lumber Co., Supreme Court of Wisconsin (Feb. 5, 1918), 165 Northwestern Reporter, page 337.*—Bernard Reiten, a boy 15 years of age, was employed on Saturday, May 27, 1916, without an employment permit, to throw edgings from live rolls carrying boards and edgings. On the following Monday he was injured by a board striking his thigh. A bony growth, which necessitated two operations, developed, and in May, 1917, it was found to be growing a third time, making another operation a probable necessity. Through his guardian he sued the company named, his employer, for damages, and a jury rendered a verdict in his favor for \$5,500. The court gave him the option of a new trial or the reduction of the amount to \$2,500. He accepted the reduction, and the company appealed. The court had submitted only the matter of damages to the jury, holding that the company was absolutely liable, because it had unlawfully employed a boy under 16 years in a dangerous occupation without a permit. This view was sustained, and the judgment affirmed, the court holding also that the damages after the reduction were not excessive. Judge Eschweiler delivered the opinion, quoting the language of the statute as to the class of employment forbidden to boys of that age, and commenting as follows upon the dangerousness of the work the boy was doing:

"23. Any employment dangerous to life or limb, injurious to the health or depraving to the morals."

We are satisfied under the undisputed testimony in this case that the judgment may and ought to be supported upon this last-quoted provision of the child labor law. His freedom of motion was limited to the small area of 3 feet in width by 6 or 7 feet in length. Heavy planks passed before him on the table along live rollers, the motion of which evidently, so far as he was concerned, was practically irresistible. There was the ever-present possibility of planks or material becoming choked and caught anywhere along the table, thereby displacing the planks and forcing them over into the space in which he was confined. All warrant and compel us, upon the undisputed facts and circumstances, to say as a matter of law that there was an employment of this boy under 16 years of age within the prohibition of the language of the statute and that particular subdivision 23, above.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—POSTING OF NOTICES—SAFE PLACE TO WORK—*Chabot v. Pittsburgh Plate Glass Co., Supreme Court of Pennsylvania (Jan. 7, 1918), 103 Atlantic Reporter, page 283.*—Paul Chabot, a boy 14 years of age, was employed by the company named in hauling plates of glass on a truck, which plates it was his duty to place in racks behind and near to the cutter's table. While he was removing a plate from the truck he collided with a cutter, causing the glass to fall from his hands and strike his foot and injure it. Through his father he sued the company for damages, and, upon the jury's verdict in his favor, judgment was rendered in the court of common pleas of Armstrong County. On appeal the company contended that there was not evidence to sustain the plaintiff's claim that a safe place to work had not been furnished him in that the space between the cutters' table and the racks was only  $3\frac{1}{2}$  feet, an insufficient amount of space to allow the cutters and the boy to move about without interference such as actually occurred. The court held that the question was for the jury, and that it had been properly submitted by the instructions given by the judge of the trial court. It was also held that the company was negligent as a matter of law because of a violation of the law relating to the employment of children. It had secured and kept an employment certificate for Chabot as required, but had not kept nor posted lists of children employed, as it was incumbent upon it to do under the provisions of the law. It was held that the proper attention to the lists was as essential a part of the employer's duty as any, and that failure to observe it would constitute the proximate cause of any injury happening to a minor unlawfully employed because of failure to keep and post the lists. It was pointed out that where such failure existed it was impossible for the company to sustain its burden of proving that it had brought itself under the exceptions to the prohibition of the employment of children under 16 years of age.

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EMPLOYERS' LIABILITY—FELLOW SERVANT—CONSTITUTIONALITY OF STATUTE—*Mason v. New Orleans Terminal Co., Supreme Court of Louisiana (May 27, 1918), 79 Southern Reporter, page 26.*—Mason was employed by the defendant as a car repairer. While he was repairing the brake beam of a car another workman, a carpenter, dropped a large piece of wood from the top of the car and it fell upon Mason and injured him, whereupon he sued, and recovered damages. Defendant alleged that the carpenter at work on top of the car was a fellow servant with plaintiff Mason, who was repairing the iron-work of the same car; also that the statute of the State abrogating the fellow-servant rule for all servants generally of public-service

corporations is unconstitutional. The opinion of the supreme court sustaining these two allegations is as follows:

It is essential that fellow servants be engaged in the same work under the same master and that their work, to a certain extent, bring them into contact with each other. The requirement that they be engaged in the same work does not mean that both must be doing exactly the same thing at the same time. If they are engaged on the same general work, and in the course of their work come into contact with each other, or that each knows of the presence of the other and knows of the work that the other is doing, that is all that is required.

The car carpenter and the car repairer in this case were in the actual presence of each other working on the same car, and knew of the presence of one another, and they knew what the other was doing. They were fellow servants.

Act No. 187, 1912, p. 333 [Bu. 148, p. 865], is unconstitutional because it includes, in one class of employees, those engaged in non-hazardous occupations as well as those engaged in hazardous occupations by certain corporations; and for the further reason that it denies to public-service corporations, and in favor of individuals, the equal protection of the laws, and it denies to public-service corporations, and in favor of all other corporations which may be doing identically the same work, the equal protection of the laws.

The judgment of the court below was therefore reversed, and judgment was rendered in the company's favor.

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EMPLOYERS' LIABILITY—FELLOW SERVANT—VICE PRINCIPAL—DUAL CAPACITY—*Bradshaw v. Standard Oil Co., Kansas City Court of Appeals, Missouri (June 10, 1918), 204 Southwestern Reporter, page 831.*—Plaintiff was employed by the defendant as a laborer with a view to becoming in time a fireman. One of the regular still firemen failed to appear for work and plaintiff, who had completed his day's work, was told by his foreman to do the work. The foreman called one Walgenbach, who was another still fireman, and said to him: "Here is a man that will help you. You will tell him what to do." And, turning to plaintiff, he said: "Do as he tells you to do." Plaintiff went to work and while lighting the gas burners under the stills there was an explosion because the gas was turned on too soon by Walgenbach, and plaintiff was injured. He sued for damages, and from a judgment in his favor the defendant appealed, claiming that Walgenbach was the fellow servant of plaintiff, and was at the time of the injury doing an act as a fellow servant and not as a vice principal. Just prior to the injury, Walgenbach had said to the plaintiff: "I will turn on the gas, because I know more about it than you do. You go back and stick your lighter in and I will turn on the gas."

Under its instructions the jury had found that Walgenbach was at the time exercising his functions as a vice principal, and the court of appeals, in passing on this point, said:

There is no question that Walgenbach became the defendant's vice principal when the general foreman told Walgenbach, "You tell him (plaintiff) what to do," and told plaintiff, "Do as he (Walgenbach) tells you to do." By these orders and directions Walgenbach was made defendant's vice principal in the work to be done.

Although the doctrine of dual capacity has been severely criticized, there is no question but that it is the law in this State. One may be acting as a vice principal and at the same time be acting in a dual capacity; that is, also as a fellow servant. And inquiring into the question as to whether he is so acting, it must be borne in mind that it is the character of the act, and not the rank of the servant, which determines the liability or nonliability of the master. When the doctrine of dual capacity is urged, the question is: Was the vice principal at the time exercising some authority vested in him as such, or was he in the performance of a mere manual act of service incident to the common employment?

Of course, if Walgenbach was at the time teaching the plaintiff the work, the former was exercising the authority of a vice principal. Whether Walgenbach was manifesting at the time the authority of a vice principal was for the jury under all the facts in evidence.

The judgment of the court below was therefore affirmed.

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EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—PERSONAL APPEARANCE AS BASIS FOR DAMAGES—*Camenzind v. Freeland Furniture Co., Supreme Court of Oregon (June 18, 1918), 174 Pacific Reporter, page 139.*—Plaintiff was employed by the defendant as a woodworker and it was his duty to operate a shaping machine which had vertical spindles to which knives were attached. These knives were not protected by any form of guard. While plaintiff was operating this machine a piece of wood became stuck and jerked his hand against the spindles and the knives cut off two of his fingers. Action was brought under the employers' liability act which required that all dangerous machinery must be provided with guards where practicable, and judgment was in the employee's favor. An appeal was taken by the defendant, who secured a reversal, together with an order for a new trial, on account of an instruction as to grounds for damages. As to guarding the machine, the court said in part:

There are two principal questions to be answered: Does the machine involve risk or danger? Is it practicable to guard the danger and at the same time preserve the efficiency of the machine? It is conceded that the shaper involves a risk or danger, and therefore comes within the embrace of the statute; but since the answer denies that it is practicable to guard the machine, it was competent for the

plaintiff to offer evidence concerning Exhibit F. Evidence relating to the guard used in Switzerland was competent, not for the purpose of showing that the defendant should have used that particular guard, but to show that it was practicable and reasonably possible to guard the spindle.

On the subject of the duty of the employer the court said:

If, in order to completely perform the duty imposed upon him by the statute, the employer must attach and maintain a guard on a machine when it can be kept there constantly without the necessity of removal or readjustment, then by the same token he must, in order to completely perform his duty as to any given piece of work with which it is practicable to use a guard, attach the guard to the machine and see that it is kept there while the servant is engaged with such piece of work. The statute, of course, does not require a guard to be used unless it is practicable to do so.

It is the duty of the employer to attach and maintain a guard when it is practicable to use a guard; and that duty is absolute, non-delegable, and continuing. If an employee, who operates a machine, attaches the guard to the machine, he has merely performed the employer's duty; but if the employee fails to attach a guard, though furnished and available, he has merely not done what is not his duty to do, but is the duty of the employer to do.

Grounds for reversal are shown in the following paragraph:

It was prejudicial error for the court to instruct the jury that in estimating the damages they could consider "any embarrassment that may result from his changed appearance." There is a conflict of authority as to whether a recovery may be had for mortification or humiliation arising from the contemplation of the disfigurement of the person; but this court has committed itself to the doctrine that humiliation and embarrassment, wholly sentimental, arising from the contemplation of a disfigurement of the person, is too remote and indefinite to constitute a possible element of damage.

A new trial was therefore declared necessary.

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EMPLOYERS' LIABILITY—INEXPERIENCED FELLOW SERVANT—*Lusk et al. v. Phelps, Supreme Court of Oklahoma (Apr. 9, 1918), 173 Pacific Reporter, page 371.*—Needham Phelps, deceased, had been in the employ of the St. Louis & San Francisco Railroad Co., of which Lusk and others were receivers. The action was brought by W. H. Phelps, administrator, to recover damages for the death of Needham Phelps. Phelps had been engaged in working for the defendants in a gravel pit near Mill Creek. His duties consisted chiefly in operating a drill, and, with other employees of the defendants, in preparing and exploding charges of dynamite with which the blasting was done. A short time prior to the accident which caused Phelps's death he complained to the foreman of the defendants

stating that he and his fellow workers were inexperienced in the handling of dynamite. The foreman promised to get an experienced man as soon as he could and requested that deceased and his coworkers get along as best they could until that time. Shortly afterwards, in discharging a charge of dynamite, Phelps was killed. Plaintiff alleged that the defendant was guilty of negligence in not supplying experienced men for the handling of dynamite, and judgment was in his favor, whereupon the defendant procured a writ of error.

Touching upon the duty of the defendants under the above circumstances the supreme court, affirming the judgment of the court below, said:

It was the duty of the defendants when intrusting the use of dangerous agencies and instrumentalities to servants to see that the servants employed by them possessed such qualifications mentally, morally, and physically as would enable them to perform their duties with that degree of skill and experience required by the nature of the employment and without exposing themselves and their coemployees to a greater danger than the work necessarily entailed in the due and careful prosecution thereof, and for a failure upon their part to use ordinary care when selecting servants to whom the use of such dangerous agencies and instrumentalities were intrusted to see that such servants possessed the requisite qualifications, they would be liable for any injuries that might result as a proximate result of such negligence.

In this case the court refused a motion for a new trial. The case again came before this court on November 14, 1918, on error and the award was again affirmed (175 Pac. 756).

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—BOARDING MOVING TRAIN—*Briggs v. Union Pacific R. Co.*, *Supreme Court of Kansas (Apr. 1, 1918)*, *175 Pacific Reporter*, page 105.—Briggs was employed by the defendant as a fireman on a freight train. At the time of the accident he was working as a fireman on a freight train engaged in interstate commerce. When the train reached Topeka the engineer and Briggs left their engine and went into a restaurant to get a lunch. The engineer left before Briggs and started the train; later Briggs jumped on one of the cars and while walking over the tops of the cars to the engine tripped and fell between the cars and was killed. The engineer said that in starting the train without the fireman he was only following a long established custom. It was, however, against the company's rules. The administrator brought suit for damages under the Federal employers' liability act and from an adverse judgment brought this

appeal to the supreme court. On the question of assumed risk, the only question considered, the court, in affirming the judgment of the court below, said:

The fireman had a right to assume that the engine would not be started until he was in the engine cab. It was started, however, without him. When he came out of the lunch room the engine and a number of cars had already gone by, and the train was going forward. He was immediately and manifestly confronted with all the difficulties and dangers to be encountered in reaching his place on the engine. It would be fatuous to say he was not aware of them, and it would be an impeachment of the mental capacity of a competent man to say he did not appreciate them.

The plaintiff says the time was nighttime. It was a night train, and no one was better aware of the darkness than the fireman. The plaintiff says there was smoke. The record does not so show, but, if there was smoke, it was a normal incident to the operation of a freight engine. The whole situation created by the engineer's negligence lay before the open eyes of this experienced trainman the moment he stepped out of the lunch room. He voluntarily chose his course, and voluntarily assumed the risk attending his choice.

The court pointed out in a concluding paragraph that the decision was based on the Federal law as construed by the Supreme Court of the United States, and was not to be regarded as a precedent for the construction of the State law on employers' liability.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—GOING BETWEEN CARS—*Boldt v. Pennsylvania Railroad Co., Supreme Court of the United States (Jan. 7, 1918), 38 Supreme Court Reporter, page 139.*—Edward J. Boldt was killed in the service of the railroad company named, and his administratrix brought suit under the Federal employers' liability act. The verdict and judgment in the district court were for the company, and these were affirmed by a circuit court of appeals. The employee who was killed was an experienced yard conductor, and was at the time of his death between two cars near the south end of a "string," trying to adjust a faulty coupler. Another string of cars running down grade from the north in charge of a brakeman struck violently against those at which Boldt was at work, causing his death. A rule forbade employees to go between cars without taking certain precautions, which rule was not observed in this case. Mr. Justice McReynolds delivered the opinion of the Supreme Court affirming the judgment below. After quoting parts of the charge to the jury, he stated that only one assignment of error, in which objection is made to the denial of a requested charge relating to assumption of risk, was properly

placed before the court. Following is part of the language of the opinion on this subject:

Plaintiff asked a charge that:

"The risk the employee now assumes, since the passage of the Federal employers' liability act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees."

Denying the request the court said:

"Under the employer's liability act the employee simply assumes the risk of his employment. Section 4 reads 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death, of such employee.' I decline to charge as requested, because this is not an action of the kind specified in section 4."

In cases within the purview of the statute the carrier is no longer shielded by the fellow-servant rule, but must answer for the employee's negligence as well as for that of an officer or agent.

In *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 503, 34 Sup. Ct. 635, 639 [Bul. No. 169, p. 80], we said:

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

The request in question did not accurately state any applicable rule of law and was properly refused. Already the jury had been told that deceased assumed the ordinary risks of his employment—a statement more favorable than plaintiff could properly demand. The risk held to have been assumed in the *Horton* case certainly arose from negligence of some officer, agent, or employee; and if the negligence of all these should be excluded in actions under the employers' liability act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risks.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—DEFECTIVE BOILER—APPROVAL BY FEDERAL INSPECTOR—*Great Northern Ry. Co. v. Donaldson*, *Supreme Court of the United States* (Mar. 4, 1918), 38 *Supreme Court Reporter*, page 230.—Vance H. Thoms, engineer for the company named, was killed by the explosion of the boiler of his engine, and his administratrix, Adaline Donaldson, brought suit under the Federal employers' liability act to recover damages for the company's alleged negligence causing his death. It was alleged that the boiler was defective in the following respects:

1. The button heads of the crown bolts of the boiler were excessively and unnecessarily large and consequently unduly exposed to the direct heat produced by the oil fuel used on the locomotive.
2. The boiler was not provided with fusible safety plugs.
3. Scale was negligently allowed by defendant company, its officers and employees, to accumulate upon the crown sheet of the boiler.



There was testimony that the engine had been a coal burner, and it was claimed on the part of the plaintiff that when it was changed to burn oil the bolt heads should have been changed to a much smaller type, and that the size of the heads caused deterioration of their material and the weakening which was in part the cause of the explosion. The company introduced testimony tending to show that the water was too low in the boiler at the time of the explosion, due to the fault of the engineer; on the other hand, evidence was given disputing this. The verdict of the jury and the judgment of the trial court were for the plaintiff, and the judgment was affirmed by the Supreme Court of Washington. As to the conflicting evidence, the Supreme Court of the United States simply said that under the circumstances it was not its province to weigh and pass upon it.

The trial court had refused to give a charge requested by the company on the matters of assumption of risk and of the effect of the Federal boiler inspection act. The provisions of section 2 of that act, and the instructions requested and those actually given to the jury, are quoted in the opinion delivered by Mr. Justice Day. It is said that the charge as given was more favorable to the company than the law requires. As to the alleged approval by the Federal inspectors of both kinds of button heads the court, which affirmed the judgment below, said:

The further contention is that the effect of this charge was to leave to the jury to determine the type of boiler construction, in respect to the use of the large button heads which are alleged to have made the engine unsafe to operate. And it is contended that there is testimony tending to show that the use of either the large or small kind of button heads was approved by the Federal department of boiler inspection. Attention is directed to the testimony of an expert witness, offered by the defendant for the purpose of showing that low water was the cause of the explosion, in which he spoke of the use of the button heads of the larger and also of the smaller or taperhead kind, and was asked whether the United States Government made certain requirements as to how boilers and engines should be constructed, to which he answered:

"No. Not as long as we had the proper factor of safety. \* \* \* They have a factor of safety, and the factor of safety is five on the shell of the boilers; that is, if we have a 200-pound pressure boiler it should stand up to a test of 1,000 pounds; five to one."

Asked whether the Government inspects engines and locomotives in general, he answered: "Yes; by the United States inspector," and that there was a standard to which locomotives must be built in order to pass inspection. Asked as to the type of the crown bolt permitted, he answered that either type is acceptable when properly applied. It is evident that this testimony, whatever might be its effect, is far from showing an approval by Government inspectors of the use of the large type of button head upon an oil-burning engine.

Nor can we agree with the contention of the plaintiff in error that so long as the large button head had not been disapproved by the Government inspector such fact is conclusive of the sufficiency of the type in use. We find nothing in the boiler inspection act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of the construction which has been found unsafe has not been disapproved by the Federal boiler inspector.

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EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FACTORY SWITCH—SAFETY APPLIANCE LAW—WORKMEN'S COMPENSATION ACT—*Kenna v. Calumet, H. & S. E. R. Co.*, *Supreme Court of Illinois (June 20, 1918)*, *120 Northeastern Reporter, page 259*.—The plaintiff, Kenna, was in the employ of the defendant company and brought action for damages for the loss of his hand resulting from an accident due to the unsafe condition of a coupler on a car operated by defendant and the negligence of the defendant's conductor, judgment being in the plaintiff's favor. Kenna was a switchman and while switching cars for defendant he was compelled to go between two cars because of a defective coupler. While there the conductor caused the cars to kick and plaintiff's hand was crushed. The defendant is a duly organized railroad company, operating over 5 miles of track which constitutes the switching system necessary to the business of the By-Products Coke Co. The defendant served only the By-Products Co., delivering cars to its plant and taking cars away. For this purpose it had connections with two belt line railways, the cars handled being sent from one State to another. As to a claim of the defendant that it is not a common carrier, the court said:

A railroad corporation, therefore, can not be organized for any other purpose than the transportation of goods and persons for the public. It can not be organized for the purpose of private transportation. When it engages in the business of transportation it does so only by virtue of its charter, by reason of the fact that it is authorized, as a common carrier, to engage in that business. It is the right of the public to use the road and demand service, and not the extent of the business, which determines its character.

The defendant also claimed that the case was subject to the conditions of the workmen's compensation act, though it is conceded that, where the Federal employer's liability act is applicable, it excludes the workmen's compensation act. As to the contention that the Federal safety appliance act also excludes the workmen's compensation act, the court said:

The safety appliance act is equally exclusive. In *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482 [Bul. 224, pp. 205-

208], it was held that a violation of the safety appliance act gave an injured employee a right of action even though he was not at the time of the injury engaged in interstate commerce.

It is argued that the workmen's compensation act does not conflict with or abrogate any of the provisions of the safety appliance act, but only changes the remedy. The safety appliance act by irresistible inference, as held by the Supreme Court of the United States, confers a private right of action for the death or injury of an employee caused by a violation of its terms. This right of action was to recover compensatory damages for the loss suffered. The workmen's compensation act would take away this right of action and confer instead a right to a sum fixed by statute without regard to damages in the particular cases except by reference to the wages which the employee was then earning in his particular employment. The workmen's compensation act substitutes, not a different remedy for the employee, but a different thing for him to recover.

Regarding the relation of the By-Products Coke Co. and the defendant corporation to the operation of the factory switch the court said:

A system of internal trackage constructed and operated by an industrial corporation to meet the necessities of its business in the process of manufacture may be regarded as a plant facility and does not make the corporation a common carrier. Where, however, the system is operated by an independent corporation organized as a common carrier, which, in addition to the service rendered in the industrial operation of the plant, also engages in the transportation in commerce of the product of the plant to customers and of material required by the plant in the conduct of its business from all shippers to the plant, such additional service is that of a common carrier. The fact that under its discretionary power over joint rates the Interstate Commerce Commission may have refused to allow the company to participate in through rates because such participation would create an unjust discrimination does not establish that the company is not a common carrier within the meaning of the safety appliance act.

The judgment of the lower court, awarding damages under the Federal statutes, was therefore affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INJURIES SUSTAINED IN CAMP CAR—*Philadelphia, Baltimore & Washington Railroad Co. v. Smith, Court of Appeals of Maryland (Feb. 27, 1918), 103 Atlantic Reporter, page 945.*—The defendant railroad company operated a branch line of its railroad from the town of Clayton, in the State of Delaware, to the town of Oxford, in the State of Maryland, over which it transported passengers and freight in interstate and intrastate commerce. The plaintiff, Smith, was employed by the defendant as a "carpenter laborer," in connection with a gang of bridge carpenters employed by the defendant in the repair of its bridges and abutments. This

gang worked over the entire line of the defendant. Plaintiff's duties required him to look after the camp car in which the gang ate, slept, and lived, and also to prepare the meals for himself and the other members of the gang. On December 23, 1915, the gang was engaged in repairing a bridge in Easton, Md., and the camp car was temporarily on a siding near by. The camp car had another car on either side of it. On the day of the accident the plaintiff was engaged in preparing the dinner for the gang, when, without warning to the plaintiff, a locomotive ran into the car to which the camp car was coupled with such force that plaintiff was knocked down and struck his head on the door of a clothes press sustaining the injuries for which he sued under the Federal statute to recover damages. From a judgment in his favor, the defendant appealed, contending that the case did not come under the Federal employer's liability act. In discussing this the court used the following language:

If the plaintiff had, through the negligence of the defendant, sustained the injuries complained of while he and the other members of the gang were being transported in the camp car over the defendant's line from a point in Delaware to a point in Maryland to repair a bridge in the latter State, his right to recover under the Federal statute could not be questioned. How, then, can the fact that the camp car was temporarily located on a siding of the defendant in Maryland, while the carpenters were repairing a bridge there, before being moved to some other point on the line, perhaps in Delaware, for the same purpose, alter the relations of the work in which the plaintiff was employed in interstate commerce? The camp car, plaintiff, and carpenters were, at the time of the injury, employed by the defendant in the repair of its road, which was essentially and directly related to the interstate commerce in which the defendant was engaged, and we see no good reason why the plaintiff, under the circumstances, should be denied the protection of the act relied on.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—PLEADING—*Breen v. Iowa Cent. Ry. Co.*, *Supreme Court of Iowa (Sept. 30, 1918)*, *168 Northwestern Reporter, page 901*.—Myles Kellehen was employed as an engineer by the defendant. He was seriously injured September 29, 1908, by the breaking of a side bar while his locomotive was in motion, and for the injuries received, his assignee, one Breen, brought suit for damages under the State law and recovered. In the final trial, on the cross-examination, information was brought out tending to show that the parties were at the time of the injury engaged in interstate commerce. Three trials were had, but at no time did the defendant plead that the parties were engaged in interstate commerce and that the action should be brought under the Federal employers' liability act.

At the last trial, after all the testimony and evidence was in, the defendant company sought to amend its answer to permit this defense, which the trial court would not allow. The supreme court, in its opinion sustaining this ruling, said in part:

The situation in a case like this is peculiar, for there are two possible remedies for the same injury, depending solely on the relations of the parties to interstate commerce. Both remedies are administered by the same court, and it is important that these remedies shall be so administered that one may not be made a pitfall for, or played by an ingenious counsel against, the other; if, in an action under the State law, the defendant does not raise the issue that the parties were engaged in interstate commerce at the time, rulings on the admissibility of evidence are to be made as though that issue was not involved. If, however, facts bringing the alleged injury within the Federal employers' liability act are pleaded, then, of course, such issue is to be taken into account in limiting the range of cross-examination.

Nor might defendant show affirmatively, as a defense against the claim for damages alleged in the petition, in the absence of so pleading, that the engineer and the company were engaged in interstate commerce at the time of the injury. We so ruled in *Bradbury v. Railway*, 149 Iowa 51, 128 N. W. 1, and nothing to the contrary is to be found in the decisions of the Supreme Court of the United States.

The trial court did not err in sustaining objection to the proffered testimony.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING OLD RAILS—FELLOW SERVANT—*Perez v. Union Pacific R. Co.*, Supreme Court of Utah (Apr. 20, 1918), 173 Pacific Reporter, page 236.—Perez was engaged as a laborer by the defendant to remove old rails, which had been detached from the ties by another gang of workmen, from the right of way to a scrap pile. Perez and seven other men worked together. It was their custom to have four men at each end of the rail grasp it in their hands and raise or lower it to or from a push car on which the rails were conveyed to the tool house. In the present case the four men on the opposite end of the rail from which Perez and his companions were working, dropped their end without giving the usual signal, causing the end on which Perez was holding to fall and strike his leg, inflicting a painful and perhaps serious injury. It is conceded that the injury was caused by the negligence of the men on the opposite end of the rail from Perez. Defendant claims this negligence is not attributable to it, and on this ground secured judgment in the court below, whereupon the plaintiff appealed. The injury was received in the State of Wyoming, so that the

law of the jurisdiction was applicable. The supreme court affirmed the judgment of the court below, saying in part:

The common law as to fellow servants and the liability of their employer for an injury caused to one employee by the negligence of another is in force in the State of Wyoming, and is controlling in this case so far as that point is concerned. The 8 men handling the rail above referred to, including the plaintiff, were undoubtedly fellow servants, and under the law referred to the defendant is not liable for the injury which the plaintiff sustained. If it is liable at all, it must be by virtue of some other law applicable to the facts of this particular case.

It is contended by appellant, Perez, that this case comes within the provisions of the Federal employers' liability act, which makes radical changes in the common law, especially as to the fellow-servant doctrine, which the act entirely abrogates and repeals.

In the case at bar the concrete questions at this time are: Was the plaintiff, at the time he was injured, employed in the doing of anything to facilitate the movement of commerce from one State to another? Was the instrumentality upon which he was employed calculated, in any manner, directly to contribute to or be in aid of commerce between two or more States? In the light of adjudicated cases construing the act of Congress, as we read them, these questions must be answered in the negative. If the plaintiff had been engaged in repairing a track admitted or proven to be an interstate track, and what he was doing tended to facilitate transportation from one State to another, in our judgment, he would have been engaged in interstate commerce. But here he was not engaged in repairing the track, rendering it capable of carrying commerce. If he and his fellow workmen carrying the rail had not removed it from the side of the track where it had been laid by those repairing the track, transportation on the road, so far as the record discloses, would have been just as effectual and commerce could have been carried on without interruption.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TIMEKEEPER—*Crecelius v. Chicago, M. & St. P. Ry. Co.*, *Supreme Court of Missouri (May 17, 1918)*, 205 *Southwestern Reporter*, page 181.—Walter Crecelius was employed as a timekeeper by the defendant. While crossing the company's tracks he was run into and killed. His administrator brought action and recovered judgment under the Federal employers' liability act. Further facts of the case are stated in the opinion of the court which is in part as follows:

Deceased, on the day he was killed, was working as a timekeeper for a gang of men engaged in repairing the main track of an interstate railroad, and in constructing a temporary track to be used while the grade of the main track was being lowered. After work hours for the gang of laborers, but at a time when the duties of the deceased required him to make out and send the roadmaster of the de-

defendant a daily telegraphic report of the number of men engaged and the nature of the work done by the gang of which deceased was time-keeper, and after he had prepared his report, he was killed by an intrastate work train, while he was crossing the tracks of defendant on his way to the telegraph office to wire in said report.

We conclude therefore that at the time deceased met his death he was engaged in the performance of duties which were so closely connected with interstate commerce as to constitute a part thereof, within the purview of the Federal employers' liability act.

Though sustaining the court below in regard to the nature of the employment, the judgment was reversed and a new trial ordered because of improper instructions to the jury by the trial judge.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WORK ON ROADBED—*Ohio Valley Electric Ry. Co. v. Brumfield's Admr.*, *Court of Appeals of Kentucky* (May 28, 1918), 203 *Southwestern Reporter*, page 541.—James Brumfield brought this action to recover for personal injuries received while in the employ of the Ohio Valley Electric Ry. Co. He died before this appeal was heard and his administrator prosecuted the action. Action was brought under the Federal employers' liability act. Brumfield had been engaged by the railway company to gather and move a lot of old and worthless ties from where they had been thrown along the right of way to a fill where he and his companions were to dump them. There had once been a trestle where the fill was now located. The ties were used in strengthening and reinforcing the fill. While engaged in this work Brumfield was injured, and for these injuries secured judgment in the trial court. The railway company operated a line from Ashland, Ky., to Huntington, W. Va. The appellant railway company contends that the work Brumfield was doing was not such as to be termed interstate commerce within the meaning of the Federal employers' liability act. In the course of the opinion of the court, sustaining the judgment of the court below, Justice Carroll said:

We think there can be no doubt about the proposition that, if these old ties were being thrown over the embankment for the purpose of strengthening or making it safer for use in interstate transportation, Brumfield, when injured, was engaged in such transportation, or in work so closely related to it as to be practically a part of it. It is not indispensable that the employee should be engaged in interstate transportation in the sense that he was assisting in the operation of a train engaged in such commerce, or in the repair of trains, fixtures, appliances, or tracks the repair of which was at the time indispensable or necessary in the conduct of the interstate transportation business. The repair of an embankment over which trains used in interstate transportation run is just as much a part of interstate transportation as are the rails and ties and cars themselves.

**EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—BURDEN OF PROOF—STATE LAW.**—*New Orleans & N. E. R. Co. et al. v. Harris, Supreme Court of the United States (June 3, 1918), 38 Supreme Court Reporter, page 535.*—This case was before the Supreme Court on a writ of error to the Supreme Court of the State of Mississippi. The latter court had affirmed without opinion a judgment in behalf of a plaintiff suing on account of the accidental death of one Van Harris, a brakeman in the employ of the railroad company. The error claimed by the company on this appeal was mainly in regard to instructions given by the judge in the trial court. In one paragraph the judge instructed the jury that under the statutes of Mississippi it was not necessary for the plaintiff to prove negligence, proof of injury being "prima facie evidence of the want of skill and care." (Mississippi Code, sec. 1985, amended by ch. 215, Acts of 1912.) The effect of this provision is to put the burden of proof upon the defendant company to show "by a preponderance of the evidence that its servants were not guilty of negligence."

The Supreme Court reversed the decisions of the State courts on the ground that such a shifting of the burden of proof under the Federal statute was not within the power of the State. Mr. Justice McReynolds, who delivered the opinion of the court, in speaking on this point, said:

The Federal courts have long held that where a suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. The Nitro-Glycerine Case, 15 Wall. 524, 537; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 487, 26 Sup. Ct. 303, 50 L. Ed. 564; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 85, 34 Sup. Ct. 566, 58 L. Ed. 860. In proceedings brought under the Federal employers' liability act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts, and negligence is essential to recovery. [Cases cited.]

The established principles and our holdings in *Central Vermont Ry. v. White*, 238 U. S. 507, 511, 512, 35 Sup. Ct. 865 [Bul. 189, p. 85], we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several States.

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**EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—DEFECTS OF TIES AND BALLASTING—***Nelson v. Southern Ry. Co., Supreme Court of the United States (Mar. 4, 1918), 38 Supreme Court Reporter, page 233.*—Philip Nelson brought action against the railway company named, and a judgment in his favor was reversed by the Supreme Court of North Carolina. The dispute was as to whether the state of facts disclosed as causing the injury



constituted negligence for which the company was liable. The United States Supreme Court agreed with the State supreme court in holding that it did not, the brief opinion by Mr. Justice Brandeis stating the facts and the conclusion in the following language:

Nelson, a civil engineer who had been in the employ of the Southern Railway 11 years, was directed to make a survey in one of its yards. While doing so he walked on the main track between the rails where he had seen others walk. As he stepped upon a crosstie, a small V-shaped piece of it one and a half inches by six being rotten, slivered off under his weight. His foot slipped down between the ties where the ballast was five or six inches below the top of the tie; and stumbling, he fell and dislocated his knee. The defect in the tie could have been discovered by sounding with an iron rod and the standard of maintenance of roadbed prescribed by the railway was to ballast to the top of the ties. But neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of a character to impair safety in operation. Plaintiff knew that there were always some ties on the line which were partly decayed, and also that the ballast was occasionally below the top of the ties.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—WARNING OF LOW BRIDGE—SUFFICIENCY OF TELLTALES—*Marland v. Philadelphia & R. Ry. Co., United States Circuit Court of Appeals, Third Circuit (Nov. 7, 1917), 246 Federal Reporter, page 91.*—The body of William Marland, a brakeman, was found on a pile of coal in the tender of his train, with the skull crushed. His widow, Catherine Marland, brought suit against his employer, the company named, alleging that the employee struck a low bridge, and that the company had not fulfilled its duty in warning him of the danger from this cause. At the trial the evidence seemed to eliminate four of five bridges under which he passed, three because they were so high that he could not have come in contact with them, and the fourth because he could not have reached the position on the train where he was found, at the time this bridge was passed. It appeared that the fifth bridge was composed of three parts, and that the sides, which would first be seen by one approaching along the railroad track, had a safe clearance, while the center was some feet lower underneath, but, being blackened by smoke, could not be seen to be thus different. The court therefore dismissed the objection of the company to the charge to the jury, as to whether or not the supplying of telltales, without further warning as to the exact conditions, was a sufficient compliance with the duty of the road, and affirmed the judgment of the trial court, which had been for the plaintiff in

accordance with the verdict. Judge Buffington for the court said in part:

The question of notice, we think, was one especially for the jury. The bridge was, as we have said, of so peculiar and unique a character as to create latent and unlooked-for dangers to trainmen. It is true the railroad had provided telltales; but for the court to have instructed the jury that these recognized standard safeguards in and of themselves were a complete fulfillment of the duty of notice would have been error. The questions of notice given by the defendant and of knowledge acquired in any way by the deceased of such dangers was submitted to the consideration of the jury in proper terms. When the real atmosphere of the trial is sensed, the case was tried and determined upon two questions of fact: First, whether the deceased was struck by an overhanging bridge which had a latent and unusual danger; and, second, was the deceased carried under such bridge without notice or knowledge of its latent dangers?

Holding that the trial court had properly answered these questions in the affirmative, he affirmed its judgment.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—WORKMEN'S COMPENSATION—EMPLOYEES ENGAGED IN INTERSTATE AND INTRASTATE COMMERCE—*Spokane & I. E. Ry. Co. et al. v. Wilson et al.*, *Supreme Court of Washington (Nov. 19, 1918)*, *176 Pacific Reporter, page 34.*—This is an action against the Industrial Insurance Commission by three electric railway companies that do an intrastate and also an interstate business. Three employees were injured and awards were allowed against each of the companies. The railway companies claimed that the commission had no jurisdiction inasmuch as the companies are engaged in interstate commerce and the Federal employers' liability act must control.

The State compensation law had been amended in 1917 so as to exclude from its operation employees of common carriers engaged in interstate and foreign commerce, as well as in intrastate commerce, the former being, of course, entitled to recover under the Federal liability law, if the conditions warrant, while the latter were given the right to sue under like conditions under a State law of identical provisions. The supreme court of the State reversed the judgment of the lower court sustaining the award and directed a decree to be entered restraining the collection of the award.

Its opinion, delivered by Chief Justice Main, is in part as follows:

From the statement of the business engaged in by the three companies involved in these suits, it is apparent that a great number of employees are engaged in work so impossible of segregation, as to whether it is at any given time interstate or intrastate, that the question of whether they came within the State law or the Federal law is impossible of determination.

In attempting to remedy this situation, and at the same time not to remit employees to the uncertainty of the common law liability, the amendment of 1917 was enacted, and, as we view it, that act, instead of attempting to segregate employees into two classes—those engaged in interstate and those engaged in intrastate work—the legislature, in effect, said that it matters not whether the employees are engaged in interstate or intrastate work so long as the company for which they were working was a railroad actually engaged to some extent in doing an interstate, foreign, or intrastate commerce. In other words, the character of the business of the railroad company determines the status of the employees, and if a portion of the railroad company's business is interstate the employees engaged in its maintenance and operation, or in the maintenance and construction of its equipment, should not come within the operation of the State law, but that all such employees could recover in the State courts, not under the common law liability, but under the liability imposed under the amendment, which is the same liability fixed by the Federal employers' liability act.

Under this interpretation of the act, the employee is the beneficiary of a clear definition of his status.

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EMPLOYERS' LIABILITY—RELEASE—FRAUD—*Carr v. Sacramento Clay Products Co.*, District Court of Appeal, Third District, California (Jan. 31, 1918), 170 Pacific Reporter, page 446.—E. G. Carr was injured on July 19, 1913, and in this appeal from the result of the trial of his suit for damages, in which he was awarded damages in the sum of \$7,500, it was not disputed that the evidence was sufficient to justify the finding of negligence as charged, or even that of gross negligence which the court made; nor was there any claim of contributory negligence, or of excessiveness of the damages awarded. The facts on which the effort to overturn the judgment was based were the giving of a release by Carr on August 29, 1913, and his delay in taking action to rescind this release, which it was claimed, being unreasonable, constituted laches and was fatal to his further recovery. There was evidence to warrant a finding that he signed the release, which was given in consideration of the payment of \$217, under the belief, fostered by the representative of the employer, that all that he could recover was 65 per cent of his wages for 12 weeks, and \$100 hospital, medical, and surgical bills, amounting in all to the sum paid him. He was not at that time aware that the company had not elected to be governed by the provisions of the compensation act of the State, and there was much evidence as to his weak physical condition caused by the injury, and also of a mental deficiency bordering on insanity. Testimony introduced on behalf of the company tended to prove the contrary, but since the jury's verdict had been for the employee, the court was under the necessity of considering the evidence in his favor as true. The court held that

fraud might be imputed to the company, since a matter of fact, namely, whether the company had accepted the compensation law, was involved, as well as matters of law. The delay in taking action to rescind the release until the following May was held not to be fatal, since the advice of competent counsel, that in view of the release it would be useless to attempt further recovery, had been followed. The judgment was accordingly affirmed.

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EMPLOYERS' LIABILITY—RELEASE—FRAUD—*Morstad v. Atchison, T. & S. F. Ry. Co., Supreme Court of New Mexico (Feb. 23, 1918), 170 Pacific Reporter, page 886.*—Andrew Morstad was in the employ of the railway company named, and was engaged with a fellow servant, Knight, in unloading bridge timbers from a car standing upon a trestle, using cant hooks for the purpose. They had raised a timber nearly to the point where it would turn over and fall from the car when Knight's cant hook slipped from the timber. This caused the whole weight to fall against the cant hook which Morstad held, and threw him off the trestle to the ground, causing injuries to his knee and leg, for which he sought damages in this suit. The negligence of the employer alleged was the hiring of an incompetent servant, Knight, who, because of his inexperience, held the handle of the cant hook at an improper angle to the timber, and failed to secure a good hold. The company denied this negligence, and also pleaded the execution by the employee of a release in settlement of his claim. He asserted in reply that he was not in a condition to comprehend what he was doing when he signed the document, that he did not read it or know the contents of it, and believed that it was an application for transportation to the company's hospital, and that the foreman so represented it to him. The plaintiff recovered a verdict for \$2,950, on which judgment was entered. On this appeal both the question of negligence and of the validity of the release were decided against the employee, and the judgment was reversed. The release was signed while the employee was in a bunk, soon after the accident. The foreman presented the paper, saying, "Here is something you will have to sign before you go to the hospital." He started to read it, but testified that he did not do so because he did not have his glasses and because he was in pain, and his leg hurt when he sat up, so he signed the paper without further inquiry. The court failed to find any reason to believe that he was physically or mentally incompetent at the time, since he testified clearly as to all the circumstances surrounding the signing; and, emphasizing the necessity that written contracts should be binding in all but exceptional cases, it held that the plaintiff must abide by the results of his bargain.

**EMPLOYERS' LIABILITY—RELEASE—REPUDIATION—TENDER**—*Swan v. Great Northern Ry. Co., Supreme Court of North Dakota (June 10, 1918), 168 Northwestern Reporter, page 657.*—This is a personal-injury case, in which defendant appeals from a judgment for \$1,284. As a section hand in the employ of the defendant, plaintiff was on a gasoline motor which, running into an open switch, caused him to be thrown to the ground and severely injured. Some two months after the injury, a settlement was made with Swan, and he signed a release for \$375, which sum he received and retained. It was claimed that in part consideration for the release the company contracted to retain plaintiff in its services at some easy job but that in six weeks it discharged him without cause. The defendant company denied the promise to employ, but the court ruled that this was proper matter to submit to the jury, and, if fraud was found, the law would afford a remedy. However, the damage suit could not be maintained without a restoration of the sum paid in settlement, which had been retained. The judgment of the lower court was therefore reversed, Judge Christenson saying in the course of the opinion delivered by him:

It is undisputed that at the time plaintiff received the money he executed the written release. It is further undisputed that this release was carefully read over to the plaintiff before he signed it. He was not deceived as to its contents, or its purpose. He knew that its purpose and effect was to release and discharge his right of action against the defendant. He signed the very instrument which he intended to sign. If his signature to the release was obtained by fraud and deceit, the law affords him ample remedy. However, he has no right to retain that which he received as consideration, and repudiate the remainder of the contract.

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**EMPLOYERS' LIABILITY—SAFE APPLIANCES—NEGLIGENCE—QUALITY OF DYNAMITE SUPPLIED**—*Terleski v. Carr Coal Mining & Mfg. Co., Supreme Court of Kansas (May 11, 1918), 173 Pacific Reporter, page 8.*—Terleski was a miner in the employ of the defendant. It was the custom of the defendant company to keep on hand a supply of dynamite which was supplied to and purchased by the miners as they needed it. Plaintiff, who had several years of mining experience, had always used the 40 per cent grade of dynamite and was familiar with the handling of this grade. He went to defendant's storekeeper and asked for the 40 per cent grade, and the storekeeper knowingly gave him the 60 per cent grade, which is more sensitive than the 40 per cent grade. The plaintiff, while tamping the dynamite in a drill hole which he had made, was injured by the premature explosion of the dynamite, causing him, among other injuries, to lose his eyesight. The court awarded plaintiff damages on the ground that the evidence that the defendant gave plaintiff a higher grade of dynamite

than was asked for was sufficient to sustain a charge of negligence on the part of the defendant. In affirming this judgment, the supreme court said in part:

The evidence in behalf of the defendant was contradictory of that offered by the plaintiff, but taking all the testimony, direct and circumstantial, it can not be said the findings and verdict are without support. The jury found that the defendant had been handling other grades of dynamite than 40 per cent, and had actually sold some of the 60 per cent; that the stick sold to the plaintiff was taken from a box containing 60 per cent grade and was of higher grade than 40 per cent; and that the one who sold the dynamite to the plaintiff had reason to believe it was more than 40 per cent in strength.

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EMPLOYERS' LIABILITY—SAFE APPLIANCES—WRONGFUL USE—*Ten Mile Lumber Co. v. Garner, Supreme Court of Mississippi (June 3, 1918), 78 Southern Reporter, page 776.*—Garner was in the employ of the defendant lumber company and was engaged with a track and bridge crew. The crew had use for a tool called a maul. While they were working another crew came and borrowed their maul and left a damaged one which could no longer be used. The crew of the plaintiff had been using a cant hook which had in use become so bent as to become almost useless. Instead of sending the cant hook to the blacksmith, who was the proper person to make repairs, the plaintiff and his coworkers attempted to repair the cant hook themselves by laying it upon the maul and striking it with an ax. While doing this a piece of metal was struck out of the maul and came in contact with Garner's eye, causing an injury for which he sued. Plaintiff recovered damages and defendant appealed. The judgment was reversed, the following being quoted from the opinion of the court:

It appears that the defect was not in the ax or in the cant hook, but that it was in the maul, and that the maul was not being used for the purpose which it was assigned for use by the company, and that the ax was not a proper instrument to use in repairing a peavey, or cant hook. This case is governed by the case of *Illinois Central R. R. Co. v. Daniels*, 19 South. 830, where the court laid down the following rule:

"An employer is not liable in damages to one of its employees where the injury resulted from putting one of the appliances supplied to a use for which it was not intended in an improper manner."

It further appears that whatever defect there was in the cant hook was caused by its being bent in the course of the work, and it does not appear that there was any notice of this defect brought to the attention of the master or any neglect on the part of the master in having it properly repaired. The plaintiff, having undertaken to repair this tool under these circumstances, was not entitled to recover from the master.

**EMPLOYERS' LIABILITY—SAFE PLACE—ASSUMPTION OF RISK—INJURY TO IGNORANT SERVANT BY ELECTRICAL SHOCK—***Kimberlin v. Southwestern Bell Telephone Co., Kansas City Court of Appeals, Missouri (Nov. 11, 1918), 206 Southwestern Reporter, page 430.*—Kimberlin was by trade a plasterer and was in the habit, during slack time in his work, of taking odd jobs of various kinds. A dangerous and poorly insulated electric wire belonging to the defendant company became broken so that a portion fell across an electric light company's highly charged wire and thence to the ground. Hutton, the company's head lineman, noting the trouble in the connections telephoned over to Grant City where the plaintiff lived and where the broken wire was. Upon being informed of the break and its general locality he asked the lady operator to get a man to fix it and she gave the job to Kimberlin. Kimberlin went to the place where the wire was broken and coiled on the sidewalk. When he grasped the wire he received a severe shock and was knocked unconscious, receiving injuries for which he later recovered damages. The court of appeals affirmed the judgment of the trial court, saying in part:

Now, if the plaintiff was ignorant of the danger in the place where he was sent and such danger was not so glaringly apparent that, as a matter of law, he should have known of it, and the defendant, with knowledge of the dangerous situation, negligently sent the plaintiff to the place without warning him, and plaintiff was injured, then defendant can not escape liability either upon the ground that the doctrine of a safe place to work is inapplicable or that the defendant assumed the risk.

The evidence tends to show negligence on the part of the defendant, both in the maintenance of its wires in dangerous proximity to the electric wires and in sending, without warning, one who was without knowledge of the danger incident to the place.

Hence, we can not say there was no evidence of negligence on the part of the defendant nor that plaintiff, as a matter of law, assumed the risk. The rule in Missouri is that the servant does not assume to bear the consequences of his employer's negligence.

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**EMPLOYERS' LIABILITY—SAFE PLACE—ASSURANCE OF SAFETY—***Chess & Wymond Co. v. Wallis, Supreme Court of Arkansas (Apr. 29, 1918), 203 Southwestern Reporter, page 274.*—On May 27, 1914, Wallis was engaged in cutting stave bolts for the Chess & Wymond Co. He had been directed to saw a log lying under a hanging limb by one Norman, his foreman. Wallis called the foreman's attention to the hanging limb but was assured by the foreman that there was no danger of the limb falling. Wallis commenced his task and while so employed the limb fell, severely injuring him. Action is brought by Wallis's father as his next friend. The Chess & Wymond Co. contend that the danger was open and obvious and that the foreman could have had no better knowledge than Wallis as to the danger.

The case was submitted to the jury and a verdict rendered in favor of plaintiff, Wallis. Justice Smith, rendering the opinion of the court on appeal, said in part:

It is argued that the danger was open and obvious, and that Norman could not have had any more knowledge of the danger than the appellee himself had, for according to the appellee's testimony the presence of the suspended limb was known alike both to himself and Norman. But it is just here that we think the jury question arises. The master is presumed to know the hazards of the employment, and the servant has a right to rely on the assurance of safety, unless the danger is so open and obvious that its existence is both known to and appreciated by the servant. The rule is stated in 4 Labatt on Master and Servant (2d Ed.) page 3965, as follows:

"But it has been held that the assurance of safety given by the master may be of such a character as to take away all question of assumption of risk, even if the risk is known to the servant. The same effect is reached in a number of cases which hold that the servant may recover if he is injured while relying upon an assurance of safety, unless the danger was so great and imminent that a reasonably prudent man would not have incurred it."

We can not say that the jury did not have the right to take into account appellee's age and experience as contrasted with that of his foreman, and to find therefrom that appellee had a right to rely upon the assurance given, and that he was not guilty of contributory negligence, and did not assume the risk.

The judgment of the court below was therefore affirmed.

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EMPLOYERS' LIABILITY—SAFE PLACE—GUARDS FOR DANGEROUS MACHINERY—*Scherer v. Danziger, Supreme Court of California (May 8, 1918), 173 Pacific Reporter, page 85.*—Scherer was employed by Danziger on the latter's ranch as an engineer to operate a gasoline engine and two pumps. Scherer made some suggestions as to alterations designed to make the conduct of his duties more safe. The alterations were made with the approval of the defendant, Danziger, and included a sheet-iron cover or guard for some exposed cogwheels on one of the pumps. The defendant's foreman, Moebius, who was plaintiff's superior, objected to the guard over the cogwheels and ordered it removed, which order the plaintiff obeyed under protest.

The following day, as Scherer was passing the exposed cogwheels, a rag which he was carrying in his hand got caught in the wheels, drawing in his hand and injuring it, for which he recovered damages. The opinion of the court on appeal, affirming the judgment of the court below, is in part as follows:

This evidence fully warranted the jury in finding the defendant had failed in his duty to use ordinary care to furnish his employee a reasonably safe place in which to work. The plaintiff was not obliged to prove that the defendant had personal knowledge



of the removal of the cover. Moebius was in full control of the plant, and notice to him was, of course, notice to his principal. There is no force in the claim that there would have been no element of danger in the situation if the location of the railing (which had been around the cogwheels) had not theretofore been changed in accordance with the plaintiff's own suggestions. The alterations had the approval of the defendant, and, if carried out according to plaintiff's ideas, would have included the covering of the cogwheels. The dangerous condition was created, not by the adoption of the plaintiff's plan, but by the elimination of an important part of that plan.

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EMPLOYERS' LIABILITY—SAFE PLACE—NECESSITY TO GIVE WARNING OF IMPENDING BLASTS IN MINES—*United Verde Copper Co. v. Kuchan, United States Circuit Court of Appeals, Ninth Circuit (June 3, 1918), 253 Federal Reporter, page 425.*—Kuchan was employed as a miner in the copper company's mine. While passing from a place on the 700-foot level, where he was put to work, to another place to eat his lunch, a heavy blast was discharged without warning, resulting in severe and permanent injuries to Kuchan, for which he secured a judgment for damages. The law of Arizona, where the mine is located, expressly requires a warning to be given before discharging blasts, but does not state who should give the warning, and it is the contention of the copper company that the duty rested upon the servant who discharged the blast and not upon the company. After reviewing the provision in the State constitution abrogating the fellow-servant rule the court of appeals, in affirming the judgment of the court below, used in part the following language:

It follows that, if it be conceded that the statute fails to place the duty to give the warning upon the mining company, nevertheless the constitution of the State, construed in the light of the general law, makes the company responsible for the neglect of such duty, and the same result is reached as though the statute had directly placed the duty of giving the warning upon the mining company. The responsibility of the mining company arises under the general law requiring all employers to use ordinary care to furnish a reasonably safe place within which their employees are required to work.

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EMPLOYERS' LIABILITY—SAFE PLACE—USE OF GUARD—NEGLIGENCE—*Kancevich v. Cudahy Packing Co., Supreme Court of Iowa (Oct. 25, 1918), 169 Northwestern Reporter, page 186.*—Kancevich was in the employ of the defendant and it was his duty to load ice from a platform into railroad cars. The platform was so constructed that it was level with the tops of the cars when they stood alongside. Plaintiff was working on one occasion when the cars had been removed from alongside of the platform and in doing his work he

slipped on some ice and fell to the ground. He claims he was not given a safe place to work in because the platform had no rail, although the use of a rail would have rendered the platform useless, and because ice had accumulated on the platform. A board had been provided to put in place when the cars were away from the platform. Plaintiff had put up this board on previous occasions and knew of its use. In affirming the judgment of the lower court in favor of the defendant the court said:

Moreover, the mere putting up of a board that was at hand, which plaintiff knew how to put up, and had seen put up in the past, even if he had not himself done so, would have made as effective a guard as was needed for his safety. His failure to use this means of self-protection will alone dispose of the complaint of the absence of a permanent guard or rail.

The proximate cause of this injury was a slip on ice. There was no ice when he went to work. It came into existence because some ice would necessarily fall upon the platform as plaintiff worked, and because of his work. He slipped because of ice he knew must accumulate because of the work, work that he had been doing for more than a year. He was hurt because his bodily movements did not take into consideration what he knew to be a necessary incident of his work.

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EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—VICE PRINCIPAL.—*Cooper v. Penn Bridge Co., Court of Appeals, District of Columbia (Mar. 4, 1918), 46 Washington Law Reporter, page 164.*—The bridge company undertook to replace an underhung bridge span on the Pennsylvania Avenue Bridge with a new overhung span. One Hoffman was sent as foreman to oversee the job. Hoffman had a man under him by the name of Hoover who acted as foreman in his absence and who really directed the work. Hoover directed one Galloway to work on the top of the underhung span, which had been removed to a barge and at the bottom of which other men were working. Galloway went to get a maul, but found only one in the tool box and the handle on this one was loose. Galloway protested that the maul was dangerous and might fall apart. Hoover nevertheless directed Galloway to use it, as there was no other to be had. While using this defective maul the head fell off and struck Cooper, who had been working below, upon the head, severely injuring him, for which injuries Cooper brought action. In reversing the judgment of the lower court in favor of the bridge company this court used in part the following language:

It of course is not denied that it was defendant's duty to provide for the plaintiff a reasonably safe place in which to work, but defendant contends that this duty was performed when proper mauls and proper handles were furnished the men. While there is

some dispute under the evidence as to whether wedges for the handles were available, we do not consider this question material under our view of the case, for, though it may be conceded that where an employer furnished such a simple tool as a hammer or maul, he is not expected to superintend its use, and that he is not responsible for minor or simple repairs if he has furnished proper materials therefor, there is evidence in the present case that the master, through its representative Hoover, deliberately directed and thereby became responsible for the use of a defectively dangerous tool. While the plaintiff assumed the risk "normally and necessarily incident to the occupation" in which he was engaged, it is not to be assumed that his employer needlessly would subject him to a risk of an altogether different sort.

This is not a case where a simple tool has been furnished an employee and that employee, by carelessly failing to make a simple repair with material at hand, has injured a fellow employee, but rather it is a case where an employer has deliberately directed the use of a defective tool by one employee to the injury of another and innocent employee.

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EMPLOYERS' LIABILITY—UNDERTAKING DANGEROUS WORK—NEGLIGENCE TO BE PLEADED.—*Manwell v. Durst Bros., Supreme Court of California (Aug. 14, 1918), 174 Pacific Reporter, page 881.*—The defendant owned and operated a ranch on which he raised a large crop of hops. To pick the hops he employed about 2,500 persons of all ages, both sexes, and many nationalities. The sanitary conditions were bad and the pickers considered that they were underpaid. They appointed a committee of 12 who went to Ralph Durst, defendant, and demanded that the sanitary conditions be improved and that the pickers be given a higher wage. Durst promised to improve the sanitary conditions but refused the higher wage. The employees were not satisfied with these promises. Thereupon Durst struck Ford, the spokesman of the committee, in the face with his gloves and told him that he was discharged and that he should get off the premises. The committee felt they were affronted. Durst attempted to have a peace officer arrest Ford, but the other employees aided Ford in resisting the attempt. The employees then threatened to go on a strike and called a meeting, which about 1,000 attended. Speeches were made and the employees became incensed and excited. Durst employed Manwell to accompany him and the sheriff and certain deputy sheriffs to this meeting of the employees. Their purpose was to clear the premises of the strikers. Upon arriving on the scene Durst and his party were met by a mob of the employees and Manwell was shot by one of the employees and killed. His widow brought suit for \$150,000 damages on the ground that Manwell was employed for hazardous work and that Durst negligently failed to inform him of the risk involved.

Plaintiff's action was dismissed on the ground that no proper case against the defendant had been stated in the complaint. Chief Justice Angellotti, in rendering the opinion of the court, affirming the judgment of the court below, said in part:

Of course, allegation of negligence was essential to the statement of a cause of action. The complaint is not assisted in this respect by the general allegation contained in paragraph 5 that "the death of said Edmund T. Manwell, on said 3d day of August, 1913, was caused by the gross negligence of the defendants." While it is true, under the rule in force in this State, and in most jurisdictions, that negligence may be charged in general terms, that rule simply means, as has been stated many times, that, "what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." And it must appear from the facts averred that the negligence caused or contributed to the injury.

Regarding the implication that Durst, in employing Manwell, concealed from him the hazardous nature of the employment, the court said:

Indeed, in so far as the complaint shows anything in this regard, it indicates from the very terms of the employment notice to Manwell of the possible danger. He was employed to accompany Durst (quoting from the complaint) "and the sheriff and certain deputy sheriffs \* \* \* to the said meeting of said employees," then and there to act in aid and assistance of the defendants "in any matter which should then and there arise," and he went with defendant and the sheriff and five deputy sheriffs. Many necessary employments are notoriously hazardous in the very nature of things, and certainly it is not the law that the mere fact of employing one to render such service constitutes negligence. Of course, in such case the employer must use what is reasonable care under the circumstances to protect his employee from injury in the rendition of his services; but there is no allegation of any omission in this regard.

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EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—ALTERNATIVE ACTIONS—CONSTITUTIONALITY OF STATUTE—*Philps v. Guy Drilling Co., Supreme Court of Louisiana (May 27, 1918), 79 Southern Reporter, page 549.*—This action was brought by Margaret Philps against the defendant for damages for the death of her son while he was in the employ of defendant, or, in the alternative, for compensation under the State compensation act. The son was killed within 30 days after his employment by defendant. Plaintiff claimed that the compensation act is unconstitutional in so far as it deprives an employee or his dependent of any other remedy, because the object or purpose of the law is not expressed in its title, as required by article 31 of the constitution. Therefore plaintiff asked for damages under article 2315 of the civil code. The lower court held that the act in question was constitutional and granted defendant a nonsuit because plaintiff

had not conclusively shown her dependency. Judge O'Niell, in giving the opinion of the court, reversing the nonsuit and ordering a new trial, said:

The decision of the question of constitutionality of the act No. 20 of 1914 [Bul. 203, p. 545] is sustained by the ruling of this court in *Whittington v. Louisiana Sawmill Co.*, 76 So. 754. The decision in that case was that the title of the act No. 20 of 1914 expressed plainly enough the object or purpose of limiting the rights and remedies of an injured employee, and the rights and remedies of dependents or the representatives of a deceased employee, to the schedule of compensation established, and to the liability of the employer, as prescribed by the statute. Hence it goes without saying that an act prescribing the liability of an employer to make compensation for injuries received by an employee is an act limiting the rights and remedies of an employee, or his representatives, for injuries received by him.

The case of *Woodruff v. Producers' Oil Co.*, 76 So. 803 (Bul. 246, p. 224), which had declared the act unconstitutional in so far as it prevented an action for damages where the injury occurred within 30 days after the beginning of the contract of employment because of an apparent inconsistency between two of the act's subsections, was considered by the court and the following opinion rendered:

We find now, by comparison of the two paragraphs or subsections, giving every word its plain and only meaning, that there is no inconsistency between them.

The decision in *Woodruff v. Producers' Oil Co.* being founded upon a wrong premise must be overruled.

We conclude also that the demand for compensation under the employers' liability [compensation] act was not waived, and should not be dismissed, merely because it was urged in the alternative and only in the event the court should hold that the plaintiff was not entitled to damages under article 2315 of the civil code.

On the merits of the demand for compensation, we agree with the district judge that the evidence is not so certain as to the amount of the average weekly wages the plaintiff's son had earned, nor as to the amount he contributed to her support, as to enable the court to determine what compensation, if any, should be allowed. But we are of the opinion that the district judge should have reopened the case to permit plaintiff to introduce more evidence on those questions instead of rendering a judgment of nonsuit. We have concluded, therefore, to set aside the judgment of nonsuit on the demand for compensation and remand the case to allow the plaintiff to introduce more evidence as to the amount of the average weekly wages her son was earning and as to the amount he contributed to her support.

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EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION LAW—LOSS OF SCALP—DAMAGES—*Boyer v. Crescent Paper Box Factory (Inc.)*, Supreme Court of Louisiana (Nov. 26, 1917), 78 Southern Reporter,

page 596.—While the plaintiff was in the dressing room of the defendant's factory, getting ready to go home after her day's work, her hair got caught in the negligently exposed wheels of some machinery, and her scalp was torn off. The negligence of the defendant is not in dispute. The plaintiff brought the action for damages under the Civil Code, denying the application and constitutionality of the State workmen's compensation law, entitled the employers' liability act. This view was adopted by the court below and judgment was rendered in the plaintiff's behalf in the amount of \$10,000. The company thereupon appealed and the supreme court held that the compensation law was constitutional and that the case should have been decided in accordance therewith. Regarding the constitutionality of the act the court held:

Coming to the question of constitutionality, the grounds of unconstitutionality are not stated with definiteness either in the pleadings or in the briefs. As we understand them, they are that the act is unconstitutional, (1) because of the several provisions therein contained relative to the insurance which the employer may take for his protection; (2) because it contains more than one object, and that the several objects which it contains are not expressed in its title; and (3) because it deprives the employee of his life and liberty by taking away from him his right of action under the general law of torts, and confining him to the remedy prescribed by the act.

The first of these objections has already been answered; these provisions relative to insurance take away nothing from the employee; their sole operation, so far as he is concerned, is to give him a right of action against the insurance company in which the employer may insure himself against liability under the act, this right of action being additional to that against the employer.

As to plurality of objects and nonexpression in title, we find that the act has but one object; it is an employers' liability act.

As to the act being unconstitutional because taking away plaintiff's right of action under the general law of torts, see *N. Y. C. R. R. Co. v. Sarah White*, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. 224, pp. 232-237], and other workmen's compensation cases, where this question is fully discussed and decided adversely to plaintiff's present contention.

The judgment of the court below was therefore reversed, and a trial ordered under the provisions of the compensation law. A rehearing was obtained, however, and the court after due deliberation reversed itself and held that the case was not one coming under the provisions of the act, and the action brought by the plaintiff was sustained. The opinion of the court is in part as follows:

Effie Boyer may be said to have sustained a personal injury "producing temporary total disability to do work" while she was in the hospital undergoing medical treatment after the accident to her. But she has sustained greater injury than a temporary disability. She has been deprived of her scalp. Such a condition can not be

termed a temporary disability, or a "disease or infection naturally resulting from the injury." She is not "entitled to compensation under this act" for the injury which she has sustained and which she now bears. Her right to damages, or to compensation, is not provided for in the act. The act only restricts the rights and remedies to those employed under the act, where it provides that compensation shall be made for personal injuries which affect the earning power of the employee.

The compensation act did not provide for compensation for the injury suffered by plaintiff, and she is therefore not entitled to compensation under that act. Her right to damages is not attempted to be excluded by the act. The rights and remedies given in the act are declared to be for a "personal injury for which he (she) is entitled to compensation under this act."

The judgment for damages was therefore affirmed.

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EMPLOYMENT OF CHILDREN—CERTIFICATES—NIGHT WORK—CONSTITUTIONALITY OF STATUTE—*Commonwealth v. Wormser, Supreme Court of Pennsylvania (Jan. 7, 1918), 103 Atlantic Reporter, page 500.*—Joseph Wormser admitted that he had employed a boy under 16 years of age after 8 p. m. and before 6 o'clock a. m. in the glass factory of which he was manager, and that the boy was employed without the procuring of the employment certificate required by No. 286, P. L. 1915. He contended, however, that he could not properly be convicted of a violation of the act for the reason that it was unconstitutional. He was convicted of the offenses indicated by the superior court, and its judgment was affirmed by the supreme court, which adopted as its own the opinion rendered by the lower court. This opinion declared with regard to the object of the act, viz, "To provide for the health, safety, and welfare of minors," that "It is too clear for discussion that this is an appropriate subject for legislative action." Further quotations from the opinion show the stand taken on the validity of the two provisions of whose violation the respondent had been found guilty:

What is a reasonable time within which children should be excluded from places of labor is a legislative question. It can hardly be contended that the State is without authority to protect persons of immature years from exposure to the danger and exhausting toil of factories, and nothing has been brought to our attention which leads us to the conclusion that the period fixed by the statute is arbitrary and unreasonable. It was clearly within the authority of the legislature to provide that children under the age of 16 should not be employed in the factories at night at which time their highest mental and physical interests require that they have rest and sleep.

We find nothing incompatible with personal rights in the regulation that no minor shall be employed to work in any establishment unless an employment certificate has been issued as provided by the

statute. This legislation has reference to the education of the boys and girls of the Commonwealth who are of school age, and education is a subject with reference to which the Commonwealth has authority to prescribe. It is intimately connected with the good order and welfare of the people and is one of the chief subjects of governmental interest and care. The State having fixed the ages within which minors can work, the right to regulate the reasonable conditions of employment necessarily follows. The general employment certificates were intended to apply to those whose proficiency in school has been of such a character that the supplementary education provided for in the statute could take the place of that provided for in the general school system of the State. Such a classification is not unreasonable, but, on the contrary, is well adapted to accomplish the result intended; that is, to permit minors over 14 years of age whose education is sufficiently advanced to work at industrial employment.

We do not find anything in the provisions of the statute to which the appellant objects which would render it invalid.

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EMPLOYMENT OF CHILDREN—FEDERAL STATUTE—INTERSTATE COMMERCE—STATE AND FEDERAL POWERS—*Hammer v. Dagenhart et al.*, *Supreme Court of the United States (June 3, 1918)*, 38 *Supreme Court Reporter*, page 529.—Roland H. Dagenhart filed a bill in the United States District Court for the Western District of North Carolina, on behalf of himself and his two sons, one between 12 and 14 years of age and the other between 14 and 16, to secure an injunction against the enforcement of the Federal child labor act. The father and sons were employees of a cotton mill in Charlotte, and under the North Carolina statutes the father is entitled to the earnings of the sons until they attain their majority, hence his interest in the matter personally. Under the State law also each of the boys is permitted to work 60 hours per week, while under the terms of the Federal act the younger could not be employed at all until he reached the age of 14, and the older could work only 48 hours per week until he became 16; or rather, if they were so employed in violation of the provisions of the Federal act, the employing company could not, during such employment or within 30 days thereafter, remove any products from its factory and ship them in interstate or foreign commerce.

The district court held the act unconstitutional and granted the injunction, without any written opinion. Hammer, the United States district attorney against whom the injunction was directed, appealed, and the Supreme Court affirmed the judgment below by a vote of five to four. Mr. Justice Day delivered the prevailing opinion, and, after stating the facts and quoting the provisions of the act, said:

The attack upon the act rests upon three propositions: First, it is not a regulation of interstate and foreign commerce; second, it contravenes the tenth amendment to the Constitution; third, it conflicts with the fifth amendment to the Constitution.



The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within 30 days prior to their removal therefrom, children under the age of 14 have been employed or permitted to work, or children between the ages of 14 and 16 years have been employed or permitted to work more than 8 hours in any day, or more than 6 days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.?

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons v. Ogden*, 9 Wheaton 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, State or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The cases taken up at this point include those upholding the validity of laws against lotteries, food and drug adulteration, and the white slave traffic. The decision in each case is briefly summarized, with some quotations from the opinions. Mr. Justice Day then discusses the distinction between these cases and the present one, and expresses the opinion of the court that the matter of child labor is one for State rather than for Federal regulation, as appears in the remainder of the opinion, which is for the most part as follows:

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the State who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after 30 days from the time of their removal from the factory. When offered

for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power.

Commerce "consists of intercourse and traffic \* \* \* and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State." (Mr. Justice Jackson in *In re Green*, 52 Fed. 113.) This principle has been recognized often in this court. *Coe v. Errol*, 116 U. S. 517; *Bacon v. Illinois*, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under Federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. *Kidd v. Pearson*, 128 U. S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children. In North Caro-

lina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; "this principle," declared Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, "is universally admitted."

A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce can not authorize the exercise of authority not intrusted to it by the Constitution. *Pipe Line Case*, 234 U. S. 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the Nation by the Federal Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the States, a purely State authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act can not be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

Mr. Justice Holmes delivered the dissenting opinion, in which Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concurred. This opinion is in the main given below:

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States in which within 30 days before the removal of the product children under 14 have been employed, or children between 14 and 16 have been employed more than 8 hours in a day, or more than 6 days in any week, or between 7 in the evening and 6 in the morning. The objection urged against the power is that the States have exclusive control over their methods of production and that Congress can not meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate

effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

The manufacture of oleomargarine is as much a matter of State regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769.

The pure food and drug act which was sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, with the intimation that "no trade can be carried on between the States to which it (the power of Congress to regulate commerce) does not extend," applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil.

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the Nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I can not believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that

case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

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EMPLOYMENT OFFICES—EMIGRANT AGENTS—CONSTITUTIONALITY OF STATUTE—PROHIBITORY TAX—*Garbutt v. State, Supreme Court of Mississippi (Jan. 7, 1918), 77 Southern Reporter, page 189.*—W. H. Garbutt was convicted of violation of chapter 94, Laws of Mississippi of 1912, which requires each labor agent or employment agent, engaged in the business of soliciting or hiring laborers to go beyond the limits of the State, to pay an annual license fee of \$500 for each county in which such agent operates. He appealed, challenging the constitutionality of the act. The conviction was affirmed, Judge Stevens for the court saying:

The contention that this law burdens or is a tax on interstate commerce is settled against appellant by the following authorities: [cases cited.] The act, as we construe it, does not undertake to tax one who solicits or hires laborers for his own use or employment, the employer seeking labor for himself; the tax is laid upon the person doing a regular business of emigrant or employment agent. The title of the act makes this clear, as does also the general language in the body of the statute, especially section 2, stating:

“Any person doing the business of emigrant or employment agent,” etc.

In view of the activity of labor agents in Mississippi within the past few years, and the free emigration of laborers to other States, especially the heavy transportation of colored laborers to the Northern States—amounting the past year to a veritable “exodus”—we are not prepared to declare the tax prohibitory. The amount of the tax is primarily a legislative question.

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EMPLOYMENT OFFICES—EMIGRANT AGENTS—DISINTERESTED OFFER OF EMPLOYMENT—BUSINESS OF HIRING—*Chambers v. State, Court of Appeals of Georgia (Nov. 7, 1918), 97 Southeastern Reporter, page 274.*—Chambers came to one Pettit, a licensed emigrant agent, and asked for work. Pettit offered him a job in Tennessee and his transportation to the place of work. Chambers accepted the job and received his ticket. At the station he was asked by one Davis where he was going, whereupon Chambers replied that he was going to Tennessee to work for \$2.50 a day and asked whether Davis did not want a job too, saying that he could get one at the same place. Chambers made no promise of employment and did not offer to pay Davis's transportation. Chambers was arrested and charged with

acting as an emigrant agent without a license and was convicted. In reversing the conviction the court quoted from an earlier decision, as follows:

In the case of *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, will be found an exhaustive and able discussion of the meaning of the term "emigrant agent" as used in the general tax act of 1898, under which the accusation in this case was brought. An "emigrant agent" was there defined as "a person engaged in hiring laborers in this State, to be employed beyond the limits of the same." To be engaged in work, in the sense contemplated by acts imposing taxation, would seem to necessarily imply that the person so engaged must make that work his business or occupation."

And in conclusion said:

Applying this principle to the evidence in the instant case, we think it quite evident that the defendant was not "engaged" in the business of an emigrant agent; and therefore the evidence did not authorize the verdict, and a new trial should have been ordered.

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EMPLOYMENT OFFICES—EMPLOYMENT OF LABOR BY RAILROAD SECTION HAND—BUSINESS—*Braxton v. City of Selma, Court of Appeals of Alabama (June 29, 1918), 79 Southern Reporter, page 150.*—Braxton was in the employ of the Louisville & Nashville Railroad Co. as a section hand. He and a number of other employees of the company were given a pass and permitted to visit the city of Selma. Braxton's foreman told him before he started on his journey that if any of the other employees would not return he was to employ other laborers to take their places. Braxton went to the city and it became necessary for him to employ some laborers to take the places of some others that were with him and who did not intend to return. He was tried and convicted under an ordinance of the city prohibiting persons from engaging in business or professions, etc., without first obtaining a license. In reversing the decision of the lower court Justice Bricken said:

The only position which the appellant held with the railroad company was that of section hand, and for services rendered by him as such he was paid, and not for obtaining labor; nor were his wages based on the amount of labor he should obtain. While on his visit to Selma the company paid his wages as section hand and not otherwise.

We feel no hesitancy in holding that the facts do not show that appellant was engaged "in business of seeking to induce laborers or other persons to remove from the city of Selma in violation of the ordinance," as charged in the complaint against him.

The term "business," as used both in the complaint and in the ordinance, means that employment which occupies the time, attention, and labor of the person engaged, for the purpose of livelihood or profit. It is his calling for the purpose of a livelihood. An occasional

act of business is for the time being the man's business who does the act, but the ordinance requiring the license which the appellant failed to obtain has reference to a regular and legal employment, and not one that is occasional, irregular, or illegal.

HOURS OF LABOR—FEDERAL EIGHT-HOUR LAW FOR RAILROAD EMPLOYEES—APPLICATION OF STATUTE—*Nelson v. St. Joseph & G. I. Ry. Co., Kansas City Court of Appeals, Missouri (Apr. 29, 1918), 205 Southwestern Reporter, page 870.*—Plaintiff, an employee on defendant's interstate passenger train, brought this suit to recover overtime compensation claimed to be due under the act of Congress of September 3, 5, 1916, known as the Adamson Law (Bul. 213, p. 153). This law provided a standard eight-hour day for all railroad employees engaged in interstate commerce. Plaintiff Nelson was engaged under a contract calling for a run of 252 miles, allowing one day off in every four days, and salary payable by the month in the amount of \$82.50. Although the contract made the monthly salary the basis of the rate of pay, the railway company kept records computing the pay of Nelson by the amount he received per day. The contract did not fix what was to constitute a day's work, nor make any provision for overtime and did fix the rate of pay on a monthly basis. Defendant claims that as the plaintiff is not being paid by the day the law above referred to does not apply. The court in holding that the law did apply said:

It is true that the act neither abrogates existing contracts nor makes new ones, and it may very well be that, if an employee makes a contract to which it is impossible to apply the law, then the employee may not be able to claim any benefits under that law. But it can not be successfully maintained that there is anything in the wording of the act showing that the intention was that the law should apply to some and not to all. The act fixes eight hours as "the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees" engaged in the movement of interstate trains. And there is nothing elsewhere in the act which can be construed as creating any distinction between employees so engaged, whether their contracts provide they are to be paid at a certain rate per month, per mile, per day, or per run.

Neither is there anything in the circumstances under which the act was passed, or in the purposes sought to be accomplished by it, to justify the inference that there is any such distinction to be made in applying the act to the various contracts of such employees. The circumstances calling for the act and the purposes of its enactment are set forth in the decision of the United States Supreme Court, in *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (Bul. 224, p. 144-159), wherein the constitutionality of the law is upheld.

We are unable to see any difficulty much less impossibility in applying the Adamson Law to plaintiff's contract nor reason why it should be held to be outside of and beyond the operation of said law.

**HOURS OF LABOR—MINES, SMELTERS, ETC.—CONSTITUTIONALITY OF STATUTE**—*United States v. Howell, District Court of Alaska (Oct. 23, 1916), 5 Alaska Reports, page 578.*—This was a prosecution to enforce a penalty for employing a workman in a mine in Alaska in excess of the period fixed by law. An act of 1913 (chapter 29), amended in 1915 (chapter 15), undertook to limit such employment to 8 hours in 24. The act was declared void because its form and enactment did not conform to the requirement of the organic act of the Territory providing that “no law shall embrace more than one subject, which shall be expressed in its title.”

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**HOURS OF SERVICE—RAILROADS—SWITCH TENDERS USING TELEPHONE.**—*Chicago & A. R. Co. v. United States, Supreme Court of the United States (May 20, 1918), 38 Supreme Court Reporter, page 442.*—Prosecution was instituted against the railroad company named for alleged violation of the hours of service act. The company had in its yard at Bloomington, Ill.,  $7\frac{3}{4}$  miles long, three switch shanties, each operated continuously night and day by two men, in 12-hour shifts. Each was equipped with a telephone connected with the yardmaster's office, which was used to issue instructions or orders to yard, train, or engine crews as to the handling of cars or trains. The Circuit Court of Appeals for the Seventh Circuit had approved a judgment of conviction, following previous decisions made by it which had apparently not been passed upon by the Supreme Court. (Bulletin No. 189, p. 153.) The Supreme Court affirmed this judgment, holding that the employees concerned were covered by the provisions of the act which forbid employment for more than nine hours per day of employees using the telephone to handle orders affecting train movements, in stations operated continuously. The conclusion of the opinion delivered by Mr. Justice McReynolds is as follows:

The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task.

The individuals within the ambit of the proviso's pertinent provisions are marked by the nature of service performed—an “operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.” If, in due course of his work, an employee while in any of the locations specified uses the telegraph or telephone for sending or receiving messages concerning train movements he may not lawfully remain on duty there-in exceeding 9 hours during any 24-hour period, except in case of emergency.

Here, the facts disclose the switch tender on duty for 12 consecutive hours in a shanty continuously operated night and day where,



by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great importance. By permitting this, the railroad violated both language and purpose of the act.

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LABOR ORGANIZATIONS—INJUNCTION—INDUCING AND INCITING STRIKE—INDUCING BREACH OF CONTRACT—WAR LABOR BOARD—WAR EMERGENCY—*Rosenvasser Bros. (Inc.) v. Pepper, Supreme Court, Trial Term, Queens County (October, 1918), 172 New York Supplement, page 310.*—This was an action for an injunction against certain unlawful and destructive acts of employees, former employees, and representatives of the labor union known as the United Shoe Workers of America. This union was being “promoted” by one Gilman. He succeeded in creating internal trouble in the plant of the plaintiff company, which was engaged to four-fifths of its capacity in Government war work. This disturbance, which amounted to a strike, was mediated by a representative of the War Department, with the result that the strikers were recognized as a union, and that they were given shorter hours and more pay. The employer was permitted to maintain an open shop. This settlement was evidenced by a written agreement between the plaintiff employer and the employees and the labor union, which instrument was signed by them and by the mediator of the War Department. It seems, however, that the aforementioned Gilman, who was the representative of the labor union, chose to disregard this contract and the reason for which it was made, namely, to aid the United States in the prosecution of the war against Germany, and for the purpose of promoting the union which he represented he induced and incited the employees of the plaintiff to break their contract and to strike to force the employer to maintain a closed shop. In granting the injunction prayed for the court rendered the following decision:

It seems established as the law of this State, by decisions of the higher courts in cases which arose before the war, that a labor union may induce or persuade the employees of a manufacturing or any other business, which is conducted by the owner thereof either as an open or a nonunion shop, to become members of the union, and to strike in order to compel the owner to conduct his factory or business as a union shop.

It seems to me that the principles announced in cases which arose before the war can not be applied to the relation between workers and employers in war industries, in so far as they conflict with the principles and policies of the United States Government in the conduct of the war. The production of war industries is so closely connected with actual military operations that it may be said to be a part of them.

All the parties to the present controversy—the employer, the employees, and the labor union—recognized that their respective rights and relations to each other were modified and controlled by their obligations and duties to the United States Government. Their recognition of the principles and policies of the United States Government in the matter of the control of war industries is shown by the evidence. The contract entered into between the plaintiff and the representatives of its employees in October, 1917, was the direct result of the mediation of the War Department, and the department's approval of the contract is shown by the signature thereto of the mediator for the department. This contract was in accord with the principles and policies of the United States for the settlement of labor disputes in war industries. The principles and policies of the United States Government, which should be applied in the decision of this case, have recently been set forth in a pamphlet issued by the National War Labor Board.

It is elementary that a court of equity may restrain a trade-union from inciting employees to violence, or the doing of any tortious acts in the conduct of a strike, or to breach their contract of employment. There is no question that the plaintiff is entitled to an injunction within these rules. The question of greatest importance, however, is whether under the facts presented here the court should not go further and enjoin the defendants from inciting, aiding, and abetting strikes of plaintiff's employees for any cause, in view of the fact that the parties to this controversy have devised and set into motion appropriate machinery to settle by arbitration all differences existing between them, and because the life of our Nation is dependent upon an uninterrupted production of those things needed to successfully carry on the war in which our country is engaged.

It seems to me that an injunction should be granted on these grounds. The usual reciprocal rights and obligations of employer and employee are modified in these times by their respective duty to the United States Government. Duty to the Government was in contemplation of the parties in entering into the contract of employment, and they dealt with each other with reference to that duty.

For the defendants to incite the employees to strike merely for the purposes of promoting the private organization interests of the union is, under the circumstances, wicked.

An injunction will be granted substantially as follows:

1. The repetition of the acts of violence which occurred during the strike in September, 1917, to be enjoined.
2. The continuance of the factory disorders which have been going on from October 5 to the end of the trial to be enjoined.
3. Strikes for any cause whatever to be enjoined for the duration of the war.

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LABOR ORGANIZATIONS—INJUNCTIONS—INDUCING STRIKE—BREACH OF CONTRACT.—*Burgess v. Georgia, F. & A. Ry. Co., Supreme Court of Georgia (Sept. 14, 1918), 96 Southeastern Reporter, page 864.*—The railway company brought this action for an injunction to restrain defendants from inducing, declaring, and conducting a strike. The plaintiff railway company was under contract with local labor

unions for the services of its employees who were members of these unions. This contract was without any fixed period of service. On May 5, 1917, however, a supplemental agreement was made under the Adamson Act and was to continue in effect until October 1, 1917. The plaintiff discharged an engineer. The unions made a prolonged effort to have him reinstated. Officials of the national unions interfered and finally all the unions demanded the engineer's reinstatement and a revision of the schedules of wages which had been fixed in the supplemental contract. Plaintiff was given 48 hours to concede these demands; otherwise a strike was to be enforced. At this juncture, before the local unions had taken a strike vote, plaintiff filed its petition for injunction. An injunction was granted restraining the officials of the national unions from inducing a strike, and restraining the local unions and individual employees from taking a strike vote, from striking, from reporting to the national unions, and from violating the contracts they had made with plaintiff until the issues could be passed upon by a jury, the men to have the right to resign or quit but not by concerted action. In affirming this interlocutory injunction, Judge George said:

In so far as the defendants, the officials of the national union, were enjoined from inducing and compelling plaintiff's employees to engage in a strike, the injunction was authorized under the pleadings and evidence.

The court did not abuse its discretion in enjoining the defendants, the local unions and the individual employees from taking a strike vote, striking, reporting that a strike had been called or was in effect upon petitioner's road, and from violating the terms of the service contracts with petitioner, the contracts being for a definite term of service which had not expired at the time the injunction was issued.

After declaring that the injunction was too sweeping and should not extend in point of time beyond the period of the contracts, the court ordered the injunction to be affirmed and modified as to time limit.

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LABOR ORGANIZATIONS—INJUNCTION—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—*Burgess v. Georgia, F. & A. Ry. Co., Supreme Court of Georgia (Sept. 14, 1918), 96 Southeastern Reporter, page 865.*—The plaintiff railway company was granted an interlocutory injunction against Burgess, Turner, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen, the Order of Railway Conductors, and the Brotherhood of Railway Trainmen, and all individual members of these unions, enjoining them from taking a strike vote or declaring a strike. Each of the defendant employees of plaintiff, although under a contract to work until October 1, 1917, resigned his position. They then proceeded to interfere with

the other employees of the plaintiff, urging them to leave or refrain from entering plaintiff's service. They also went upon the premises of plaintiff and congregated around the plaintiff's locomotives and intimidated and threatened plaintiff's employees. Plaintiff petitioned for an injunction against defendants to prevent them from going upon its premises and from interfering with its business by inducing its employees to leave by threats, coercion, menaces, intimidation, etc. Judge George, expressing the opinion of the court in sustaining the injunction, said:

In so far as the defendants were enjoined from attempting by proper argument, elsewhere than on or near the premises of the plaintiff, to persuade others from taking their places, the injunction was not authorized. Equity will not enjoin employees who have severed their connection with the service of the employer from attempting by proper and fair argument to persuade others from taking their places, so long as they do not resort to force or intimidation.

Subject to the modifications indicated, the injunction was upheld on the authority of *Jones v. Van Winkle Gin, etc., Works*, 131 Ga. 336, 62 S. E. 236 (Bul. 79, p. 965).

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LABOR ORGANIZATIONS—INJUNCTION—RULE REQUIRING THEATER TO EMPLOY A CERTAIN NUMBER OF MUSICIANS.—*Haverhill Strand Theater (Inc.) v. Gillen et al., Supreme Judicial Court of Massachusetts (Feb. 28, 1918), 118 Northeastern Reporter, page 671.*—The company named operated a moving-picture and vaudeville theater and employed one Coburn, a member of the local union of musicians, as organist. The union notified the company that a minimum rule would be put in force, requiring that five musicians be employed if the company wished to have the services of any union musicians. The company brought a bill for an injunction on September 9, 1916, against officers and members of the union, as such and as representing all the members, to prevent their enforcement of the rule, which was alleged to be illegal. After playing at the performances of September 10, Coburn left the company's employment "because of the existence of the rule and the penalties incident to its violation." After a time the company secured a nonunion organist, paying, however, about twice the salary that Coburn had received. The matter was referred to a master for ascertainment of facts, and he made certain findings, one of them being that the defendants had not put in force or threatened any strike or boycott. By agreement of the parties a question as to the right of a union to put into effect such a rule as the one in question was submitted to the court. The rule was held illegal and the injunction granted, Judge Loring saying in part in the opinion delivered by him:

With this explanation the question propounded to the court by the agreement of parties is this: Is a combination between musicians a legal one by which the plaintiff is compelled to employ a number of musicians specified by the members of the combination if he wishes to employ any member of the combination, even though it be the fact that in the plaintiff's opinion the employment of a single musician is the most advantageous way of conducting his (the plaintiff's) business and that the employment of more than one musician will cause him pecuniary loss? It is manifest that such a rule is an interference with a plaintiff's right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on the business in which he or it has chosen to embark. The right to the free flow of labor is not an absolute right; it is limited by the right of employees to combine for purposes which in the eye of the law justify interference with the plaintiff's right to a free flow of labor. A combination which interferes with a plaintiff's right to a free flow of labor is legal if the purpose for which it is made justifies the interference with that right. On the other hand, it is illegal if that purpose does not justify the interference (which ensues from the making and enforcing of the combination in question) with the plaintiff's right to a free flow of labor. So much is settled in this commonwealth. [Cases cited.]

No case has gone further toward supporting the defendant's contention than *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 [Bul. No. 70, p. 747]. But that case does not go so far as to support that contention.

The question we have to decide in the case at bar is whether the doctrine of *Pickett v. Walsh* is to be extended. In *Pickett v. Walsh* a union of masons struck, that is to say, combined to refuse to lay bricks to get the work of pointing the mortar after the bricks were laid. The contractor wished to give the work of pointing to men known as pointers, who had that and that alone as their trade. In that case the complaint was made by the pointers. But that is not material. It was held that the purpose for which the combination was made, namely, to get work for members of the union, was a justification for the interference with the pointers' right to be employed to do the work and as a consequence that the combination was a legal one. But in that case the contractor wanted the pointing done. The peculiarity of the case at bar is that the work which the defendants have combined to force the plaintiff to give to them is work which the plaintiff does not want done; not only that, but it is work which if done at the plaintiff's expense will cause him pecuniary loss. The difference between *Pickett v. Walsh* and the case at bar is that in *Pickett v. Walsh* the defendants combined for the purpose of getting work which the employer wanted done, while in the case at bar the purpose of the defendants' combination is to force the plaintiff to make work for them when he does not wish to have that work done and when that work will result in a pecuniary loss for him.

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LABOR ORGANIZATIONS—INJUNCTION—SECONDARY BOYCOTT—APPLICATION OF THE CLAYTON ACT.—*Duplex Printing Press Co. v. Deering et al.*, *United States Circuit Court of Appeals, Second Circuit* (May

25, 1918), 252 *Federal Reporter*, page 722.—The Duplex Printing Press Co. is engaged at Battle Creek, Mich., in making large presses of the kind used by newspapers throughout the United States and in foreign countries. Many years ago a strike was declared at its plant in an effort to unionize the company's shops. The company persisted in maintaining an open shop, however, and because the employees of the company were satisfied as to hours and pay and as most of them were nonunion workers the strike may be said to have failed. The efforts on the part of the unions were therefore transferred to other fields of endeavor, with, however, the same object, the unionizing of the company's shops. The lodges and District Council of New York of the International Association of Machinists attempted a boycott, principally in the City of New York, of the presses manufactured by the Duplex Co. Various methods of attaining this end were resorted to, including threats of injury to person and property; at times, also, assaults were made under at least very suspicious circumstances. The combined efforts of the unions had such effect as to cause this suit to be brought for an injunction to restrain the unions from maintaining their boycott. The whole contention in this case seems to rest upon the question whether or not a secondary boycott may be maintained by a labor union. The district court refused the injunction and the court of appeals affirmed this decision, Judge Rogers dissenting.

However, Judge Hough, who delivered the opinion of the court, pointed out that the very thing that the defendants were attempting had been previously condemned by the Supreme Court.

As plaintiff's business is largely interstate, and the attentions paid by defendants to plaintiff consisted essentially in trying to make it impossible for plaintiff to get its machines from Michigan to New York, or have them used there even if they successfully ran the gauntlet, it seems plain that the defendant associations have agreed to do and have attempted performance of the very thing pronounced unlawful in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622], and 235 U. S. 522, 35 Sup. Ct. 170 [Bul. No. 169, p. 140]. Therefore such interference with interstate commerce should be enjoined, unless the Clayton Act of October 14, 1914, forbids it.

Section 6 of the Clayton Act declares that labor organizations or the members thereof shall not be regarded as illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Section 20 prohibits the issue of restraining orders or injunctions against strikes, peaceful persuasion, or picketing where one may lawfully be "for the purpose of peacefully obtaining or communicating information;" or against ceasing to patronize any party to a labor dispute or "recommending, advising, or persuading others by peaceful and lawful means to do so;" or in case of a "dispute concerning terms or conditions of employment."

"These sections," said Judge Hough, "enumerate as lawful, notwithstanding any earlier statute or decision emanating from national authority, every peaceful and all the really important things the defendant associations have done."

Continuing, he said:

The question becomes this: Is the present litigation one between the employers and employees or an employer and employees, growing out of a dispute concerning terms or conditions of employment? The answer depends on whether the catalogued injuries are to be permitted only in litigations between an employer or employers and the workmen in (or perhaps lately in) their several establishments, or also in cases, however promoted, when the parties are generically the hired and the hirer, and the dispute even an offshoot or by-blow of the endless quarrel over terms of employment?

There is no ruling decision on the subject, and prognosis as to the probable disposition of the matter in a higher court, based on anything as yet published in the United States Reports, would be both unprofitable and improper. It is necessary to form an opinion as upon new matter.

There was a dispute, and one concerning conditions of employment, and at plaintiff's Michigan factory, long before this suit was brought, and before the plan of campaign—the boycott, which is the thing really complained of—was seriously attempted. The machinists' union created the dispute, by calling a strike at plaintiff's place, if it never existed before; that dispute did relate to conditions of employment, in that every striker and every affiliated machinist disputed the right of plaintiff or any other concern similarly situated to employ anyone but a member of the union; and so far as statutory interpretation is concerned it seems immaterial that no more than a trifling proportion of the workers in plaintiff's factory paid any attention to the strike order. The dispute existed, and existed from the beginning, between this plaintiff and the principal defendants, among whom are included by representation the dozen or so obedient union men in the factory. In strict truth this is a dispute between two masters, the union, or social master, and the paymaster; but, unless the words "employers and employees," as ordinarily used, and used in this statute (Clayton Act), are to be given a strained and unusual meaning, they must refer to the business class or clan to which the parties litigant respectively belong.

In so far as courts are permitted to study legislative proceedings and contemporary history for an aid in statutory interpretation, we consider it plain that the designed, announced, and widely known purpose of section 20 (perhaps in conjunction with section 6) [Clayton Act, Bul. 166, pp. 235, 236] was to legalize the secondary boycott, at least in so far as it rests on, or consists of, refusing to work for anyone who deals with the principal offender. We are earnestly told that this rule gives to the workman the choice of being a pariah or a guildslave, and to the employer a doubtful escape from bankruptcy by the path of commercial servitude. If this be true (and the writer is not disposed to question it) the result is imposed by an act of Congress; the remedy is political, not judicial.

The decree of the court below refusing to grant the injunction was therefore affirmed. Judge Learned Hand, concurring in the result of Judge Hough's reasoning, said:

I think that section 20 of the Clayton Act has legalized secondary boycotts in cases between an employer and employees, and that this was such a case, at least after the strike was declared on August 27. I do not think that the section applies only when the employer is plaintiff and his present or former employees are the defendants. Further, I think that the dispute here under any definition included the conditions of employment. I therefore concur in general in Judge Hough's reasoning and in the result, though I do not concur in all the expressions of his opinion.

Judge Rogers offered a lengthy dissenting opinion, from which the following is quoted:

The important fact to be noted is that no one of the defendants is or ever was an employee of the complainant, and that no local lodge or union or officer or member of any union, in the place where the complainant manufactures its presses, has been made a party defendant herein. The parties defendant are residents and citizens of New York, except the defendant Bramley, who is a resident and inhabitant of New Jersey, and the unions with which they are connected are local to New York and vicinity.

It is the duty of courts to protect the life, liberty, and property of all within their jurisdiction. Courts are not respecters of persons, and the rights of employers and those of employees are entitled to equal protection. Liberty of contract is a constitutional right secured to employers and employees alike. It consists in the ability at will to make or abstain from making a binding obligation. The employee has a right to choose his employer. The employer has the like right to choose his employee. The defendants insist that all they have done has been to exercise the right, which they claim for the organizations which they represent, to say that their members shall not work for the complainant or handle the complainant's product; in other words, that it is their right to say for whom their members shall work and upon what they shall work. The complainant denies that that is the sole question which the facts present.

Reference was then made to the decisions of the Supreme Court of the United States in the cases *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, and *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 Sup. Ct. 80 (Bul. 246, pp. 145-153), forbidding efforts to unionize employees under contract not to join a union. Judge Rogers continued:

The above decisions very much restrict the right of labor unions to interfere with employers of labor in the management of their business; and this court must follow the law as laid down by the court in all cases to which it is applicable. But the decision goes upon the common law of West Virginia; there being no statute affecting it and no authoritative decision of the courts of that State.

It may be conceded that the defendants were endeavoring to establish uniform conditions in the industry in which the complainant



was engaged. It follows, therefore, that under the New York law, as expounded by the New York Court of Appeals, the defendants were within their rights, unless there are other circumstances which make the rule laid down in that case [*Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Bul. No. 246, p. 129] inapplicable.

It is said that the defendants are not engaged in a peaceful strike, but in an alleged boycott, and that their conduct seeks to coerce complainant's customers, who are in turn to coerce the complainant into unionizing its business against its will.

A strike and a boycott are two quite distinct matters. A strike is an effort on the part of employees to obtain higher wages, or shorter hours, or a closed shop by stopping work at a preconceived time. It is an attack made by employees upon their employer, by labor upon capital. But a boycott made by union labor against a product manufactured by nonunion labor is an attack upon both labor and capital. It is union employees on the one side and nonunion employees and the open shop employer on the other. The principles applicable to a boycott are not applicable to a strike. The strike in Battle Creek may be lawful, while the boycott of the product in New York may be unlawful. The use of the boycott is very generally held to be the use of unlawful means, and it is not material, where it is resorted to, whether the end which is sought—in this case the unionizing of the shops in Michigan—is lawful or not.

A boycott is a combination formed to injure the trade, or business, or occupation of another, by preventing other persons from doing business with him, by threatening injury to the trade, business, or occupation of those who have business relations with him.

The boycott methods used by the defendants were then recited. These are summarized as follows:

The testimony shows, not simply that the union men have been instructed not to haul or install the complainant's machines as being the product of an unfair shop, but that coercion was resorted to, by threats of taking their cards away (a very serious matter for a union man), and by telling them that they had good reasons to be afraid to look after the work of the Duplex Printing Press, and that they would blacklist the men as scabs and make trouble for them; and men under most suspicious circumstances have been assaulted and felled unconscious to the ground. They have intimidated the complainant's customers by threats to call out men engaged in other trades. The members of the different building trade-unions would be called off on a strike and compelled to quit work on a building not yet completed, and in which it was intended to install a press manufactured by complainant, so that the owner of the building feared the work on the building would be held up two or three weeks. Pickets were employed. No repairs were to be made on machines installed. Threats of putting the machines out of order were likewise indulged in by defendants. The defendants in at least one instance sought to obtain the cancellation of one of complainant's contracts; and they have sought by direct and indirect means to prevent customers from buying any of complainant's machines.

In concluding this phase of the subject it appears that, although the defendants were engaged in an undertaking which the law of

New York recognizes as legitimate, the unionization of complainant's factories, they have resorted to measures in the accomplishment of that end some of which the law does not countenance. The law does not permit either party to a labor dispute to use force, violence, threats of force, intimidation, or coercion; and words or acts which are calculated to cause one to fear injury to his person or to his business are equivalent to threats. Moreover, the law does not permit any attempt to be made to cancel contracts which an employer has made with third persons.

There is, as we have seen, evidence of threats to call out men in the building trades from work on a building under construction for a customer of the complainant, because a press made by the complainant was about to be installed in the building. A strike of that kind is a sympathetic strike; that is, one in which the striking employees have no demands or grievances of their own, but strike for the purpose of indirectly aiding others, having no direct relation to the advancement of the interests of the strikers, and courts have held that such a strike is an unjustifiable invasion of the rights of the employer. *Labatt on Master and Servant*, vol. 7, p. 8346 (Ed. 1913).

But there is, in conclusion, another phase of the matter, and one which is not the least important, which remains to be considered. The complainant is engaged, as we have seen, in the business of manufacturing printing presses in its factories in the State of Michigan. But it is also engaged in interstate commerce, as over 80 per cent of its presses are sold to customers outside of the State. The defendants, not being able to prevent the complainant from manufacturing its presses in its factories in Michigan by nonunion workers, who are contented with their hours and their wages, have sought, it is charged, to restrain its trade and commerce by making its products nonsaleable in other States by the means already set forth in this opinion. The action of defendants is claimed to be contrary to the antitrust legislation of Congress.

In my opinion the things done and threatened to be done by the defendants tend to the destruction of the complainant's interstate trade. Whether an injunction can issue depends upon the construction to be placed upon what is known as the Clayton Act, which was passed by Congress in 1914.

It is my opinion that, if the acts complained of in this case would not have been lawful prior to the passage of the Clayton Act, they are not lawful now. It relates to injunctions in a case between an employer and employees, etc. So far as the purposes of this case are concerned, it would seem to suffice to say that the parties to this suit do not come within the classification therein named. No one of the defendants is now or ever was an employee of the complainant, and the relief prayed for does not contemplate protection from strikes among complainant's employees engaged in the manufacture of its printing presses. If, however, it be contended that the intention of Congress was that the act should apply to any case growing out of a labor dispute, even though none of the parties defendant had ever been in the complainant's employ, it would not prevent the issuance of the injunction, for it is to be noted that the act does not absolutely prohibit the granting of an injunction, even in cases between employer and employees. The injunction may still be granted between an employer and employees, when "necessary to prevent irreparable

injury to property, or to a property right of the party making the application;" and it is so well settled that no citation of authorities is necessary that acts that will cause the destruction of one's property or business, and acts that interfere with the carrying on of one's business, destroying his custom or his profits, do an irreparable injury and authorize the issuance of an injunction.

The achievement of the end sought by these defendants is not through an appeal to the purchasing public not to buy nonunion-made machines; and the defendants have not confined themselves to withdrawing union men from complainant's factories. The course which has been pursued has made the complainant's presses "a contraband of commerce," "a kind of commercial leper." The plan has been to make the complainant's machines unmarketable by preventing their being hauled, installed, operated, or repaired, or even exhibited to the public. If this can be done under the laws of the United States, then it seems that no manufacturer of printing presses in this country can maintain an "open" shop, and no machinist engaged in the manufacture of such presses can earn his living at his trade, unless he consents to join a union, and be bound by all its rules and regulations, and the channels of interstate commerce are practically closed against the products of an "open" shop. If the truckmen are in the unions and can not handle nonunion goods, of what use is it to ship goods from Michigan to New York? And if the unions have the right to say what goods their members shall handle, or shall not handle, what reason is there for saying that union men employed by the railroads can not refuse to handle any goods not made in an "open" shop? The railroads are common carriers, it is true; but all persons who hold themselves out as willing to carry goods for the public, draymen, carters, truckmen, wagoners, and moving van companies, proprietors of taxicabs, omnibuses, and baggage wagons, are in like manner common carriers. And they may be engaged in interstate commerce, as the goods they carry are being shipped outside the State, or have been shipped into the State to be delivered to the consignees therein.

My associates do not agree with me in the conclusion at which I have arrived. Therefore, in accordance with their opinion, and contrary to my own, the decree is affirmed, with costs.

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LABOR ORGANIZATIONS — INJUNCTION — STRIKES — BOYCOTT — UNLAWFUL ACTS—*Thomson Mach. Co. v. Brown, Court of Chancery of New Jersey (July 11, 1918), 104 Atlantic Reporter, page 129.*—Plaintiff brought this action to secure a temporary injunction against the defendant and other strikers and a labor union to restrain them from committing unlawful acts in connection with a strike which was conducted at plaintiff's plant pending the suit for a permanent injunction. The defendants and the labor union maintained a shanty near plaintiff's plant. This shanty was placarded with posters declaring plaintiff unfair to labor. There was also a list posted at the shanty called a "black list," on which was listed the names of the plaintiff's workmen. The posters also called plaintiff's workmen scabs. The labor union wrote to other unions whose work required their mem-

bers to use the machines which plaintiff manufactured and induced some of them to refuse to work with those machines unless plaintiff capitulated to the demands of the strikers. Prospective employees of the plaintiff were presented with cards bearing the same matter contained in the posters. In granting the injunction the court said:

No serious argument is made by respondents that the acts hereinbefore referred to were not illegal. They insist, first, that it does not appear that complainant is being injured. The free flow of labor is being obstructed, the complainant is being harassed in its business. If the threats, open and implied, of the various users of the machinery and the workers thereon are carried out, there will unquestionably be injury. This court does not wait until there is actual injury; it protects against anticipated injury. Second, respondents insist that the unlawful acts are not now being performed. So far as the placards are concerned, even after this court ordered their removal, they were retained until a few days ago. So far as written communications are concerned, there is one as recent as of April of this year. The strike is still on, and I think it is reasonable to assume that unless restrained the unlawful practices will be continued. Third, it is argued that complainant refuses to agree to mediation, and that for that reason this court ought not interfere in its behalf. As previously stated in this case, whatever the personal feelings of the court may be, it has no power to coerce an employer into mediation. If coercion be proper in any event, it is not the function of the court to apply it. There is a sharp line of division between the complainant and the respondents as to the reasons which induced the complainant to refuse to submit to mediation or arbitration. Complainant is operating an open shop, and it charges that the union insisted, before agreeing to mediate, that complainant should agree to unionize its shop. This proposition complainant rejected. Respondents do not in terms deny that this was a condition precedent; but, even if such a denial may be gathered from their papers, there is a question of fact which is not for this court, in dealing with the legal and equitable rights of the parties, to settle. The broad question of public or governmental policy which respondents seek to inject into this issue is one which must be left to some one tribunal.

There will be an injunction against the continuance of the unlawful practices heretofore referred to.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKES—CONSPIRACY—INJUNCTION BY FEDERAL COURTS—UNLAWFUL ACTS—FOOD CONSERVATION—*Kroger Grocery & Bakery Co. v. Retail Clerks' International Protective Association, Local No. 424, United States District Court, Eastern District of Missouri (Mar. 22, 1918), 250 Federal Reporter, page 890.*—The employees of the plaintiff formed a union, which is the defendant herein. The union declared a strike because of the failure of the manager of the plaintiff corporation to subscribe immediately to the contract presented to him, wherein it was provided,

among other things, that no person should be employed unless he was a member of the union. In connection with the strike, the employees indulged in various acts which were unlawful. The plaintiff sues in equity for an injunction to restrain said unlawful acts. Other facts of the case appear in the opinion of the court as expressed by District Judge Trieber:

The right of wage earners to organize themselves into unions for the purpose of bettering their conditions is a right which no one can question. There can be no doubt that, but for these organizations, the conditions of wage earners would have been much less endurable than they are at the present time. The law recognizes them, and has never questioned their right to exist. Nor can anyone question the right of any employees to quit their employment, whether they do it singly or collectively, whether it is done for a good reason or without cause, and no court can compel any man to work against his will. But it is a right which may cause great injury, injury to wage earners in the loss of their wages, injury to their employers in the loss of their business, and generally the greatest loss falls upon those who are the least responsible for it, the innocent public. For this reason it is a weapon that should never be used, unless all efforts of conciliation, either by conference or arbitration, have failed.

There are certain acts which have been declared by the courts, from time immemorial, to be unlawful. In the latest case decided by the Supreme Court [*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, Bul. 152, pp. 137-151] it was held that it was unlawful to intentionally do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another person's property or rights, and therefore is actionable.

On October 14, 1914, Congress passed a law, known as the Clayton Act, whereby it restricted the power of the Federal courts to grant injunctions in strike cases and conditions arising thereunder unless the strikers commit unlawful acts or threaten to cause irreparable injury to property, and there is no adequate remedy at law. As to the unlawfulness of the strikers' acts in this case the court said:

It is a mistake to suppose that by these provisions of the act any act or acts, which were unlawful at the time the act was passed, were legalized. The only effect of this act is to prevent United States courts, sitting as courts of equity, from granting injunctions in the cases mentioned therein; but so far as the legality of the acts is concerned, if they are illegal at the time, they are illegal today, and if the plaintiff has been damaged thereby, he may obtain from the courts any remedy which could have been obtained before that time, except an injunction. *Paine Lbr. Co. v. Neal*, 244 U. S. 459-471 [Bul. 169, pp. 164-167].

Now the questions to be determined in this action are whether these defendants did induce or attempt to induce any employees of the plaintiff to leave their employment by force, threats, or intimidation, or did they attempt merely to persuade them peacefully. That is the first question. It is useless for the court to review all the testimony in this case; but the court is satisfied from the great pre-

ponderance of the testimony that these acts of the defendants were not quiet and peaceable—that they used language which would naturally have an intimidating effect on those to whom it was uttered. Whether they meant to carry out these threats is wholly immaterial. The question we are concerned with is: What was the effect on those persons to whom they were applied? Another thing the evidence shows is that harsh terms, opprobrious epithets, were used toward these employees. They were called “scabs.” One man was called “Kaiser,” and while, ordinarily, that could hardly be deemed an insulting term, yet, considering the conditions now prevailing in the minds of the public toward the emperor of Germany, who is generally alluded to as “the Kaiser,” we know it was intended as a term of insult, and not of commendation. The court finds from the evidence that the efforts made to induce the employees of the plaintiff to quit their employment were not made in a peaceful manner, but were by threats, insulting language, and intimidation.

The same finding must be made in relation to the attempted boycott. So far as the distribution of the circulars is concerned, they had a perfect right to distribute them, if it was done peaceably. But the evidence shows that the picketing was not done in that manner; \* \* \* but was done by threats and intimidation, and, practically, I may say, violence.

The next question is: Were the acts of the defendants, unlawful by reason of the fact that by ordering this strike and inducing so many of the employees of the plaintiff to withdraw from employment 85 of the 140 retail stores of this plaintiff had to be closed by reason of the strikes, causing a loss of the value of \$36,000 of perishable food, such an unlawful act as would justify this court, in view of the food conservation act of Congress, to grant the writ of injunction? That act provides:

“That it is unlawful under this act for any person or persons to knowingly commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, or distribution.”

And furthermore it makes it an offense for any person to restrict the distribution of any necessities, or do anything whereby transportation, producing, harvesting, manufacturing, supply, or dealing in any necessities of life is interfered with. If these defendants, by reason of their acts, caused a loss of all this perishable food, they were certainly guilty of the violation of this act, and in the opinion of the court it would be wholly immaterial whether it was done by violence, threats, intimidation, or otherwise. The owner of this perishable food would be entitled to the aid of a court of equity of the United States to restrain them from such acts which will cause still greater destruction of such food.

Now there is one other question which is of considerable importance. The evidence connects only a part of the defendants with these unlawful acts. But there is no question of law better settled than that an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means, is an unlawful conspiracy, and the act of any one person, who is a party to that agreement, any overt act to carry out its objects, the objects of the un-

lawful agreement, before the object of the conspiracy has been abandoned, is the act of every member thereof. The evidence shows that all of the defendants with the exception of two were members of this union.

The court then commented on various speeches that were made by members of the union and certain advice that was given the strikers.

But, no matter what advice was given, acts of violence were committed by members of the union. They were committed for the purpose of carrying out successfully the object of the union, that is, to secure a successful strike, or otherwise put the plaintiff out of business, and every member of the union, the defendants here, is equally responsible for the acts of the others. \* \* \* The court is of the opinion that the temporary injunction should issue against all the members of the union who are defendants in this case.

We now come to the defendant Cohn and the Meadow Brook Grocery Co. It seems that after the strike had been ordered, Mr. Cohn, although not a member of this union, did aid and encourage them to commit the acts which were committed.

There was also evidence introduced tending to show that some pickets in front of that store (the plaintiff's store which was opposite Cohn's) were advising people who wanted to go to plaintiff's store not to go there, because it was unfair to labor, and advised them to go to Cohn's store, who was fair to labor. He was present at the meetings when the reports were made, and he contributed \$25. So far as this contribution was concerned, there would, ordinarily, be nothing wrong in it. But he attended their meetings, and told them to go ahead, and before that time he had offered the sum of \$100 if they would succeed in closing up the stores of the plaintiff. That moment he made himself an accomplice of those who were engaged in this unlawful action, and is just as liable as they are, and for that reason there is no reason why the injunction should not go against him.

As to the Meadow Brook Grocery Co., there is no evidence that justifies an injunction against it. Perhaps it was not proper, from a moral standpoint, to distribute the boycott circulars; but people will frequently do things from selfishness that are not exactly ethical, yet not a violation of any law. They distributed circulars, which under the Clayton Act may be done, if done peaceably, and therefore does not justify an injunction.

For these reasons the injunction against the Meadow Brook Grocery Co. will be denied, but the temporary injunction against the other parties will be granted, upon execution by the plaintiff of a bond in the sum of \$10,000, conditioned that it will pay to the defendants, or any of them, the damage which they, or either of them, may sustain by reason of the temporary injunction, if on final hearing it shall be held that it was wrongfully granted.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKES—JURISDICTION OVER COMPANIES WORKING WITH AND FOR THE GOVERNMENT.—*Wagner Electric Mfg. Co. v. District Lodge No. 9, International Assn. of*

*Machinists, District Court, Eastern District of Missouri (June 6, 1918), 252 Federal Reporter, page 597.*—The plaintiff company undertook to perform some work for the United States Government in the manufacture of munitions of war. The Government constructed and equipped a large building for the use of the company and supplied it with the needed materials. The company was to be held liable to heavy penalties for any failure to carry out its contracts with the Government. The company also kept on hand a large supply of perishable foodstuffs for the use of its employees. The employees of the company belonged to various labor unions. They conspired together to bring about a strike for the purpose of unionizing the company's plant and to secure an eight-hour working day. To make their strike successful they planned to prevent anyone from working in the company's plant and on the war materials in course of manufacture and to resort to force if necessary. The company secured an injunction at the beginning of the trial. The unions are now attacking the jurisdiction of the Federal courts over the case, both parties being citizens and corporations of the State of Missouri. The following is quoted from the decision of the court:

I am of the opinion that this court does have, and hence must retain, jurisdiction of this cause, and for the following reasons:

First, there can be no question whatever but that, as shown by the petition, plaintiff is engaged in a very large manner, and was at the time the acts done by the defendants of which complaint is made, in interstate commerce, both in its private manufacturing capacity and in the performance of its public duties under contracts with the Government.

Further, that the petition in this case well pleads the joint acts of defendants, in the formation of their unlawful confederation, and the manner in which it was attempted to be carried out, has worked, and unless restrained, will work, special and irreparable injury and damage to the plaintiff and to the Government of the United States, which, in my judgment, by reason of the provisions of the Sherman antitrust law, and in harmony with the common law against unlawful combinations in restraint of trade and monopolies, may be enjoined by plaintiff, for through such course of procedure alone lies any complete or adequate remedy against the unlawful combination and acts of the defendants averred in the bill.

In other words, in my judgment, in so far as the plaintiff in this case is engaged in doing work for the Government, not as an independent contractor with the Government, but through the occupation of property of the Government specially constructed and adapted to the carrying out of the business of the Government in the manufacture of munitions of war from the materials purchased and owned by the Government, all in pursuance of existing laws, it is acting under authority of the laws of the United States to as full an extent as though it had been incorporated under and in pursuance of national laws. In the exercise of rights so granted, and in the per-



formance of duties so enjoined by national laws, a Federal question is involved, which confers jurisdiction on this court at the suit of one specially injured, as plaintiff well pleads it is in this suit.

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LABOR ORGANIZATIONS — INJUNCTION — STRIKES — PICKETING — *Truax et al. v. Bisbee Local No. 380, Cooks' and Waiters' Union et al., Supreme Court of Arizona (Mar. 5, 1918), 171 Pacific Reporter, page 121.*—William Truax and his partner in the restaurant business brought suit in equity against the union named for an injunction against interference with their business. They employed in their restaurant, called the English Kitchen, 10 waiters who were members of the union named. The employers gave notice of changes in wages and hours, to take effect April 10, 1916. The union contended for a continuance of the previous hours and wages. No agreement was reached, and on April 10 the union members struck. Picketing was at once resorted to, banners being carried along the sidewalk in front of the restaurant, circulars being distributed, and the pickets talking about the matter, often in loud tones, and advising that all friends of organized labor refrain from patronizing the establishment. Truax testified that he did not know of any violence being used in connection with the persuasion exercised. The action was dismissed by the superior court, Cochise County, and the plaintiffs appealed. The decision was, however, affirmed by the supreme court, Judge Cunningham delivering the opinion. He pointed out that the employees had a right to organize to improve their conditions of employment and to strike in case of failure of agreement in regard to such conditions. The irreconcilable conflict between the decisions of various States in regard to boycotts and picketing was referred to. Calling attention to the fact that the alleged means employed to "coerce and intimidate" the plaintiffs consisted only of various forms of publicity, the author of the opinion said in part:

No right of plaintiffs is violated by publishing facts. Certainly, if a dispute between plaintiffs and a labor union exists, and one of the plaintiffs so testifies, plaintiffs have no legal right to enforce the union to keep the facts secret. The extent of the publicity given such dispute is unimportant and violates no right of plaintiffs, either civil or criminal. If the publicity given the existence of the dispute results in a loss of patronage and business to plaintiffs, such loss is attributable to the dispute, and not attributable to the publicity given to the dispute.

In this connection it is well to remember that the defendant union violated no rights of the plaintiffs in causing union members in plaintiffs' service to quit such employment. The workmen had the right to quit separately or in a body, without question, no contract to continue in the service being in existence, and having been forced

to quit the service by the union would give plaintiffs no right to complain.

Likewise, the members of defendant union violated no right of the plaintiffs by refusing to deal with the plaintiffs. The plaintiffs had no vested right in the patronage of union members. As a consequence the union members, singly or as a body, had and have the legal right to refuse to transact any business with the plaintiffs for no cause whatever, and by such refusal no right of the plaintiffs is violated.

Plaintiffs have the legal right to conduct their business as suits them, and any attempt on the part of any one to interfere with the free conduct of that business violates a right. An appeal by one deeming himself injured in some manner by the system adopted by the plaintiffs in conducting their business, to his friends and to members of and sympathizers with a union to which such an one belongs, requesting such friends, members, and the general public to cease from dealing with plaintiffs, cannot fairly be termed an interference with the methods adopted for the conduct of plaintiffs' business.

Citing the terms of Civ. Code 1913, par. 1464, permitting picketing, the court said:

Whether the picketing is peacefully carried on is a question of fact in this jurisdiction and, as is the case in all such matters, when the trial court has determined the question, and substantial evidence in support of the determination reached appears in the record, the appellate court will not interfere.

Under the evidence in this record, the court was justified in finding as a fact that the defendants were engaged in peacefully picketing about the plaintiffs' place of business.

As to certain statements on the banners and circulars, and in the street talk of the pickets, derogatory to the plaintiffs and perhaps libelous, it was said that the remedy was in a civil action rather than a suit for injunction, even though the offenders might be insolvent, and unable to respond in damages if judgment were obtained.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKES—PICKETING—INJURY TO BUSINESS—DAMAGES—*Baasch v. Cooks' Union, Local No. 33, et al., Supreme Court of Washington (Jan. 11, 1918), 169 Pacific Reporter, page 843.*—C. F. Baasch conducted a restaurant in Seattle, operated on the open-shop principle. The Cooks' Union named, also the Waiters' Union and the Waitresses' Union of the city, picketed his place of business with "unfair" signs. He brought suit against these bodies and the Central Labor Council, and their officers and members, for an injunction and for damages for alleged loss of business. The complaint alleged the picketing and active annoyance of patrons and threats of secondary boycotts; that the wages, hours of labor, and conditions of employment in the establishment conformed to the union standards; that the defendants had threatened to drive the plaintiff out of business, and that the amount of busi-

ness done had been much reduced. Damages were set at \$1,500. The defendants did not file any pleading, but at the hearing their counsel moved for dismissal of the action, orally assuring the court that the picketing had ceased and would not be resumed. The trial judge thereupon ordered the action dismissed, and the plaintiff appealed. The supreme court held that the dismissal was error, and remanded the case with orders to require the defendants to plead to the complaint. Judge Fullerton delivered the opinion, from which the following is quoted:

The allegations of the complaint unquestionably state a cause of action. The complaint showed that serious damage had been done to plaintiff's business, for which he was entitled not only to relief against its continuance or repetition, but also to damages for the financial loss occasioned by the wrongful acts of the defendants. But the court, with full knowledge of the injuries caused the plaintiff through the illegal conduct of defendants, refused the right of trial on the mere assurance of opposing counsel that his clients would discontinue their acts. Future good behavior has never been recognized as an antidote for past actions which have occasioned substantial prejudice to the complainant. Although the chief object of the action may have been the restraining of the continuance of the illegal acts, yet, conjoined with the demand for relief on that score, was the added demand for compensation for the injury inflicted by the wrongful acts before they were discontinued. The trial judge recognized the weakness of his position by stating at the time of dismissing the action:

"I may not have the right to do it. I think it is the part of wisdom and good citizenship and good morals to do it, and I will take the responsibility. If the supreme court says I have no right, they can say so."

We think the lower court was in error. The guide for its rulings is found in the code of legal obligations rather than in the moral code.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKES—PICKETING—INJURY TO BUSINESS—RIGHT TO WORK IN ONE'S OWN BUSINESS—"BANNERING"—*Roraback v. Motion Picture Machine Operators' Union of Minneapolis, Supreme Court of Minnesota (Aug. 2, 1918), 168 Northwestern Reporter, page 766.*—Roraback owned a motion-picture theater in Minneapolis. He was a qualified motion-picture machine operator, but he could not belong to any unions because the unions would not let owners, part owners, or persons interested in a business become members. It had been his custom to hire union laborers of the defendant union, but, as he says, in order to economize, he started to operate his own machines part of the usual time. The union operators refused to work because they would not work with nonunion operators and plaintiff could not belong to their union. The union bannered plaintiff's place by having a person carry a ban-

ner back and forth in front of his theater. The banner had on it the words "This place is unfair to labor." Plaintiff sued for an injunction and applied for an injunction pendente lite, for, as he alleged, his business was being ruined. This was refused in the court below, and an appeal was taken. The supreme court, owing to some doubt in the evidence, did not grant the injunction pendente lite but referred the case back for trial, using in part the following language:

Defendants may use any lawful means to accomplish a lawful purpose, although the means adopted may incidentally cause injury to the plaintiff; but they may not intentionally injure or destroy plaintiff's business to accomplish an unlawful purpose.

If men, either singly or in combination, may lawfully injure or destroy the business of another for the purpose of compelling him not to work in such business himself, it will have far-reaching consequences. Such a doctrine would limit the field of business to those who have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their own account. Such a doctrine means that a machinist who starts a machine shop may lawfully be prevented from working therein as a machinist; that a carpenter who starts a carpenter shop may be required to have all his work done by others; that a barber who opens a barber shop must cease work as a barber. It means that the man in any occupation who starts in business for himself, relying upon his personal skill and ability to attain success, must forego the right to profit by his own skill by the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right guaranteed to him by the Bill of Rights in the Constitution and by the fourteenth amendment to the Federal Constitution, and any attempt to deprive him of that right is necessarily unlawful. \* \* \* The case is presented upon the pleadings and upon affidavits pro and con; it has not yet been tried. If, when the case is tried and findings are made determining the facts, it shall appear that plaintiff's contention is correct, he is entitled to relief, but we can not say that the trial court abused its discretion in refusing to issue an injunction before the facts are ascertained, and the order appealed from is affirmed.

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LABOR ORGANIZATIONS — INJUNCTION — STRIKES — PICKETING —  
 STRIKE TO UNIONIZE CAFÉ—*Local Union No. 313, Hotel and Restaurant Employees' International Alliance v. Stathakis, Supreme Court of Arkansas (July 1, 1918), 205 Southwestern Reporter, page 450.*—Joe Stathakis operated two cafés in the city of Little Rock, and his employees demanded that he unionize his cafés. He refused, whereupon the employees, who were members of the appellant union, declared a strike. The union employed pickets, who bore placards saying, "This café is unfair to union labor" and "Look, Faust Café

is unfair to union labor," up and down the sidewalk immediately in front of the plaintiff's cafés. The pickets also accosted people telling them not to patronize the cafés and threatening some who would not listen to their statements. They also threw stink balls into the cafés. Some persons about to enter the cafés were seized by the arm to restrain them from entering. Stathakis sought an injunction, which was granted, and an appeal was thereupon taken by the union. In upholding the injunction, Judge Smith said in part:

It is recognized, and this court has expressly decided, that laborers have the right to organize into unions for the purpose of bargaining collectively for the betterment of their condition, and, as an incident thereto, to strike collectively. On the other hand, it is equally as well settled and as uniformly held by the courts that the labor unions have no right to resort to force, intimidation, or coercion. Publicity as well as other means of persuasion may be used; but force, coercion, and intimidation may not be used.

The labor union or its representatives and employees had the right to exhibit the placards in question to the public; but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to so patrol or picket appellee's place of business with these placards as to interfere with his lawful business.

So here the strikers and the union to which they belonged and the employees thereof had the right to give notice to the public that appellee's cafés were open shops, and therefore unfair to union labor; but, in doing this, they had no right to exercise coercion resulting from the conduct herein set forth. They were not using the streets in front of appellee's place of business for the ordinary purposes for which streets and sidewalks are intended, but were using them for the avowed purpose of injuring his business or driving away the patronage which the public might otherwise have given him. Their interference with his business was direct and immediate and was intended so to be.

The decree enjoins picketing at and near appellee's premises, and the operation of the injunction is limited to that immediate vicinity. The reason for the limitation is manifest. A presentation of labor's grievances elsewhere gives the member of the public whose support is thus solicited an opportunity for reflection; but when the picketing is conducted in the small space of the frontage of the business picketed the effect of that conduct is practically immediate. No opportunity for reflection is afforded. One must choose immediately between defying the picket and acceding to his appeal, so that interference necessarily results to the business there being conducted. We conclude, therefore, that the decree of the court enjoining the picketing under the conditions stated is right and proper, and should be affirmed.

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LABOR ORGANIZATIONS — INJUNCTION — STRIKES — PICKETING —  
 STRIKE TO UNIONIZE RESTAURANT—BOYCOTT—*Webb v. Cooks', Waiters' & Waitresses' Union, No. 748, Court of Civil Appeals of Texas,*

*Fort Worth, (Apr. 20, 1918), 205 Southwestern Reporter, page 465.*— One Mr. Childs, the business agent or “walking delegate” of the defendant, came to plaintiff and presented him with a contract whereby he would be compelled to unionize his restaurant. He refused to do this. The defendant declared a strike against him and picketed his place. The picketing was done by having persons stand outside of the restaurant and intercept people about to enter it and present them with a card saying “This café is unfair to organized labor.” These pickets also verbally attempted to keep people from patronizing the restaurant. The employees of plaintiff were satisfied and were getting more pay than the contract presented by Mr. Childs would have allowed; they continued to work and made no demands of plaintiff. The lower court refused to grant an injunction. In reversing the lower court Chief Justice Conner, in giving the opinion of the court, said in part:

It therefore seems idle to say under circumstances as indicated that the acts complained of and shown are not provocative of violence and bloodshed, and do not amount to intimidation and coercion. We at least can not hide or obscure the truth with the specious contention urged therein that no open threats or violence was proven. We must know what has been frequently declared in adjudicated cases, that restraint of the mind is just as potent as a threat of physical violence.

It is further insisted in behalf of appellees, and its witnesses so testified, that the object was not to injure the appellant, but to promote the legitimate purposes of the union to better the conditions of the laboring man. Such purposes are, of course, worthy of all commendation, and by all lawful means are to be encouraged. But in the accomplishment of such a purpose care must be exercised not to invade the field of the rights of other persons; for it is a fundamental with us that all men have equal rights, that no man, or set of men, is entitled to separate public emoluments or privileges, save for public services, and that all of our citizens are entitled to the equal protection of our laws. The right of the appellant to conduct his business upon terms of equality with all other persons is an essential part of his constitutional rights as an American citizen.

It is immaterial, therefore, that appellees' ultimate object in ordering and carrying on the picketing may have been lawful; for, as said in the case from which we have before quoted at some length:

“The law looks to the immediate, and not the incidental, object of the combination. If the immediate object is unlawful, the combination is unlawful.”

And inasmuch as the acts complained of constituted an invasion of appellant's rights and were voluntarily and knowingly done, it must be further held that defendants, in a legal sense, acted maliciously. Malice, in a legal sense, denotes wrongful act intentionally done without just cause or excuse.

But yet for another reason, we think the judgment below is erroneous. We are of the opinion that the acts of the appellees as al-

leged by appellant and as shown by the undisputed evidence fall within the prohibitory effect of our antitrust statutes.

As it seems to us the acts of the appellees plainly come within the meaning of a trust as above defined. [Definition was taken from article 7796, ch. 1, title 130, 4 Vernon's Sayles' Tex. Civ. Stats., p. 4808. It stated that a trust was a combination of persons, associations, etc., to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.] They combined in open meeting and formally initiated and carried into effect the picketing of appellant's premises as shown by the evidence. The direct, the immediate, object in so doing seems just as certainly to have been to create and carry out restrictions in the free pursuit by appellant of his business, which was a lawful one.

We conclude that both by the weight of authority and by virtue of our antitrust statutes the judgment below was wrong, and that it should be reversed, and here rendered for appellant; that writ of injunction forthwith issue as prayed for.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKES—RENUNCIATION OF ILLEGAL PURPOSE—*Baush Mach. Tool Co. v. Hill et al.*, *Supreme Judicial Court of Massachusetts (July 16, 1918)*, 120 *Northeastern Reporter*, page 188.—The defendants are two labor unions consisting of about 250 members. The strike was called in August, 1917, for the purpose of unionizing the plaintiff's shop and to limit the number of apprentices to be employed in the shop. An injunction against the maintenance of the strike was issued, and on appeal upheld by the supreme court. Judge Loring in giving the opinion of the court, said:

This is a bill in equity brought against the members of two labor unions to enjoin them "from interfering with the business of the plaintiff \* \* \* by maintaining, carrying on, aiding or abetting in any manner the strike in force against the plaintiff." The case was sent to a master. The master found that the members of the two unions had struck to get an increase of pay, to unionize the plaintiff's shop, and to limit the number of apprentices. The plaintiff and defendants are at issue on the legality of a strike to limit the number of apprentices. But both the plaintiff and the defendants agree that a strike to unionize an employer's shop is an illegal strike and a strike for an increase in wages is a legal strike. Without question a strike for both a legal and illegal purpose is an illegal strike and no contention has been made to the contrary. It is not necessary therefore to consider the legality or illegality of a strike to limit the number of apprentices and we lay that purpose of the strike on one side as a matter of no consequence.

On the coming in of the master's report a temporary injunction against the strikers was issued and later the master's report was confirmed, whereupon 38 of the defendants moved to amend their answer. In this amendment they declared that they renounced and

abandoned the strike for the purpose of unionizing the plaintiff's shop and limiting the number of apprentices. This amendment was allowed. The 38 members, however, still remained in the unions of which they were members. When the final decree was entered the injunction included the 38 members with the rest of the two unions. This inclusion was appealed from. In deciding this point the court said:

The subsequent renunciation made by the 38 defendants "of the closed shop principle and any other unlawful object of" the illegal strike called and then maintained by the union of which they were and were to continue members and to which (illegal strike) by reason of the fact that they elected to continue members of the union they were of necessity parties was nothing more than a statement of their motive in remaining parties to the illegal strike. A party to a strike which is illegal because it is a strike to unionize a shop as well as to get higher wages is a party to an illegal strike although so far as he is concerned he either became or continued a party to it only to get an increase of pay. The 38 wanted a legal strike for an increase in pay only. That is plain. It is plain also that they wanted to get out of the illegal strike then being maintained by the union of which they were members. But they did not want to leave the union. To get out of the strike and to keep in the union they hit upon the novel scheme of renouncing the illegal purpose of the strike. But that was a futile proceeding because it was nothing more than a statement of their motive in continuing members of the union and so of necessity parties to the illegal strike. It had no effect upon their liability as parties to the strike and in the final decree no distinction should have been made between the 38 and the 212 members of the two unions here in question.

As the strike was an illegal one it is not necessary to consider whether the means employed by the defendants were lawful or unlawful.

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LABOR ORGANIZATIONS—INJUNCTION—STRIKES—VIOLATION OF INJUNCTION—*Tosh et al. v. West Kentucky Coal Co., United States Circuit Court of Appeals, Sixth District (June 14, 1918), 252 Federal Reporter, page 44.*—The West Kentucky Coal Co. in 1907 brought a suit in equity for an injunction against certain persons and former employees who had declared a strike. The strike was brought on by a union called the United Mine Workers of America. The coal company was granted an injunction enjoining defendants "and all other persons whatsoever who may have acquired notice, information, or knowledge of this judgment" from interfering by threats, violence, or intimidation with complainant's employees. Tosh and his coplaintiff in error, Overby, had been employees of the coal company, but were discharged for joining the aforementioned union. They thereupon, with the aid of others, attempted to cause a strike to unionize the coal company. The coal company served



them with certified copies of the decree of 1907 and later had them prosecuted and fined for criminal contempt of court for the violation of the decree. Tosh and those with him had become members of the union since the decree of 1907. In deciding the various points of the case, and reversing the judgment of the court below, the court said:

We see no merit in the contention that the injunctive decree in the equity suit afforded no basis for contempt proceedings for its violation against parties amenable to it, upon the ground that the decree finally adjudicated the rights of the parties to it, or because of mere lapse of time since its rendition. The purpose of the decree was to restrain—it looked to the future.

Were the plaintiffs in error (Tosh and Overby) amenable to the injunction in the equity suit? The company was within its rights in refusing to employ union men and in discharging those who joined the union, and was entitled to protection against unlawful invasions of such rights. Plaintiffs in error had a right, by peaceful methods, to persuade others not to work in a nonunion mine, but had no right to attempt such result by violence or intimidation.

The inclusion of the words "and all other persons whatsoever, who may have acquired notice, information, or knowledge of this judgment," would not alone operate to make them parties to the litigation and the resulting decree. It is not even claimed that up to the time of the decree they were in privity with the defendants. Nevertheless, had the strike which was the occasion of the decree been still in progress, plaintiffs in error, by committing the acts of which they were found guilty, after actual knowledge of the injunction, would have rendered themselves amenable to it and liable for its violation. But unless the subject matter of the suit in which the injunction was issued still existed, that is to say, unless the condition out of which the alleged contempt grew was in substance the strike condition of nearly 10 years earlier, a mere continuation of it, or unless plaintiffs in error in commission of the acts charged against them in 1917 can be said to have been the associates of or to have represented the defendants in the injunctive decree, we think they can not be held amenable to the old injunction.

In our opinion, the renewed efforts of the United Mine Workers to unionize the mines, and the connection of the plaintiffs in error with such efforts, were not enough to tie the conditions of 1917 to those existing in 1907 as either to make the former but an extension of the strike of 1907 or as to make plaintiffs in error with respect to their acts in 1917 the associates or representatives of the defendants in the decree of 1907.

Under the circumstances shown here, to hold the plaintiffs in error amenable for contempt for violating the injunction made nearly 10 years before would extend the rule of the Lennon case, 64 Fed. 320 [Bul. No. 11, p. 532], as well as of the adjudications generally, far beyond any decision which has come to our attention. To our minds such extension is unwarranted upon principle, as well as unsupported by authority.

Judgment was therefore reversed.

LICENSING OF EMPLOYEES—BARBERS—PERIOD OF PREPARATION—CONSTITUTIONALITY OF STATUTE—*People v. Logan, Supreme Court of Illinois (June 20, 1918), 119 Northeastern Reporter, page 913.*—W. J. Logan was convicted of violation of a statute enacted in 1909 by employing in his barber shop a man not registered according to its provisions. The law referred to provides for an examining board of three persons, who shall give certificates of registration to persons found qualified. Three years' preparation as an apprentice or as a student in a barber school is required as a preliminary unless one has practiced the trade for three years in other States; and the applicants are required to be possessed of the requisite skill to perform properly all the duties of the trade, and to have sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof. Persons actually engaged in the occupation within 90 days after the approval of the act might be registered without examination. The act, it was contended by the respondent, was unconstitutional; but the court held that the regulation of the trade was directly related to the health and safety of the public. The registration of those already in the occupation, though objected to as making them a favored class, was held not unreasonable. As to the requirement of the three years' period of preparation Judge Dunn, who delivered the opinion affirming the conviction, said:

It is argued that the requirement of three years' service as an apprentice or study in a barber school has no direct relation to the public health or safety, but is rather intended to restrict and discourage the public from engaging in this occupation. The intention is to restrict the public from engaging in this occupation to the extent that only those may do so who have learned the trade; know how to prepare, use, and care for the tools; know what sanitary precautions must be taken to avoid the risk of spreading disease; and are acquainted with the sanitary regulations which the board of examiners is authorized by section 11 to adopt. Three years seems a long time to require for learning the trade of a barber, but we can not say that it is so unreasonably long as to constitute an unreasonable restriction upon the right to engage in the trade.

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LICENSING OF OCCUPATIONS—CEMENT CONTRACTOR—CONSTITUTIONALITY OF ORDINANCE—*State ex rel. Sampson v. City of Sheridan et al., Supreme Court of Wyoming (Jan. 21, 1918), 170 Pacific Reporter, page 1.*—The State of Wyoming, on the relation of C. W. Sampson, sued in mandamus to compel the city of Sheridan and its officers to issue to Sampson a cement contractor's license. Sheridan is a city of the first class, having a commission form of government. Under the authority of the State laws relating to the subject of licenses, as

was claimed, an ordinance had been enacted by the city for the licensing of cement contractors, requiring the payment of a fee of \$15, and the giving of a bond for \$1,000 that the work done would remain in good condition for five years after its completion. The relator showed that he had been engaged in the business for 10 years, and that all the work he had done had been first class; that he had complied with all the requirements except the filing of the bond, which he was unable to procure from a surety company because he could not make a sufficient showing of his financial standing in the absence of the possession of real estate or a substantial bank account. The court found only one case involving a requirement of a bond guaranteeing the durability of the work done, *Gray v. Omaha*, 80 Neb. 526, 114 N. W. 600. The court, speaking through Judge Blydenburgh, held the ordinance invalid for reasons which are fully discussed after stating the principles applicable to the exercise of the police power, but which are also given in brief form in the following language:

Viewing the ordinance in question in the light of the above principles, we are constrained to hold that it is unconstitutional and void because: First, the vocation of cement contractor is not a proper subject of police regulation not affecting either the health, morals, safety, or welfare of the public generally so as to be a necessary subject of regulation; second, no express power to regulate this vocation is conferred upon the city, and none can necessarily be implied from the powers granted; third, were the power given, the regulations required are unreasonable, especially in requiring a maintenance bond to run five years; fourth, the ordinance is discriminatory and class legislation in that it requires a fee and bond from one laying concrete or cement sidewalks and requires neither from those laying sidewalks composed of asphalt, granite, vitrified brick or any other hard and incombustible material.

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PENSIONS—OLD-AGE AND MOTHERS' PENSIONS—CONSTITUTIONALITY OF STATUTE—*State Board of Control v. Buckstegge*, *Supreme Court of Arizona* (July 1, 1916), *158 Pacific Reporter*, page 837.—L. H. Buckstegge was a taxpayer in the State of Arizona, and brought action against the State Board of Control to restrain the payment of certain sums allowed under an initiated act of November 3, 1914 (Acts of 1915, p. 10). Payment was objected to on the ground that the act in question was invalid. Judgment was granted in favor of Buckstegge in the superior court of Maricopa County, whereupon the board appealed, with the result that the judgment of the superior court was affirmed. The title of the act is "An act providing for an old-age and mothers' pension and making appropriation therefor."

The supreme court recited the law and the facts in the case, saying that:

It will readily be seen that the purpose and intent of the act is to introduce into the laws of Arizona a pension system for the benefit of certain citizens and persons designated in the act. While the object of the act is easily determinable from its title and context, the lack of a clear statement of the means and methods of its enforcement, we think, must necessarily result in its defeat.

The first section undertakes to abolish all almshouses in the State; the grounds and buildings are to be sold, and the proceeds to be devoted to the purposes of the act. The second section establishes a pension system "in the absence of almshouses."

Two difficulties were pointed out in these sections, one that the constitution directs the establishment and support of various institutions, such "as the public good may require," and as the language of the act under consideration is broad enough to cover both private institutions and State charitable institutions, it comes into conflict with this provision of the constitution. It is also said that existing statutory provisions regulate the sale and disposal of county property, and that this act is an invalid attempt to provide a different method. Again, as the act is to be effective "in the absence of almshouses," it is ruled that until it is made clear that almshouses no longer exist, the act could not come into effect as providing a pension system.

The provision of the State constitution limiting laws to the subject matter expressed in the title is also found to be violated, since the title contains no intimation of the purpose to abolish almshouses. The result of such abolition would be to leave unprovided for all other needy adults than those specified in the act under consideration, needy men and women, citizens of five years' residence and above 60 years of age, excepting only widows and the wives of inmates of penal institutions and insane asylums who have children under 16 years of age; so also of all needy children, orphans or others, who had not a mother of the foregoing description. Such a result being in no wise indicated in the title of the act is further evidence of its being in contravention of the constitutional limitation noted.

The judgment of the court below was therefore affirmed.

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PENSIONS—POLICE PENSION FUND—CONDITIONS ENTITLING TO BENEFITS—*Stiles v. Board of Trustees of Police Pension Fund of West Chicago Park, Supreme Court of Illinois (Dec. 19, 1917), 118 Northeastern Reporter, page 202.*—Arthur A. Stiles brought suit for mandamus to compel the trustees named to pay him a yearly pension of \$900, beginning June 4, 1914. He alleged that he had been a po-

liceman for the park commissioners for more than 18 years previous to June 29, 1911, on which date he was made police captain; that he performed the duties of the latter position until June 4, 1914, when he was suspended, and later discharged; that he had served more than 20 years altogether, and was therefore entitled to the pension under the act of 1913 providing for the fund, and that he had not been guilty of a felony or become a habitual drinker or a nonresident of the United States—these being the exceptions to the allowance of the benefits of the act. The defenses relied on were his discharge under the civil-service act for having entered a saloon in uniform, and at other times using vile, profane, and abusive language; and his institution of another proceeding to compel his reinstatement, the claim being that in doing this he had elected to consider himself as still a member of the force, and therefore could not apply for a pension. The case was decided in the superior court of Cook County on a demurrer to the answer, which procedure admitted all the facts alleged, but denied that they constituted a sufficient defense in law. The court sustained this contention, and granted the writ of mandamus directing the pensions to be paid; this judgment was reversed by the appellate court, but the supreme court affirmed the judgment of the trial court in favor of Stiles. Judge Craig delivered the opinion, saying that the civil-service commissioners had certain duties in connection with the hiring and discharge of policemen, but nothing to do with the pension system. The following is quoted from this opinion:

The legislature has seen fit, in plain and unmistakable terms, to fix as the only condition and prerequisite for a pension 20 years of service and ceasing from such service. The legislature has further seen fit to provide that the only acts for which a pensioner may be deprived of his pension are conviction of felony, becoming an habitual drunkard or a nonresident of the United States. Accordingly, whether the appellant was properly discharged by the civil-service board, or whether he was discharged at all, has nothing to do with his right to a pension under the statute.

It was further said that if he was successful in being reinstated, he could of course draw no pension for his period of active service; otherwise the other proceeding had no effect.

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RELIEF ASSOCIATIONS — RAILROADS — ATTEMPTED REPUDIATION OF CONTRACT—STATE AND FEDERAL STATUTES—*Pittsburgh, C. C. & St. L. Ry. Co. v. Miller, Supreme Court of Indiana (June 6, 1918), 120 Northeastern Reporter, page 706.*—The railway company is a member of a relief association together with various other railroads, all of which are engaged in interstate commerce. The law of Indiana ex-

pressly declares that any and all contracts providing for the retention of part of the employee's wages by the employer for payment into relief funds are null and void. There is a Federal statute which, although it does not prohibit relief associations and contracts thereunder, regulates such contracts to the extent that they are not valid to limit the liability of the employer. Otherwise under the Federal statute such contracts are valid. Miller became employed by the defendant railroad and entered into a contract permitting the railroad company to retain part of his salary for the purposes of the relief fund. He was disabled on one occasion and received \$36 as benefits. He now sues for the money retained by the railroad company alleging that the contract was null and void under the statute of Indiana. He recovered in the lower court but this court reversed the decision, rendering a decision which reads in part as follows:

The Constitution of the United States confers upon Congress the power to regulate commerce among the several States and with foreign nations, and the power thus conferred is exclusive. The States, however, possess the power to impose by law on carriers exercising their calling in the State certain restrictions and regulations as to the conduct of their business. Such laws do not in themselves constitute a regulation of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. As to regulations of the character mentioned the power of the State to legislate is concurrent with that of Congress; and, so long as Congress does not legislate on the subject, such legislation by the State is regarded as a valid exercise of the police power of the State for the regulation of the relative rights and duties of all persons and corporations within its limits; but, when Congress acts in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceases, and all laws passed by the State on the subject become inoperative.

If the statute of Indiana was rendered inoperative by the act of Congress quoted, the fifth paragraph of the answer states facts sufficient to constitute a defense. Under the act of Congress the contract was valid in all respects, except as to the provisions by which the interstate commerce common carrier attempted to exempt itself from liability for damages.

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SABOTAGE—ADVOCACY BY CIRCULATION OF POSTERS—CONSTITUTIONALITY OF STATUTE—PENALTIES—*State v. Moilen et al.*, *Supreme Court of Minnesota* (Apr. 19, 1918), 167 *Northwestern Reporter*, page 345.—A statute of Minnesota enacted in 1917 prohibits and penalizes the advocacy of criminal syndicalism, which is defined in the following terms:

Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage (this word as used in this bill meaning ma-

licious damage or injury to the property of an employer by an employee), violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

The advocacy or teaching of the things condemned, by word of mouth or the distribution of written or printed matter, is made punishable by imprisonment for not more than five years, or fine not exceeding \$1,000, or both. Voluntary participation in public assemblies for such advocacy may involve a still greater punishment, the statutory penalty being imprisonment for not more than 10 years, or fine not exceeding \$5,000, or both. Matt Moilen and others were indicted for violation of this act. One defendant, Maki, was tried separately and convicted, and before sentence was pronounced he secured the certification to the supreme court of the following questions of law:

(1) Is the statute on which the prosecution is founded a valid constitutional law? and if valid, (2) Do the facts presented by the indictment and certified record constitute a violation thereof?

Both these questions were answered in the affirmative. The question as to constitutionality is stated and discussed in the following language by Judge Brown, who delivered the opinion for the court:

It is contended by defendant that the statute violates the provisions of the fourteenth amendment of the Federal Constitution, wherein it is declared that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to him the equal protection of the law. And, further, that the statute violates the provisions of the State constitution prohibiting special or class legislation, and also the prohibition against excessive fines and cruel and unusual punishments for crimes.

The contention that the statute violates rights granted and secured by the Federal Constitution is without special merit. The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the State, arising from the practice of sabotage and other unlawful methods of terrorism employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like in terrorem methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the legislature is clear. Sabotage as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles embraces among other lesser offensive acts the willful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. The methods of terrorism referred to in the statute have close relation to sabotage, and are practiced for the pur-

pose of intimidation, and to coerce employers into a compliance with labor demands. Methods of that sort are equally unlawful and open to legislative condemnation.

It is the exclusive province of the legislature to declare what acts, deemed by the lawmakers inimical to the public welfare, shall constitute a crime, to prohibit the same and impose appropriate penalties for a violation thereof. With the wisdom and propriety thereof the courts are not concerned. [Cases cited.] Judicial consideration of enactments of the kind is limited to the inquiry whether the constitutional rights of the citizen have been invaded or violated. If such rights be in nowise infringed or abridged, the statute must stand, however harsh it may seem to those who run counter to its commands. It requires no argument to demonstrate that the subject matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or teaching of the iniquitous and unlawful doctrines which it condemns.

The argument in attempted palliation or justification of the practice of sabotage, on the theory that it is an appropriate and effective method of combating or countervailing frauds committed by others, such as the act of the manufacturer in the adulteration of food products with ingredients and foreign substances detrimental to the consumer, which is placed on the market under the label of pure food, is wholly beside the question. The law equally condemns frauds and deceptions of that kind and the perpetrator thereof is punishable to the extent and in the manner prescribed by particular statutes. No person heretofore has had the courage publicly to advocate such frauds as a means of redressing alleged wrongs, nor the temerity, when charged with a violation of the statutes prohibiting the same, to appeal to the courts on the claim that the adverse statute impaired his constitutional liberties. It follows that no right granted or secured to the citizen by either the Federal or State constitution has in any way been taken away or impaired.

It is next contended that, since the statute is limited in its application to employer and employee, with protection only to the employer to the exclusion of all other persons, it is class legislation and a denial of the equal protection of the law, and for that reason unconstitutional and void. The point is without force. While the practice of sabotage applies only between employer and employee, the other methods of terrorism referred to in the statute are not so limited, and the statute in that respect has general application. But for the purposes of the case it may be conceded that the statute applies only to the relation of employer and employee, yet we have no difficulty in affirming its validity against this attack. The relation of master and servant, employer and employee, has long been the basis and foundation for specific legislation in this State, as well as in the other States of this country. And though often vigorously challenged as class legislation, statutes applying only to that relation have in later years been sustained by the courts with few exceptions. A few instances of such legislation may be referred to for the purposes of comparison.

The instances cited are laws relating to the abolition of common-law defenses in cases of injury to employees through negligence of



the employer; the prohibition of blacklisting by employers, and of combination by employers to prevent the employment of discharged employees; the regulation of hours of labor and wages of women and children; the protection of motormen; and, finally, the enforcement of liability without fault under the workmen's compensation act. The court concludes on this point:

The rule is thoroughly settled that the relation of master and servant may properly be made the classification for legislation concerning rights, duties, and obligations arising therefrom.

As to the penalties fixed by the statute, the court said:

The contention that the penalty fixed by the statute violates the provisions of the constitution against excessive fines and cruel and unusual punishments for crime is not sustained. The nature, character, and extent of such punishments is a matter almost wholly legislative. The legislature may prescribe definite terms of imprisonment, a specified amount as a fine, or fix the maximum or minimum limits of either, which the courts are bound to respect and follow. In fact, the court has jurisdiction to interfere with legislation upon this subject only where there has been a clear departure from the fundamental law and the spirit and purpose thereon and a punishment imposed which is manifestly in excess of constitutional limitations. [Cases cited.] The term "cruel and unusual punishments," as used by the constitution, has no special reference to the duration of the term of imprisonment for a particular crime, though it would operate to nullify the imposition by legislation of a term flagrantly in excess of what justice and common humanity would approve. The purpose of incorporating that particular provision in the constitution was to prevent those punishments which in former times were deemed appropriate without regard to the character or circumstances of the crime, but which later standards in such matters condemned as unjust and inhuman; such punishments as burning at the stake, the pillory, stocks, dismemberment, and other extremely harsh and merciless methods of compelling the victim to atone for and expiate his crime. The intention was to guard against a return to such unhuman methods. The punishments fixed by this statute do not exceed the limit of legislative discretion, and the statute must stand. It is possible that an excessive punishment may in a particular case be imposed by the court. But that possibility will not destroy the statute. The sentence may be reviewed on appeal, and, if found excessive, proper correction may be made or ordered. No sentence has yet been pronounced in this case, and we assume that it will be in harmony with the special facts of the case. (Sec. 9219, G. S. 1913.)

As to the second question submitted, whether the facts made out a case of violation of the act, the court said:

We come lastly to the question whether the facts presented by the indictment and certified record show a violation of the statute. There was a trial below and a verdict of guilty. The evidence is not returned to this court, though the certificate of the trial judge is to the effect that the evidence presented justified a finding of all the facts alleged in the indictment. The charge made by the indictment

is that at the time and place stated therein defendants did wrongfully and feloniously circulate, distribute, and publicly display certain written and printed matter in the form of posters (photographic copies of which were made a part of the indictment), which were posted upon certain buildings in the village of Biwabik, St. Louis County, and which contained printed matter, advocating and teaching that industrial and political ends should be brought about by crime, sabotage, violence, and other unlawful methods of terrorism.

The final question discussed by the court is whether the circulation of the posters, which were put up during the night, constituted the crime denounced by the law. The posters were small, from 1½ to 2 inches in the largest dimension, and printed in red as well as black, the red being a flag in one case and the background of pictures in the three others. Photographic copies are reproduced in the court's opinion; not, however, in colors. The first showed in the center a snarling black cat, with the words "Beware—Good pay or bum work—I. W. W.—One big union—We never forget—Sabotage" appearing above and below the picture (portions appearing on the original on one line being indicated by the dashes as given here). The words "Beware" and "Sabotage" stand out in large letters. The second had a wooden shoe, with "I. W. W." in small type above, and "Sabotage" below in comparatively large letters, with the quotation "Sabotage means to push back, pull out, or break off the fangs of capitalism. W. D. Haywood." The third had the red flag in the center, with the words "Abolition of the wage system" and a wooden shoe upon it; the words "Industrial unionism" above, and "Join the I. W. W. for freedom" below. The last was a picture of a workman with one hand uplifted, underneath which were the words "Join the one big union." The opinion concluded as follows:

The posters which defendant distributed and caused to be publicly displayed do not attempt to limit the sabotage thus advocated under the captions in large black type, "Beware," and "We never forget sabotage," to the innocent variety. And, taking all the posters together, headed by the one with the snarling black cat, we are clear that the jury were justified in finding that the vicious kind of sabotage was intended and that the public display thereof was an advocacy of such doctrine by the defendant. The whole atmosphere given out by the posters is one of intimidation, indicative of a purpose to incite fear in the employers of labor and to compel submission to labor demands. If defendant intended some innocent phase of the doctrine of sabotage he should have made it appear upon the face of the posters, and, not having done so, the jury were justified in finding that he was advocating sabotage in this offensive form.

**SABOTAGE—ATTEMPT AT THE DESTRUCTION OF WAR MATERIAL—OFFENSE—***United States v. De Bolt et al., United States District Court, Southern District of Ohio (July 3, 1918), 253 Federal Reporter, page 78.*—The Ralston Steel Car Co. was engaged in the construc-

tion of 4,400 steel cars for the United States for war purposes, 400 of which were to be used in trench warfare in France. Early in June an attempt was made to unionize the company's plant. The company thereupon discharged some 10 or 12 employees. The employees belonging to the union held a meeting which one Fox, a prospective member, attended. They determined that Fox should pour vinegar into the bearings of a 9-foot spindle lathe operated by one Ingraham and also loosen the tailstock of the machine, the purpose being to injure the work on the machine and also the machine itself which was indispensable to the swift prosecution of the company's contract. Fox was suspected and watched. Upon being called to the office of his employer he recanted and confessed, disclosing all the facts. The defendants claimed that it was not possible to indict them for an attempt to commit sabotage, alleging that the law provides only for the commission of the act and moved for directed verdicts in their behalf. The following is quoted from the opinion of the court:

They therefore claim that the indictment is insufficient in law, and that if the evidence offered by the Government be accepted as true, no offense was committed, for the reason that the defendants did nothing more than to advise, solicit, and attempt to influence Fox to pour vinegar into the bearings of the lathe and to loosen its tailstock and screws.

The gravity of the situation produced by the present war is such that Congress in its wisdom was impelled to enact the wise, but somewhat drastic, law on which the indictment was based.

The indictment charges an aggravated offense much more prejudicial to the community than an indictment to steal—an incitement or solicitation to commit an offense which, if committed, would cripple the Nation in the prosecution of the present war, prolong its duration, increase its cost, and multiply the number of killed and wounded Americans. The offense charged is such as tends to aid our country's enemies, and is an attack upon our body politic; i. e., the whole body of people living under our organized political Government, and law-abiding as our citizenship is, is provocative of disorder and breaches of the peace.

The indictment is sufficient, and the evidence such as requires the submission of the case to the jury.

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SEAMEN—MEASURE OF RECOVERY FOR INJURIES—*Chelentis v. Luckenbach S. S. Co. (Inc.)*, *Supreme Court of the United States (June 3, 1918)*, *38 Supreme Court Reporter*, page 501.—Peter Chelentis brought action for damages for an injury received in December, 1915, which he suffered while employed on the steamship *J. L. Luckenbach*, owned and controlled by the company named. He was performing certain duties on the deck of the vessel during a heavy wind, when a wave came aboard, knocked him down and broke his leg. When the

vessel reached shore he was taken to the marine hospital; he remained there three months, during which time his leg was amputated. He sued the company for damages at common law, waiving the right to recovery for wages, maintenance, and cure given by the maritime law. Judgment for the company was affirmed in the Circuit Court of Appeals for the Second Circuit, and the plaintiff carried the case to the Supreme Court. That court denied the common-law right and affirmed the judgment below, Mr. Justice McReynolds delivering the opinion. That the matter was one governed by the maritime law he stated as follows:

The work about which the petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance, and cure. Under the doctrine approved in *Southern Pacific Co. v. Jensen* [Bul. 246, p. 203] no State has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States."

The plaintiff, however, relied upon two statutes, the first being the judiciary act, with its clause "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." As to the effect of this the court said in part:

The precise effect of the quoted clause of the original judiciary act has not been delimited by this court, and different views have been entertained concerning it. In *Southern Pacific Co. v. Jensen* we definitely ruled that it gave no authority to the several States to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations."

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized by the common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

That the Seaman's Act of 1915, which provided that seamen having command shall not be held to be fellow servants with those under their authority, was also ineffectual to give the plaintiff in the present case, even though a negligent order of the master caused the injury, damages larger than those included in the scope of the maritime law, which provides only for wages, maintenance, and cure, was maintained in the concluding paragraph of the opinion here quoted:

Section 20 of the seaman's act declares "seamen having command shall not be held to be fellow servants with those under their authority," and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of a crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore.

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SEAMAN—WAGES—PAYMENT IN PORT—ADVANCES MADE IN A FOREIGN PORT—*Sandberg v. McDonald, Supreme Court of the United States (Dec. 23, 1918), 39 Supreme Court Reporter, page 84.*—Sandberg and other seamen shipped on board the British ship *Talus* in Liverpool, where advances were made to them not in excess of one month's wages. Such advances are valid under the British laws. The seamen, when the vessel arrived at Mobile, Ala., demanded one-half of their wages as provided under the laws of this country. They were paid one-half of the wages earned after deducting the amount of the advances. The seamen claimed that they were entitled to one-half the total wages due them without regard to the advances, alleging that the payment of advances being illegal under the Seaman's Act (Mar. 4, 1915, ch. 153, 38 Stat. 1165), the advances could not properly be reckoned in determining the amount due them. The district court gave judgment in favor of the seamen. On appeal the Circuit Court of Appeals reversed this judgment, whereupon a writ of certiorari was brought to this court. Judgment was rendered affirming the decision of the Circuit Court of Appeals by a divided court. Mr. Justice Day, in expressing the majority opinion, said in part:

The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that such advancements shall in no cases, except as in the act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to foreign vessels? We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels "while in the waters of the United States."

Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. We think there is nothing in this section to show that Congress intended to take over the control of such contracts and payments [of advances] as to foreign vessels except while they are in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

In the same section, which thus applies the law to foreign vessels while in the waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction, a purpose so wholly futile is not to be attributed to Congress. *United States v. Freeman*, 239, U. S. 117, 120, 36 Sup. Ct. 32. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

It is said that the advances in foreign ports are against the policy of the United States, and, therefore, not to be sanctioned here. As we have construed this section of the statute, no such policy as to foreign contracts legal where made, is declared.

Affirmed.

Justices McKenna, Holmes, Brandeis, and Clarke dissented, and Mr. Justice McKenna, in giving the dissenting opinion, spoke, in part, as follows:

It is conceded, yielding to the authority of *Patterson v. the bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821 [Monthly Labor Review, February, 1919, pp. 253-256], that the act applies to American seamen shipping in an American port upon foreign vessels, but it is contended from that case and other cases that it ought "to seem plain on principle and authority that the advancement statute has no effect except upon advancements made to seamen within the territorial jurisdiction of the United States." And, indeed, it is insisted that Congress "ex industria in terms confined the application to the waters of the United States." The conclusions are deduced from the cases which are reviewed and the language of the act.

We can not concede the qualification nor doubt the power of Congress to impose conditions upon foreign vessels entering or remaining in the harbors of the United States. And we think that the case of the *Eudora* declares the grounds of decision. Its principle is broader than its instance and makes the vessel and its locality in the waters of the United States the test of the application of the act and not the nationality of the seamen, nor their place of shipment, nor contravening conventions, and precludes deductions and advances.

Nor is there obstacle in the penal provisions of the act. They may be distributively applied, and such application has many examples

in legislation. It is justified by the rule of *reddendo singula singulis* [referring particular things to particular matters]. By its words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction. The seamen's act especially invokes the application of the rule. The act applies to foreign vessels as explicitly and as circumstantially as it does to domestic vessels. Let the foreign vessel be in the waters of the United States and every provision of the act applies to it as far as it can apply.

We are, therefore, of the opinion that the district court was right in refusing to allow the Liverpool advances and the Circuit Court of Appeals was wrong in reversing the ruling.

This case was immediately followed by the cases of the *Rhine* and the *Windrush* decided together on substantially the same facts. The same decision was handed down by the Supreme Court of the United States as in the case of the *Talus*, the same justices dissenting for the same reasons as above stated.

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SUNDAY LABOR—EXCEPTIONS IN LAW—OPERATION OF MOVING-PICTURE THEATER—*Capital Theater Co. v. Commonwealth, Court of Appeals of Kentucky (Jan. 22, 1918), 199 Southwestern Reporter, page 1076.*—The theater company was sought to be subjected to the penalty prescribed for violation of the law relating to Sunday work by the operation of a moving-picture theater on Sunday. The Court of Appeals of Kentucky, in upholding a judgment for the Commonwealth, Chief Justice Settle delivering the opinion, said in part:

The only work or business excepted by the statute is such as appertains to the "ordinary household offices, or other work of necessity or charity or work required in the maintenance of operation of a ferry, skiff, or steamboat, or steam or street railroads." The exceptions enumerated exclude other exceptions.

If the running of a ferry, skiff, steamboat, steam or street railroad on the Sabbath was not regarded by the legislature as a work necessarily coming within the meaning of the words, "or other work of necessity or charity," found in the statute, and, for that reason, was declared permissible, it was equally necessary for the statute to declare permissible the work of maintaining a moving-picture theater on the Sabbath, which is far less a work of necessity or charity than that of operating a ferry, skiff, steamboat, steam or street railroad. So, logically speaking, if the latter work does not, in the absence of a declaration in the statute to that effect, come within the meaning of the words, "work of necessity or charity," how can it be said that the work of operating a moving-picture show on Sunday does come within their meaning?

It was further held that "the inhibition of the statute applies whether the work forbidden to be done on the Sabbath be for profit or amusement," and that the fact that in this instance the theater was run for profit rather aggravated the offense than diminished it.

WAGES—MINIMUM WAGE—CONSTITUTIONALITY OF MASSACHUSETTS STATUTE—DECREE—*Holcombe v. Creamer, Supreme Judicial Court of Massachusetts, Suffolk (Sept. 23, 1918), 120 Northeastern Reporter, page 354.*—This is a petition by the minimum wage commissioners against owners or officers of laundry concerns to compel them to furnish the commission with information as to the wages paid by the laundry companies to women and children in their employ. In accordance with the provisions of the act establishing a minimum wage commission, an investigation was made into the wages and conditions of employment of women and children in laundries. The wage board, after considering the reports, fixed what it considered a just minimum wage, and a decree was issued by the commission directing all the laundry companies to obey this finding. Later the commission directed an investigation to determine just how far the decree had been obeyed by the laundries. Chief Justice Rugg, in considering the case, rendered a rather lengthy opinion from which the following is quoted:

The question presented by this record is the constitutionality of St. 1912, ch. 706, as amended by St. 1913, chs. 330 and 673, and St. 1914, ch. 368 [Bul. 166, p. 120-130; Bul. 186, p. 184], establishing the minimum wage commission.

It is manifest from the summary of its various provisions that the act is not mandatory as to the rates of wages. It contains no words of compulsion upon either employer or employee. It does not restrain freedom of action by either employer or employee as to the wages to be paid or received. Any woman and her employer may make and enforce any agreement respecting compensation for her labor unhampered by any provision of the act. There is no constraint affecting property or conduct. The act does not purport to exercise any check with respect to liberty of contract, use of property, or management of business. \* \* \* Although in several places in the act occur the words "decree" and "decree of its findings," it is manifest that they signify only advisory suggestions and not authoritative directions. "Decree" is not used in its judicial sense in the statute. It is the equivalent of counsel succinctly stated.

After reviewing various compulsory statutes designed to correct industrial evils, which, although mandatory in nature, were declared constitutional, the court continues:

Reference is made to these authorities solely to indicate the range of the public interest respecting matters of private relations, and not to intimate whether they afford any foundation for a compulsory minimum wage law. These decisions rest at bottom on the proposition that the public welfare in respect to health, morals, and safety bears so close a relation to the subjects dealt with in the several statutes as to justify legislative regulation.

Unless it can be said to bear no relation whatever to legitimate public interest or to be a palpable invasion of private right, liberty, and property without constitutional warrant, the decision of the general court [legislature] as embodied in the statute must stand.



There is no undue invasion of the right of privacy assuming that that is an element of the constitutional right to seek and obtain "safety and happiness."

Since the statute is not compulsory either in form or effect, there is no ground for holding that it is invalid because not affording equal protection of the laws. Whatever might be said about certain provisions of the act in this regard, if it were mandatory, there is no occasion now to discuss that matter.

The analysis of the act already made demonstrates that it is not open to objection as an unconstitutional delegation of legislative power. In this respect the statute is well within the authority of numerous decisions.

There is no criminal element about the act so far as it concerns the employer. The facts which the commission is authorized to ascertain and the evidence which it is empowered to seek from employers can not form the basis of a criminal proceeding, because no crime is created and no prosecution is provided for. Revealing the information or answering the questions required by the statute can not subject the employer to penalty or forfeiture, and does not expose him to imputation of crime. Therefore the constitutional prohibition against a subject being "compelled to accuse or furnish evidence against himself" is not violated.

The act as it has been interpreted does not seem to us to violate any provision of the fourteenth amendment to the United States Constitution.

Writ to issue.

Having upheld the constitutionality of the statute for the foregoing reasons, the court refused to consider its possible unconstitutionality if the act had been a mandatory one. It also refused to make a "prophesy" as to whether such an act would or would not be declared unconstitutional by the United States Supreme Court in construing it in the light of the fourteenth amendment to the United States Constitution.

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WAGES—MINIMUM WAGE—CONSTITUTIONALITY OF WASHINGTON STATUTE—NATURE OF EMPLOYMENT—RELEASE—*Larsen v. Rice, Supreme Court of Washington (Apr. 3, 1918), 171 Pacific Reporter, page 1037.*—The workmen's compensation law of Washington was enacted in 1913, and provides for the determination by the industrial welfare commission, after investigation by an advisory conference, of minimum rates of wages to be paid in any industry or line of employment. The employment of a woman or minor at a lower wage than that fixed is punishable as a misdemeanor, and it is also provided that an employee may recover in a civil action the difference between the amount of the legal minimum wage and the amount actually received. The plaintiff in the present case, Lillian Larsen, had been employed by J. D. Rice as a ticket seller in a

moving-picture house at \$3 per week of 39 hours, and had been paid this amount during 56 weeks, in which time she had been absent from duty a total of 7 days. The wage fixed by the commission as a minimum for cashiers, and also for clerical work generally, was \$10 per week of 48 hours. The plaintiff at first based her claim on a flat rate of \$10 per week, but later modified it by claiming \$10 for each 48 hours' work. On this basis the superior court of Lewis County gave her judgment for \$278.87, which was affirmed by the supreme court. The question of the constitutionality of the law was briefly answered by a reference to the decision of the Oregon supreme court, affirmed by the Supreme Court of the United States, sustaining the validity of the similar Oregon law, and by the statement that the reasoning of the Oregon court in the cases before it "appeals to us as sound and conclusive." (*Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743 (Bul. No. 169, p. 173); *Simpson v. O'Hara*, 70 Or. 261, 141 Pac. 158 (Bul. No. 169, p. 172).)

As to the inclusion of the work done by the employee among the employments enumerated by the commission, the court held that, whether or not it was work as a cashier, it was at any rate clerical work. It was noted that the precise employment came to the attention of the conference in its investigations.

The claim had at one time been compromised by the payment of \$40 (by a check which apparently was not cashed) and the making of an agreement that the ticket seller should be employed for three hours each day, from 7 p. m. to 10 p. m., at a wage of \$5 per week. The court said that while it is the general rule that compromises are favored by the law, and will be allowed to stand, in the absence of fraud, this rule should not be followed in the present case. Speaking on this point, Judge Fullerton, who delivered the opinion, said:

But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The State, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employee a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not therefore intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a

controversy arising out of a failure to pay the fixed minimum wage in which the State did not participate is voidable, if not void. Especially must this be so, as here, where the contract of settlement is executory, has been repudiated by one of the parties, the parties can be placed in statu quo, and the wage earner, by carrying out the contract, will not receive the wage to which she is justly entitled. One has but to glance at the terms of the proposed settlement in this instance to see that the respondent will not receive thereby any just equivalent for the sum which she agreed to surrender. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute to do so.

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WAGES—PAYMENT—PENALTY—CONSTITUTIONALITY OF STATUTE—*Moore v. Indian Spring Channel Gold Mining Co., District Court of Appeal, California (May 28, 1918), 174 Pacific Reporter, page 378.*—Moore and his assignors were employed as miners by the defendants. The employment was by one Mushrush who agreed to pay plaintiff \$3.50 per day for an 8-hour day. Plaintiff worked for defendants several months until the end of August, when the mine became flooded and plaintiff was discharged. Mushrush, however, refused to pay plaintiff and his assignors (other miners) their wages for the month of August. Plaintiff brought action under a law of California (ch. 663, Acts of 1911 as amended in 1915, Bul. 186, p. 87) which provides that when discharged an employee's wages become at once due and payable, and further provides that, in case of nonpayment, the wages are to continue for 30 days as a penalty. The only issue in this case is the constitutionality of this law under the Constitutions of the United States and California. In holding this law constitutional, after reviewing various authorities and decisions, the court announced the following conclusion:

It is not to be expected that the laborer upon whose service these industries depend will give his service without assurance of receiving the reward promised for such service, and any law whose object is to give to the laborer some further assurance that he will be promptly paid for his labor, in addition to his employer's promise, would seem to be reasonable, especially as the object is to induce, if not to compel, the employer to keep faith with his employee, and imposes a penalty only when he commits a wrong which not only injures the employee, but is an injury to the public in its tendency to deprive the public of an incidental benefit which comes from the employee's labor. The law imposes no unreasonable burden upon the employer, for, operating as it does in the future, and disturbing no vested right, he must, and it is but fair he should, make provision to pay his employee before hiring him, failing in which he should pay the penalty. Many enterprises require the services of large numbers of men—the numbers shifting from day to day—some being discharged and others taken on the job. It is common knowledge that a refusal to pay discharged men under such circumstances would tend to create breaches

of the peace and disturb the public tranquillity. The intention of the penalty imposed by the act in question is to make it to the interest of the employer to keep faith with his employees and thus avoid injury to them and possible injury to the public at large.

We can discover no ground for holding the act to be violative of any provisions of our constitution, or that it violated the fourteenth amendment of the National Constitution.

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WAGES—PAYMENT—TENDER—PENALTY—GROUNDS FOR DISCHARGE—*Dickinson et al. v. Atkins, Supreme Court of Arkansas (Jan. 28, 1918), 200 Southwestern Reporter, page 817.*—T. E. Atkins brought suit against Jacob M. Dickinson, receiver, and the Chicago, Rock Island & Pacific Railway for wages, interest thereon, and penalty for refusal to pay on demand after discharge; also for damages for alleged unlawful discharge, by way of injury to his reputation for honesty. Atkins had been a station employee at a wage of \$53 per month. He was discharged on January 15, and was not paid the sum of \$25.14 due him at the time of his discharge, although he demanded it. On January 31 a check for that amount was tendered him, and he refused to accept it, claiming under the State statute a penalty, consisting of the amount of his wages until settlement should be made. At that time nothing was said about interest, which would amount to slightly less than 4 cents. The employee contended that since the interest due had not been tendered, the penalty continued to run after the time of the incomplete tender. The court denied this, although on general principles he would be entitled to interest. The amount was so small in this case that it was disregarded under the legal maxim, *De minimis non curat lex*. However, it was held that the interest would continue to run until settlement.

The employee had at times been short in his accounts, but had promptly made adjustment. Inefficiency on his part was claimed. On Friday before his discharge a package containing a pearl valued at \$300 had arrived by express. The employee placed it, as he said, on the desk or in a pigeonhole, but on the owner's agent calling for it it could not be found. He was discharged on Monday, and that night the package was found on the floor under the safe, close to one of the wheels. In one count of his complaint, Atkins claimed damages for wrongful discharge, alleging that the station agent had trumped up a charge of his misappropriation of the package, in order that a relative of the agent might secure the position, and that the accusation of dishonesty had injured his credit with the railroad and the express company, and his standing in the community for integrity. On this count damages were allowed by the jury in the sum of \$500. The court held that the provision of

the statute for the recovery of damages in a suit for wages and penalties did not warrant the inclusion of a separate cause of action for a wrong, but merely, in the case of wrongful discharge of an employee engaged for a definite term, allowed recovery of the amount of his wages for the time between the discharge and the termination of the contract period, minus the amount which he had been able to earn during that time. In the present instance it was held that the circumstances warranted the discharge, therefore the judgment of the trial court was modified by the elimination of the \$500 allowed under this count, leaving the wages due to the 15th, interest thereon, and wages up to the 31st, when the tender was made, as a penalty.

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WAGES—PUBLIC EMPLOYMENT—OVERTIME WORK—*Wright v. State, Court of Appeals of New York (Feb. 26, 1918), 119 Northeastern Reporter, page 83.*—George S. Wright was employed by the State as a lock tender on the Erie Canal during the seasons of 1893 and 1894, from May 1 to December 1. The superintendent fixed his compensation at \$42.50 per month, and he received this amount monthly and receipted for it. He worked 7 days per week and 12 hours per day, being relieved by another who completed the 24 hours. In 1895 he filed a claim to compensation for overtime, under the law of 1870, amended in 1894, fixing eight hours as a day's work for mechanics, laborers, and workingmen employed by the State, and, in the amended form, that they shall receive not less than the prevailing rate of wages in the locality in which employed. The court of claims, which found, as a matter of fact, that the prevailing rate of wages for such work in the locality where Wright was employed was \$1.50 per day, gave judgment for overtime pay as claimed for the entire two seasons, holding the original law sufficient to warrant this. The appellate division, however, modified this to allow recovery only from May 10, 1894, when the amendment became effective, since the original law, while it fixed eight hours as a day's work, said nothing about compensation. The latter judgment was affirmed, after being again modified by the allowance of the interest claimed, from the time of filing the claim. The contentions on the part of the State that the claimant was not a mechanic, workingman, or laborer within the meaning of the statute, and that he had waived his claim by signing the monthly pay roll as a receipt for his wages, were overthrown in reaching the conclusion that the plaintiff was entitled to judgment.

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WAGES—SECURITY FOR PAYMENT—CONTRACTORS' BONDS—*National Market Co. v. Maryland Casualty Co., Supreme Court of Washington (Feb. 21, 1918), 170 Pacific Reporter, page 1009.*—The city of Seattle contracted with C. W. Coit for a public improvement, and

Coit and the Maryland Casualty Co. executed a bond to secure the payment of claims for labor and materials. In June, 1916, the contractor was indebted to seven laborers in sums aggregating \$221.50, and issued checks to them for the amounts due. The laborers all transferred their checks by indorsement and delivery to the National Market Co., being paid in full either in merchandise or money. The company presented the checks to the bank on which they were drawn, and payment was refused because there were no funds on deposit. They remained unpaid, and the market company filed with the city its claim against the contractor and the surety, and commenced this action against the latter. The court stated that the question involved was whether the transfer of the checks constituted an assignment of the debts, and if so, whether it carried the right to security from the bond. The decision of the same court in the case *Northwestern National Bank v. Guardian, etc., Co.*, 93 Wash. 635, 161 Pac. 473, is referred to as going "a long way toward answering this question in the affirmative." The checks in that case were time checks, or certificates that the laborers had worked a certain length of time and were entitled to the payment of a certain amount, and were transferred by a formal assignment indorsed upon them; while in the present instance ordinary negotiable bank checks had been given, and transferred by indorsement in blank and delivery. It was held that, though the instruments did not exhibit upon their face the nature of the indebtedness, the company succeeded to all the rights of the laborers against the employer and the surety company. The judgment of the trial court dismissing the suit, on the ground that the complaint did not state a cause of action, was reversed, and the case remanded for further proceedings.

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WAGES—SECURITY FOR PAYMENT—CONTRACTORS' BONDS—MATERIALS—SUPPLIES FOR WORKMEN—*Brogan v. National Surety Co., Supreme Court of the United States (Mar. 4, 1918), 38 Supreme Court Reporter, page 250.*—The Standard Contracting Co. undertook to do some dredging work in St. Mary's River, Mich., and executed the usual bond to which the defendant was surety for "labor and materials for the prosecution of such work." The contracting company, because the place of work was so isolated, was compelled to board and lodge its workmen. This it did in accordance with an agreement with the labor unions, and plaintiff supplied the groceries used to feed the workmen. This was an action to recover the value of the same. A judgment in Brogan's favor had been rendered in the district court, along with other claimants, but the circuit court of appeals threw out Brogan's claim, whereupon the case was brought to the Supreme Court. Here the judgment of the

court of appeals was reversed and that of the district court reinstated. Justice Brandeis, in giving the opinion of the court, said in part:

This court has repeatedly refused to limit the application of the act [act of 1905 providing for bond] to labor and materials directly incorporated into the public work.

The bare fact that the supplies were furnished to the contractor and were consumed by the workmen in its employ would have been immaterial. A boarding house might be conducted by the contractor as an independent enterprise undertaken solely to utilize the opportunity for separate and additional profit afforded by the congregation of many laborers in the locality where the work is being performed. The laborers might resort to such boarding house in the exercise of individual choice in the selection of an eating place. Under such circumstances the furnishing of supplies would clearly be a matter independent of the work provided for in the contract and would not entitle him who had furnished the groceries used in the boarding house to recover on the bond. But here, according to the undisputed facts and the findings of the trial court, the furnishing of board by the contractor was an integral part of the work, and necessarily involved in it. Like the supplying of coal to operate engines on the dredges, it was indispensable to the prosecution of the work, and it was used exclusively in the performance of the work. Groceries furnished to a contractor under such circumstances and consumed by the laborers, are materials supplied and used in the prosecution of the public work.

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WORKMEN'S COMPENSATION—ACCIDENT—HEART FAILURE AFTER EXHAUSTING LABOR—*Guthrie v. Detroit Steamship Co., Supreme Court of Michigan (Mar. 27, 1918), 167 Northwestern Reporter, page 37.*—Ada A. Guthrie was awarded compensation by the industrial accident board of Michigan for the death of her husband in the employment of the company named, which occurred April 30, 1916. Heart failure in the form of mitral regurgitation was the direct cause of his death, and this occurred during a moment of rest between periods of lifting over a shaft a metal cover weighing between 150 and 175 pounds, three men being engaged in the work. The temperature of the room was between 75° and 78°, and there was some ventilation. The deceased had worked from 7 a. m. to 3 p. m., and from 5 p. m. up to the time of his death at 11 p. m. The court, following the same line of reasoning as in the Roach case (see p. 153), and the Tackles case (see p. 156), decided at the same time, held that the nature of the work being done, the heat, the long hours, or a possible misstep by the employee did not constitute an unusual or fortuitous happening which made the injury an accidental one. As in the Tackles case, Judges Fellows and Moore concurred only because the principle had been established by a majority ruling in the

Roach case. Quotations are here given from the opinion delivered by Judge Stone, showing the attitude taken with regard to the various features of the case:

It is, as we understand it, the claim of the appellant that there was nothing about the work, or employment, that was accidental or even unexpected, that the work was proceeding in the manner intended, and that there was nothing fortuitous occurred while the work was proceeding.

Upon the subject of the place where the men were working, it may be said that it was not even unusual. The undisputed evidence shows that the temperature was from 75° to 78°, which was about what is termed summer heat. The evidence shows that steam had been off for 20 hours, and the room in which the work was being done was ventilated by two portholes, 12 inches by 14 inches in diameter, one on each side, and two large doors, one open to the dock and the other to the river. Claimant's physician testified that the temperature was not an excessive heat, and would not have produced death from heart disease. So we repeat that it can not be claimed that the temperature in which claimant's decedent was working was unusual or fortuitous.

Upon the subject of strain: Deceased was a machinist, and was employed to do any machine work that the foreman or the superintendent directed him to do. The work that he was doing at the time of his death was ordinary work, the same class of work he was doing before, apparently no more strenuous than his other jobs. We think, therefore, it can not be claimed that there was anything fortuitous in the lifting of the cover; and there was nothing fortuitous about the work.

Upon the subject of long hours, it can not be said that the working day was out of the ordinary. The testimony is undisputed that deceased had worked longer hours before, having worked 31½ hours on April 21 and 22.

The burden certainly is upon claimant to show that there was an accident; and there was nothing fortuitous in the long working day. No claim is made that the place itself was unsafe or insecure. There was no claim or evidence that the deceased slipped, and there was nothing on the platform that would cause one to slip or fall. The undisputed evidence is that they were just dry planks—not even grease spots upon them. There is nothing from which it can be inferred that the deceased slipped or stumbled. It can not be assumed that the man made a misstep, and then again assumed that such misstep caused fright, and then again assumed that the fright caused the heart to stop. This would be not only basing an assumption upon an assumption, but would be taking one into the realms of conjecture.

It is the claim of appellee here that death was due to an accidental injury arising out of the employment of the deceased, and it is said:

“The industrial accident board having found as a fact that the combined circumstances resulted in the death of the deceased, their finding is final and can not be reviewed, provided, however, that there is any legal evidence produced to support such finding.”

Was there any evidence to support such finding? We think there was none. An examination of the findings of the board shows that its decision is based upon and sought to be justified by the follow-



ing cases: *La Veck v. Parke, Davis & Co.*, 190 Mich. 604, 157 N. W. 72 [Bul. No. 224, p. 226]; *Schroetke v. Jackson-Church Co.*, 193 Mich. 616, 160 N. W. 383; *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027 [Bul. No. 224, p. 320].

While the *La Veck* case is a border line case, there was evidence there of overexertion and excessive heat, a condition which was clearly unusual if not fortuitous; and the *Schroetke* case is clearly distinguished from the instant case. We can arrive at no other conclusion than that the claimant has failed to show by any evidence that the death was due to accident. The record is entirely barren of any evidence of an accident.

That an injury received by a workman while engaged in his usual work, without intervention of something unusual or fortuitous, is not an accident, is now so well established by our decisions that the proposition needs no discussion. [Cases cited.]

In our opinion, there was no evidence to support the finding of the industrial accident board, and its award and order are reversed.

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WORKMEN'S COMPENSATION — ACCIDENT — HEAT PROSTRATION — WORK IN BOILER ROOM—*Roach v. Kelsey Wheel Co., Supreme Court of Michigan (March 27, 1918), 167 Northwestern Reporter, page 33.*—George Roach met his death through heat prostration while placing new brickwork around a boiler in the plant of the company named, on July 27, 1916. This was the fourth day of his employment on this job, and during the period the temperature, even outside the building, was extremely hot. It was said that at the place of employment the temperature was 136°.

He had suffered ill effects the previous days, and had been laid off a part of the time. He was prostrated at 4 p. m., and died between 6 and 7 o'clock. The majority of the court held that there was no evidence of accidental injury, and reversed an award to Phoebo Roach, widow of the deceased employee, made by the industrial accident board. Judge Brooke delivered the prevailing opinion, and said in part:

The record is absolutely barren of any evidence that anything untoward or unusual happened in the course of his employment during any of the three days or that he exerted himself in any unusual manner or to an unusual degree. He was doing the work which he and his associates were employed to do exactly in the manner they expected to do it. To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler in the performance of his ordinary and accustomed labor succumbs to heat prostration.

The Michigan compensation act provides compensation for accidental injuries only. *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485 [Bul. No. 169, p. 258]. Recovery here is predicated upon the cases of *Schroetke v. Jackson-Church Co.*, 193 Mich. 616, 160 N. W. 383, and *La Veck v. Parke, Davis & Co.*, 190

Mich. 604, 157 N. W. 72 [Bul. No. 224, p. 226.] I am of opinion that neither case is authority for the determination of the board, but that compensation should have been denied under our holdings in *Kutschmar v. Briggs Mfg. Co. et al.*, 163 N. W. 933, and *Johnson v. Mary Charlotte Mining Co.*, 165 N. W. 650.

Judge Fellows delivered the opinion for himself and another dissenting judge, and from this the following is quoted:

That he collapsed on the premises of the defendant while in its employ is admitted; that he was within the ambit of his employment is not questioned; he was in the course of his employment beyond doubt. That he was a man in robust health with no predisposition to disease, and temperate in his habits, the record discloses. The board found that he suffered a heat stroke which was brought upon him by the superheated condition of his place of employment, and the testimony abundantly supports such conclusion. That he fell instantly upon an excessive exertion in shoving the heavy truck loaded with brick and mortar after working in the heat under the boiler appears from the testimony of his fellow employee who was by his side when he fell. This is not a case of a workman being subjected to the ordinary heat of a summer day which is an incident in the life of all, but is a case where to the natural heat of a hot summer day was added in the particular place of his employment so many degrees of artificial heat as to make it well-nigh intolerable, and the men could stand it but a short time, and changed frequently. The case is very much like that of *La Veck v. Parke, Davis & Co.*, 190 Mich. 604, 157 N. W. 72 [see above], and is controlled by it. If anything, it is stronger for the plaintiff than was that case.

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WORKMEN'S COMPENSATION — ACCIDENT — HEAT PROSTRATION — WORK IN BOILER ROOM—*Walsh v. River Spinning Co.*, *Supreme Court of Rhode Island (July 5, 1918)*, 103 *Atlantic Reporter*, page 1025.—Action was brought by Mary Walsh, under the workmen's compensation act, for the death of her husband from an accident arising out of and in the course of his employment in the service of the River Spinning Co. Walsh was employed by the defendant in its boiler room on September 17, 1915. The temperature out of doors that day was warm; the temperature in the boiler room where three boilers were being operated was excessive. The other fireman employed with Walsh had been compelled to leave his work because of the great heat in the room. In the afternoon of the same day Walsh was overcome by the excessive heat, and was afterwards taken to a hospital, where he died from heat exhaustion on the morning following. The defendant contended that death from heat exhaustion is not death from accident but death from disease, and is to be classed with heat stroke and sun stroke as an inflammatory disease of the brain; and that recovery can not be had under the compensation act. Justice Sweetland, expressing the opinion of the court affirming an award in

the claimant's favor, referred extensively to English and American cases, discussing them at length, and especially the case of *Fenton v. Thorley* (1903) App. Cas. 443, Lord Macnaghten, Justice. The opinion of the court is in part as follows:

From all this discussion, however, covering many pages in the reports, the conclusion of Lord Macnaghten, which in a later case he referred to not as a definition, but merely a decision that the word [accident] was to be taken in its ordinary and popular sense, has been accepted as, on the whole, the best interpretation of the expression. Applying that interpretation to the facts of the case at bar, it appears to us that the unusual and excessive heat in the boiler room, producing the sudden inability of the physical system of John Walsh to longer resist its debilitating effects, constituted a chain of circumstances which may fairly be regarded as an unlooked-for mishap not designed and undoubtedly unexpected. If by reason of the condition of the floor of the boiler room the deceased had slipped and fallen, as a result of which a disease had developed in his brain causing his death, we think no one would have questioned that his injury was produced by accident. Can it be reasonably regarded as otherwise when by reason of the high temperature of the air in said room his physical and mental stability is overthrown, and a physiological derangement is set up which causes his death? The respondent has claimed that the effect of the heat upon said Walsh was not sudden, for he complained of it in the forenoon. That he should have been made uncomfortable by the heat was to be expected; but the collapse of his physical resistance may fairly be said to have been sudden. We think that in thus viewing the occurrence we have not confounded the injury with the accident. The untoward event which in this case produced the disability from which John Walsh died was the aggregate of the circumstances culminating in the breaking down of his physical stamina.

The defendant argued that the accident in this case was in the same class with heat stroke and sun stroke, which the defendant described as inflammatory diseases of the brain. The court after pointing to several cases where recovery was had for sun stroke and heat stroke said:

In all cases of this character, involving injury by accident arising out of the forces of nature, the controlling consideration has been whether or not the situation of the injured workman was such that the injury by accident can properly be said to arise "out of" his employment. When, however, a workman has been injured in the course of his employment by reason of being subjected to certain conditions incident thereto and not common to the neighborhood or the whole community, then without question the injury was received in the course of his employment and arose out of it. Of this nature were the injuries received by John Walsh in the case at bar. The view which we have taken that such injuries may properly be considered as accidental is supported by a number of cases which deal with heat stroke.

WORKMEN'S COMPENSATION — ACCIDENT — HEAT PROSTRATION — WORK IN LUNCH ROOM—*Lane v. Horn & Hardart Baking Co., Supreme Court of Pennsylvania (May 6, 1918), 104 Atlantic Reporter, page 615.*—Lane was employed by the defendant company at its lunch counter. Lane was overcome by heat while working at this lunch counter on a hot August day in 1917 and died within two hours. His widow brought proceedings under the workmen's compensation act for compensation, and was granted an award. The employer appealed and claimed that the death of Lane was not such an accident as may be compensated for under the act. The opinion of the court upholding the award is in part as follows:

Upon the facts involved Commissioner Scott says:

“\* \* \* There is nothing in the statement to show that [the temperature of] the place where the employee was working was hotter than the outside atmosphere, or that he was affected by different heat conditions than prevailed in the community at large.”

In cases such as the one at bar, the character and cause of the injury must be considered, in order to determine whether the results complained of are properly attributable to “accident,” within the meaning of that term as used in the act of June 2, 1915 (P. L. 736) [Bul. 203, p. 796]; for wherever death is mentioned in the statute, it means death resulting only from unforeseen violence to the physical structure of the body and its resultant effects, or in other words, death from an “accident” happening in the course of the deceased person's employment, as distinguished from either ordinary or occupational disease developed during the course of such employment.

The commissioner's findings are that the statement of facts contained therein “precludes any other cause of death than that of heat exhaustion or prostration due to the heated condition of the atmosphere”; hence we must take it no organic weakness or occupational disease can be accounted the proximate cause of the death of claimant's husband, but the casualty was attributable solely to the unexpected and violent effect of the heat upon the physical structure of deceased's body, and this was properly held by the compensation board and the court below to be an accidental death within the meaning of the act.

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WORKMEN'S COMPENSATION — ACCIDENT — HERNIA — *Tackles v. Bryant & Detwiler Co. et al., Supreme Court of Michigan (Mar. 27, 1918), 167 Northwestern Reporter, page 36.*—Charles E. Tackles developed an inguinal hernia while lifting a heavy timber in the course of his employment with the company named. The question at issue before the supreme court being whether or not this constituted an accidental injury under the Michigan compensation law, the court rendered a decision similar to that in the Roach case, decided at the same time (see p. 153), holding that there was no accidental injury, and setting aside the award of the industrial accident board. Two judges concurred only because they felt bound by the majority deci-

sion in the Roach case, in which their personal views had been overruled. This award was of the difference between his weekly wages before the injury and those which he was able to earn after it, to be determined by the board from time to time in case of failure of the parties to agree upon the amount. From the opinion delivered by Judge Stone the following is quoted:

It will be noted that, while claimant was performing his usual duties connected with his employment as a civil engineer, it became necessary with the assistance of another, to lift a heavy block of timber weighing approximately 200 pounds; also that he felt a severe pain in his right groin while lifting; that he did not slip or fall, nor did the timber which he was lifting strike him. Nothing out of the ordinary happened, because he had lifted such timbers before, when such action was necessary in the performance of his duties; and down to the time of the hearing he had remained at work continuously. It seems to us that these facts conclusively show that claimant did not receive an accidental injury within the meaning of the act.

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WORKMEN'S COMPENSATION — ACCIDENT — HERNIA — PREEXISTING DISEASE—*Puritan Bed Spring Co. v. Wolfe, Appellate Court of Indiana (Oct. 18, 1918), 120 Northeastern Reporter, page 417.*—Wolfe was in the employ of the Puritan Bed Spring Co. and had suffered from hernial trouble. While lifting a bale of wire weighing 150 pounds to a rack 4 feet high he strained himself, causing his intestine to protrude into the hernial sac, causing a strangulation and necessitating an operation in order to save his life. The company had actual notice of the injury. The company admits that if the injury would have occurred had there been no disease a recovery could be had, but deny that a recovery can be had where the existence of a disease has made the employee more susceptible to the particular injury which resulted. The court, in affirming the award allowed by the industrial board, said:

Appellant [company] concedes, and correctly so, that where an employee affected with disease received a personal injury under such circumstances that the act in question would entitle him to compensation had there been no disease involved, and such disease is hastened to a final culmination by the injury, there may be an award if it is shown that such injury was the result of the accident; that in such cases the court will not undertake to measure the degree of disability due, respectively, to the disease and to the accident, but the consequence of the disease will be attributed solely to the accident.

The mere fact that the appellee's [Wolfe's] condition made him more susceptible to the particular injury which resulted in his disability furnishes no ground for holding that the disease or condition, rather than the accident, was the proximate cause of the injury upon which the allowance for disability is based. We recognize that there is a line of compensation cases in other jurisdictions which

give to the word "accident," used in the respective compensation acts, a restricted meaning which in a measure justifies appellant's contention; but the weight of authority and the better reason, we think, favors the adoption of the popular meaning of said word, which includes "any unlooked-for mishap or untoward event not expected or designed." This court has given to said word the popular meaning indicated.

WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—ANTHRAX—*McCauley v. Imperial Woolen Co., Supreme Court of Pennsylvania (May 6, 1918), 104 Atlantic Reporter, page 617.*—McCauley was engaged by the defendant company as a wool sorter. In the course of his work while sorting wool he received a slight abrasion on his neck. To use his words he "got stuck with a sticker." This abrasion became discolored and after three days McCauley died from anthrax. The evidence showed that he had been inoculated with the disease by germs contained in the wool entering the abrasion on his neck. Among some questions of procedure the question as to whether McCauley's death was caused by accidental injury or by an occupational disease also arose. The widow was awarded compensation and the employer appealed. On this appeal the supreme court sustained the award, giving the following opinion, after considering the various provisions of the compensation act referring to accident:

It is plain from these provisions that the act before us contemplates injuries by accident only, and therefore does not cover what are termed "occupational diseases."

It remains but to show that, in this case, the entry of the anthrax germ into the body of the deceased, and the disease or infection which naturally resulted therefrom, can be held properly to constitute an accident within the meaning of the act. If the incident which gives rise to the injurious results complained of can be classed properly as a "mishap," or "fortuitous" happening—an "untoward event, which is not expected or designed"—it is an accident within the meaning of the workmen's compensation act.

When, however, death results from germ infection, to bring a case of this character within the act of 1915 supra, the disease in question must be a sudden development from some such abrupt violence to the physical structure of the body as already indicated, and not the mere result of gradual development from long-continued exposure to natural dangers incident to the employment of the deceased person, as in cases of occupational diseases, the risks of which are voluntarily assumed. Here the anthrax germ, a distinguishable entity, came into actual contact with the deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden and violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working, had unexpectedly and suddenly bitten him.

**WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—ARSENICAL POISONING.**—*Matthiessen & Hegeler Zinc Co. v. Industrial Board, Supreme Court of Illinois (June 20, 1918), 120 North-eastern Reporter, page 249.*—Proceedings were brought by the administrator of Joseph Adrian for compensation for his death against the Matthiessen & Hegeler Zinc Co. The arbitrator granted an award in favor of Adrian's dependents under the workmen's compensation act. The Industrial Board reviewed and allowed the award. The case was certified to the circuit court and affirmed and again certified to this court. Adrian had been in the employ of the company for 38 years and up to the date of his death. During the last 15 years of his service he was a fireman. It was a part of his duty to devote 45 minutes twice each day to scraping the scum or oxide from the surface of the molten zinc ore in the furnace of the company. This scum was very hot and gave off fumes when it cooled. When scraped out of the furnace it was dropped on a platform. There was a hood over the furnace but not over the platform and as a result the workman breathed the vapors and gases given off by the cooling scum or oxide. These vapors contained lead, zinc, and arsenic fumes. On October 6, 1914, Adrian became ill and, on October 14, he died. The doctors stated that he died from arsenical poisoning; that this poison accumulates in the body over a long period and finally a climax comes and the person dies. The company had never in 50 years had such a case, nor did it have any case of sickness or death from poisoning. The company declared that the workmen's compensation act covers only accidental injuries, and that Adrian's death was caused by an occupational disease. In affirming the award the court said:

The word "accident" is not a technical legal term with a clearly defined meaning, and no legal definition has ever been given which has been found both exact and comprehensive as applied to all circumstances. \* \* \* The meaning of the word as used in the workmen's compensation act is necessarily influenced by various provisions of the act and the purpose of its enactment, and can not be determined, alone, from any definition found in a dictionary. The act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all the courts. \* \* \* It is therefore clear that the words "accident" and "accidental injury," used in the act, were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed; also, to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation.

The words "accident" and "accidental injury" imply, and the provision for notice to the employer within 30 days after the accident and his report to the Industrial Board of accidental injuries

show, that an injury, to be accidental or the result of an accident, must be traceable to a definite time, place, and cause; but if there is such a definite time, place, and cause, and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act and the obligation to provide and pay compensation arises.

The second objection to the judgment is that Adrian died from an occupational disease incident to the business of smelting. A disability caused in that way or from that source is not to be regarded as an accident, because such a disease has its inception in the occupation and develops over a long period of time from the nature of the occupation and not from any unusual or unforeseen cause or event. For the prevention of such diseases there is a statute requiring the employer to use certain precautions for the safety of the employee, and an action may be maintained against the employer for failure to comply with the provision of the act. \* \* \* There is no evidence tending in any degree to prove that the arsenical poisoning of Adrian was a disease incident to the occupation of the plaintiff in error [zinc company].

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WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—  
POISONING FROM PAINT FUMES—*Industrial Commission of Ohio v. Roth, Supreme Court of Ohio (Apr. 2, 1918), 120 Northeastern Reporter, page 172.*—Roth, the plaintiff in this case, was a boy about 18 years of age in the employ of McFeeley Bros. His occupation was that of a common laborer. McFeeley Bros. had accepted and complied with the workmen's compensation act and its requirements. On November 8, 1915, in the course of his employment Roth was ordered to do some painting on a house in the course of construction. The paint would not flow because of the cold. Roth's foreman then ordered him to take the paint to a small building and heat it, which he did. This small building had no ventilation except the door and windows which were closed. This heating had to be repeated several times throughout the day and following days while Roth worked at this task. The heated paint gave off fumes which were poisonous and which were inhaled by Roth. On the evening of the second day Roth became ill and this illness increased until his death on the 26th day of the same month. The Industrial Commission refused to grant an award, which decision on appeal was reversed and error is now brought to this court. The sole question is: Did Roth die from an occupational disease? The opinion of the court sustaining the award as for an accidental injury is in part as follows:

In the construction of the law it is the duty of a court to give to words their usual and ordinary meaning, such meaning as they import to mankind in general, and not a forced or unusual definition, which may in its last analysis be technically correct, but wholly at variance with the common understanding of men. Applying this fair and reasonable rule of interpretation to the term "occupational dis-



ease," it follows that an "occupational disease" is not only a disease incident to a particular occupation, but that it is a disease developed in the usual and ordinary manner by reason of and because of the occupation in which the person suffering therefrom is or was engaged.

An "accident" is some happening that occurs by chance, unexpectedly, and not in the usual course of events. It is something that might possibly be prevented by the exercise of due care and caution. In this particular case, if the young man had understood the deadly nature of the fumes he was breathing, he could easily have escaped all danger by opening the doors and windows of the room in which the paint was being heated, and the fact that the accident might easily have been avoided readily distinguishes it from an occupational disease; for, notwithstanding the fact that more than two centuries ago occupational diseases had become so well known as to justify their treatment in a separate volume in the medical literature of that day, nevertheless science has been unable to discover any positive means and methods of prevention. These diseases are incident to certain employments, yet with full knowledge of that fact human foresight can not defend against them. The fact that this injury resulted in a disease that is incident to diverse occupations does not bring it within the doctrine announced by this court in the case of *Industrial Commission v. Brown*, 170 N. E. 744 [Bul. 224, pp. 305, 306]; for this accident might have happened to any person, regardless of occupation, who had occasion to enter this building at the time this folly was being perpetrated.

We are therefore of the opinion that the term "occupational disease" must be restricted to a disease that is not only incident to an occupation, but the natural, usual, and ordinary result thereof; and held not to include one occasioned by accident or misadventure.

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WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—WOOD ALCOHOL POISONING—*Fidelity & Casualty Co. v. Industrial Accident Commission, Supreme Court of California (Feb. 25, 1918), 171 Pacific Reporter, page 429.*—This is a proceeding brought by the employer and the insurance company to review an award granted by the Industrial Accident Commission to one De Witt, an employee of the employer, Jacoby Bros. De Witt was occupied as a show card sign writer. In making colors and applying them he used wood alcohol. During the rush of a very busy period about January 7, 1914, he was compelled to use a far greater quantity of wood alcohol in his work than was his usual custom. On the date above mentioned his eyes suddenly caused him great trouble, and on the 13th he was no longer able to use his eyes for any work. The opinion of the court is in part as follows:

It is the contention of the petitioners herein that the injury suffered by the applicant under the state of facts as found by the commission was not "an injury sustained by accident" within the meaning

of that phrase as used in the foregoing excerpt from the workmen's compensation act.

This court has, however, heretofore held that the phrase "injuries sustained by accident" as used in the workmen's compensation act is to be given the broader interpretation in harmony with the spirit of liberality in which it was conceived, and in which by the terms of the act we are required to construe it so as to make it applicable to injuries to workmen which are unexpected and unintentional, and which thus come within the meaning of the term "accidents" as it is popularly understood. In adopting this interpretation of the terms of the act above referred to we have been mindful of the source from which our statute was evidently derived, viz, the workmen's compensation act of England, enacted by Parliament in the year 1897, under section 1 of which employers are declared to be liable to their employees for "personal injuries by accident arising out of and in the course of the employment." Construing this act of Parliament, Lord Macnaghten, in the leading case of *Fenton v. Thorley, Ltd.* (1903), A. C. 443, said:

"The expression 'accident' is used in the public and ordinary sense of the word as denoting an unlooked for event which is not expected or designed."

Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant as set forth in the findings of fact of the Industrial Accident Commission and for which he was awarded compensation was an "accident" within the meaning of the act.

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WORKMEN'S COMPENSATION — ACCIDENT — RUPTURE OF DISEASED AORTA, CAUSED BY EXERTION—*Indian Creek Coal & Mining Co. v. Calvert et al.*, Appellate Court of Indiana (May 22, 1918), 119 *Northeastern Reporter*, page 519.—This was a proceeding by Laura Calvert and others to obtain compensation for the death of Addison Calvert, a miner employed by the company named. He had been considered a strong, healthy man, up to the day of his death, but was addicted to the excessive use of intoxicants. He and his son, who worked together, moved a partly loaded car of coal for a distance, receiving help from two other miners for part of the way, which was up grade. He complained of pain in his side, but went on, and with his son began the loading of the car. Very soon he became worse, and collapsed, dying some two hours afterwards. It proved that the aorta had been ruptured and that it had been in a diseased condition which would have resulted in his death eventually if it had continued, even without severe exertion. The industrial board held that the injury was an accident arising out of his employment, and made an award to his dependents. On appeal, after an examination of the British and American cases, this was affirmed by the court, one judge dissenting.

WORKMEN'S COMPENSATION—AID BUREAU—CONSTITUTIONALITY OF STATUTE—EVIDENCE—*Murphy v. George Brown & Co., Supreme Court of New Jersey (Feb. 18, 1918), 103 Atlantic Reporter, page 28.*—Dennis Murphy, while at work for the concern named, burned his fingers with acid. An infection developed, and he died from the effects. The widow of the deceased did not file any petition for compensation, and the workmen's compensation aid bureau certified a statement of facts to the judge of the Essex County Court of Common Pleas in accordance with chapter 54 of P. L. 1916, the act by which the aid bureau was created. Nora Murphy, the widow, was named by the bureau as petitioner. The judge appointed counsel for the petitioner, heard the cause, and rendered judgment awarding her compensation, including \$150 for legal expenses. The company then sued out a writ of certiorari, bringing the case before the supreme court.

The first point made was that the act did not conform to the constitutional requirement that "Every law shall embrace but one object, and that shall be expressed in the title." The title of the act is, "An act creating a workmen's compensation aid bureau in the department of labor." This was held to state the object of the act, the change made in the procedure in the court of common pleas being merely a cognate matter, which need not be expressed in the title. Taking up the contention that the obligation of contracts was impaired by the provision that no binding agreement may be made by the employer and employee as to the amount of compensation due, without the approval of the aid bureau, the court showed that this would not be true, whether the contract of hiring was made subsequent or previous to the passage of the act. The imposition upon the employer of liability for legal expenses was held not to be a change in the contract of employment, but merely in the remedy and procedure for its enforcement.

The evidence of fellow employees had been admitted as to statements made by the deceased, before and during the time when his fingers were being bandaged, as to the cause of the accident. These statements were held to be a part of the *res gestae*, and therefore admissible.

The judgment of the court below was therefore affirmed.

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WORKMEN'S COMPENSATION—ALIEN BENEFICIARIES—*Southwestern Surety Ins. Co. et al. v. Vickstrom et al., Court of Civil Appeals of Texas (Mar. 20, 1918), 203 Southwestern Reporter, page 389.*—Vickstrom suffered accidental injuries while in the course of his employment by C. Flanagan & Sons, at Port Arthur, Tex., from which he

later died. His employers at the time were subscribers and carried an insurance policy for Vickstrom's benefit with the Southwestern Surety Insurance Co. Compensation up to the time of his death, aggregating \$145.20, was paid Vickstrom. After his death liability to pay any further compensation was denied, primarily on the ground that the claimants were nonresident aliens. These claimants were the present appellees, Gustava and Irene Vickstrom, his mother and sister, and were residents of the Grand Duchy of Finland, Russia. Mr. Justice Graves, expressing the opinion of the court in favor of the claimants, adopted the trial court's statement that "the fact that the plaintiffs in this case are aliens constitutes no bar to their recovery, since neither under the workmen's compensation act, nor under the general law of this State, are they denied right to inherit," as fully stating the plaintiffs' personal rights.

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WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—BURNS RESULTING FROM SMOKING—*Whiting-Mead Commercial Co. v. Industrial Accident Commission, Supreme Court of California (July 3, 1918), 173 Pacific Reporter, page 1105.*—Plaintiff was engaged in wrecking some houses and had in its employ one Miguel Duarte. While at work on one of the company's jobs he ran a nail into the palm of his right hand, but the wound was not severe enough to prevent him from working, although it had to be bandaged. Twice during the day the bandage was soaked with turpentine by an agent of the plaintiff in an endeavor to alleviate the pain in the wound. After the second saturation of the bandage, Duarte temporarily ceased his labors and struck a match for the purpose of lighting a cigarette. The saturated bandage became ignited and he was severely burned. Duarte sought and was awarded compensation by the Industrial Accident Commission, and the company brought writ of review. The supreme court in affirming the award adopted the opinion of the district court of appeal from which court this cause was brought, which is in part as follows:

From these cases there is deducible a rule which is thus stated in one of them [*Archibald v. Ott*, 87 S. E. 791, Bul. 224, pp. 293-294]: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. \* \* \* That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents

resulting from the employment." Are we to place the use of tobacco in this list of ministrations to the comfort of the employed? Is its use necessarily contemplated in the course of such an employment as that in which Duarte was engaged? The petitioner in answering these questions in the negative, places great dependence in the argument that tobacco is used to appease a self-created appetite and not a natural appetite. The argument does not appeal to us. In an endeavor to determine what indulgences of human beings are responsive to the demands of natural, what to unnatural, appetites, we should be carried to the depths of biological and physiological research. Such labor is not necessary. We have the tobacco habit with us and must deal with it as it is.

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WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—HEAT PROSTRATION—WAGON DRIVER—*Campbell v. Clausen-Flanagan Brewery, Supreme Court of New York, Appellate Division, Third Department (July 1, 1918), 171 New York Supplement, page 522.*—Campbell was employed by the defendant as a driver on one of its brewery wagons. There had been a long period of excessively hot weather. On August 1, 1917, Campbell began work at 7 o'clock and delivered 91 half barrels of beer at 11 places in Flushing, N. Y. About 3 o'clock of that day he was driving the wagon about 5 miles from the city of New York when he stopped the horses, alighted from the wagon, and walked around. About 10 minutes later he dropped dead, apparently from the heat. The State Industrial Commission in refusing an award said that the heat prostration which resulted in death was an accidental injury, which occurred in the course of the employment, but that it did not arise *out of the employment*. In affirming the commission's decision Justice Cochrane said in part:

The question is whether the deceased by reason of his employment was subjected to a special and increased hazard not common to the public in general, but because of the particular circumstances under which he was required to work.

The facts in this case are undisputed. The question as above enunciated depends on inferences to be drawn from such undisputed facts. Whatever answer the commission gives to the question finds support in the evidence and is binding on this court.

It was a question of fact for the commission to determine whether the deceased was specially affected by the severity of the heat by reason of his employment. \* \* \* From all the circumstances the commission was justified in drawing the inference that the heat prostration which caused his death did not arise "out of" his employment, and that conclusion is not reviewable.

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WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—INJURY COMMON TO PUBLIC—*Cennell v. Oscar Daniels Co., Supreme Court of Michigan (Sept. 27, 1918), 168 Northwestern Reporter, page 1009.*—Cennell and two other complainants, Boissineau and

Buvia, were in the employ of the defendant. On May 15, 1917, the three men were directed to load 13 iron-mixer wings upon the launch *Ralph T.* and take them to Brady Pier on the water front and unload them. They had proceeded as far as Brady Pier, where they found the United States buoy tender *Clover* moored alongside. Upon inquiry they found that the *Clover* would move in about 10 or 15 minutes, so they moored their launch at the rear of the *Clover* and to Brady Pier and decided to wait until the *Clover* left and made room for them. Brady Pier is under the control of the United States Engineer Department, but the defendant had permission to use it. While waiting the complainants went to an adjoining dock to watch a city scavenger dump his load. There were some dynamite caps in the load and they exploded, killing Cennell and three others and injuring the other two claimants. A committee on arbitration allowed the claimants awards for compensation and the Industrial Accident Board affirmed the awards. Justice Brooke, in setting aside the awards, said:

We have frequently held that, in order to entitle the injured person to compensation under the act, the injury must arise out of the employment as well as in the course of the employment. An injury arises out of an employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between conditions under which the work is required to be performed and the resulting injury. The injury must be the result of one of the risks incident to the employment. Applying these rules to the case under consideration, how can it be said that the employment of Cennell, Boissineau, and Buvia subjected them to the risk of death or injury from which they suffered. Their duties required them to load the mixer wings from defendant's dock on the Fourth Lock at Sault Ste. Marie and transport them to Brady Pier and there unload them. Their duty to their master neither required them to nor warranted them in wandering from the immediate scene of the contemplated operation and gratifying an idle curiosity. The premises where the accident occurred, and where they had no business, were not under the control of their common master. The scavenger, whose possible negligence caused the disaster, was a municipal employee. We feel bound to determine, therefore, that the accident causing the injuries did not arise out of the employment. Assuming, however, that the presence of the claimants in the vicinity of the scavenger's wagon was justified, which can not properly be done, then in suffering death and mutilation from the explosion the claimants were subjected to no greater and different risk than that sustained by every member of the general public within the zone of the blast. Three other persons were killed, one totally unconnected with the operation. An injury resulting from a risk common to the general public may not be compensated.

**WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—SCOPE OF EMPLOYMENT—WILLFUL MISCONDUCT—***Merlino v. Connecticut Quarries Co., Supreme Court of Errors of Connecticut (July 23, 1918), 104 Atlantic Reporter, page 396.*—Merlino was employed by the defendant in its quarry. On the day of the accident he quit work at 5.30 p. m. when the whistle blew and proceeded to the commissary, which was placed near the quarry by the defendant for the convenience of its workmen. Merlino was carrying two empty wooden boxes and at the commissary he met his child, whom he took up in his arms. At the commissary he stopped to talk a few minutes. When about 60 feet from the commissary he was struck by a rock from a blast and killed. It was the custom of the company to blast 10 minutes after work ceased and to give 5 warning whistles, upon which everyone in the vicinity must seek shelter. The whistles were blown by the company on the day of the accident and the blasts were not let off until nearly 10 minutes after work. The opinion of the court is as follows:

The injury arose out of the employment at a place within the danger zone created by the business of the employer. That being so, the only question remaining is whether it was fairly consistent with the performance of the contract of employment that Merlino should be at or about the place at or about that time. In *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 386 [Bul. 224, pp. 310, 311], we pointed out that, where an injury arising from a risk of the business is suffered while the employee, though not doing the work for which he was employed, is still doing something which the employer has expressly or tacitly consented that his employees might do incidentally to their employment, at that time and place, the injured employee is within the scope of his employment. That rule is applicable to this case, and it leads to the inquiry whether the respondent had consented that his employees, on quitting work, might stop at the commissary, and so remain within the danger zone created by the business for the space of 10 minutes after the quitting whistle blew. While there is no explicit finding on this precise point, it is a necessary inference from the findings that the employer had so consented.

Merlino's failure to obey this rule [to take shelter when warning blew] was a careless and perhaps a negligent omission; but it was not such serious and willful misconduct as amounts to a defense under the workmen's compensation act.

The judgment of the lower court vacating the award in favor of Merlino's widow was set aside and an order entered to affirm the award granted by the commissioner.

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**WORKMEN'S COMPENSATION—AWARDS—CONCURRENT AWARDS—DISFIGUREMENT—***Erickson v. Preuss et al., Court of Appeals of New York (May 7, 1918), 119 Northeastern Reporter, page 555.*—Matilda Erickson was employed by Max Preuss in a laundry when her hair was

caught in a revolving shaft and she received serious injuries, including extensive laceration of the scalp and facial injuries which resulted in a long scar across the face, concerning which the commission found: "This scar draws the skin into large folds at the inner angle of each eye." The commission awarded the claimant compensation in the amount of \$1,000 for the disfigurement, and continued the case for a further hearing on her claim for compensation for impairment of earning capacity, the extent of which impairment could not be ascertained at that time. The provision for compensation for serious facial or head disfigurement was added by chapter 622 of the Acts of 1916, and permits the allowance of such compensation as the commission deems equitable and proper, in view of the disfigurement, not exceeding \$3,000. The court held that concurrent awards may be made for disfigurement and for disability or loss of earning power, provided that it clearly appears that the award for disfigurement does not include anything for the loss of earning power. This clearly appearing to be true of the present award, it was affirmed.

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WORKMEN'S COMPENSATION—AWARDS—REVIEW—*Georgia Casualty Co. et al. v. Industrial Accident Commission, Supreme Court of California (Jan. 24, 1918), 170 Pacific Reporter, page 625.*—Laura Sims was awarded compensation for the death of Lewis Hicks, and the award was later increased. The alleged employer, Robert Sherer & Co., and the Georgia Casualty Co., insurer, brought writs of review. In considering the increased award, a construction of sections 25 and 82 of the compensation law was necessary. Section 82 provides that the commission within 245 weeks of any award may review, diminish, or increase any compensation award upon the ground that the disability of the person in whose favor it was made has either increased, diminished, or terminated. Section 25 provides that the commission shall have continuing jurisdiction over all its orders, decisions, and awards, and may at any time, upon notice, rescind, alter, or amend any such order, decision, or award. The court held that, in order to harmonize the provisions of the two sections, section 82 must be construed as limiting the more general terms of section 25, and as permitting review, diminution, or increase of awards only in cases where the occurrence of new facts arising after the date of the original decision requires such change. Since there were in the present instance no such new facts warranting the increase, the increased award was annulled and the original award affirmed.



WORKMEN'S COMPENSATION—AWARDS—SUCCESSIVE AWARDS—INJUNCTION PENDING APPEAL—*Employers' Mutual Insurance Co. v. Industrial Commission of Colorado, Supreme Court of Colorado (June 3, 1918), 176 Pacific Reporter, page 314.*—One Pier was injured severely while in the employ of the Leyden Coal Co. He applied for and was awarded compensation, which was to continue only for 22 weeks, the commission retaining jurisdiction of the case, because the extent of the injuries could not be definitely determined. This award was made in August, 1916. In June, 1917, after application by Pier, the commission made another award granting him the maximum compensation for permanent total disability. The insurance carrier, plaintiff here, appealed to the district court and asked for a temporary injunction, which was refused. When appeal was brought here the same application was made and refused. The court, in holding that the award and proceedings before the commission were correct and proper, said in part:

The insurance company applied in the district court for an injunction against the enforcement of the award of the commission until the court had passed upon the questions involved. That application was denied below and renewed here, where it was again denied.

It is to be noted in this connection that the judgment of the commission in favor of a claimant is prima facie evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the legislature that payment of these weekly allowances should not be stayed. Indeed, to hold that such payments could be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law.

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WORKMEN'S COMPENSATION—AWARDS—SUCCESSIVE AWARDS—SUBMISSION TO OPERATION—*Enterprise Fence & Foundry Co. v. Majors, Appellate Court of Indiana (Nov. 26, 1918), 121 Northeastern Reporter, page 6.*—Majors was in the employ of appellant foundry company when he received an injury to his index finger described as a "twist and laceration." He and the foundry company, his employer, entered into an agreement which was ratified by the Compensation Commission by which Majors was to receive \$6.81 per week during permanent disability. The physician wanted to amputate the finger, but Majors declared he wanted him first to try to save it, as it was said that that was possible. Infection set in and the finger was amputated, and Majors and his employer made a supplemental agreement whereby Majors was to receive \$6.81 weekly for 15 weeks. Later the infection spread to the middle and ring fingers and affected the whole hand and Majors applied to the Compensation Commission for a larger award in view of this fact and secured an award of

\$6.81 per week for 22 weeks. The employer declares recovery can not be had as Majors refused to submit to the amputation and because a full settlement had already been made. The opinion of the court is in part as follows:

We will first dispose of the appellant's second contention. The law seems to be well settled that an injured employee seeking compensation must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering, and if as a result of such refusal on his part he suffers a permanent impairment, the employer will not be required to compensate him for the resulting permanent impairment.

After considering the possibility of saving the finger the court continued:

It would therefore seem to follow that appellee's insistence that his finger be saved if possible, when taken with the statement made by the surgeon, was not such unreasonable or willful misconduct as would prejudice the allowance of additional compensation.

We are satisfied that the further contention of the appellant has been determined by this court. In *re Stone*, 117 N. E. 669. In that case it is said:

"Where the Industrial Board has approved an agreement under the workmen's compensation act, it still has jurisdiction of the subject matter, even if the agreement was intended as a compromise settlement of all compensation, and may consider all disputes with reference to compensation to be paid at any time before the case is finally disposed of."

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WORKMEN'S COMPENSATION—BENEFICIARIES—RIGHTS OF WIDOW UPON REMARRIAGE—*Hansen v. Brann & Stewart Co.*, *Supreme Court of New Jersey* (June 7, 1917), 103 *Atlantic Reporter*, page 696.—Alf Olsen, while in the employment of the defendant, on September 27, 1911, received injuries by accident during the course of his employment, which resulted in his death a few days later. His only surviving dependent was his widow. The defendant admitted its liability and made payments to the widow of \$5.25 per week up to November 11, 1914, when it ceased making said payments. On November 25, 1914, the widow was married to her present husband, Harold Hansen, with whom she is now living and by whom she is now supported. Plaintiff sues for the remaining payments which she alleges are due her. Of the 300 allowed payments but 139 had been paid. The workman's compensation act of 1911 permitted the remarried widow of a deceased husband to continue to receive compensation. By an amendment passed in 1913 a widow who remarried could no longer receive compensation after her remarriage. The trial court held that the plaintiff could not recover. In the opinion of the appeal court, reversing this judgment, it was said:

In reaching this conclusion the trial judge erred. This case must be dealt with under the provisions of the act of 1911. If, under the act, the petitioner, upon the death of her husband, was entitled to compensation for 300 weeks, she acquired a vested right, which could not be legally abridged by subsequent legislation.

It is obvious, from a plain reading of the act of 1911, that the legislature provides for an award of compensation to a widow without any condition annexed. Therefore, in order to give the construction contended for by the counsel for respondent, we would be forced to read into this act the condition contained in the amendment of 1913, which, as has already been pointed out, is clearly not permissible.

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WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—REPAIRING BUILDING—*Holman Creamery Association v. Industrial Commission of Wisconsin et al.*, *Supreme Court of Wisconsin (May 21, 1918)*, 167 *Northwestern Reporter*, page 808.—William Wallum was injured while making repairs on the creamery of the association named. He had been employed in the construction of the building, and at various times had made repairs, being hired specially on each occasion. The circuit court of Dane County rendered a judgment vacating an award of the Industrial Commission in his favor, because it considered the employment to be only casual; but the supreme court took the opposite view and affirmed the commission's award. The following is from the opinion delivered by Judge Vinje, and at the close of the quotation are citations and brief statements of the facts in two cases decided at the same time, which also involved the question of casual employment and which are not separately noted:

[Repairs] being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time and a usual concomitant thereof. They are foreseen, provided for, and made when necessary or convenient. The fact that one can not exactly foretell just when they will have to be made is immaterial. On the same principle a proprietor of a meat market who has to hire extra help Saturdays or on busy days, though at irregular intervals, and does so, makes such extra help an employee within the meaning of the statute. *Jordan v. Weinman*, 167 N. W. 810, decided herewith. And because the cleaning up after repairs is a part of the repair work, one employed to do that is an employee within the act. *F. C. Gross & Bros. Co. v. Industrial Commission*, 167 N. W. 809, decided herewith.

As in the Illinois statute noted in the following case, the Wisconsin law excluded persons whose employment is but casual or not in the usual course of the employer's business, differing in this respect from

the California act (Walker case, see below). As in Illinois also, the phrase excluding casual employees was stricken out by an amendment of 1917.

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**WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—SPECIFIC PIECE OF WORK—***Chicago Great Western R. Co. v. Industrial Commission of Illinois, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 508.*—Anderson, who was a structural-iron worker, was sent from union headquarters, together with three other members, to complete a job for the railroad company requiring only three or four days' work. He was employed for this particular job by the plaintiff, though the work was in line with the company's regular business. While busy at this work he was injured, and was allowed compensation by the Industrial Commission. This court in reversing the award said:

The character of the contract of employment, as to whether it was casual or not, was fixed by the contract of hiring—that is, the contract could have been of such a nature that Anderson would have been a regular employee of the railroad as a structural-iron worker, or it could have been of such a nature that he was only a casual employee for this particular job—and the question to be determined here is which contract was, in fact, made. The burden of proof is upon the claimant to prove the employment and injury, but the burden is on the plaintiff in error [railway company] to prove that the employment is but casual.

In view of the reasoning of this court in the cases already cited and the other decisions mentioned, in our judgment it must be held that Anderson's employment was but casual, and that therefore there can be no recovery under the workmen's compensation act.

The law under which this decision was rendered excluded any person "whose employment is but casual or who is not engaged in the usual course of the trade," etc., of the employer. It was admitted that the employment was in the line of the employer's business, but the conclusion of the court was as above set forth. The injury occurred March 21, 1917, and on May 31, 1917, the law was amended by striking out the words "whose employment is but casual."

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**WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—USUAL COURSE OF BUSINESS—CLEANING IN LODGING HOUSE—***Walker v. Industrial Accident Commission, Supreme Court of California (Mar. 19, 1918), 171 Pacific Reporter, page 954.*—Miss Pearl P. Walker conducted a lodging house in Stockton, Calif. A chambermaid was regularly employed, but, she not being able to do all the cleaning, Louis J. Robinson was employed at times to assist in this work. On one of these occasions he was injured and subsequently applied for compensation.

The compensation act excludes from its benefits those whose employment is casual and not in the usual course of the employer's business. The commission found that the employment was casual, but was in the usual course of business, and made an award to the injured man. On the appeal of the employer this award was affirmed, Judge Sloss, in the opinion delivered by him for the court, saying:

It would not be questioned that the chambermaid, in doing the cleaning which fell within her province, was engaged in normal operations forming part of the employer's ordinary business. There was no essential difference in character between her work and that done by Robinson. One was as necessary in the conduct of the business as the other. The only distinction is that the maid's work was done daily, while that of the man was called for at intervals. But the intermittent character of the employment is not of itself sufficient to exclude it from the purview of the statute. Section 14 does not except employments that are casual simply, but those that are both casual and not in the usual course of the business.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—CLASS LEGISLATION—SPECIAL PRIVILEGES—*Johnston v. Kennecott Copper Corp., United States Circuit Court of Appeals, Ninth Circuit (Feb. 18, 1918), 248 Federal Reporter, page 407.*—J. W. Johnston, an employee 20 years of age, suffered the loss of his right foot. Through his next friend he sued his employer, the company named. Judgment was rendered in his favor in the sum of \$1,440, under the workmen's compensation act of Alaska, which applies to mining only and under which election to accept its provisions is presumed in the absence of written notice to the contrary. The employers brought a writ of error to the judgment rendered, attacking the constitutionality of the act; but it was upheld and the judgment affirmed. It was stated that the law certainly does not grant special privileges. The objection was raised that there is no provision for industrial insurance or for payment of compensation; but the court held that the security given to claimants by the requirement of a bond or a cash deposit was sufficient. That the limitation of the scope of the act to mining does not make it invalid as class legislation was also held, the court enunciating the principle that such classification must have a reasonable basis, and saying further:

The application of the rule here is simple. Mining is the one great industry of Alaska. It is attended by many hazards and complexities, and it is not strange that the legislature should make of the single industry a classification for adjustment of workmen's compensation. The act is criticized because "mining operations" are to be held to include all work performed on or for the benefit of any mine or mining claim, it being urged that many persons but remotely connected with the working of mines are thereby included. This, again,

is matter for legislative discretion, and the question whether the workmen are engaged in mining operations is one that can be best disposed of when we come to it.

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—COUNTIES—*Nevada Industrial Commission v. Washoe County, Supreme Court of Nevada (Mar. 15, 1918), 171 Pacific Reporter, page 511.*—The Nevada Industrial Commission brought suit against Washoe County for premiums under the Nevada workmen's compensation act, which is compulsory as to public employees. The county demurred to the complaint in the district court of Washoe County, and, after a decision against it, refused to plead further, so that judgment was rendered for the plaintiff. It appealed, continuing to press its contention that the act, as applying to counties without choice on their part, was unconstitutional. The first point made was that the title was not sufficiently comprehensive to embrace the portion relating to public employment, but this position was shown to be untenable. The compulsory feature was claimed to be in conflict with the due process of law provisions of the Federal and State constitutions. The court, speaking through Judge Coleman, called attention to decisions of State courts and the Supreme Court of the United States upholding compulsory compensation laws, and also said:

But we think there is another and very excellent theory upon which the law may be held to be constitutional, namely, that the money required to be paid under the act by the counties of the State goes for a public purpose which is a legitimate charge upon the people and the State and the subdivisions thereof.

The present statute was held to be comparable with that appropriating money for the purchase of seed grain for those unable to obtain it for themselves, held valid by the Supreme Court of North Dakota, both being designed for the relief of the poor or the prevention of numbers of persons becoming public dependents.

As to discriminatory classification claimed to exist, the court stated that it was necessary only that the basis of the classification be reasonable, and said:

Is the classification reasonable? We think it is. It is not only within the power, but, as we have shown, it is the duty of the county and State to provide for its indigent and to care for those who are unable to care for themselves or who are likely to become dependent upon public charity.

If there is any virtue in the old adage that an ounce of prevention is worth a pound of cure, was it not a reasonable exercise of discretion on the part of the legislature to impose upon the counties the duty of contributing to a fund which can be drawn upon to prevent those injured in its employ from becoming paupers? We think it was.

**WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—PRINCIPLES INVOLVED—***Zancanelli v. Central Coal & Coke Co., Supreme Court of Wyoming (July 11, 1918), 173 Pacific Reporter, page 981.*—The plaintiff was employed by the defendant in its mines at Rock Springs, Wyo. While in the defendant's employ, and due to the defendant's negligence, plaintiff was injured and brought this action for damages. Defendant claimed proceedings must be brought under the workmen's compensation act of 1914 as amended. Plaintiff demurred to the answer on the ground that the workmen's compensation act was unconstitutional and therefore the answer setting it up constituted no defense. The court overruled the demurrer and plaintiff refused to plead further and now appeals from a judgment denying all his contentions. The opinion of the court, as expressed by Judge Blydenburgh, sustaining the court below, is in part as follows:

It is incumbent upon courts in declaring an act unconstitutional to point out the specific provisions of the Constitution or the propositions necessarily implied which are violated by the statute stricken down as invalid.

After considering two objections which the plaintiff presented as making the act unconstitutional according to the Federal Constitution, the court dismissed them by referring to the decision rendered in the *Mountain Timber Co. v. Washington*, 37 Supreme Court Reporter 230 (Bul. 224, pp. 252-258); continuing the court said:

The questions coming under the other objection, C, relative to the fourteenth amendment and the deprivation of life, liberty, and property without due process of law, are those most seriously urged not only in the *Mountain Timber* case and in this case, but in other cases attacking the constitutionality of workmen's compensation acts, both as against the Federal Constitution and similar provisions of the constitutions of the various States, and it is particularly urged that the requirement that employers shall be forced to contribute or pay for accidents that were not caused by their own negligence are against these constitutional provisions. Attorneys and courts, in urging this, seem to be unable to grasp the difference between mere doctrine or rules of law which are under legislative control and subject to legislative change and inherent and fundamental rights which are protected by constitutional provisions. The whole common-law doctrine of compensation in damages for negligence, with all its attendant rules and doctrines as to fellow servants, assumption of risks, and the like, are but rules of law of growth through decisions of courts from time to time, and not inherent or vested rights that can not be changed or abolished by legislative enactment, unless prohibited by some constitutional provision.

The right to pass workmen's compensation acts, even without the aid of constitutional amendments, is generally upheld under the police power of the State and thereunder to regulate any industry that in its operation affects any considerable number of people of

the State or that is a matter of public concern as distinguished from mere private interest.

One objection raised was to the effect that "the amounts to be paid according to the scale or schedule fixed by the act are unreasonably low." As to this the court said:

The objectors on this ground do not grasp the scope or province of the new system. It is not intended to give compensation as damages, but is more in the nature of accident insurance. In adopting the new system both employees and employers gave up something that they each might gain something else, and it was in the nature of a compromise; as was said in *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 590, 158 Pac. 256, 258 [Bul. 224, p. 284]:

"Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty; the workmen through the old defenses or exhaustion in wasteful litigations. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it."

Concluding, the court said:

The act in question, in all its general provisions, is in accord with the system of workmen's compensation acts that were in the minds of the people adopting the constitutional amendment, and, as said in *Jensen v. Southern Pac. Co.*, 109 Northeastern 600 [Bul. 189, pp. 221-224]:

"It is plainly justified by the amendment to our own State constitution, and the decisions of the United States Supreme Court."

And any and all provisions of the constitution that might have been construed as preventing the legislature from passing such an act are modified or repealed as far as they would affect such an act. That both the employers and employees of the State are better satisfied with the new system than the old is to be seen from the fact that in this case the attorneys for the employers of the largest number of workmen of any employer contributing to the industrial accident fund, and also an attorney employed and appearing on behalf of the workmen and organized labor of the State appeared, both arguing in favor of the constitutionality of the act and for its validity. Both employers and employees and the people of the State generally being satisfied with the operation and administration of this act, they would be very loath to return to the old system.

We hold that the act passed and considered is justified in all respects by the amendment to the constitution providing therefor, and that it is not in conflict with any provision of either the Constitution of the United States or the constitution of this State.

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WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—BURNS RESULTING FROM SMOKING—*Dzikowska v. Superior Steel Co.*, *Supreme Court of Pennsylvania* (Jan. 7, 1918), 103 *Atlantic Reporter*, page



351.—Mary Dzikowska proceeded for compensation for the death of Victor Dzikowska against the steel company named and the insurance company which carried its compensation risks. The workmen's compensation board made an award, and an appeal was taken on the ground that the injury was not one in the course of employment, the Pennsylvania law not requiring that the injury shall also arise out of the employment. The employee was at work with others in the shipping room, loading steel upon a railroad car. Having placed all the steel at hand upon the car, they were waiting for trucks to arrive with more steel. The employee was wearing a burlap apron, and had his arms wrapped with burlap to protect them from the steel. As most of the steel was oiled, his clothing was saturated with oil. He stepped out of the room and into a box car and, in order to smoke, scratched a match upon his trousers. His burlap apron caught fire, and he ran out of the car in flames, receiving burns from which he died a few days later. The court affirmed the award, saying that it is not unreasonable for employees to smoke out of doors during intervals of work when it does not interfere with their duties, and mentioning that the foreman in this case allowed smoking if not done in the building. The oiliness of the clothing increased the peril, and itself resulted from the employment. The employee's negligence in striking a match on his clothing under the circumstances was, of course, under compensation principles, immaterial.

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WORKMEN'S COMPENSATION — DEPENDENCY — PRESUMPTION AS TO WIFE LIVING APART—EVIDENCE THAT DEATH RESULTED FROM INJURY—*State ex rel. London & Lancashire Indemnity Co. v. District Court of Hennepin County et al., Supreme Court of Minnesota (Mar. 15, 1918), 166 Northwestern Reporter, page 772.*—The county court named awarded compensation to Lillian Rush for the death of her husband, John Rush, and the insurance company named petitioned for a review. The company admitted that Rush received an injury arising out of and in the course of his employment, but denied that his death resulted from it. On January 25, 1917, he fell and struck his head, and was unconscious for a few minutes. Two or three days later he resumed work, and continued for a week or more, appearing normal except for the accentuation of an impediment in his speech. He was then discharged from his employment. On February 19, he entered a hospital, where he died on March 3. An autopsy disclosed that his death resulted from a hemorrhage on the brain of traumatic origin, and the microscope revealed "repair cells," showing that the injury had been received several weeks before. This evidence was held to justify the finding that the death resulted from the injury of January 25.

Mrs. Rush had been separated from her husband for several years, and had supported herself by her own efforts. The statute provides that a surviving wife "shall be conclusively presumed to be wholly dependent \* \* \* unless it be shown that she was voluntarily living apart from her husband at the time of his injury or death." The court held that this presumption was within the power of the legislature to enact, and that it applied in the present instance. With reference to these matters the court, speaking through Judge Taylor, said:

The legislature can make a presumption conclusive unless such presumption would cut off or impair some right given and protected by the constitution. No provision of the constitution is cited which takes from the legislature the power to define and prescribe the duties of the husband to his wife and children and the rights to which the wife shall be entitled in consequence of the existence of the marriage status, and we are satisfied that the legislature had power to provide that for the purposes of the compensation law the wife "shall be conclusively presumed to be wholly dependent" upon her husband regardless of whether she had or had not been supported by him in his lifetime. The duty to support her rested upon him as a continuing obligation, which could have been enforced at any time.

She had lived apart from her husband for about 12 years, but there is no finding that she did so voluntarily, and the evidence does not require such a finding. According to her testimony, which is the only evidence upon the question, he not only threatened her life, but ordered her to leave and drove her away with a gun, and she left and lived apart from him solely because she was in fear of personal violence. This fails to show that she was voluntarily living apart from him within the meaning of the statute.

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WORKMEN'S COMPENSATION—DEPENDENCY—REVIEW OF DECISIONS OF COMMISSIONER—*Poccardi, Royal Consul v. Ott, Compensation Commissioner, Supreme Court of Appeals of West Virginia (Sept. 10, 1918), 96 Southeastern Reporter, page 790.*—This action is brought for compensation by the royal consul of Italy at Philadelphia for Barbera Schipani, widow of an employee of the Davis Colliery Co. at Bower. The employee was killed while in the employ of the colliery company. The widow seeks compensation. Commissioner Ott refused to allow an award, because he claimed the dependency had not been proved. In reversing him Judge Lynch gave the following opinion:

Though not final and conclusive, the findings of the compensation commissioner upon the proof submitted to him to show dependency should be given the same force and effect as the finding of a judge or jury, and generally should not be set aside if supported by any evidence. In that event—support by evidence—dependency is like

any other fact settled by the adjudication, unless the adjudication is apparently against the clear weight and preponderance of the evidence. As an inference from what has been said, where there is no such conflict dependency is not merely a fact finally and conclusively determined by an adjudication either way, but is a question of law to be determined upon the pertinency and applicability of the proof, upon which the ruling was based, to the fact to be proved.

Thus it appears she [the widow] frankly admits that she has the ability to aid herself in part, but was "in greater part dependent on deceased for support." To entitle her to compensation total dependency is not necessary under our statute. Partial reliance for support is sufficient to justify an award to her as a dependent. Such is the plain import and intendment of the statute. Clause "f," section 33, ch. 15P, Code; *Poccardi v. State Compensation Comr.*, 91 S. E. 663.

The intention and design of this statute is to establish a mode for the prompt redress of grievances and secure restitution commensurate with the loss of the services of those upon whom depend for support and maintenance the persons named in the statute as its beneficiaries. Strict rules are not to obtain to the detriment of a claimant in violation of these wholesome purposes. The rejection of this claim seems to us not to accord fully with that spirit and object.

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WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—LOSS OF SIGHT OF EYE—COMPENSATION—*Nelson v. Kentucky River Stone & Sand Co., Court of Appeals of Kentucky (Dec. 3, 1918), 206 Southwestern Reporter, page 473.*—Nelson was in the employ of the defendant company and was engaged in crushing rock. One day while he was passing one of the workers a piece of rock flew into his eye. The injury to the eye was very severe, necessitating the removal of the eye ball and the use of a glass eye. The compensation act provides a specific award for the loss of the sight of an eye, and also provides for compensation for general injuries resulting in disability, adding thereto compensation for disfigurement. The latter, if applied to this case, would make a greater amount than the schedule award.

In reversing the commission's award for the loss of the sight of the eye, and directing an award on the general basis, the court spoke in part as follows:

Looking at our act, we find that it provides compensation at a certain rate for the "loss of a thumb," the "loss of a first finger," the "loss of a hand," the "loss of an arm," the "loss of a foot," the "loss of a leg," etc., thus showing that the compensation therein provided for was confined to the loss of the particular member named. When it deals with the eye, however, it does not provide for compensation for the loss of the eye itself, but solely for the "loss of the sight of the eye." If it be true, and there is no reason to doubt the soundness of the rule, that the purpose of the legislature was to confine the fixed

compensation provided for specific injuries to those injuries and no others, and that the compensation allowed for a specific injury was not payable for a less injury, the rule should work both ways, and the compensation provided for a particular injury should not be held to include a greater injury. Here the employee lost not only the sight of his eye but the eye itself. His injury was therefore greater than the mere loss of the sight of the eye. That being true, his case does not fall within the schedule making compensation solely for the loss of the sight of an eye, but falls within the general provision awarding compensation "in all other cases of permanent partial disability."

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WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—LOSS OF USE—CORRECTION BY GLASSES—*Frings v. Pierce-Arrow Motor Car Co., Supreme Court of New York, Appellate Division (Mar. 6, 1918), 169 New York Supplement, page 309.*—Richard Frings claimed compensation from the company named, his employer. He was an assembler, and while chipping a casting he was struck in the right eye with a sharp piece of steel, which penetrated the eye, and the resulting injury necessitated the removal of the lens of the eye. By the use of a correcting glass lens the sight of the eye was rendered normal, but it could not be used in conjunction with the other eye on account of the lack of coordination of images. The other eye was normal, but the man could use only one eye at a time, except that the injured eye would be of some assistance in avoiding objects in crossing a street or the like. He was paid an agreed rate of compensation for the time he was absent from work, and returned to work at wages somewhat higher than he received before the injury. He claimed, however, compensation for permanent partial disability in the loss of use of the eye, which is declared by the statute to be equivalent to the loss of an eye. The industrial commission certified to the court the question whether such loss of use had been suffered and the answer was in the negative, two judges dissenting. In concluding the prevailing opinion delivered by him Judge Lyon said:

Unquestionably, when the lens of the eye was destroyed, the use of the eye, unaided, was lost. It was only by providing an artificial lens outside the eye that the image could be so thrown upon the retina as to restore the sight. The retina was not destroyed, and through the use of an artificial lens the eye, so far as its use alone was concerned, could fulfill the natural function of an eye. The claimant has permanently lost the use of the eye, when so supplemented, to the extent only of using it in conjunction with the other eye, which he can not do, owing to the lack of coordination of images. Should the claimant lose his left eye, he would be able, using the injured eye, aided by a lens, to fully perform his duties.

I think there has not been the loss of an eye within the contemplation of the statute, and that the certified question should be answered in the negative.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—LOSS OF USE—CORRECTION BY GLASSES—*Smith v. F. & B. Const. Co., Supreme Court of New York, Appellate Division (Nov. 18, 1918), 172 New York Supplement, page 581.*—While Smith was in the employ of the defendant company his eye was injured so that, by the aid of glasses, he had only one-third normal vision in the injured eye and then only when he refrained from using his good eye. If he used his good eye (the left) he could not see with the injured one at all. In other words, only one eye could be used at one time. The company employer appeals from an award compensating Smith for the "permanent loss of the use of the right (injured) eye considered as the equivalent of the loss of such eye." Judge Kellogg, in affirming the award, said:

With the use of powerful glasses he has a vision of about one-third with that eye, but in order to obtain it he must close the other eye. In any event he can have only one eye, and if he uses the injured eye he has the vision of but one-third of an eye.

The case differs from *Frings v. Pierce-Arrow Motor Co., 169 N. Y. Supp. 309* [this Bul. supra], where by the use of glasses claimant had the normal vision of the injured eye. There, without glasses, he had vision of but one eye, and with the use of glasses had the normal vision of the other eye only. In any event he had the full vision of one eye, and could use either eye at pleasure. But here, to get a third vision from the right eye, he must forego entirely the use of the left eye. I think the rule in the *Frings* case should not be extended beyond the facts there found.

I favor an affirmation of the award. All concur, except Lyon, J., who dissents.

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WORKMEN'S COMPENSATION—EMPLOYEE—BUSINESS OF EMPLOYER—INSTALLING ENGINE IN PAPER MILL—*McNally v. Diamond Mills Paper Co., Court of Appeals of New York (Mar. 12, 1918), 119 Northeastern Reporter, page 242.*—Charles McNally was injured during the installation of a new engine for the company named. He had moved the engine from the railroad to the company's plant under a contract, and when that task was completed, he was asked to assist in the work of installation, and did so, being paid by the day, and using his own rigging in doing the work. Two of his men were hired for the same purpose, but he made no profit on their labor. The appellate division of the supreme court had dismissed his claim for compensation, but the court of appeals reversed this, and affirmed an award made by the State industrial commission in his favor. In disposing of the contention that McNally was an independent contractor Judge Cardoza, who delivered the opinion, said:

He was then employed by the day to work as a laborer with others. He was not in control of the job; he had no power of superin-

tendance or direction; he had no other rank than the regular employees of the mill who were with him; he took his orders from the engineer whom the mill had placed in charge. In this situation, the distinctive tokens of the independent contractor are lacking. The claimant for the purposes of this job was an employee, and nothing more. What he may have been at other times and for other purposes does not concern us. It is true that his employment was temporary and casual, but that is not enough to exclude him from the protection of the statute.

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WORKMEN'S COMPENSATION—EMPLOYEE—CASUAL EMPLOYMENT—TRYING OUT NEW CHAUFFEUR—*Marshall Field & Co. v. Industrial Commission of Illinois, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 773.*—One Yager was in the employ of the company as the superintendent of its garage. On December 1, 1915, he hired one Rice as a chauffeur to drive the company's cars. The employment was to continue until December 24, provided Rice proved satisfactory. As was the custom, an old employee of the company went with Rice on the first day of his employment to ascertain how well he ran the auto truck. The old employee, Fritz, and Rice made various deliveries and finally went to one firm with a load of blankets. The elevator of this firm was in the sidewalk and after the first load went down the two men stood waiting for it to return. It was a cold day, so Fritz went in front of the truck to stand by the radiator. He heard a noise and upon investigation he found Rice lying at the bottom of the shaft. His administrator brought action for compensation, which was allowed, and the company appealed, declaring that there was no employment, and that if there was it was but casual. The court in sustaining the award said:

Plaintiff in error [company], among other grounds for reversal, insists that the relation of employer and employee did not exist at the time of the accident; that if there was any employment of Rice, it was but casual; and that there is no evidence that the accident arose out of and in the course of the employment. An "employee" is defined in our workmen's compensation act as "every person in the service of another under any contract of hire, express or implied, oral or written." Section 5, subd. 2. This provision of definition is to be construed broadly. In our judgment Rice must be held to have been an employee. His continued employment depended upon his ability to drive a car, and he was put to work with the understanding that, if he was competent, he would be continued in that employment.

The evidence was sufficient to sustain the conclusion of the board that the accident arose out of and in the course of the employment of Rice.

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WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—*Litts v. Risley Lumber Co., Court of Appeals of New York (Oct. 29, 1918), 120 Northeastern Reporter, page 730.*—Litts agreed

with the lumber company to paint three smokestacks of the latter for the sum of \$50. Litts was to supply all necessary ropes, scaffolding, and tackle, and the company was to supply the paint and a helper. While at work on one of the stacks the rope supporting him broke and Litts fell, sustaining injuries from which he died. The widow brought suit under the workmen's compensation act and recovered an award which the appellate division affirmed. The lumber company claimed that Litts was an independent contractor. This court in reversing the award said:

In the instant case Litts was an independent contractor. He agreed to do a specific piece of work for the company. In doing it he had absolute control of himself and his helper. He was independent as to when, within a reasonable time after the agreement was made between him and the company, and as to where he should commence the work. He was free to proceed in the execution of it entirely in accordance with his own ideas. He was not to any extent subject to the directions of the company in respect of the method, means, or procedure in the accomplishment. He was not subject to a discharge by the company because he did the painting in one way rather than in another. Those facts, considered by themselves, would constitute him an independent contractor.

In the relation of employer and employee the employer has control and direction, not only of the work or performance and its result, but of its detail and method, and may discharge the employee disobeying such control and direction.

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WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—SKILLED WORKER—*Rosedale Cemetery Association v. Industrial Accident Commission of California, District Court of Appeal, Second District of California (July 1, 1918) 174 Pacific Reporter, page 351.*—The plaintiff brings this action against the defendant to have an award in favor of one Armstrong, who was employed by plaintiff, set aside. Armstrong was especially skilled in the use of dynamite and was employed by plaintiff to remove some concrete foundation from its premises and while doing this Armstrong was injured. Armstrong had been called before the superintendent and treasurer of the plaintiff and was asked how long it would take to do the blasting job and how much it would cost. Armstrong said it would take one week to complete but he could not state the cost. No written agreement was made. Armstrong went to work for \$5 per day. He was not supervised or directed, because his employers knew very little about the handling of the work, although there was nothing to prevent them from assuming full charge of the work. Plaintiff says Armstrong was an independent contractor. Judge Works, expressing the opinion of the court that he was within the act, said in part:

In support of its contention that Armstrong was an independent contractor, the petitioner [plaintiff] cites many authorities to the

general effect that, to quote from *Green v. Soule*, 145 Cal. 96, 99, 75 Pac. 337, 339:

“The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.”

Whether, however, the employer has or has not such right of control is necessarily to be determined from the contract of employment. The fact that there was no right of control can not be predicated upon an absence of the exercise of it, in practice, if the contract in fact allows the right. The employer would be very likely to refrain from exercising a direction or control over an employee as to whom he had the undoubted right of control, merely because the employee had a greater knowledge concerning the nature of the work to be done than did the employer himself.

According to the superintendent of the petitioner, the business in which it was engaged was cemetery work. That expression may be properly defined, we believe, in the statement that it consists in platting, grading, planting, beautifying, and maintaining a tract of land in such a manner as to render it an appropriate place for the sepulture of the dead, and to preserve it as such. It can make no difference whether “cemetery work” is done by means of blasting or through the use of the wheelbarrow, the spade, or the spirit level. All these and other instrumentalities may be required to reduce a given tract, necessarily variable to some extent in character, to a proper condition for cemetery uses and to so maintain it. The employment of Armstrong was in the ordinary course of the business of the petitioner.

We are satisfied that the finding that Armstrong was an employee of the petitioner is supported by the evidence.

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WORKMEN'S COMPENSATION—EMPLOYEE—MEMBER OF FIRM PERFORMING SERVICES—*Cooper v. Industrial Commission of California*, Supreme Court of California (Mar. 6, 1916), 171 Pacific Reporter, page 684.—W. L. Cooper was a member of a firm formed to operate certain mining claims. He was a practical mining engineer, and was sent to the mine to take samples of the ore and make or verify reports as to conditions. His expenses were to be paid by the partnership, also a stated per diem allowance for his services. He was killed, while on this trip, through the operation of a bucket tram operated by the firm. His widow, Eva L. Cooper, applied for compensation for his death, but the industrial commission denied it, agreeing with the view of the employer and the insurer that Cooper was not an employee of the partnership. The supreme court took the same position and dismissed the claim. Judge Richards delivered the opinion and said in part:

We are constrained to hold that the industrial accident commission was correct in its conclusion upon this subject. Ordinarily the relation between a partnership and its members performing services for it is not the relation of employer and employees. The definition of



the term "partnership" as "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them implies that each of its members shall render such services to the firm as he is able, and without compensation, in the absence of special agreements to the contrary. In the rendition of such services the partner is acting in no sense in the capacity of a servant or employee subject to the direction, or it may be the discharge, of his firm acting as his master or employer.

The workmen's compensation act clearly does not contemplate such a mixed relation as that existing between partners, wherein each member of the partnership is at the same time principal and agent, master and servant, employer and employee; and wherein each, in any services he may render, whether under his general duty as a partner, or under a special agreement for some particular service, is working for himself as much as for his associates in carrying on the business of the firm.

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WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Industrial Commission of Colorado v. Aetna Life Ins. Co., Supreme Court of Colorado (July 1, 1918), 174 Pacific Reporter, page 589.*—This action is brought by Cora Lynch, the widow of Charles Lynch, for compensation under the Colorado compensation statute. She was granted an award by the industrial commission, which the district court annulled. This petition was brought to have the case reviewed. The supreme court granted the widow the award. Lynch was employed by the C. E. Walker Contracting Co. in Colorado as a foreman. Both parties were residents of Colorado, the contract was made there, and some of the work was to be done there. Lynch had completed a job in Afton, Wyo., and set out for Montpelier, Idaho, to work at another but he missed the stage from Afton. A friend voluntarily took him in his automobile and started from Afton, and while on the way the machine overturned and Lynch was killed. Defendant says that the accident did not arise out of and in the course of the employment and that the workmen's compensation act of Colorado did not have extraterritorial effect. Justice Scott, giving the opinion of the court which sustained the award, said in part:

In the case at bar it was an essential part of his employment that the deceased should travel from the place where he installed one plant to the place where he was to install another. It is also clear that he adopted a reasonable and apparently the only facility for such travel under the circumstances, and as safe as any other that may have been available. No case is cited that adopts a different rule, and we know of none, as applied to workmen's compensation statutes.

In the case at bar, if we are to determine, in the absence of any provision of the statute to the contrary, that the doctrine of *lex loci contractus* [law of place of contract] does not govern, it will be to

destroy the very spirit and purpose of the law as it affects the employer, the employee, and the public welfare. If we assume that there are no workmen's compensation laws in the States where deceased was to perform his services outside of Colorado, then there can be no recovery of compensation, notwithstanding all premiums sufficient to maintain the workers' accident insurance had been fully paid. On the other hand, if we are to assume that a workmen's compensation law prevails in each of the seven States of Colorado, Wyoming, Idaho, Montana, Utah, Arizona, and New Mexico, then the employer must be compelled to comply with each statute and to pay the premiums required by the law of each State for the protection of the one employee, or approximately seven times the amount otherwise required. If this were legally permissible, the expense would make it prohibitive. The result in this case must be that: The employer has paid the full premium demanded by the State to insure his employee against accident; the employee has relied on the pledge of his State for the protection of himself and his dependents; his widow and children discover the whole arrangement to be a delusion and a snare and find themselves without protection. Thus the employer and employee, his dependents, and the public have all been deceived and cheated, because forsooth the accident occurred beyond the imaginary line that marks the boundary of the Commonwealth, though it happened within the line of employment. We can not assume that the legislature ever intended such an injustice and absurdity in the absence of some clear and express provision in the statute to that effect, which we do not find.

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WORKMEN'S COMPENSATION ACT—EXTRATERRITORIAL EFFECT—EMPLOYEE INJURED IN ANOTHER STATE—*State ex rel. Chambers v. District Court, Hennepin County, Supreme Court of Minnesota (Jan. 11, 1918), 166 Northwestern Reporter, page 185.*—This action is brought by the widow of Chambers to review a judgment denying her compensation under the workmen's compensation act for the death of her husband. Chambers was a resident of North Dakota and was employed by C. C. Wyman & Co., a Minnesota corporation doing a general grain brokerage business in Minneapolis. It does not appear that it had a business situs elsewhere. The contract for employment was made in Minneapolis and contemplated the rendition of services by the deceased in soliciting business in Minnesota, North Dakota, and elsewhere. The firm furnished him with an automobile with which he performed such services. While he was in North Dakota on May 5, 1917, the automobile was accidentally overturned and he was killed. The accident arose out of and in the course of the employment. The opinion of the Supreme Court, granting compensation as claimed, is in part as follows:

Liability would be conceded had the accident happened in Minnesota. The claim of the employer is that compensation can not be awarded for an accident occurring outside the State.

In the case before us the business of the employer was localized in the State. What the employee did, if done in Minnesota, was a contribution to the business involving an expense and presumably resulting in a profit. It was not different because done across the border in North Dakota. It was referable to the business centralized in Minnesota. Sometimes the construction which we adopt will result to the immediate advantage of the employee, and against the employer, and sometimes the result will be the reverse. Whatever view is adopted, perplexing situations may arise. Business has scant respect for State boundaries. An industry may be located a part in one State and a part in another State, or it may have separate business situs in two or more, and its employees may from time to time work in each and may reside in one or another at their convenience. Situations may arise where it is difficult to say whether the employment is referable by the act of the parties or by intendment of law to a business conducted in one State or another and whether the governing law, applicable to an injury coming from the employment is that of the one or the other, or whether there may be a recovery of the employer under the compensation act of one State and of a third person under the common law of the State of the injury. They are safely left for determination as they arise. Here, if the facts stated in the complaint are true, the employment was referable to the business conducted in Minnesota, and its compensation act is the governing law between employer and employee.

This case was referred to, and its decision adopted by, the court in the case of the State *ex rel. Maryland Casualty Co. v. District Court, Rice County*, 166 Northwestern Reporter, page 177, where the facts were substantially as they are here.

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WORKMEN'S COMPENSATION—FARM LABOR—THRASHING-MACHINE OPERATOR—*State ex rel. Bykle v. District Court of Watonwan County et al., Supreme Court of Minnesota (June 28, 1918), 168 Northwestern Reporter, page 130.*—John Bykle was a separator man on a thrashing machine which went about from farm to farm thrashing grain for the farmers. He asserted a claim for compensation for an injury suffered when he made a misstep and fell from the deck of the separator after making some repairs, which he apparently might reasonably make, as he was in charge during the temporary absence of the owner's brother, who operated the thrasher. It was held that the injury was one arising out of the employment, but compensation was denied on the ground that the employee was a "farm laborer," and as such excepted from the operation of the compensation law. This is in direct opposition to the decision of an Indiana court in the case *In re Boyer*, 117 N. E. 507 (Bul. No. 246, p. 233).

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—CONDUCTING HOSPITAL CONTAINING APPARATUS REGULATED BY ORDINANCES—INTOXICATION AS CAUSE OF INJURY—*Hahnemann Hospital v. Industrial Board of Illinois et al.*, *Supreme Court of Illinois* (Feb. 20, 1918), 118 *Northeastern Reporter*, page 767.—William H. Delscamp, chief engineer of the hospital named, was killed in the hospital on December 16, 1913, under circumstances which left little doubt that his death was caused by a fall down the basement stairs to the concrete floor. His duties of supervision often called him down these stairs to the basement. The industrial board made an award to his widow, and the hospital appealed. The appellate court reversed the award, whereupon the claimant appealed to the supreme court. One question was as to whether the hospital was engaged in conducting an extrahazardous business. Hospitals are not themselves enumerated as extrahazardous, but class 8 of section 3 of the compensation act enumerates one class of the enterprises included as follows:

In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use, or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein.

It appeared that ordinances of the city of Chicago affected the building as to the inclosure of at least one elevator in a fireproof shaft, the equipment with fire escapes and the inspection of the building, the number and width of stairways, the methods of installation of electric wires and apparatus, and the inspection of the boilers and steam transmission apparatus. Judge Duncan, who delivered the opinion, stated the views of the court as to certain general principles relating to the classification of extrahazardous occupations and their application to the present instance.

He said that the court agreed with the contention of the hospital that no occupation, even if enumerated in the earlier clauses of section 3, should be deemed extrahazardous unless it is so in fact, as already asserted by the court in *Uphoff v. Industrial Board*, 271 Ill. 312, 111 N. E. 128 (Bul. No. 224, p. 274), and illustrated by the "construction" of a chicken coop or the "excavation" of a posthole. If the circumstances of the height of the building and its equipment with dangerous machinery and power, however, are such that its safety is regulated by ordinances, and make it actually extrahazardous, it is not necessary that the variety of business should itself be mentioned in the lists of enterprises. Continuing the discussion of this point, Judge Duncan said:

Under the evidence in this case we think it clearly appears that the hospital of appellee—i. e., the business or enterprise of conducting a hospital by it in the building, with the machinery, appliances, and equipment therein used—is, in fact, extrahazardous within the mean-

ing of the statute. Many of its employees are engaged in handling, repairing, and operating the dangerous machinery, equipment, and appliances, and are exposed to the dangerous agency or power which drives or makes serviceable such equipment and appliances. Not only are those employees exposed to such dangers, but all other employees therein are more or less exposed to them. Extraordinary care and skill are required in the handling and management of said equipment and appliances to prevent serious accidents.

Another contention that was held untenable was that the hospital was not an "enterprise" under the definition in the Uphoff case, *supra*. The court finally held that it could not be said that the employee's intoxication, rather than his employment, was the cause of his death. Drunkenness to be a bar to compensation, it is said, must be such that the court can say as a matter of law that it was the cause of death, and this would only be true if the person were unable to fulfill the duties of the employment. The judgment of the appellate court was reversed, and the award of the Industrial Board to the widow affirmed.

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WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—CONSTRUCTION OF TELEGRAPH LINES—CONSTITUTIONALITY OF STATUTE—INTERSTATE COMMERCE—*State v. Postal Telegraph-Cable Co. of Washington, Supreme Court of Washington (Apr. 29, 1918), 172 Pacific Reporter, page 902.*—Action was brought by the State of Washington against the company named to recover the amounts of premium on its pay roll, due to the State fund under the provisions of the workmen's compensation law, usually known as the industrial insurance law. The premiums sued for included in separate items those based on the pay roll of workmen engaged in the construction of railroad lines, and of workmen engaged in operating the telegraph systems within the State. The superior court of King County entered judgment dismissing the action. The defense consisted of a denial that the workmen were employed or that the company was engaged in a hazardous occupation under the law, and of an attack upon the constitutionality of the law as interfering with interstate commerce, and as violative of personal property and contract rights. In passing upon the extrahazardous classification of the occupation Judge Mount, who delivered the opinion for the supreme court, said in part:

We are of the opinion that, unless the courts may take notice of the fact that an occupation is not hazardous, it is within the power of the legislature to classify the same as hazardous. The construction of telegraph lines has been declared by the legislature of this State to be an extrahazardous occupation. We are of the opinion, therefore, that the denial of the respondent that it was engaged in an extrahazardous occupation is of no effect, because it is a denial of a legislative declaration.

As to the paragraphs of the company's answer relating to interstate commerce the court said:

The first, second, and third affirmative defenses are to the effect that the respondent, during the times mentioned in the complaint, was engaged in interstate commerce as an agent of the Government, and that the tax here sought to be collected is an unlawful attempt to regulate interstate commerce by placing a burden upon the business, and that the intrastate business is not clearly separable from the interstate business.

Conceding for the present that the employees engaged in sending and receiving messages and in operating the telegraph system were engaged in interstate commerce, it is plain that the other class of employees engaged in construction work was not engaged in interstate commerce. These employees, according to the complaint, were engaged in original construction of lines of telegraph.

In the case of *Raymond v. Chicago, Milwaukee & St. Paul Railway Co.*, 243 U. S. 43, 37 Sup. Ct. 268, where an employee was engaged in shortening the main line of a railway within this State, and was injured by an explosion of a charge of dynamite while he was working in a tunnel, it was held that such employee was not engaged in interstate commerce at the time of his injury, and that he was relegated for relief to the workmen's compensation act above referred to. For the same reason it necessarily follows that, even though the telegraph company, the respondent here, is engaged in interstate commerce, its employees engaged in construction work come under the terms of the employers' liability act.

Conceding that the telegraph company is an agent of the United States, it does not follow that the provision made for injured employees in the construction of a telegraph system within this State is either a tax or an attempt to regulate the business of the telegraph company.

It is further alleged that the employees of the respondent became members of the Postal Telegraph Employees Association, and that there was a contract and agreement between the respondent and its employees by which the respondent agreed to pay its employees for any incapacity happening during the time of their employment at a rate as set forth in the complaint; that the majority of the employees who worked during the years 1911 and 1912 entered the employment of the respondent before the passage of the workmen's compensation act; that the said act illegally interferes with the rights of the respondent and attempts to destroy vested interests under the contract.

Matter is then quoted to the effect that the proper exercise of the police power of the State can not be abridged nor delayed by reason of existing contracts; and as the compensation law is such an exercise, such an interference as is claimed does not invalidate it. (State ex rel. *Pratt v. Seattle*, 73 Wash. 396, 132 Pac. 45.)

We are of the opinion, therefore, that, as to the employees of the respondent engaged in construction work, the State was entitled to a judgment for the amount alleged in the complaint. As to the employees engaged in the operation of the lines of the respondent, we are of the opinion that the act does not apply to them under the

allegations of the answer to the effect that the respondent is engaged in interstate commerce; that such employees are engaged in operating the system for handling interstate messages; that a large percentage of the business actually done for the years mentioned in the complaint consisted in interstate messages; and that it is impossible to segregate or separate the time when the employees were engaged in interstate commerce from the time that they were engaged in intrastate commerce.

The employees who are engaged in operating the telegraph lines and in handling interstate and intrastate messages are, no doubt, engaged in interstate commerce. It is clear that the Congress of the United States may establish a rule of liability and a method of compensation for such employees. This act, therefore, by its terms, applies to such persons only to the extent of their mutual connection with intrastate work, which shall be clearly separable and distinguishable from interstate or foreign commerce. Under the allegation of the answer, this work is not clearly separable and distinguishable as to those employees. If this is true, the act does not apply.

General questions of constitutionality were disposed of by reference to decided cases. The judgment of dismissal was reversed, with instruction to enter judgment in favor of the State for the premiums due for the construction employees, with leave to make a suitable answer as to the inseparability of the time of the employees engaged in operation, into those engaged in interstate and intrastate commerce.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT ON ONE EMPLOYEE BY ANOTHER—*Pekin Cooperage Co. v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 530.*—The plaintiff cooperage company had in its employ, among others, two men, Razor and Miller, who acted as cullers for their respective barrel raisers. They each selected from their respective racks staves to be used for the raisers. When one's rack became empty it was customary to draw on a neighbor's rack. Miller had first been placed on this work on the day of the injury and had been drinking to a certain extent. He left his work for a period and when he returned he took a number of staves from Razor's rack. Razor protested in rather violent language, whereupon Miller assaulted him and injured him. Razor applied for compensation which was granted by the Industrial Board. The employer attacked this award, and in affirming it the court said:

Razor clearly suffered an accidental injury in the course of his employment. It was a sudden and unexpected mishap, occurring outside the usual course of events, without any design on his part, while he was engaged at his work. The compensation to be provided and to be paid by the employer under the workmen's compensation act is

not, however, for all accidental injuries which may be sustained by his employees in the course of their employment, but only for such as may also arise out of the employment. There must be some causal relation between the employment and the injury. It is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment.

Where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT ON ONE EMPLOYEE BY ANOTHER—QUARREL OVER POSSESSION OF TOOL.—*Jacquemin et al. v. Seymour Manufacturing Co., Supreme Court of Errors of Connecticut (Mar. 12, 1918), 103 Atlantic Reporter, page 115.*—The company named is engaged in the manufacture of iron castings, the casters leaving their work for the day when they have poured the molten metal into the molds. In order not to have too many casters at one time about the cupola where the molten metal is drawn out, and not to have the casters get through and leave earlier than was desirable, the company limited the number of ladles supplied to the men. One O'Shaugnessy and his helper were using one ladle, which they had secured permission to use from another who had just been using it, and Jacquemin had another ladle in front of his working place, placed there by him. When he and his helper started to pick this up he was told by O'Shaugnessy to desist or he would get into trouble. After angry words had passed between them O'Shaugnessy started for Jacquemin, and they scuffled, rolling on the floor, until O'Shaugnessy let his opponent up because they were endangering one of the molds. Jacquemin then started for O'Shaugnessy again, and the latter dealt him a blow over the heart which resulted in his death. The question contested was whether the injury arose out of the employment. The commissioner and the trial court, which passed upon the parents' claim for compensation, took the view that it did, holding that the quarreling was a natural consequence of the conditions of the business and the manner of conducting it. The supreme court held that the fight was a purely personal affair, and, calling attention, among other things, to the fact that Jacquemin renewed it when it might have been terminated, denied compensation. In the course of the opinion it was said:

The fact that employees sometimes quarrel and fight while at work does not make the injury which may result one which arises out of their employment.



**WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT ON ONE EMPLOYEE BY ANOTHER—SKYLARKING—***Mountain Ice Co. v. McNeil et al., Court of Errors and Appeals of New Jersey (Mar. 7, 1918), 103 Atlantic Reporter, page 184.*—Albert McNeil, 19 years of age, and Edward Toomey, 15, worked together in the icehouse of the company named. On January 28, 1914, the two boys had been skylarking together, and finally had a scuffle, during which the president and the foreman of the company came in and ordered them back to work. Later on, while McNeil was at work, Toomey struck him over the head with an ice pick, rendering him unconscious and fracturing his skull. Jennie McNeil petitioned for compensation as his guardian. Judgment in her favor was rendered in the court of common pleas of Morris-County and was affirmed by the supreme court. The court of errors and appeals reversed the decision, the same court having held in *Hulley v. Moosbrugger*, 88 N. J. Law 161, 95 Atl. 1007 (Bul. No. 189, p. 279), that an employer was not responsible for assaults by one employee upon another. In the present case the distinction was attempted to be made that the company had knowledge of the matter, and that therefore what happened was a risk incidental to the employment. The court held that such an occurrence as a violent assault could not be anticipated from what had been previously seen, Judge Walker saying, in part, as to this:

We think that because of the skylarking which came under the observation of the president and superintendent of the ice company's plant, namely, skylarking between these boys, charged the president and superintendent with contemplating no more than that the same thing might occur again, that is, skylarking or horseplay, not that one boy might thereafter commit an atrocious assault upon the other.

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**WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—BURNS FROM FALLING ASLEEP WHILE WAITING FOR ELEVATOR—***Richards v. Indianapolis Abattoir Co., Supreme Court of Errors of Connecticut (Dec. 15, 1917), 102 Atlantic Reporter, page 604.*—Joseph Richards, a driver for the company named, came in from his route after working hard handling meat on a cold day, from 6 a. m. to 12 noon. His next duty was to take by elevator some beef to an upper floor. Learning that the elevator was in use, and would be so for 15 minutes, he sat down upon a nail keg a few feet from the elevator shaft and near the fire box of a boiler. No one else was about that part of the premises. He dozed off, on account, as the compensation commissioner found, of his weariness and chilled condition and the heat, and awoke to find himself afire.

His greasy apron, the commissioner found, had caught fire from the heat or from a flying bit of coal. An award in his favor for the resulting injuries was affirmed by the superior court of New Haven County, and the supreme court of errors also found that the injury was one arising out of and in course of employment, Judge Roraback for the court saying:

The controlling question here presented is whether Richards, the claimant, when injured, was actually doing the work he was employed to do or whether he was doing something substantially different. He was injured while on duty, in his working hours, when waiting for an opportunity to continue his service of employment.

The accident occurred when the claimant was at a place where he might reasonably be. There was no turning aside upon his part—no attempt to serve ends of his own. The fact that he fell asleep, under the circumstances set forth in the finding, was not decisive of his claim. This, at the most, was negligence, and our compensation act of 1913 expressly provides that in an action to recover damages for injuries sustained by an employee arising out of and in course of his employment it shall not be a defense that the injured employee was negligent.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CHAMBERMAID CLEANING OUT LIGHT WELL IN ABSENCE OF JANITOR—*Williamson v. Industrial Accident Commission, Supreme Court of California (Mar. 12, 1918), 171 Pacific Reporter, page 797.*—Mrs. Harriet A. Prosser was an employee of a small hotel in Oakland, Calif., which was kept in order by the proprietress, Mrs. Prosser, and the janitor. Mrs. Prosser's duties were largely confined to keeping the chambers in order; she sometimes attended the telephone and assisted the clerk. The janitor was ill for some time, and rubbish collected in the bottom of a light well upon which the windows of some of the rooms opened, and which he was accustomed to clean out. At the suggestion of the owner of the building, whom she saw in the absence of the proprietress, Mrs. Prosser went, without her employer's consent and against the advice of the clerk whom she told where she was going, to clean out the well. This necessitated climbing about 9 feet down a ladder after climbing out the window and getting a footing on a narrow ledge below; and it was said that it was suitable work only for a young and active man. In attempting to do this she fell and received injuries which resulted in her death. An award was made to her sister for the benefit of a young girl whom she, Mrs. Prosser, and her husband had informally adopted. The court held that she had gone outside the scope of her employment in the attempt in which she was injured, and annulled the award of compensation.

**WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DRINKING ACID BY MISTAKE FOR WATER—***In re Osterbrink, Supreme Judicial Court of Massachusetts (Feb. 27, 1918), 118 Northeastern Reporter, page 657.*—Henry Osterbrink, a man 72 years of age, was employed by John P. Squires & Co. as door tender, to stand outside the cooling room of the plant and open the door when any of the men wanted to pass in with a truck. The temperature where he stood being, during the summer, the same as outdoors, he had for some time kept in the cooler a bottle of water for his use. There was no definite provision for drinking water on that floor, but some of the men drank from a rubber hose attached to a faucet in the cooling room. A bubbling fountain was on the floor below. The practice of putting bottles of coffee and tea in the cooler was known to and permitted by the management, but they did not know of this employee's placing water there. On July 7, 1916, he took a bottle from under the sink where he kept his water and drank from it. It was muriatic acid which the evidence warranted the industrial accident board in finding had been left by employees engaged in soldering, and it caused his death. The award of compensation by the board to the claimants, daughters of the deceased, was affirmed, Judge Pierce saying:

We are of opinion that there was a causal connection between the employment and the accident. The placing of bottles of coffee or tea in the cooler had the sanction and approval of the subscriber. There is no evidence that it disapproved the cooling of water in bottles in the refrigerator, and it would be a natural and reasonable expectation that employees would place water in bottles in the cooler in summer time to relieve the thirst of the employees or to be drunk by them with their meals, in preference to their drinking from the end of a rubber tube or from a bubble fountain after going to the floor below. We are also of opinion that the risk of drinking acid from a bottle which had been exchanged or substituted for a bottle of like appearance containing drinking water by an employee, whose work required the use of such a substance, was not too remote a danger to be found to be an incident of that employment.

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**WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT — FROSTBITE — COMPENSABLE INJURY —***Ellingson Lumber Company v. Industrial Commission of Wisconsin, Supreme Court of Wisconsin (Dec. 3, 1918), 169 Northwestern Reporter, page 568.*—This action was brought by the lumber company in an effort to have an award made by the commission in favor of one Beaulieu set aside and vacated. Beaulieu was employed by the lumber company as a woodsman. By a mix up of orders he went one afternoon to the wrong place to work. When the mistake was discovered he was sent

to the right place. In order to make up for the time thus lost he exerted himself to accomplish a great amount of work, and in doing so his feet became wet from perspiration. On his way back to the camp his feet froze, and he then sought compensation for this injury. In affirming the award of the commission the court said:

The facts being undisputed, the question is: Has the employee, Beaulieu, brought himself within the provision of the act under the doctrine approved by this court in the case of *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N. W. 996 [Bul. 189, pp. 276, 277]? Injuries to employees for which compensation is to be paid under the workmen's compensation act are such as are incidental to and grow out of the employment. Compensation is not given for an injury resulting from exposure to a hazard which is not peculiar to the industry or substantially increased by reason of the nature of the services which the employee is required to perform.

Injury by freezing is certainly not peculiar to the industry in which defendant, Beaulieu, was engaged. Did the nature of Beaulieu's employment expose him to a hazard from freezing which was substantially increased by reason of the services which he was required to perform? It has been said that the causative danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

It is clear that the exposure of Beaulieu to the injury by freezing was substantially increased by reason of the nature of the services which he was obliged to render. We think it must be held that the injury for which compensation was awarded was proximately caused by accident within the meaning of the compensation statute.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—*State ex rel. McCarthy Bros. Co. v. District Court, Supreme Court of Minnesota (Nov. 1, 1918), 169 Northwestern Reporter, page 274.*—The McCarthy Bros. Co., a Minnesota corporation doing a general grain brokerage business in Minneapolis, employed one Von Hagen, who lived in Bismarck, N. Dak., as its traveling salesman. It was Von Hagen's custom to cover his territory in North Dakota during the week and return to his home on Sunday. At the time of the accident the Missouri River had inundated the tracks of the railroad and in an effort to cross the river to return to his home Von Hagen and some others entered a rowboat and attempted to row across the river. They were unsuccessful, and their boat, striking a submerged fence post, overturned and Von Hagen was drowned. His dependents were allowed compensation. This action opposes the award. The opinion of the supreme court affirming the award is in part as follows:

Decedent's duties required his traveling from place to place in his territory, which was several hundred miles from his employers' place

of business. It was proper that he should have some regular or fixed place for communicating with his employers. His home was near his field of labor. He made it his headquarters, as well as his retreat for over Sunday, as he properly would, and as his employers must naturally have expected and intended he should do. Indeed, all the correspondence between them so indicates. We see no reason why he might not properly, and without stepping outside the scope of his employment, return to his home from his field of labor on the Sabbath day. We think the trial court was justified in finding from the evidence that decedent came to his death by reason of an accident arising out of and in course of his employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—EXTRAHAZARDOUS WORK—CASUAL EMPLOYMENT—*Scully v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918)*, 120 *Northeastern Reporter*, page 492.—Scully was a sewer builder, who usually worked as a subcontractor under general contractors. He "usually employed from two to five men for such work." De Vito had been in the employ of Scully for about five months as a laborer, his chief work being to dig ditches and to carry material to and from the place of work. On the day of the accident De Vito was met while on his way to work by Scully, who was driving a Ford motor truck. Scully instructed De Vito to get on the truck and go with him to get some material and to bring it to the place where the work was to be done that day. After having loaded the material on the truck and while on their way to the place of work the machine was run into by a street car, and De Vito was injured. De Vito sued for compensation, and an award was granted him by the Industrial Commission. Scully now brings proceedings to have this award set aside, claiming De Vito's occupation was not extrahazardous and therefore not under the workmen's compensation act, that De Vito's injury did not arise out of and in the course of his employment, and that his employment was casual. The court affirmed the award, saying in part:

The trenches dug by De Vito necessarily had to be as deep as the sewers and water mains laid in the streets, and it requires no stretch of the imagination to see and understand at once that his occupation was more dangerous than an ordinary occupation and therefore extrahazardous.

An injury may occur within the course of the employment, and arise out of it, even though it happen while the employee is on his way to or from his usual place of employment, or while engaged in the doing of an act that is necessary to, or an incident of, the employment.

De Vito's employment was not casual, as argued by the plaintiff in error. His employment can not be said to have been uncertain, hap-

hazard, irregular, or incidental, as distinguished from stated or regular. The word "casual," in the statute, has reference to the contract for service, and not to the particular item of work being done at the time of the injury.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—PARTIES PLAINTIFF—*Coster v. Thompson Hotel Co., Supreme Court of Nebraska (June 15, 1918), 168 Northwestern Reporter, page 191.*—The widow of Coster brought this action for compensation for the death of her husband. Coster had been employed by defendant as a general foreman of mechanical work for a hotel owned by defendant. On the morning of the accident Coster telephoned to the hotel and gave instructions to his subordinates as to some plumbing work to be done. Some supplies were needed. Coster then telephoned to the plumbing company and ordered what he needed and then, as was his custom, set out on his motorcycle to get the supplies from the plumbing company. On his way he collided with a street car and was injured and later died. Two contentions are made: First, that such an action as this should be brought by the dependents of deceased and not by his administrator, and second, that the death was not caused by an accident "arising out of and in the course" of deceased's employment. After quoting two sections of the statute referring to the first point, the court said:

These sections, construed together, seem to authorize recovery to be had by the dependent or dependents themselves, their legal guardian or trustees, the executors or administrator of the deceased, and if no such representative be qualified, the payment may be made "to such persons as would be appointed administrator of such decedent." The statute is confusing upon its face and inconsistent, but it should be liberally construed, and, if it is borne in mind that its object is to furnish compensation to those dependent on the deceased for support, it does not seem very important in whose name the action is brought so long as the relief is sure to reach the proper party.

The next point argued by the defendant is that the death "was not caused by accident arising out of and in the course of employment." We can not take this view. It was a part of Coster's duty to obtain materials. He was his own master as to his hours and place where he might engage in his master's service. When he ordered material by telephone from his house he was in the course of his employment, and when he was accidentally struck and killed upon the street while on the way to procure materials, the accident arose out of the employment. Both the order for the goods and the going to procure them were strictly within his duties. The fact that he rode upon a motorcycle which he commonly used in performing errands and in going to and from his home, does not alter the case. He had a right to use such instrumentalities as were best fitted to perform his master's work.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—PLACE OF WORK—INJURY TO SALESMAN—*Bachman v. Waterman, Appellate Court of Indiana (Nov. 26, 1918), 121 Northeastern Reporter, page 8.*—This action for compensation was brought by the widow of Lee F. Waterman who, when he was killed, was a salesman in the employ of Bachman. Bachman operated a flour mill, and Waterman sold the flour to grocery stores in and about the city. It was Waterman's custom and duty to call on the customers and prospective customers of Bachman's products, and before 6 o'clock of each day to telephone from his home the orders received during the day. On the day of the accident he had just called on a customer and was crossing the street when he was struck by an automobile. It was not known whether he was crossing the street to catch a car to return home or to see another groceryman. The Industrial Board allowed compensation and the employer appealed. The opinion of the court affirming the award is in part as follows:

This court is committed to the following doctrine: That an injury is received in the course of the employment when it is suffered while the workman is doing what he was hired to do; that it arises out of the employment when it appears that there is a causal connection between the environments of the employment and the resulting injury; that such causal connection is not indicated by the mere fact that a workman's employment required him to be at a certain place at a certain time, and while there was injured, but it must appear also that the nature of his employment subjected him at such place to a certain danger, although not foreseen, and that by reason of being subjected to such danger he was injured; that under the workmen's compensation act an employee's place of employment is sufficiently comprehensive to include all territory that he is required to visit in performing the duties of his employment; that where the duties of his employment require him to travel public streets, the perils and hazards incident to travel thereon, such as the danger of coming in contact with moving vehicles, becomes a part of the environment in which he is required to work.

Under the facts this case is not governed by those decisions wherein it appears that a workman was injured while returning from or going to his place of employment, the day's duties being completed or not yet commenced, but rather by that other line, wherein the day's service in its general scope being completed, there yet remains some other incidental duty, the workman being injured while performing it. In such cases it is held that the injury arises out of and in the course of the employment.

The duty or custom of Waterman to telephone his orders from his home is such incidental duty as mentioned in the last paragraph of the above opinion.

**WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—RETURNING FROM ERRAND—***N. K. Fairbanks Co. v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 457.*—This was a proceeding to have an award made by the Industrial Commission to the widow of McGuire for compensation for his death set aside. The lower court affirmed the award and appeal was taken to this court. McGuire was employed by the plaintiff and was sent to the plant of Darling & Co. to inspect and get samples of some fats. This he did, but did not complete his inspection before 7.15 p. m. The plaintiff's plant closed at 6 p. m. McGuire therefore decided to take the samples home with him and bring them to plaintiff the following morning. On leaving Darling & Co.'s plant and while on his way home he was struck and killed by a street car. In reversing the award for compensation the court said:

At the time deceased was injured his duties for the day had ceased and he was on his way to his home. He was not doing anything incidental to his employment, and the applicant was not entitled to compensation for his death.

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**WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—WEEK-END TRIP—***International Harvester Co. of New Jersey v. Industrial Board of Illinois et al., Supreme Court of Illinois (Feb. 20, 1918), 118 Northeastern Reporter, page 711.*—William C. Sain was an employee of the company named at its plant in Chicago, but was detailed to the International Harvester Co. of America at Detroit, and sent out to places within a radius of 75 miles to assemble farm machinery which was sent knocked down to local dealers. On Saturday, November 11, 1915, he was in Grand Blanc, and at 3 p. m. announced that he was going to Detroit to spend Sunday and would return and finish the work Monday. He took a jitney bus to go to Flint, expecting to take the train there; but on the way the jitney was struck by a train and he was killed. The question at issue was whether the injury was one arising out of and in course of employment of the deceased, and the Industrial Board held that it was, and made an award to the beneficiaries, who had received a payment from an employees' benefit fund, whose plan was to pay benefits only for accidents not so arising. The board found as facts that it was the custom for employees to go into the city and remain for Sunday, and that the expenses in such cases were paid by the company; also that the deceased had charged his railroad fare and supper the evening of the accident in his expense account, and that the charge had been allowed. The court emphasized evidence that the employees tried to complete work



so as to report between jobs on Saturday night, when expenses would of course be paid, but that they were expected to remain until a piece of work was done. It also called attention to testimony that the expense account had been allowed under a misapprehension, and, holding that the board's conclusion was not supported by competent evidence, reversed the judgment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HEATING WATER FOR WASHING—*In re Ayers, Appellate Court of Indiana (Jan. 18, 1918), 118 Northeastern Reporter, page 386.*—Omer Ayers claimed compensation from his employer, the Ansted Spring & Axle Co., and the Industrial Board of Indiana submitted to the court for decision the question whether, under the facts as found by it, he was injured by an accident arising out of and in the course of employment. It appeared that the employees had been in the habit, after finishing work, in order to heat water for washing, of heating an iron in the furnace and dropping it into a bucket of water. On November 23, 1916, the fire in the furnace had gone out when Ayres and another employee completed their work. They went into an adjacent room, which was in another department of the factory, and observing a tank of hot liquid, which appeared to be water, proceeded to set their bucket therein. It was in fact an explosive acid, and when they placed in it the bucket of cold water it exploded, and injured Ayres so that he was totally disabled until May 7, 1917, and thereafter partially incapacitated for a length of time which could not be determined at the time of the trial. The tank was not labeled in any way to indicate its contents, but afterwards the employer labeled it to show this and also that it was dangerous. The court held that the injury arose out of the employment and was compensable. The opinion was delivered by Judge Ibach, who also called attention to the acquiescence of the employer in the custom of washing before leaving the premises, and stated that the deviation from the usual plan of accomplishing this was not unnatural. In the course of the opinion he said:

Where an employee is injured while on duty, or while doing something incident to his employment, and reasonably necessary to his personal health or comfort, though not strictly necessary to his employment, such injury will ordinarily be held to arise out of the employment.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LEAVING WORK TO TALK TO FRIEND—BURDEN OF PROOF—*Robinson v. State, Supreme Court of Errors of Connecticut (July 23, 1918), 104 Atlantic Reporter, page 491.*—Robinson

was employed by the highway department of the State as a working foreman of a gang of workmen who were repairing the State highway. While he was at work a friend drove up and stopped on the other side of the road from the one on which Robinson was working and called out to him. Robinson proceeded to cross the road to speak to his friend and while doing so a touring car ran into him and killed him. These proceedings were brought by Robinson's mother for compensation under the workmen's compensation act. The commissioner and the lower court denied an award. In reversing the lower court and directing that an award be granted the court said:

Upon the findings of the commissioner the case turns on the question whether one employed as a foreman of a repair gang on a much-traveled State highway does or does not step outside of his employment as a matter of law, because he starts to cross the road, in response to a friendly salutation, for the purpose of conversation, when there is no evidence as to how long he intended to talk, and no evidence that his starting to cross the road did interfere, or that his intended conversation would have interfered, with the due performance of his work as foreman. We think the question must be answered in the negative.

The burden of proof was, of course, on the claimant to show that Robinson's injury arose out of and in the course of his employment. That it arose out of his employment is not denied.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH-HOUR ACCIDENTS—BENEFICIARIES—*Humphrey v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 816.*—Humphrey, as a member of the partnership of Humphrey & Co., brought this action to review an award by the Industrial Board in favor of the father of Leo Riordan, deceased. Leo was employed by the company in its three-story factory. There was an elevator in the factory which it was the custom and privilege of the employees to use and which Leo had been instructed how to operate. During the lunch hour on the day of the accident Leo was eating his lunch on the second floor. One of the employees ran the elevator to the first floor, leaving it there. Shortly after the elevator was heard running and then was heard to stop and a scream was heard. Leo was found wedged between the gate on the second floor and the floor of the elevator, fatally injured. Leo during the past four years had contributed to the support of his parents, although they were not dependent upon him. The company claims that the accident did not arise out of and in the course of the employment and that the father was not entitled to compensation. The opinion of the court sustaining the award is, in part, as follows:

The deceased was required to take his lunch to the plant with him and was permitted and expected to eat it on the premises. No particular place was assigned to any of the employees to eat their lunch, but each man was permitted to eat wherever he desired about the plant. All the employees used the elevator during the lunch hour as they had occasion to, just as they used it during the hours the plant was in operation. Whether the deceased was negligent in his operation of the elevator, or in attempting to get off while it was in motion, was immaterial. He was permitted to use this elevator as an incident of his employment, and was so using it. Unless it could be shown that he deliberately placed himself in this position of danger for the purpose of taking his life, the plaintiffs in error are liable under the workmen's compensation act. There is nothing here to indicate that this was anything but an accident. The proof amply sustains the finding that the accident arose out of and in the course of the employment.

The statute does not require that the parents of lineal heirs shall be dependent upon deceased, but it is sufficient if the deceased employee leave parents to whose support he had contributed within four years prior to the time of the injury.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH-HOUR ACCIDENTS—DEVIATION FROM ROUTE OF TRAVEL—*Moore & Scott Iron Works et al. v. Industrial Accident Commission et al., District Court of Appeal, First District, California (Mar. 25, 1918), 172 Pacific Reporter, page 1114.*—An award was granted Minerva Higgins by the Industrial Accident Commission for compensation for the death of Michael Higgins, deceased employee, against Moore & Scott Iron Works, employer. The award of the Industrial Accident Commission was annulled, upon the petition of the plaintiff, because the act which caused the death of Michael Higgins was held not to have been in the course of his employment. The considerations of the court were:

Michael Higgins, employed as a bolter-up within the hull of a ship in the course of construction at the Moore & Scott Iron Works, left his employment for the purpose of going to his lunch; he went by an unusual route, and undertook to go down a scaffolding and ladder on the outside of the ship, a means not intended for his use in leaving the ship at any time, another and perfectly safe method of exit having been provided by his employers. In doing so he lost his hold and fell and was killed. Upon these facts it must be held that the death of Higgins did not take place in the course of his employment; nor was he at the time of the accident performing any service growing out of or incidental to his employment, nor acting within the course thereof.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—PUBLIC HAZARDS—*In re Betts et al.*, Appellate Court of Indiana (Jan. 18, 1918), 118 *Northeastern Reporter*, page 551.—Howell T. Betts, an employee of Ebenezer Crompton, who was in the business of tinning and furnace repairing, was killed on October 6, 1916. Betts, with another employee, returned with the employer's horse and wagon from the job to the place of business for lunch, as was his custom, and the employer advanced him a small sum of money for the purchase of tobacco. They started back to their work, and when the other man, who was driving, stopped to water the horse, Betts stepped off to go across the street to a drug store to buy the tobacco, and was struck by an automobile and killed. The Industrial Board referred to the court the question whether the accident arose out of the employment, and this was decided in the negative, one judge dissenting. The following is quoted from the opinion delivered by Judge Hottel:

Of course, it can not be said that Betts, while on an errand for himself, was doing any service required by his employment, and we are unable to see wherein his employment exposed him to the hazard or danger which resulted in his death. To illustrate our meaning, if the employment of the injured party had been of the kind to take him on a roof, and in going for his tobacco he had slipped, or for any other cause had fallen from the roof and been injured, we can see a connection between the employment and the injury, in that his employment placed him where the hazard of indulging in his tobacco was increased. In the instant case the employment did not keep deceased on the street as a pedestrian. If it could be said to expose him to any dangers of the street, other than that to which the public generally are exposed, it was the danger of traveling in a vehicle to and from his work. In other words, as a pedestrian on the street going for his tobacco, his employment exposed him to no danger that would not have been incurred by any other pedestrian on a like errand, nor was he exposed to any hazard different from or in excess of the hazard to which he would have been exposed when on such errand, though he had not been engaged in the employment indicated.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WATCHMAN SHOT BY TRESPASSER—DEPENDENCE OF DAUGHTER—*Mechanics' Furniture Co. v. Industrial Board of Illinois et al.*, Supreme Court of Illinois (Dec. 19, 1917), 117 *Northeastern Reporter*, page 986.—The Industrial Board of Illinois awarded compensation of \$16.25 semimonthly from October 18, 1914, until 192 payments had been made, to the administrator of August Anderson, deceased, for the use of his daughter, Margaret Anderson. The deceased was a night watchman for the furniture company named. On the morning of October 18, 1914, his body was found

on the premises near the boiler room, he having been instantly killed by a .32-caliber bullet. His revolver of that caliber was missing from the boiler room, and was found the following March under a board about 60 feet away. Anderson's wife was dead, but he left two daughters, both of age. One was married and lived with her husband, and made no claim. The other was 22 years of age and worked as a domestic, receiving \$5 or \$6 per week. During 1911 this daughter had lived with her father for seven weeks during an illness, and he had cared for her and furnished her board. In the summer of 1914 she went to a hospital for an operation, and on her return went to her father's house, taking some of her meals with him and some with her married sister, who was at that time living in the other part of a two-apartment house owned by the father. The award to this daughter was affirmed, Judge Farmer delivering the opinion. It was held that the evidence tended to show that the employee was killed by some marauder, not because of personal enmity but because he was a watchman. The other question in dispute was whether or not the daughter Margaret was entitled to compensation. The law of Illinois of 1913 included as beneficiaries relatives of certain classes to whose support the deceased had contributed within four years of the injury, and it was held that the daughter fulfilled these conditions. That the Illinois law in this provision differed from most of the compensation laws is noted in another case decided by the same court, *Peabody Coal Co. v. Industrial Board of Illinois*, 117 N. E. 983; but the law was amended in 1917 so as to require actual dependence. In the case last mentioned compensation was awarded to two married daughters, each of whom had six children, and who were not dependent upon their father, but to whom he had made contributions of assistance regularly.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—AMOUNT OF RECOVERY BY EMPLOYER—*Albert A. Albrecht Co. v. Whitehead & Kales Iron Works, Supreme Court of Michigan (Mar. 27, 1918)*, 166 *Northwestern Reporter*, page 855.—Both the plaintiff and the defendant in this case were contractors in the construction of a building, the former for masonry and the latter for structural steel. John Debinski, an employee of the Albrecht Co., was injured, as was claimed, by the negligence of the employees of the iron works. He elected to take compensation from his employer rather than to sue the company causing the injury, and payments were made to him, amounting to \$1,408.33 at the time of the commencement of the suit by the Albrecht Co., and to \$2,215 at the time of the trial in the circuit court of Wayne County. This court allowed the company to recover from the iron works the sum which the employee would

have been entitled to recover from the latter if he had elected to pursue that remedy, which, according to the jury's verdict, was \$10,000. Appealing, the iron works contended that such a basis for recovery by the employer was wrong, and that the amount should be limited to the sum paid by the employer to the injured man as compensation. The supreme court agreed with this view, holding that the recovery of the excess was not permissible either for the benefit of the employer or the employee. It held, further, that recovery might be had only after payment made to the employee, since the industrial accident board might at any time reduce the amount of the payments or order them discontinued, thus causing confusion. In the present instance the case was remanded to the trial court for ascertainment of the amount already paid to the employee, with a provision for further suits for future payments. Judge Bird, who delivered the opinion, said, in part, in regard to the main question at issue:

To hold that the employer might recover the same amount the injured party might have recovered would permit the employer to speculate on the misfortunes of his employees.

But counsel reply to this that a trust should be impressed on the excess recovered in favor of the injured party. If this were so, would not the injured party then have two remedies, when the statute says he shall have but one? If the injured party is willing to waive the excess by accepting the more certain award of the compensation board, why should the act permit a disinterested person to recover it? We are persuaded that the language should be construed to mean that the employer may enforce the liability of such other person to the extent that he has paid compensation to the injured party and no further. This construction is not only consistent with the letter of the law but is in accord with the spirit of it.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF REMEDIES—*Swader v. Kansas Flour Mills Co., Supreme Court of Kansas (July 6, 1918, and Nov. 9, 1918), 176 Pacific Reporter, page 143.*—This action was brought for damages for the wrongful death of the husband of the plaintiff. The husband was in the employ of the defendant company when he met his death. The statute of Kansas allows recovery from the employer in the form of compensation or a recovery from the wrongdoer in the form of damages, but both compensation and damages can not be had. The company paid the compensation to the clerk of the industrial commission, but plaintiff did not receive or accept it. The company successfully demurred to plaintiff's action in the trial court. In setting aside this demurrer the supreme court said:

The time will probably come in the course of the present lawsuit when plaintiff must elect whether she will accept the compensation

provided for her or accept the damages which she may recover against Hoffman [the negligent third party], provided she successfully maintains her cause of action against him, but there is nothing in the statute which says or infers that she need choose between the damages and the compensation until she knows definitely which is the more to her advantage. In this respect the Kansas statute differs from some other State laws.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTIES—ELECTION OF REMEDIES—ACTIONS BY DEPENDENTS—*Vereeke v. City of Grand Rapids, Supreme Court of Michigan (Sept. 27, 1918), 163 Northwestern Reporter, page 1019.*—David Vereeke was killed while in the employ of the city of Grand Rapids. His mother claimed compensation, and the Industrial Accident Board granted her an award. His father started proceedings to have himself appointed administrator. The mother opposed this action. They compromised and sued the Grand Rapids-Muskegon Power Co., whose negligence caused the son's death, and recovered damages. They then divided the damages according to the compromise. The city of Grand Rapids now wants the amount thus acquired by the mother accredited to its favor on the amount of compensation it must pay her. Their contention is under section 15, part 3, which prevents an employee from taking both compensation and damages. The court, in ruling that this section did not apply to dependents, gave the following opinion:

Neither the section under consideration [sec. 15, supra], however, nor section 1 of part 6, contains any limitation upon the right of dependents except that under section 1 of part 6 a dependent who accepts compensation from an employer releases the said employer from all claims or demands at law, if any, arising from such injury.

We think it can not be contended that Kate Vereeke, by accepting compensation from the city of Grand Rapids, thereby released the Grand Rapids-Muskegon Power Co., the alleged wrongdoer, from liability in an action for the benefit of heirs at law or creditors of David Vereeke. By making a claim for compensation against the employer, the defendant city, she clothed that employer under the terms of section 15, part 3, with a right of action against the wrongdoer. Had that right of action been prosecuted by the city, recovery thereupon would certainly have been taken into consideration in awarding damages in a suit instituted by the administrator of the estate against the alleged wrongdoer. Having failed to protect its rights in the manner pointed out by the statute, we are of the opinion that the appellant city can not now by petition to the Industrial Accident Board have credited upon the award against it any sums received by Kate Vereeke as a result of the suit against the power company.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF REMEDIES—"PLANT"—*Carlson v. Mock, Supreme Court of Washington (June 15, 1918), 173 Pacific Reporter, page 637.*—Carlson was employed as a track oiler by the Puget Sound Traction, Light & Power Co., and while engaged in the duties of his employment was struck by an automobile negligently driven by the defendant, Mock, and injured. This action was brought to recover for the injuries received. Mock was a third party and was not in the employ of the company. There is a proviso in the workmen's compensation act permitting an injured employee to choose whether to proceed under the act or to sue the third party when he is injured away from the employer's plant by the negligent act of said third party. The lower court said the railway tracks were part of the company's plant and granted defendant a nonsuit, whereupon the plaintiff appealed. In reversing the lower court Justice Tolman said:

If one were to lose sight of the purposes of the act, and construe the word "plant" strictly, he might, under some definitions, and possibly under this definition, say that it included the street railway tracks as a part of the plant of the operating company. But a liberal construction, having in mind the purposes of the act, and the necessity of giving full force to the proviso, leads to the conclusion that the legislature never intended that the term "plant" should include more than that part of the employer's fixed property over which he has exclusive control, and can not be applied to a public street or highway, though occupied by the employer for certain purposes, over which the general traveling public have at least equal rights with the employer, and over which the employer has no oversight, or method of protecting the employee from the negligent or wrongful acts of third persons. To hold otherwise would deny the right of election to all workmen whose regular duties take them upon the public highways.

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WORKMEN'S COMPENSATION—INJURY DUE TO ACCIDENT—LATENT DISEASE—PROXIMATE CAUSE—*Behan v. John B. Honor Co., Limited, Supreme Court of Louisiana (June 30, 1917), 78 Southern Reporter, page 589.*—Behan was working as a longshoreman for the defendant company. While attempting to remove a skid from the ship to the wharf he slipped and fell into the river. He fell upon some wooden piling or stringers and hurt his head and spine. He sued for compensation at the rate of \$10 per week for 400 weeks and was allowed \$6.50 for 400 weeks. The defendant appealed on the ground that the plaintiff had been suffering from a latent case of locomotor ataxia. This disease had in no way manifested itself in the plaintiff prior to his injury and he was not aware that he had it. Judge O'Niell, giving the opinion of the court, said:

The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not



been diseased at the time of the accident. But the accident was, none the less, the proximate cause of the present disability. We are not aware of a decision of this court on the subject, but it is well settled in jurisprudence elsewhere that the fact that a person was already afflicted with a dormant disease that might some day produce physical disability is no reason why he should not be allowed damages or compensation for a personal injury that causes the disease to become active or virulent and superinduces physical disability.

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WORKMEN'S COMPENSATION—INSURANCE—DUTY OF EMPLOYERS—POWERS OF INDUSTRIAL COMMISSIONS—*Industrial Commission of Utah v. Daly Mining Co., Supreme Court of Utah (Apr. 3, 1918), 172 Pacific Reporter, page 301.*—This was an original action by the plaintiff commission for a writ of mandamus to be issued to the defendant mining company requiring the latter to take out insurance or otherwise comply with the workmen's compensation law of 1917 of the State of Utah. The counsel for the plaintiff claim that the law is compulsory and requires defendant to take out insurance or give security under it, while, on the other hand, counsel for the defendant allege that the law is elective only at the will of the employer. The case was contested by defendant by interposing a demurrer. Chief Justice Frick, expressing the opinion of the court, upholding the commission, said, in part:

The application in this case is more particularly based upon subdivision 3, of section 53, supra. That section provides that all employers of labor, except municipalities, "shall secure compensation to their employees in one of the following ways": (1) By insuring payment of compensation in the "State insurance fund"; (2) by insuring payment by insuring with some company engaged in the indemnity insurance business; or (3) by furnishing satisfactory proof to the commission of the financial ability of the employer to pay such compensation direct to his employees. If, however, the employer desires to pay direct without obtaining insurance as provided in subdivisions 1 and 2 aforesaid, the commission may, in its discretion, nevertheless, require security in the manner provided in the act so that in case any employee shall become entitled to compensation the same will be paid without delay. It is alleged in the application that on the 1st day of July, 1917, the defendant made application to the commission pursuant to the subdivision 3 aforesaid for the privilege of paying the compensation provided by the act to its employees direct; that the commission granted the privilege, upon the express condition, however, that the defendant "file with the commission its surety bond or liquid collateral in the sum of \$25,000." A formal order to that effect was made by the commission, and the defendant has failed and refused to comply with such order or to otherwise secure payment of compensation to its employees as provided by the act. All of the foregoing facts are admitted by the demurrer. The commission therefore prayed that the defendants be "commanded to file with the commis-

sion its bond in the sum of \$25,000, or liquid security in that amount as required by said commission's order, or, in lieu thereof, file its policy with said commission as evidence of its having insured its employees either in the State insurance fund or in some stock corporation," as provided by the act.

Counsel for the defendant, however, vigorously contend that the provisions of the act relating to the insuring of the payment of compensation are merely elective, or, as they put it, are at most coercive in view of the severe penalties that are imposed and by reason of other provisions contained in the act. In order to give counsel full benefit of their contention, we have felt constrained to set forth various sections upon which they more especially rely in full. While we freely concede that there are quite a number of provisions and expressions contained in those sections which, if considered by themselves, would more or less strongly indicate the insurance feature to be elective, yet, when the act is considered as a whole, and when the manifest purpose thereof is kept in mind, it is quite clear, to our minds at least, that the legislature intended the insuring of compensation in advance to be compulsory. That is, in adopting the act it was the manifest purpose and intention of the legislature to require all employers coming within its provisions to secure the payment of compensation to their employees in advance by either one of the three methods stated in section 53, *supra*. True it is there are a number of provisions contained in the act that are merely elective, but those provisions are merely incidental.

The defendant further contended that the plaintiff had an adequate remedy at law by bringing action for the tax, as counsel designated it, which defendant would have to pay under the act, and hence this action for mandamus would not lie. On this point the court said:

The duty that is imposed by the act, upon employers, is to comply with its provisions relating to the insuring of the payment of the compensation provided for by it. As we read the act, the commission is empowered to enforce obedience to its provision in that regard and to enforce payment of the compensation when it becomes payable in accordance with the terms of the act; but no power is conferred upon the commission to sue to recover the amount employers are required to pay for insurance unless and until they have obligated themselves to pay. The only remedy that the commission has in a case like the one at bar, therefore, as we view it, is to compel the delinquent employer to comply with the provisions of the act relating to the insuring of the payment of the compensation provided by the act.

The final point discussed was the objection of the company to the requirement of the commission in the matter of the security or insurance to be furnished, it contending that the workmen were well secured without such insurance. As to this the court said:

The commission upon whom was conferred the power to decide the question, however, decided otherwise. It decided and ordered that the defendant secure the payment of the compensation as the act provides and as it, in its discretion, may do. Insurance is, therefore,

not forced upon defendant "contrary to law," but it is merely required to do what the law enjoins.

In conclusion, we desire to state that, if it be held that the provisions of the act are merely elective, then very little, if anything, is gained by its enactment. While such a reason may not be conclusive—may not even be controlling—yet it is one the court should not overlook. It is always important in construing and applying the provisions of any comprehensive act, such as the one under consideration, to keep in mind the purpose the legislature had in view in adopting it. If, therefore, an act is subject to two constructions, one of which in a large measure would make it useless and of no material benefit to anyone, while the other construction would make it effective and beneficial, and moreover, would subserve the public welfare, the court should be slow to adopt the first construction, but should adopt the second if such may be done according to sound principles and rules of construction.

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WORKMEN'S COMPENSATION—INSURANCE—RATES—FIXING BY INDUSTRIAL COMMISSION—CONSTITUTIONALITY—*Scranton Leasing Co. v. Industrial Commission of Utah, Supreme Court of Utah (Jan. 29, 1918), 170 Pacific Reporter, page 976.*—The Interstate Casualty Co. of Birmingham, Ala., doing an insurance business in Utah under the workmen's compensation act, entered into a contract with the Scranton Leasing Co. for insurance against liability under the terms of that act. The policy was presented to the industrial commission for acceptance and filing, but the commission refused to accept it for the reason that the rate for ore mining was \$5 per \$100 of pay roll instead of \$5.59, the rate fixed by the commission, and because the policy was made a participating one. The company contended against the right of the commission to make rates except for State insurance, claiming (1) that the legislature had no constitutional power to interfere with the making of the insurance contract; (2) that it had no power to delegate such power to the commission; and (3) that the act did not warrant the assumption of power to fix rates of private companies. The court held that the case, *German Alliance Insurance Co. v. Kansas*, 233 U. S. 409, 34 Sup. Ct. 618, involving the question of rate making for fire insurance, and sustaining a similar provision, was controlling. Referring to the strong dissenting opinion of three justices, it remarked that this opinion at the very beginning stated that the case did not deal with a statute affecting the safety or morals of the public. Since the matter of compensation insurance is clearly affected with a public interest, it would appear that even in the view of these justices the law involved in the present case would be sustained. It was pointed out that the commission, in fixing the rates for State insurance, must fix the premiums at the lowest possible rate consistent with the maintenance of the fund in a sound condition; and the approval of policies written by private cor-

porations at a lower rate was plainly either a failure properly to protect policyholders or an admission that the private companies could carry the risks at a lower rate than the State fund. On the other hand, it was said that the allowance of a higher rate would be permitting an imposition upon the public. It was shown that the provision authorizing the fixing of rates for the State fund was positive, and for the reasons given it extended by implication to the rights of other insurers. Finally the provision of the policy for participation was held to be a method of avoiding the prescribed rates and therefore this also was ground for the rejection of the policy by the commission.

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WORKMEN'S COMPENSATION — MARITIME JURISDICTION — INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT — ACT OF GOD — ENGINEER ATTEMPTING TO SAVE DREDGE BOAT FROM WRECK IN STORM — *Southern Surety Co. v. Stubbs et al., Court of Civil Appeals of Texas (Dec. 20, 1917), 199 Southwestern Reporter, page 343.*—E. J. Stubbs was drowned by the capsizing of the dredge boat *Houston* in the severe storm of August 16 and 17, 1915, and his wife and minor son were awarded compensation at the rate of \$15 per week for 369 weeks, or \$5,400, against the company named, the insurer of his employer. The first contention of the company on its appeal that is discussed in the opinion is that the State courts did not have jurisdiction over the case, the claim being that under the ruling of the United States Supreme Court in the *Jensen* case it was a question of admiralty. It was held that neither the *Jensen* case nor any other cited had maintained that the United States court had exclusive jurisdiction over suits in personam, simply because the cause of action was of maritime origin, and that this was not a matter under the Federal employers' liability act, since the dredge was not engaged in interstate commerce.

Stubbs was the assistant engineer and had been off duty, as far as dredging operations were concerned, for 14 hours. Presumably he was, at the time the boat capsized, engaged in assisting in the attempt to keep her afloat; it was held that this made the injury one in the course of employment and also one arising out of the employment, though the latter is not required by the Texas statute. And since the contract of insurance was voluntary and not one into which the company was obliged to enter, and no question of negligence was involved, it was held that the fact that the drowning was the result of the act of God did not absolve the company from responsibility. It was, however, held that in the present action only the payments overdue at the time of bringing action should be recovered, but that another action might be maintained at any time for further installments. Judgment was therefore given for \$815 and interest thereon.

WORKMEN'S COMPENSATION—MARITIME JURISDICTION—WORK ON VESSEL PRIOR TO LAUNCHING—FALSE STATEMENT IN APPLICATION FOR INSURANCE—*Employers' Liability Assurance Corporation (Ltd.)*, v. *Industrial Accident Commission, Supreme Court of California (Apr. 16, 1918)*, 171 *Pacific Reporter*, page 935.—Charles F. Mann was killed in the employ of J. A. Johnson, and his widow applied for compensation. An award was made to her by the industrial accident commission, running against the employer and against the company named, his insurer. At the beginning of the proceedings certain facts were stipulated, among others that the employment was such as to subject the employer and employee to the provisions of the workmen's compensation act. At a later stage the insurer raised the contention that the claim was maritime in character and that the commission had no jurisdiction over the matter, this contention being based upon the decision of the Supreme Court of the United States in *Southern Pacific Co. v. Jensen* (244 U. S. 205, 37 Sup. Ct. 524), which held such matters to be under the control of the Federal laws to the exclusion of State compensation laws. The court pointed out, in the opinion delivered by Judge Sloss, that the facts as stipulated were consistent with the view that the employment was in the construction of a ship before launching, and, since a definite stipulation had been made that the commission had jurisdiction, other facts must be taken to be such as would agree with the truth of this stipulation.

The insurance company set up the defense that Johnson had, in his application for the policy, made misstatements and that it had canceled the policy on learning the truth. He had stated that no insurance had been issued in connection with the risk during the preceding three years except that by the Hartford company, and none had been canceled, while as a matter of fact another company had written a policy and had canceled it. The court held that the insurer is in the same situation as the employer, and can not avoid the jurisdiction of the commission by a mere denial of the validity of the policy, but that the commission has power to decide the question of validity like the others. There being no provision in the policy that the statements in the application are warranties, the breach of which will avoid the policy, and the materiality of the truth of this answer not having been proved, the court held that the award should be affirmed.

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WORKMEN'S COMPENSATION—MEDICAL SERVICES—INJURY—*In re McKenna, Supreme Judicial Court of Maine (Mar. 14, 1918)*, 103 *Atlantic Reporter*, page 69.—In a proceeding by Corinna McKenna to secure compensation from her employer, the Bates Manufacturing Co., or from the insurance company carrying its compensation risk, the

question arose as to a rule adopted by the industrial accident commission. This rule fixed the date of the development of disability as the time from which the waiting time for compensation should begin, and also as the starting point of the two weeks during which the employer is to furnish medical services. In the case under consideration the injury was received September 11, and disability began, as the commission found, on September 18. It therefore awarded her the expenses of medical services for two weeks from the latter date. The court held that the part of the rule relating to medical services is inconsistent with the provision of the statute which makes such services compensable for two weeks from the injury. In other words, the injury is held to be contemporaneous with the accident rather than with the beginning of the disability, if this develops at a later time. This view agrees with that taken in some other States, but is contrary to that announced in Indiana (*In re McCaskey*, 117 N. E. 268; Bul. No. 246, p. 271).

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WORKMEN'S COMPENSATION—MEDICAL SERVICES—INJURY—PERIOD OF CARE—INTERMITTENT DISABILITY—*John A. Shumaker Co. v. Kendrew*, Appellate Court of Indiana (Nov. 20, 1918), 120 *Northeastern Reporter*, page 722.—Kendrew, an employee of the company named, received a bruise on his left leg, which injury arose out of and in the course of his employment. When the injury was first inflicted Kendrew went to the company's physician and was treated for a bruise on his leg which was at the time the only injury that could be detected. Seven months later, as a result of the same injury, a tumor developed on the leg. Kendrew told his foreman about it, but the company did not provide any medical service, so he, at his own expense, had the tumor treated, the cost being \$100. The compensation commission allowed him a special order for this sum. The company appealed, alleging that, inasmuch as the law provides only that the employee must be provided medical attention for the first 30 days after the injury, he was not entitled to more medical aid than was provided in the first instance. This court, in holding to this view and reversing the commission, said:

We deem it unnecessary to enter into a lengthy discussion of the question here presented or of the cases cited by appellants in support of their contention, since we are of the opinion that their position is sustained by the language of the workmen's compensation act.

The act specifically limits the liability for medical treatment to a period covered by the first 30 days after the injury. We find nothing in the act under consideration, or in the authorities construing that act or similar acts in other jurisdictions, which can be said to warrant a holding that, in order to cover the different phases of a progressive injury, the period of medical treatment at the expense of the employer

may be divided into parts, some of which may reach into a period beyond the first 30 days following the injury. This court has given to the section under consideration an interpretation which impliedly, if not expressly, holds to the contrary.

The effect of this holding is to say that the word "injury," as used in section 25, means an injury which results in a disability contemplated by the compensation act, and that so long as such injury is one which both the employer and the employee regard and treat as not requiring the services of a physician, and therefore not contemplated or covered by the provisions of section 25, it should likewise be so treated by the industrial board; that in such a case the period during which an attending physician must be provided begins to run when an actual disability to the employee, within the meaning of the act, develops from such injury.

This case was differentiated from the McCaskey case (117 N. E. 268, Bul. No. 247, p. 271), in which medical aid was directed to be paid where the disability first manifested itself some 30 days after the accident. It was held that the rule there laid down did not apply here, where there had been aid rendered immediately following the accident.

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WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—DANGEROUS MACHINERY—*Waterman Lumber Co. v. Beatty, Court of Civil Appeals of Texas (June 19, 1918), 204 Southwestern Reporter, page 448.*—Beatty was employed by the defendant company. His duties were to fasten a cable to the harness of a mule and ride the animal to a place in the woods where men fastened the cable to a log, the log then being pulled to the train by a steam drum. Plaintiff was at the time of his employment and injury under the age of 15 years. One day, while riding to work on a locomotive of the defendant, the plaintiff was told to get on the front of the locomotive and spread sand on the rails of the track. While doing this he slipped and fell, sustaining severe injuries to his leg for which he now brings this action for damages. The defendant declares that it accepted the employers' liability act and the plaintiff must bring action under that act. The compensation act says minors must not be employed in hazardous work, and a penal statute says that anyone employing a minor under 15 years to labor about dangerous machinery shall be guilty of misdemeanor. Justice Levy, in delivering the opinion of the court, said:

And the circumstances of this case show, it is thought, a violation of the statute. The boy, Dave Beatty, was under the age of 15 years, and was employed to labor about an establishment or mill using dangerous machinery. A log-loading machine, a track-laying outfit, or a locomotive engine propelled by steam is a "dangerous machine." And a conveyor of any kind operated by steam power and used to carry logs from the forest to the mill to be made into lumber can be

said to be, in point of fact, a necessary part of the manufacturing "establishment." While the criminal law only punishes the "agent" or "employee" of a person or corporation for violation of the child-labor law, the effect is to directly forbid persons or corporations employing children under 15 years of age in certain occupations. For the words "agent" and "employee" are of a representative relation. And the provisions of the workmen's compensation act apply only, it is believed, to valid employment contracts. The insurance policy in evidence provides, "This policy shall cover all employees of the employer legally employed." And persons employed in violation of law as to age will not be within its terms. It is believed that the appellant's contention should be overruled.

As it must be said it is thought that the boy was employed by the lumber company, the employment in violation of the statute gives rise to a cause of action in behalf of the boy, being injured, as he was, as it is concluded, while in the employment. And it is, as held, negligence per se to violate the statute. And the plaintiff may recover although at the time the boy was not engaged at the very piece of work he was primarily employed to do. The unlawful employment is deemed as the proximate cause of the injury.

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WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ELEVATOR OPERATOR—*Robilotto v. Bartholdi Realty Co., Supreme Court of New York, Special Term (September, 1918), 172 New York Supplement, page 328.*—Michael Robilotto, a minor under 16 years of age, was killed, while in the employ of the defendant company, while operating an elevator in violation of the law of the State. The compensation law provides the exclusive remedy for injuries received in employment, but the application of this act to persons unlawfully employed was said by the trial court not to have been decided by the State court of last resort at the time of this action. The administrator sued for damages in behalf of the father of the deceased infant, but the employer contended that the compensation law offered the only remedy available. Judge McAvoy, in rendering a decision in favor of the employer, referred to the fact of the illegal employment of the boy, and cited the judgment of the appellate division in the case, *Ide v. Faul & Timmins*, 179 App. Div. 567, 166 N. Y. Supp. 858, in which it was held that the law applied to a boy 14 years old, injured while unlawfully employed. The reasoning of the court was that the employment was one within the act, and that minors are not excluded, either by the compensation law or the labor law. Judge McAvoy followed this ruling against his personal judgment, citing cases in support of his views.

He then concluded:

It is almost manifest that it will be found that the policy of conserving child life from injury or destruction does not ask that infants protected by this legislation enacted in the labor law be confined to



the exclusive remedy of the compensation act. The evils attendant upon the pleas of contributory negligence, assumption of risk, and the construction of the follow-servant doctrine are not to be feared in an infant's action, or that of his representative, upon an allegation of unlawful employment in a hazardous occupation.

It would seem surely to be a better policy to negative the right of compensation in employments prohibited as unlawful as a salutary restraint both on parents tending toward their fulfillment of their obligation to keep their children from the proscribed work and on employers as exposing them to the risk of common-law damages for injuries, if sustained by such infants, as to whose engagements the law has interposed a barrier. Notwithstanding individual judgment that remedy is not to be found within the compensation act, and an action at common law still survives in these circumstances, I will follow the decision of the third department and overrule plaintiff's demurrer to the defense.

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WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—STAMPING MACHINE ATTENDANT—*Acklin Stamping Co. v. Kutz, Supreme Court of Ohio (April 2, 1918), 120 Northeastern Reporter, page 229.*—Louis Kutz was a minor 15 years of age, employed by the defendant stamping company as a helper to a stamper; it was his duty to supply small pieces of steel or yoke ends to the stamper to be used in the stamping machine. His hours of service were from 5.45 o'clock in the evening to 5.15 o'clock in the morning. The defendant installed in its shop where plaintiff worked a large fan which was made to revolve at a great speed by machinery. There was no guard on the fan. The jury found that, while playing about the fan and after being warned to keep away from it, plaintiff in some way had his hand drawn into the fan and so mutilated that it was necessary to amputate it. The court of common pleas took the view that the plaintiff, Kutz, had exercised his option not to proceed under the compensation law and refused to let plaintiff prove his age and hours of service, and gave judgment for the defendant. The court of appeals reversed this judgment and remanded the case to the lower court for new trial. On petition of defendant the case was referred to the supreme court. The supreme court, in affirming the decision of the court of appeals, said:

But was the court of common pleas correct in assuming that the case was controlled by the provision of the workmen's compensation act?

This act was enacted for the purpose of providing a State insurance fund for the benefit of injured and dependents of killed employees and requiring contribution thereto by employers. If the relation of employer and employee does not exist its provisions have no application. It becomes necessary, therefore, to determine who is an "employee" within the meaning of the term as used in the workmen's compensation act. The term is defined by section 14 of the act (sec. 1465—61, General Code). It includes minors "who are legally

permitted to work for hire under the laws of the State." We think that it was intended by this clause to exclude from the operation of the provisions of the act minors whose employment is illegal. \* \* \* The test is: Was the employment of the minor in a given case illegal? If there has been on the part of the employer a violation of the statutes of this State enacted for the protection of children, the employer can not avail himself of the provisions of the workmen's compensation act.

A law of Ohio, section 12996, General Code, prohibits the employment of children under the age of 16 years before the hour of 7 o'clock a. m. or after the hour of 6 o'clock p. m.; another law, section 13001, General Code, prohibits the employment of such children to assist in operating a stamping machine. At the close of all the evidence the court of common pleas sustained a motion of the defendant to strike out all evidence relating to plaintiff's age and hours of service. As to this action the supreme court said:

We think this evidence was competent and should have been allowed to go to the jury. If plaintiff had been employed to work in or about or in connection with the factory before the hour of 7 o'clock in the morning and after the hour of 6 o'clock in the evening, or had been employed to assist in operating a stamping machine used in sheet-metal and tinware manufacturing—and these were questions of fact for determination by the jury—then the employment was illegal, and the plaintiff would not be an employee within the meaning of that term as used in the workmen's compensation act. Its provisions would have no application, and the case would be one as though the act had not been enacted.

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WORKMEN'S COMPENSATION ACT—NOTICE—ACTUAL KNOWLEDGE OF INJURY BY EMPLOYER—*Vandalia Coal Co. v. Holtz*, *Appellate Court of Indiana (Oct. 11, 1918)*, *120 Northeastern Reporter*, page 386.—Holtz was in the employ of the coal company as a foreman under the direction of a pit boss. It was his duty to operate an electrical machine. While at this work his eye was injured by a flying particle. The coal company's chief electrician or machine foreman had actual knowledge of Holtz's injury a few minutes after it occurred. Holtz, in accordance with the company's rules, went to the mine physician and had his eye examined. The physician said the injury was only temporary and would soon get well. Holtz returned to work but some time later consulted an oculist and learned that he had lost the sight of the injured eye. Holtz, relying on the statement of the mine physician, had not given any notice in writing of his injury, and when he visited the oculist the time for giving a formal notice had expired. The court in affirming an award in favor of Holtz by the industrial board said:

The board having found the facts showing actual knowledge of the injury by appellant's agent and representatives at the time it occurred,

and also reasonable excuse for the failure to give the statutory notice, such findings are binding and conclusive on this court if there is any evidence tending to sustain either of such findings.

Furthermore, as already stated, appellant's pit boss or general foreman had actual knowledge of the injury suffered by the appellee at the time the disability therefrom was definitely ascertained to have resulted from such injury, and this has been held to be sufficient under our statute.

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WORKMEN'S COMPENSATION—NOTICE—CLAIM—DATE OF INJURY—DISABILITY, AND NECESSITY FOR MEDICAL TREATMENT, BECOMING EVIDENT AFTER EXPIRATION OF LIMIT FOR FILING CLAIM—*Cooke v. Holland Furnace Co., Supreme Court of Michigan (Mar. 27, 1918), 166 Northwestern Reporter, page 1013.*—Fred H. Cooke was an employee for several years in the factory of the Holland Furnace Co. On October 6, 1915, a bolt fell from an overhead track and struck him on the head. The foreman gave him first-aid treatment, and washed the wound with peroxide. Commencing in the following December he had headaches, sleepiness, and dizziness, and a lump appeared on his head where the bolt had struck. During August, 1916, he was obliged to lay off from work for two weeks, but resumed on September 14. A few days later he had an X-ray examination made, and about October 1 an operation was performed, which showed a fracture of the skull and a softening of the bone, with an accumulation of pus underneath. The removal of the bone and trepanning of the skull were necessary. He made claim for compensation on October 9, and resumed work November 14. The industrial accident board awarded compensation for 8½ weeks, and for medical and hospital services, and the company contested this award on the ground of failure of notice and claim within the statutory limits of three and six months, respectively. The court stated that four other cases were before it, involving the same question as presented here, as to whether the running of the limitation for filing notice and claim, which under the terms of the act begins with the "happening of the injury," starts with the accident or with the development of such results that the disability occurs, or the injured person becomes definitely satisfied that the disability is the result of the accident. The court emphasizes its duty to take the law as it finds it rather than to resort to judicial legislation, and discusses somewhat the matter of limitations in general. Continuing, Judge Fellows, who delivered the opinion, said:

At the time of the enactment of this legislation the word "injury" had acquired in the law a well-defined and well-understood meaning; indeed, counsel for plaintiff in the instant case frankly states:

"There must necessarily be a new definition of the word 'injury' to embrace the circumstances that arise under the workmen's compensation law."

But the difficulty with this suggestion lies in the fact that the legislature did not use this word in the act in question with the view of some new definition which this court or an administrative body might later see fit to coin. It was used in the act as it was commonly understood at the time. Our legislature did not see fit to give it a special definition, as did the Legislature of Nebraska, as we shall presently see.

The Nebraska case relied upon by the plaintiff in the present case, *Johansen v. Union Stockyards Co.*, 99 Nebr. 328, 156 N. W. 511 (see Bul. No. 224, p. 340), is discussed, and distinguished from the present case because the Nebraska statute contains the following language:

The terms "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom.

Other decisions are discussed, and the conclusion is reached that the award to the injured man must be vacated and reversed. In concluding the opinion, the court says:

Upon principle we are persuaded that the defendant must prevail in its contention. When the bolt fell, striking the plaintiff on the head, it fractured his skull. That was the injury. The formation of an abscess, the accumulation of pus, the softening of the bone, were the results of that fracture—of the injury received; while these results rendered the injury more severe, the injury was there from the first and subsequent want of care but aggravated it. Had the plaintiff then made his claim for compensation and had proper medical treatment, which his employer was bound to pay for under the provisions of section 4, it is highly probable he would have been saved much pain, and a serious and expensive operation would have been obviated. This would have been beneficial alike to him and his employer.

While the words "accident" and "injury" are not synonymous, the accident produced the injury, and in point of time they were concurrent. We are compelled to hold, unless we resort to judicial legislation, that the legislature by these two sections fixed the date of the injury at the date of the accident, and not some remote date thereafter, when the injured employee became definitely satisfied that he was disabled as a result of the accident.

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WORKMEN'S COMPENSATION—NOTICE—KNOWLEDGE—AGENT OF EMPLOYER—*In re Simmons, Supreme Judicial Court of Maine (Mar. 13, 1918)*, 103 *Atlantic Reporter*, page 68.—Bertha B. Simmons was petitioner, in proceedings to obtain compensation for injury received by her, against the Commonwealth Shoe & Leather Co., her employer, and its insurer. One defense was her failure to give written notice. The petition, which alleged that injury to her thumb had occurred in the course of her employment in the stitching room of the com-

pany, and that the wound became infected and the thumb became useless in consequence, also alleged that the company had knowledge or notice of the injury. The commission found from the evidence that the foreman of the room was informed of the accident during the day on which it occurred. One section of the law states definitely upon what officers of a corporation written notice may be served, and a foreman is not one of such officers. In the following section it is declared that "want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury." The court held that the agent whose knowledge would be considered that of the company need not be one of the officers referred to in the provision for written notice, but held that the knowledge of the foreman, whose duty it was to report accidents to the company, was sufficient. Massachusetts decisions and some others are cited in support of this position. The evidence having been sufficient to sustain the finding of the commission as to disability, the appeal of the company was dismissed.

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WORKMEN'S COMPENSATION—RAILROAD COMPANIES—INTERSTATE OR INTRASTATE COMMERCE—WORK ON POWER LINE SUPPLYING ELECTRICITY TO INTERSTATE TRAINS—*Southern Pacific Co. v. Industrial Accident Commission, Supreme Court of California (Apr. 24, 1918), 171 Pacific Reporter, page 1071.*—William T. Butler was killed while working as an electric lineman in the employ of the Southern Pacific Co. The company operates a system of electric railway lines in Alameda County, Calif., cars of the company being used on these lines for both interstate and intrastate commerce. The company generates electric power, which passes through a main line to substations where, by the agency of converters and transformers, it is changed from alternate to direct current and reduced to a voltage suitable for use on the trolley wires. The employee was working on the main line which carried the high-power current when he was killed by electric shock. The court examined the principles of the decided cases to determine whether an award of compensation to Butler's dependents by the industrial accident commission could stand, or whether the employment was in interstate commerce, and therefore governed by the Federal employers' liability act. The court held that the nearest analogy to the present case was that of the switching of cars of coal to be used in railroad locomotives to a chute, in which circumstances the Supreme Court of the United States had decided that the relation of the work to interstate commerce was too remote to be considered as employment in interstate commerce. The award of compensation was therefore affirmed. Two of the six judges sitting in the case

dissented on the ground that the power line was in effect an extension of the trolley wires, work upon which had been held in an earlier case to be in interstate commerce.

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**WORKMEN'S COMPENSATION—RELEASE—FRAUD—TRIAL BY JURY—***Vogler v. Bowersock, Supreme Court of Kansas (Feb. 9, 1918), 170 Pacific Reporter, page 805.*—A. J. Vogler brought action against J. D. Bowersock, employer, to enforce the payment of compensation for an injury consisting of the loss of his left hand, except the thumb, as the result of its being crushed in the rollers of a corrugating machine. The defense was based upon the execution of a release in consideration of the payment to the plaintiff of \$500. In reply it was stated that an arrangement had been entered into for collective insurance under which 5 cents had been deducted from the pay of employees for each \$5 or major portion thereof earned; that the agent of the insurance company had obtained the release without disclosing that he represented Mr. Bowersock; and that the employee accepted the \$500 in settlement of his claim for insurance, and not as compensation. The release on its face absolved the employer from further liability for damages, and made no reference to insurance. Correspondence between the plaintiff's attorney and the company, however, showed that the company claimed that it was intended to cover also a settlement of the insurance matter. Evidence of the discussion between the agent and the employee as to the amount to which he was entitled under the policy tended to prove that a settlement of the insurance claim was contemplated. When the case had come on for trial the plaintiff had demanded a trial by jury, while the employer insisted that the compensation law provided for trial by the court only. A jury trial was granted, and the verdict and judgment were in the plaintiff's favor. The supreme court, construing together various sections of the act relating to settlement by agreement, determination of disputes, and waiver of jury trial, held that the demand at the time of hearing before the court constituted sufficient notice, and that the procedure had been correct. The evidence was reviewed, and it was decided that the verdict setting aside the release was justified, as was the instruction to the jury that they might find for the plaintiff without finding that the agent of the insurance company intentionally practiced fraud. The judgment for the employee was affirmed.

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**WORKMEN'S COMPENSATION—REPORTS OF INJURIES—EMPLOYERS ELECTING NOT TO BE GOVERNED BY ACT—***In re Burk, Appellate Court of Indiana (Jan. 17, 1918), 118 Northeastern Reporter, page 540.*—The Industrial Board of Indiana referred to the court in this case

questions as to the scope of section 67 of the compensation law of that State, which requires reports from employers as to injuries suffered by their employees in the course of their employment. The first was as to whether employers who have availed themselves of the exemption features of sections 2 and 3 are required to make such reports. The court answered in the affirmative, calling attention to the fact that such reports are required of employers of casual laborers, farm laborers, and domestic servants, although they are excepted from the operation of the act in other respects, so that it is evident that the intention was to require reports from others than those operating under the compensation provisions. In answering the other questions the court held that an action for penalties for noncompliance with section 67 might be brought either in the name of the State or by the industrial board, and that the venue of the action is in the county of the employer's residence and business (he being required to deposit the reports in the mails), rather than that in which the State capital is located.

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WORKMEN'S COMPENSATION—SPECIAL FUND FROM CONTRIBUTIONS BY INSURERS WHERE NO BENEFICIARY SURVIVES—CONSTITUTIONALITY—*State Industrial Commission v. Newman, Court of Appeals of New York (Jan. 29, 1918), 118 Northeastern Reporter, page 794.*—Julia De Hart died from injuries which made the workmen's compensation act applicable, and, there being no person entitled to compensation under the act, the commission awarded to the State treasurer the sum of \$100. An appeal was taken, the contention being made that this provision was unconstitutional. It was claimed that the amendment to the constitution providing for the enactment of a compensation law did not authorize the payment of compensation to others than employees or their dependents. The compensation law as enacted in 1914 was construed, in case of a second injury to one already partially disabled, bringing about total disability (as by the loss of a second eye or a second hand), as making the employer at the time of the second injury responsible for compensation for total disability. This naturally created a handicap to partially disabled persons, preventing their ready employment, and the legislature in 1915 passed an amendment to the effect that compensation to previously disabled persons should not be greater than the amount allowed for the latter injury considered by itself. In 1916 another amendment, subdivision 7 of section 15, the one in question in the present case, provided that such disabled persons, after the cessation of the payments for permanent partial disability, should receive for the remainder of their lives 66½ per cent of their wages, payable from a special fund accumulated by the payment of \$100 by the insurer in

every case of fatal injury where there is no person entitled to benefits. This provision was held valid, Judge Collin delivering the opinion and saying in part:

The evident and clear purpose of the subdivision was to remove a condition, as between employers and partially disabled employees, inconsonant with the spirit of the act and, perhaps, unjust, through the creation of a State fund contributed to by the insurance carriers and, as the permanent disability arose, accessible to any member of the entire prescribed class of employees so disabled. Its provisions are within the letter and spirit of the constitution.

All employers contribute under identical conditions to the special fund of said subdivision 7, those utilizing the State fund or the stock or mutual associations through the insurance premiums contributed to the fund or association, and the self-insurers by payments directly. The special fund is exclusively distributed among the employees of those who contribute. Its creation and use are not different in principle from those of the State fund or the funds of the associations constituted of the premiums received. In the last analysis all compensation to the employees of the employers paying those premiums is not paid by the employer to his employees, but from the aggregated and indiscriminate funds. From those funds the awarded compensation is paid directly to the employees or dependents, or reimbursement for payments by employers is made to them. In matter of *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600 [Bul. No. 189, p. 221], we expressed the conclusions that the scheme of the act is essentially and fundamentally the creation of a State fund from premiums paid by employers to insure or effect the payment of a prescribed compensation for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments, and that the act was amply sustained by the constitution. Subdivision 7 is well within the scheme.

It was further held that an undertaker to whom an award of \$100 had been made for funeral expenses of the deceased employee was not a "person entitled to compensation" out of the contributions to the special fund.

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WORKMEN'S COMPENSATION—TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY—AWARDS—LOSS—*Franko v. William Shollhorn Co.*, *Supreme Court of Errors of Connecticut (July 23, 1918)*, 104 *Atlantic Reporter*, page 485.—Franko while in the employ of the defendant suffered a laceration of the first finger of his right hand, which injury arose out of and in the course of his employment, and was totally incapacitated from February 18 to May 21, 1917. On May 21 two phalanges of the index finger were removed. The commissioner awarded claimant, Franko, as compensation for total incapacity on account of said injury \$5.50 a week from February 18 to May 21, 1917, and at a like rate for the two phalanges of the index finger beginning May 21 and extending for a period of 25½ weeks. Defendant contends that compensation can only be had for 25¼ weeks



for the loss of the phalanges. The opinion of the court, as expressed by Judge Wheeler, confirming the two separate awards, is in part as follows:

Our act in its original form and in its amended forms of 1915 and 1917 provides compensation for both total and partial incapacity resulting from injuries which do not prove fatal. Section 11 relates to total incapacity. \* \* \* Section 12 provides that, in case of injury resulting in partial incapacity, there shall be paid the injured employee, etc. \* \* \*

We can not agree with appellant that since the loss from February 18 to May 21 was of the *use* of the two phalanges, and from May 21 of the *loss* of the two phalanges, the injury was a single one. These two sections provide for compensation in the case of certain named injuries resulting in the loss of a member of function.

The word "loss" is used in the sense of deprivation. It designates the handicap under which the employee will suffer in the future. Compensation is based on this loss. It is not measured, as are other injuries resulting in partial incapacity, by impairment of earning power. Each class of injuries results in partial incapacity. There is no reason why an injury under each class should not be compensated, and, if the injuries in question be, as the respondent insists, the loss of the use of the two phalanges and the loss of the two phalanges, these are two independent injuries for each of which compensation is provided measured as to amount and duration. The loss of two phalanges carries a named compensation and the loss of the use of two phalanges also carries a similar compensation. There is nothing in the act which prevents compensation for any number of the several injuries specifically provided for. Payment for one does not pay for any but the one injury.

The argument of the respondent relies, to a large extent, upon that part of section 11 which provides that the compensation for the named injuries shall be "in lieu of all other payments." This refers to payments for the named injuries. As to these the compensation designated is exclusive. But this does not limit the award to any one of the compensations provided for the named injuries; nor does it purport to be in lieu of payments made for injuries resulting in partial incapacity not among these named injuries. And since these are a distinct class of injuries resulting in partial incapacity the compensation provided for these specific injuries can not and does not cover them. It is exclusive of any other payment by way of compensation for the injuries specifically designated.

The handicap determines the loss. But when the loss of the member is preceded by a long incapacity while efforts are made to heal and cure the injury, the injured employee has suffered far more than the mere loss of the member.

The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member.

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WORKMEN'S COMPENSATION—TOTAL DISABILITY—LOSS OF PHALANX—AWARDS—*Kramer v. Sargent & Co., Supreme Court of Errors of Connecticut (July 23, 1918), 104 Atlantic Reporter, page*

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490.—Kramer, on December 4, 1917, suffered an injury to the terminal phalanx of the index finger of his left hand, which resulted on the same day in the loss of this phalanx by amputation and in total incapacity for all labor from the date of the injury to February 8, 1918, and such incapacity seemed likely on the latter date to continue for some time. Kramer claimed and the commissioner allowed awards for the loss of the phalanx and for the total incapacity resulting from such loss. Judge Wheeler, in giving the decision of the court, distinguished this from the *Franko v. Schollhorn* case, and limited the award to the loss of the member. The opinion is in part as follows:

In *Franko v. Schollhorn Co.*, 104 Atl. 485, above, just decided, there was a total incapacity preceding the loss and resulting from an injury and continuing during the period of the attempt to cure the injury to the finger. In *Olmstead v. Lamphier*, 104 Atl. 488, [next case below], just decided, the loss of the leg and the total incapacity resulting from the injury to the shoulder were independent injuries arising out of the one accident. In this case there is one injury and the incapacity follows immediately the loss of the phalanx and results from it. We reached the conclusion in *Franko v. Schollhorn Co.*, supra, that under our act there may be a total incapacity and a partial incapacity growing out of the same injury, for each of which compensation may be awarded. But such an award is not, as we think, contemplated by our act in the case of a loss of a member.

All of the specified injuries in section 12, for which a specially named award is made, will ordinarily involve a period of incapacity of varying duration. And this is the reason the rate of the award in these cases is made the same as in the cases of total incapacity under section 11. The award was made larger because of the extent of the injury. In section 12, the rate of compensation for cases of partial incapacity resulting from injuries not specifically described is "half the difference between his average weekly earnings before the injury and the amount he is able to earn thereafter;" while, in the cases of partial incapacity resulting from injuries specifically described, the rate of compensation is half of the average weekly earnings of the injured employee. This increased scale of compensation is no doubt intended to cover the loss of the member and the handicap of the future through this loss, but it was also intended to cover all the injuries resulting from the loss of the member. This compensation is made "in lieu of all other payments;" that is, it is exclusive of all other payments for this particular injury which is the loss of the member. This language is used in its ordinary significance.

For the reasons stated in the above opinion the award for the loss of the phalanx was allowed but the award for the total incapacity on account of the injury was vacated.

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WORKMEN'S COMPENSATION—TOTAL DISABILITY—PARTIAL DISABILITY—MULTIPLE INJURIES—SURGICAL AID—ARTIFICIAL LEG—*Olmstead v. Lamphier, Supreme Court of Errors of Connecticut*

(*July 23, 1918*), *104 Atlantic Reporter, page 488*.—Olmstead was in the employ of the defendant on September 26, 1916, when he was thrown from a horse, sustaining an injury to his shoulder, causing partial incapacity equal to one-half total incapacity, and also sustaining injuries to his left leg of such a nature that they necessitated its amputation above the knee. Olmstead was supplied with an artificial leg. He brought proceedings under the workmen's compensation act, and was granted an award of \$7.50 per week for 182 weeks for the loss of the leg and \$3.75 per week during the period of partial incapacity resulting from the injury to the shoulder, and \$115 for the artificial leg. Defendant claims that under the provisions of section 7B and other sections of the workmen's compensation act he should not be compelled to pay for the artificial leg or for compensation for the partial incapacity. Judge Wheeler, in giving the opinion of the court sustaining the award, said:

In *Franko v. Schollhorn Co.*, 104 Atl. 485 [p. 224], just decided, we construed section 11 of our act as providing one form of compensation during total incapacity and another for the permanent loss of a member of the body. The injury to the shoulder was a distinct injury, resulting in total incapacity; the loss of the leg was also a distinct injury, resulting in partial incapacity. For each injury, under our construction of this section, the injured employee was entitled to compensation. The fact that each injury resulted from one accident did not make of these a single injury. Nor did the act intend that compensation for the loss of a member should be in lieu of all compensation for other injuries resulting from one accident. Our act does not permit double compensation, and hence the trial court was correct in making these awards consecutive, the award for the total incapacity to precede in payment that for the partial incapacity.

We are left with the bald question whether surgical aid or service includes the furnishing of an artificial leg.

There is no specific provision for the furnishing of medicines or any material or apparatus required by the physician. Yet it is clear that all these are included in the term "medical aid or service." It must also be clear that all necessary bandages, materials, splints, and apparatus required by the surgeon in effecting cure are included under the term "surgical aid or service." \* \* \* Why give the patient splints to hold the bones in place or crutches with which to walk, and regard these as used in surgery? Why supply a glass eye? Because it is the everyday duty of the surgeon to order these things for his patient, and they are included as, of course, under "surgical aid." There is no difference in principle between supplying these and the artificial limb. That pertains to surgery and is used in surgery.

Our act contemplates the furnishing of all the medical and surgical aid that is reasonable and necessary. The purpose of this provision is to restore the injured employee to a place in our industrial life as soon as possible by the use of all medical and surgical aid and hospital service which the ordinary usages of modern science of medicine and surgery furnish.

**WORKMEN'S COMPENSATION—TOTAL DISABILITY—LOSS OF SIGHT—SECOND INJURY—***In re J. & P. Coats (R. I.), Inc., et al., Supreme Court of Rhode Island (June 7, 1918), 103 Atlantic Reporter, page 833.*—Joseph Spence was engaged by the company named as a card stripper. Previous to this employment he had lost the sight of his right eye while serving in the Spanish-American War. On June 8, 1917, while still in the employ of the company, he was struck upon the head by a falling ladder and suffered as a result thereof the total and irrecoverable loss of the sight of his left eye. Prior to this accident Spence had waived his common-law rights to recover for injury occurring during this employment, and the corporation had elected to become subject to the provisions of the workmen's compensation act. These facts being agreed to by both parties, the case was submitted on petition asking for the construction of sections 10, 11, and 12 of article 2 of the workmen's compensation act. Section 10 provided for compensation of one-half of the employee's pay, but not less than \$4 nor more than \$10 per week for a period of 500 weeks for total and permanent disability. Section 11 is very much the same, providing, however, for partial disability. Section 12 provides additional compensation in case of (a) loss of both eyes and (b) loss of one eye, to the amount, in the former case, of half pay for 100 weeks and in the latter case for 50 weeks.

The questions before the court were: (1) Could Spence have suffered more than partial disability under the act by the loss of his remaining eye? (2) Conceding that Spence suffered permanent disability, does a conclusive presumption arise under the act that it was total disability? (3) Under section 12 is Spence entitled to half pay for 50 or 100 weeks?

The court, after reviewing the case of *In re Braconnier*, 223 Mass. 273, 111 N. E. 792 [Bul. No. 224, p. 228], in which the employee lost his remaining eye and the court held that, under the provisions of the statute, he had suffered total incapacity, gave the following opinion:

In the present case we are of the opinion that a condition of total incapacity resulted to the employee from the injury to his left eye, and we adopt \* \* \* the opinion in *Braconnier's* case, *supra*, as a clear and succinct statement of the grounds of our own opinion. We accordingly answer question 1 in the affirmative.

We also are of the opinion that question 2 should have an affirmative reply. It is so closely akin to question 1 that the same line of reasoning is applicable.

In answering question 3 the court said:

The purpose of section 12 is plainly to provide compensation for specified injuries in addition to the compensation otherwise provided for in the act. There is and can be no question that the specified in-

jury in this case is "the entire and irrevocable loss of the sight of" one eye, and not of both, and accordingly the employee is entitled to compensation therefor for 50 weeks and not for 100 weeks.

The law of Rhode Island makes specific awards for certain maimings, etc., these awards to be in addition to other benefits paid. It follows that in the present instance there was an award for the loss of the eye in addition to that for the permanent total disability due to complete loss of sight.

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WORKMEN'S COMPENSATION—USUAL COURSE OF EMPLOYER'S BUSINESS—INJURY TO EMPLOYEE WHILE BUILDING AN ADDITION TO PREMISES—*State ex rel. Lundgren v. District Court, Supreme Court of Minnesota (Nov. 15, 1918), 169 Northwestern Reporter, page 488.*—The defendant corporation was engaged in the retail lumber business and decided to sell also coal and other fuel. It employed one Lundgren to do a specific part in the construction of a shed in which to keep the coal. While constructing this shed plaintiff was injured. The district court refused him compensation on the ground that the work he was doing was not in the usual course of the employer's business. In reversing this decision the court said:

While the defendant was not a building contractor nor engaged in specific work of that kind, the construction of the shed in question was in furtherance of its established business, a necessary part thereof, and we discover no sufficient reason for holding that it was outside of and beyond what is customary and usual in a situation of the kind. That should be the test in construing the statute. The construction of the shed should therefore be held within the usual course of the defendant's business within the meaning and contemplation of the statute. We so hold.

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WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Baltimore Car Foundry Co. v. Ruzicka, Court of Appeals of Maryland (Apr. 3, 1918), 104 Atlantic Reporter, page 167.*—Ruzicka was crushed and killed while attempting to pass between two cars on a track in the car-erecting shop of the Baltimore Car Foundry Co., in which he was employed as a maker of decks or platforms for the cars there in the course of construction. The accident occurred in the evening as the day's work was closing and Ruzicka was starting to leave the shop on his way home. He had been notified that the cars were going to be coupled and moved. There was a board walk over the tracks, which he might have taken, although there was no rule requiring him to do so. Another workman warned him not to pass between the cars, but he stated that he had plenty of time. But he stopped and talked with

another worker for five minutes before he continued on his way and was killed. The company claims Ruzicka was guilty of "willful misconduct," and that the accident did not arise "out of and in the course of his employment." The trial court approved the award made by the commission, and its judgment was affirmed by the court of appeals. The opinion says, in part:

It is, of course, perfectly clear that the fatal accident we have described was the result of Ruzicka's own negligence. But we agree with the court below and the State industrial commission in the opinion that the highly imprudent act which caused the unfortunate man's death is not properly to be characterized as willful misconduct. It lacked the element of intentional impropriety which those words imply. It was a thoughtless and heedless act but not a willful breach of a positive rule of conduct or duty.

But in thus neglecting to have proper regard to his safety he was not, in our opinion, guilty of willful misconduct within the purview of the workmen's compensation law, which, except in cases of injury produced by such misconduct, or self-inflicted, or due to intoxication, provides compensation for the disability or death of employees resulting from accidental personal injury arising out of and in the course of the employment "without regard to fault as a cause of the injury."

We think that the accident which resulted in Ruzicka's death, and which occurred while he was on the employer's premises and immediately at the close of the day's work, should be regarded as arising out of and in the course of the employment.

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WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE BEST SAFETY DEVICES—*Haskell & Barker Car Co. v. Kay*, *Appellate Court of Indiana (May 29, 1918)*, 119 *Northeastern Reporter*, page 811.—On September 8, 1916, Charles Kay was struck by a car lever in which he was drilling a hole and died from the effects of the blow. His widow applied for compensation, and an award was made to her by the industrial board, from which the employing company appealed. Admitting that the employee suffered a personal injury by accident arising out of and in the course of his employment and resulting in his death, it contended that the employee was guilty of willful misconduct, consisting of failure or refusal to use a safety device, which under the compensation law bars compensation. It appeared that there was danger of pieces of the iron being drilled whirling with the bit, and also of their climbing the stem and then whirling. A device called a clamp was provided, which prevented both whirling and climbing; but the employees often used a "plug," which could be attached more quickly and prevented whirling except in the case of climbing, and which, as appeared by much of the evidence given, was equally good for some

kinds of work. Kay had been doing heavy work and using the plug, and when four car levers were given him to drill he did not change to the use of the clamp as a guard and was killed as indicated. The court held that his failure to use the more efficient guard was negligence rather than willfulness. The following is from the opinion delivered by Judge Caldwell:

The evidence being uncertain, as indicated, and decedent shortly prior to his injury having been engaged in drilling where a clamp was not required, and being directed by the foreman to do a small job that did require a clamp according to appellant's view of the matter, we can not say as a matter of law that his conduct amounted to anything more than thoughtlessness. We do not feel that the situation justifies us in going any further than this, even on the assumption that decedent knew that the use of the plug was attended by a degree of danger. As we have said, however, the evidence does not compel a deduction any stronger than that the choice of appliances in any situation was committed to decedent's discretion. At any event we can not say as a matter of law that his conduct was anything more reprehensible than mere negligence.

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WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE GUARD—*Bay Shore Laundry Co. v. Industrial Accident Commission of California et al.*, District Court of Appeal, Third District, California (Mar. 20, 1918) 172 Pacific Reporter, page 1128.—An award for compensation was granted to Paul Verdier by the industrial accident commission against the Bay Shore Laundry Co. Verdier was an experienced laundry workman, having been in that line of work for 20 years, and was at the time of his injury in the employ of the plaintiff. While operating a wringing machine he removed a safety device or guard for the sole purpose of gaining time and because he had seen other employees doing likewise. While the guard was removed his foot slipped from the brake causing him to lose his balance and his hand to be injured by coming in contact with the unguarded portion of the machine.

Plaintiff petitioned to have the award annulled, and the petition was granted on the ground that Verdier's action constituted "willful misconduct" within the meaning of the Workmen's Compensation, Insurance, and Safety Act of 1913 and was in violation of the safety orders of the industrial accident commission. Regarding the latter the court said:

Section 62 of said act [workmen's compensation, etc., act] provides that every employee shall obey and comply with the requirements of the safety orders of the commission. Hence it can not be disputed that Verdier was guilty of a crime when he removed the guard, and that he knew that his act was likely to result in injury to himself.

On the question of the willful misconduct of Verdier the court expressed the following opinion:

Moreover, there can be no doubt that the misconduct of Verdier was willful within the meaning of the statute. The definition of the term is found in the code, and it must be presumed that in said compensation act the legislature had in view that definition. Section 7 of the Penal Code provides:

“The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or injure another, or to acquire any advantage.”

That Verdier had a willingness and purpose to commit that act of removing the guard is beyond question. From the act itself such presumption would follow, but he makes it certain by his testimony as to why he performed the act. It is not required to show that the injured person committed the wrongful act maliciously to prevent his recovery. If the legislature had so intended it would, of course, have so provided. It was deemed proper to exclude one who was guilty of intentional or willful wrongdoing, and if we are to regard the fact in this case and the plain ordinary significance of the terms employed by the legislature it must be held that the applicant herein is in the excluded class.

In substantiation of this decision concerning what constitutes willful misconduct the court quoted from a decision of the supreme court in the case of *Great Western Power Co. v. Pillsbury*, 149 Pac. 35 (Bul. No. 189, p. 292).

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WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE GUARD—*Wick et al. v. Gunn et al.*, *Supreme Court of Oklahoma* (Dec. 11, 1917), 169 *Pacific Reporter*, page 1087.—Charles D. Gunn was granted compensation against his employer, S. J. Wick, and the insurer of the latter, for injuries sustained during the course of his employment by Wick. The employer and insurer appealed from the award of the industrial commission because, as they alleged, the injury was caused by the employee's willful failure to use a safety appliance provided for his protection, which failure, under the terms of the compensation law of the State, barred him from benefits. He was injured while operating a combination edger and planer, and the court stated that the evidence showed that the injury would not have occurred if the guard had been adjusted, but that doing the work without the guard was not unusually or necessarily dangerous; that the employee evidently had no idea of violation of law or wrongdoing in adopting the method he did; that the work took but a moment without the use of the guard, while the guard provided was out of date, complicated, and not automatic, and took considerable time to



adjust and use, and the labor commissioner had recommended one that was automatic, simple, and inexpensive. The court affirmed the judgment for the award, holding that mere careless failure was not willful, and that it was not made by the statute the employee's duty to use such a guard as the one provided. The following quotations from the opinion by Judge Stewart indicate the views of the court:

We hold that the mere intentional and voluntary failure on the part of a workman to use a proper safety appliance does not necessarily make the act willful as contemplated by the exception under consideration. The willfulness contemplated amounts to more than a mere act of the will and carries with it the idea of premeditation, obstinacy, and intentional wrongdoing. The mere voluntary failure to use the same would constitute contributory negligence and to hold that such failure in itself barred relief would, in effect, preserve a defense abrogated by the act.

The claimant, being charged only with the duty of using guards provided in pursuance of law or by order of the labor commissioner, can not in this case be charged with failure to use the guard furnished, there being evidence to show that the same was neither a proper guard nor one provided pursuant to order of the labor commissioner.



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