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DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR 1919–1920

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U. S. BUREAU OF LABOR STATISTICS.

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REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1919-1920.

INTRODUCTION.

This bulletin is the eighth in the series devoted exclusively to the presentation of court decisions, the preceding numbers being 112, 152, 169, 189, 224, 246, and 258. The foregoing bulletins appeared annually, but for a variety of reasons the publication of a bulletin for 1919 was omitted and the material for that year is now combined with the material for the year 1920. 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 if of sufficient general interest.

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 years 1919 and 1920, the volumes covered being as follows:

Opinions of the Attorney General, volume 31 and volume 32 to page 368.

Supreme Court Reporter, volume 39, page 21, to volume 41, page 64.

Federal Reporter, volume 253, page 481, to volume 268, page 96.

Northeastern Reporter, volume 121, page 81, to volume 128, page 800.

Northwestern Reporter, volume 169, page 577, to volume 179, page 1023.

Pacific Reporter, volume 176, page 321, to volume 192, page 560.

Atlantic Reporter, volume 104, page 896, to volume 111, page 688.

Southwestern Reporter, volume 206, page 577, to volume 225, page 288.

Southeastern Reporter, volume 97, page 609, to volume 104, page 785.

Southern Reporter, volume 80, page 25, to volume 86, page 448.

New York Supplement, volume 172, page 817, to volume 184, page 832.

Washington Law Reporter, volumes 47 and 48.

OPINIONS OF THE ATTORNEY GENERAL.

The opinions of the Attorney General of the United States are rendered on request of the President or certain officers of the Government and are usually limited to a specific case, though some of them are of general application. It occurred that during the period covered by the present bulletin no question was submitted in the labor field that called for a pronouncement of special interest, so that only the following notes are given. The Government control of the railroads during the war raised the question of the status of railroad employees in connection with the civil service, the decision being that they were not covered (31 Op. 530). Another question arising out of the same situation was as to the relation of the Director General to the United States Employees' Compensation Commission. It was held that the Government control, which involved the bringing of actions for damages directly against the Director General, did not deprive the commission of its power to require a compensated employee to assign to the commission his right of action to prosecute the same where the injury was due to negligence of the railroad as a third party (31 Op. 365). Other decisions under the compensation act were to the effect that an assistant United States district attorney was not an employee under the act, but was an officer of the United

States (31 Op. 201). A like conclusion was reached with regard to a surgeon in the Public Health Service, he having been appointed by the President by and with the advice and consent of the Senate (31 Op. 184).

The status of a State compensation fund was considered (31 Op. 308), the Pennsylvania Compensation Insurance Fund being held not subject to taxation under the income tax act of September 8, 1916; nor are policies of insurance issued by the State under the compensation act subject to the special tax placed upon insurance policies by the war revenue act of October 3, 1917.

The act of Congress authorizing a suspension of the eight-hour law in time of a national emergency, in the case of "persons employed upon" contracts with the United States was held to include only the "persons" referred to in the law—i. e., laborers and mechanics. Overtime pay for work in excess of eight hours was therefore only to be given in the case of such classes of workers (31 Op. 144).

The retirement act for United States employees was construed in an opinion appearing in volume 32 of the Opinions of the Attorney General, the law being held not to provide retirement but to compel dismissal of employees who had reached the age of 70 years without having rendered the 15 years of service which creates eligibility for retirement on annuity (p. 203); another opinion (p. 207) declares the authority of the President to extend the provisions of the retirement act to employees in the service of the United States who have not been included in the classified service. Deputy collectors of internal revenue and prohibition officers, not being definitely included under the civil service act and rules, are not within the scope of the retirement act regardless of whether or not they were in fact appointed in accordance with civil service rules (p. 273). The enforcement officers and employees under the national prohibition act were said in the same opinion to be required to be appointed with certain exceptions under the civil service act and rules, so that such of them as must be so appointed are within the provisions of the act. Unskilled laborers in the employment of the Superintendent of the United States Capitol Building and Grounds are covered (p. 311).

As already stated, no text of opinions is reproduced in the present bulletin.

DECISIONS OF THE COURTS.

ALIENS.

The subject of immigration under contract to perform labor was before the United States Circuit Court of Appeals in the case of an accountant who had come from Canada to work in a branch of a

Canadian bank opened in New York City. It was held (United States *v.* Union Bank of Canada, p. 71) that the employee was not a manual laborer and therefore not covered by the act. In the same decision the court passed upon another case (United States *v.* Royal Dutch West India Mail Co., p. 71), the Government having taken an appeal from a decision by the district court (noted at page 48 of Bulletin No. 258). It was there held that a clerk coming from Holland to work for a time in New York in a branch office of the employing company had not been induced to immigrate to perform labor in this country in violation of the law; this decision was on appeal affirmed.

The same provision of the law was involved in another case (United States *v.* International Silver Co., p. 71), the decision being rendered by a district court. British subjects resident in Nova Scotia had corresponded with a Connecticut employer and had come expecting work. A strike prevented their employment and they returned home, but the Government brought suit for a violation of the law by the company. The judgment was adverse to the prosecution, no sufficient cause of action appearing.

CONTRACT OF EMPLOYMENT.

ENFORCEMENT.

The enforcibility of a contract made and performed in one State (Idaho), but sued upon in another State (Washington), where it was invalid, was considered in Hatcher *v.* Idaho Gold & Ruby Mining Co. (p. 84). The labor performed was to be paid for partly in commissary supplies, which might be done in Idaho, but not in Washington. However, the supreme court of the latter State construed the action of the parties in making their contract in a State where it was legal as placing them voluntarily under the rule of law in that State, so that the contract should be upheld.

Failure to carry out a contract of hire on the strength of which advances had been made was held (State *v.* Oliva, p. 85) not punishable under a Louisiana statute, which was held to be unconstitutional as in effect establishing a condition of peonage. A like contention of the defendant was made in an Arkansas case (Johns *v.* Patterson, p. 86), where a suit was brought against an employer who accepted the services of a laborer who had abandoned his contract while in debt to a prior employer. The court found the rule in this case to be different, the act in question being constitutional; however, the judgment of the lower court against the second employer was reversed on account of the errors in the instructions given by the judge. A quite similar case was that of Shaw *v.* Fisher (p. 87), where a second employer was sued for enticing and harboring an employee.

Judgment was in the plaintiff's favor in the trial court, but the Supreme Court of South Carolina reversed the judgment, finding that the second employer had merely accepted the services of an employee who had left the earlier employment on his own motion.

An implied obligation of the employee is not to disclose trade secrets where learned in confidential relations with his employer. In a case of this nature (Vulcan Detinning Co. *v.* Assman, p. 93) a workman leaving employment was held to trial for disclosure of trade secrets and resultant damages.

The relation of employer and employee was held not to exist in the case of a pupil conductor on a street car for the purpose of receiving instruction with a view to qualifying for employment; but his position was said to be different from that of a mere licensee, and a judgment in his favor was affirmed where an injury resulted from the company's negligence (Fineberg *v.* Public Service R. Co., p. 89).

BREACH.

An apprentice agreement in which a father contracted to be liable for the payment of $100 if his son should not live up to the contract was held to be binding in Putnam Machine Co. *v.* Mustakangas (p. 77), the decision of the court below being modified so as to require payment of the full amount agreed upon. Where a workman had been required to deposit a $50 Liberty bond as security for the performance of a contract to work to the end of the season, and nevertheless struck and left employment, the court held that the performance of the contract was several, so that payment should be made for all services rendered; however, the bond was held forfeited because the full measure of service had not been rendered (Englander *v.* Abramson-Kaplan Co., p. 78).

Breach by the employer was held to make him liable where a salesman was discharged after working for three months on a two-year contract, the discharge being attributable to the bad state of business necessitating retrenchment (Dunbar *v.* Orleans Metal Bed Co., p. 79). A like judgment ensued in another case (Lyons *v.* Pease Piano Co., p. 80), in which a contract was construed to be for a yearly hiring, while the employer claimed that it was terminable at will.

Where a seaman was discharged in violation of an oral contract made in California, where contracts continuing more than a year are void unless in writing, it was held that the maritime law controlled, no services being performed within the State, so that damages would lie for the breach (Union Fish Co. *v.* Erickson, p. 88).

COLLECTIVE AGREEMENTS.

The validity of a collective agreement is upheld in Moody *v.* Model Window Glass Co. (p. 81), where it was shown to be a mutual understanding that waiting time should be compensated where the employer failed to furnish work at the time agreed upon. Like value was attached to an agreement made as to the employment of railroad conductors, guaranteeing seniority rights, etc. In the case in hand the plaintiff was not a member of the union with which the agreement was made, but its terms were held to control all employment of that class by the employer affected (Gregg *v.* Starks, p. 82).

BLACKLISTING.

A statute of Oklahoma practically reads into the contract of employment a term requiring the granting of a service letter on the termination of employment. The constitutionality of this law was upheld (Dickinson *v.* Perry, p. 90) and a judgment for damages affirmed where it appeared that the letter granted misstated the facts and amounted to a blacklisting of the employee.

Placed here for lack of a better classification is the case Putnal *v.* Inman (p. 73), in which it was held that a credit list among the merchants of a town was not libelous, it being a privileged communication.

COMPULSORY WORK LAW.

Delaware was one of a number of States which during the war undertook to secure productive labor from all male residents between fixed ages. The statute was declared constitutional (State *v.* McClure, p. 74). This opinion is in opposition to that of the Supreme Court of West Virginia in discussing a similar law of that State (Ex parte Hudgins, p. 76).

EMPLOYMENT OFFICES.

An ordinance of the city of Denver regulating the activities of private employment agencies was held not to apply to a "Business Exchange Corporation," which placed only persons seeking clerical and technical positions (Wilson *v.* City and County of Denver, p. 151). A law of South Carolina fixes a license fee of $2,000 per year for persons securing workmen to go outside the State for service of others. This act was held constitutional in State *v.* Reeves (p. 151), as against the contention that the fee was prohibitive and discriminatory.

WAGES.

MINIMUM WAGES.

The Minimum Wage Commission of Minnesota was made the defendant in a case (G. O. Miller Telephone Co. *v.* Minimum Wage Commission, p. 291) in which the validity of orders issued by it was challenged. The court below granted a temporary injunction restraining the enforcement of orders, but the supreme court, citing its previous decision as to the constitutionality of the act, in the present case sustained the validity of the orders under it.

PAYMENT.

The California law requiring the payment of wages on the termination of employment, and fixing a penalty for noncompliance, was held to be valid as against individual employers (Manford *v.* Menil Singh, p. 294), as had been previously done with regard to corporate employers. A similar law of Michigan, which provided a penalty of 10 per cent per day of the amount due in case of nonpayment, was held by the supreme court of the State to be unconstitutional as class legislation (Davidow *v.* Wadsworth Manufacturing Co., p. 300). The seamen's act, authorizing the recovery of one-half of the wages due at any port in the United States, was held applicable and controlling in the circumstances in a case of employment on a British vessel in port at Pensacola, Fla. (Strathearn S. S. Co. *v.* Dillon, p. 297).

A public agency was required by mandamus to pay a balance due a discharged employee, against its contention that there was no money available from the funds for the fiscal year, where it was shown that the lack of funds was due to an apparently intentional act of the commission to avoid payment (State ex rel. Stephens *v.* State Corporation Commission, p. 295). A workman discharged from a railroad company because of theft was held nevertheless to be entitled to pay which had accrued prior to the date of his discharge (Kowalski *v.* McAdoo, p. 296).

The prevailing custom was held to control in a contest between employer and employee as to the right of the latter to receive pay for the time spent on vacation, his claim being allowed by the court (Vaile *v.* Walker Construction Co., p. 302).

Where services were rendered by request without mention as to the amount of compensation, a reasonable amount was said by the court to be presumed in the absence of evidence that the work was to be done gratuitously (Williams *v.* Jones, p. 300).

Note may be here made of the finding of unconstitutionality of the antitipping law of Iowa, the law being held invalid because not

making proper classifications, employees only being subject to its restrictions, while employers might receive tips without incurring its penalties (Dunahoo *v.* Huber, p. 289).

SECURITY.

The Massachusetts statute regulating assignments of wages restricts both time and amount; it was held, however, in the instant case (Raulines *v.* Levi, p. 290) that the termination of the employment affected by the assignment rendered the assignment void regardless of the lapse of time.

Wages of employees carrying on a bankrupt business were held to be entitled to preference as against prior liens against the property of the company for which they were working (Florida Construction & Realty Co. *v.* Pournell, p. 294). A mechanic's lien was held enforceable under the Massachusetts statute against the owner of a house where a subcontractor's claim included both labor and materials, where the value of the labor could be distinctly shown (Manson & MacPhee *v.* Flanagan, p. 290).

HOURS OF LABOR.

Hours of labor of city firemen were considered in Danielson *v.* City of Bakersfield (p. 155), the law of California fixing an eight-hour day for "laborers, workmen, or mechanics" on public works being held inapplicable.

A Mississippi statute limits to 10 per day the hours of labor of workmen employed by persons, firms, or corporations engaged in manufacturing or repairing. This was held (Handy *v.* Mercantile Lumber Co., p. 154) not to affect the status of a laborer unloading lumber from cars outside the planing mill of the defendant company, as his employment was not affected by the machinery.

The constitutionality of a statute limiting the hours of labor of women in hotels, etc., but excepting railroad hotels and eating houses, was upheld by the Supreme Court of the United States against the contention that there was an unreasonable classification involved in the law (Dominion Hotel *v.* State of Arizona, p. 160). The employment of women at collection stations for laundries was held not to be subject to the restriction of an act governing female employees in the District of Columbia employed in mercantile establishments, laundries, etc. (District of Columbia *v.* Marshall, p. 160). A Texas law limits to 9 per day and 54 per week the hours of labor of women, and a cafe proprietor was convicted for a violation of this law. His contention that an hour per day should have been deducted because that amount of time was used by the employees in eating their meals was denied, as it appeared that while eating the waitresses were subject to call to render service (Haddad *v.* State, p. 161).

The Adamson law, establishing a basic eight-hour day for certain classes of railroad employment, was held not to apply to switch tenders, the law having been enacted for the purpose of meeting conditions not involving that class of workmen (Coke *v.* Illinois Central R. Co., p. 158). The Supreme Court also held that the law did not bar an agreement between an insolvent road and its employees to continue the operation of the road under a contract satisfactory to both parties, but not conforming to the law in question (Fort Smith & W. R. Co. *v.* Mills, p. 156).

The older law limiting hours of service to 16 per day for trainmen was held to apply to employees of a terminal company operating in the State of New York exclusively, but handling commerce for a number of railroads and steamship companies doing an interstate and foreign business (United States *v.* Brooklyn Eastern District Terminal, p. 162). A like conclusion was reached in another case (Penn. R. R. Co. *v.* United States, p. 166), the employee working in railroad yards making up trains, none of his duties calling him to work on the main line of the road.

The same statute fixes the hours of labor of telephone operators transmitting train orders to nine per day. A terminal company at Atlanta rendered practically the same service as the Brooklyn company in the case noted above, and a circuit court of appeals applied the same doctrine to the instant case, involving the services of a telegraph operator, reversing a directed verdict for the company in the lower court (United States *v.* Atlanta Terminal Co., p. 163). That mealtime, during which an employee was subject to call, was not properly time off duty, deductible from the hours of service, was the conclusion in Chicago R. I. & P. R. Co. *v.* United States, p. 164). Another case along this line (United States *v.* Baker, p. 165) involved the question of continuous operation. Two railroads exchanged service in such a way as to have continuous service by their joint action. This was held to constitute continuous operation so that neither operator could be employed more than nine hours per day.

Not strictly falling under the heading of "hours of labor" is a case involving the right of an inventor to an invention which was perfected during the time of his employment by the United States, the court holding that the law did not exclude any portion of the employee's time from the time "of his employment or service" (Moore *v.* United States, p. 167).

MUNICIPALITY ENGAGING IN BUSINESS.

Kansas City, Mo., voted for an issue of bonds to enable the city to engage in the business of manufacturing and distributing to its citizens and the city offices a supply of ice. The city comptroller refused

to issue the bonds, claiming that the city had no authority to enter upon such an undertaking, this view being upheld by the supreme court of the State (State ex rel. Kansas City *v.* Orear, p. 282).

PENSION AND RELIEF SYSTEMS.

The deduction of a portion of the salaries of public employees for the establishment of a pension fund for their retirement was held valid in Higgins *v.* Sweitzer (p. 284), against the contention that their salaries were to be fixed by the county board and were not liable to such reductions as the law effected. The same court (Illinois supreme) had before it the claim of a policeman who was entitled to retirement under a provision fixing 20 years' service as the sole test of eligibility. Before final action on the claim, the legislature added a provision to the effect that the claimant must also be 50 years of age, and it was held that the added provision was a valid obstacle to the granting of the pension until he should satisfy it. (Beutel *v.* Foreman, p. 285).

An Ohio statute forbids compulsory contributions to relief departments maintained by any corporation. This was held constitutional and applicable in a case in which a former employee sought to recover from a railroad company the statutory penalty for deducting contributions from his wages, though the company claimed that he had agreed to such action (Baltimore & O. R. Co. *v.* Bailey, p. 286). The Court of Appeals of the District of Columbia reversed a former decision in refusing to a discharged railroad employee a refund of the contributions made by him to a relief department in excess of benefits received, there being no statute in this jurisdiction interfering with the withholding of contributions (Philadelphia, B. & W. R. Co. *v.* Campbell, p. 288).

EMPLOYMENT OF WOMEN.

A Texas statute requiring that female employees in certain establishments be furnished with seats which they might use when not engaged in active duty was held constitutional in Glanges *v.* State (p. 150).

FACTORIES AND MINES.

A New York statute authorizes the fire commissioner of New York City to require certain safety devices to be installed in factories, etc. The owner of an office building claimed that the law did not apply where only office workers were engaged, and, if so, it was unconstitutional. These contentions were denied in the case of People ex rel. Cockroft *v.* Miller (p. 152), and the order sustained as affecting the particular building.

The constitutionality of an Illinois statute requiring the maintenance of wash rooms at coal mines, steel mills, foundries, "or other

like business" was declared constitutional by the Supreme Court of Illinois, but held not to apply to a railroad roundhouse (People *v.* Cleveland, C., C. & St. L. R. Co., p. 153).

A law of Kansas forbidding the use of dynamite and similar explosives in coal mines unless certain regulations were complied with was held constitutional even though the power of regulation was in a measure delegated to operators and miners for mutual agreement (Richards *v.* Fleming Coal Co., p. 282).

LIABILITY OF EMPLOYERS FOR INJURY TO EMPLOYEES.

ASSUMPTION OF RISK.

An injury to a member of a railroad bridge crew was held to be caused by the action of his foreman in driving a motor car in such manner as to cause a risk which the workman was not legally presumed to have assumed; and even if he was guilty of contributory negligence, under the South Dakota statute this would not bar recovery but would reduce the amount of it (Dunn *v.* Great Northern R. Co., p. 99). A contrary finding was made in another case in which a simple operation was ordered to be performed without instruction as to the method, the court holding that the workman could see and understand all probable dangers and therefore assumed the risk (Dean *v.* H. Koppers Co., p. 100).

Where a minor employee was urged to hurry in the performance of work on which he had had a limited experience but no warning as to necessary care was given, it was held that he did not assume the risk of a resultant injury (Stam *v.* Ogden Packing & Provision Co., p. 101).

Somewhat similar was the determination of the Supreme Court in reversing the judgment of the courts below, in a case where a laborer had asked permission of his foreman to secure a stick with which to place a block under a rock which afterwards fell upon his arm (Fillippon *v.* Albion Vein Slate Co., p. 141). The action of the foreman in ordering the workman to go on without procuring the desired instrumentality was held to relieve the injured man of the charge of contributory negligence.

NEGLIGENCE.

The State of California has a workmen's compensation law, but it contains a provision that where injury is due to gross negligence or willful misconduct a suit for damages will lie. This provision was held to control in a case where a workman was injured due to contact with exposed gears in a dimly lighted room (Helme *v.* Great Western Milling Co., p. 102).

SAFE PLACE AND APPLIANCES.

A mason employed for construction work was injured while attempting to adjust the derrick by which stone was carried for his use. Against the employer's contention that he was not negligent, that the workman had assumed the risk and contributed to his injury, the court held that the common-law duty of furnishing safe place and appliances had not been fulfilled (E. H. Parrish & Co. *v.* Pulley, p. 103). A like conclusion was reached where a tannery employee received injury by falling from a walkway into a tub of scalding liquid owing to the darkness (Beck *v.* Sylva Tanning Co., p. 104).

The factory laws of Indiana contain specific requirements as to safety, and also impose the general duty of supplying "every device, care and precaution" needed in the circumstances. This was held to charge an employer with negligence in failing to supply goggles for the use of a workman cutting steel with a cold chisel, and who received injury to his eyes (Emerson-Brantingham Co. *v.* Crowe, p. 112). Failure to provide fire escapes was held to charge the owner of a sawmill with liability for the death of a workman in a Louisiana case (Dotson *v.* Louisiana Central Lumber Co., p. 144).

The fact that a State statute imposed direct duty on the employer to supply safe scaffolding in building operations fixed the liability of an employer who failed in this regard (Propulonris *v.* Goebel Const. Co., p. 146).

A railroad employee adjusting ties with a defective bar, old and worn, was held entitled to damages in Arkansas Cent. R. Co. *v.* Goad (p. 142), as against the contention that the rule of "simple tools" should apply.

An injury due to a cause not foreseen by the employer was held, nevertheless, to entitle the injured workman to damages where the jury found that injury might have been reasonably anticipated, and no instruction was given (Collins *v.* Pecos & N. T. R. Co., p. 146).

Electric haulage by locomotive operated from a trolley wire is forbidden in gaseous portions of mines by a law of Pennsylvania. Failure to observe this statute was held to charge the employer with liability as against the contention that the removal of a barricade that had been placed to prevent the running of the engine into a forbidden section was the approximate cause of the injury (Jaras *v.* Wright, p. 116).

Agricultural work, in the present instance shelling corn with the aid of a steam traction engine, was held not to come within the scope of the law requiring machinery to be guarded in "manufacturing or other establishments," so that no liability attached for the failure to guard the cogs of the sheller (Hainer *v.* Churchill, p. 143).

FELLOW SERVICE.

The doctrine of dual capacity was applied to a Missouri case in which the plaintiff was injured by reason of the negligence of a fellow workman under whose direction he was placed, though both were under a common foreman. The act of giving orders was held not to be one of fellow service but an exercise of supervision for which the employer was responsible (Morin *v.* Rainey, p. 114). Quite similar circumstances appeared in a Mississippi case (Gulfport & M. C. Traction Co. *v.* Faulk, p. 115). There was an assumption of authority by one of two fellow coworkers, but the court found no testimony to support the theory of actual control. It was further concluded that the act done by the injured man at the suggestion of his fellow worker was no part of his duty, so that in performing it he was a mere volunteer for whose injury the employer was not liable.

The negligence of an employee of a very different class may be noted here for lack of better classification. An employee suffered an injury to his finger and was treated by the employing company's physician in such a way as to necessitate amputation. Though the injured man had been directed to go to this physician, the court found the company not liable for the lack of skill of the latter, unless it had failed to exercise ordinary care in the selection of a physician. No recovery was therefore allowed (Smith *v.* Buckeye Cotton Oil Co., p. 117).

COURSE OF EMPLOYMENT.

The Supreme Court of Washington held an employing company liable for injury to one of its workmen resulting from an assault by its superintendent, the ground being that even though the company had not authorized that action on his part he had attempted this method of obtaining discipline, so that the company must be charged with the consequence of his action (DeLeon *v.* Doyhof Fish Products Co., p. 105).

UNLAWFUL EMPLOYMENT OF CHILDREN.

It is quite generally recognized that even technical requirements must be observed in employing children unless the employer is to be presumptively chargeable with negligence in cases of injury to them. Thus in Wolff *v.* Fulton Bag and Cotton Mills (p. 109), failure to obtain an employment certificate for a minor under 16 years of age, as required by the New York statute, was held to charge the employer with a misdemeanor, such employment being entirely un-

lawful. Therefore, it would not come under the workmen's compensation act, but would render the employer liable to a suit for damages for an injury received.

The courts of the same State had before them a case (Karpeles *v.* Heine, p. 106) in which a minor 13 years of age was injured by falling into the open shaft of an elevator which he had himself run to the floor from which he fell. Employment to operate elevators is absolutely forbidden until the age of 16 years is reached, and the court of appeals reversed decisions of the lower courts which denied recovery on the ground that the child had been guilty of contributory negligence, holding that this defense was not available for a young child, particularly in the face of the unqualified prohibition of the statute.

A Kentucky statute likewise fixes 16 years as the minimum for employment at certain machinery, including laundry machinery. An injury to a girl employed in violation of this law was held to make the employer liable without the intervention of the ordinary defenses, even though she had misrepresented her age (Sanitary Laundry Co. *v.* Adams, p. 107).

Very similar was the conclusion of the Court of Errors and Appeals of New Jersey (Schwartz *v.* Argo Mills Co., p. 108), the minor in this case being injured by a moving portion of a carding machine. The law forbids employment between fixed and traveling parts of a machine while in motion. The court below denied recovery on the ground that the plaintiff was not between the parts, but this decision was reversed as not meeting the intent of the law.

An employer was held liable for the violation of the child-labor law of New York where the offense consisted in an act of the driver of a milk wagon securing the services of a boy of 13 to assist him, paying him out of his own pocket. The law fixes 14 years as a minimum age for employment, and it was found that other drivers had violated the rule with the knowledge of the employer but had not been disciplined other than by reprimand (People *v.* Sheffield Farms-Slawson-Decker Co., p. 110).

No statutory provision was involved in the case of Brown *v.* Atchison, T. & S. F. R. Co. (p. 111), the foreman of the company being held negligent in directing a boy of 17 to undertake hazardous errands without appropriate instructions as to the dangers, for which action the company was held liable.

MARITIME WORKERS.

One of the difficult problems that has been presented for solution with the advent of liability and compensation laws, looking toward a more adequate protection of workers, is that which relates to mari-

time employments. Seamen have long been recognized as a distinct class of workers, subject to special privileges and limitations, but at present lacking much of the beneficial status secured by recent legislation in behalf of other classes of employees. The great enlargement of those groups of workers who are employed at loading and unloading, repairs, etc., involves other difficulties in view of the fact of the mixed nature of their employment, which is partly on the wharf, partly on the vessel, and partly on the runway, or serving the tackle which forms the means of communication between wharf and vessel. In Siebert *v.* Patapsco Ship Ceiling & Stevedore Co. (p. 94) a stevedore was injured while working in the hold of a ship, due to the negligence of the foreman of the defendant company. The injured man first gave notice that he would claim under the compensation law of Maryland, the injury having taken place in a harbor in that State. The claim was later withdrawn and placed in the hands of an attorney who brought action in admiralty, against the protest of the company. This step was declared legal by the district court, and a judgment was entered in his favor under the admiralty law.

A different course was followed in Dziengelewsky *v.* Turner & Blanchard (p. 96), where a longshoreman was drowned by falling from a defective companionway. A suit for damages at common law was brought, but the employer contended that recovery should be had under the workman's compensation act. The court refused to recognize this contention, holding the plaintiff to be within her rights in her suit for damages.

The refinements involved in the situation are suggested by the fact that where a longshoreman was injured in unloading a vessel, but was himself at the time on the land, it is held that the maritime law would not control (Smalls *v.* Atlantic Coast Shipping Co., p. 98). In other words the man passes from one realm of law to another by the mere shifting of his position while employed in a single undertaking, with different procedure, remedies, and amounts of recovery.

Another case under this heading involves a construction company's laborer detailed to aid in unloading a barge of sand moored in navigable waters. The gang plank over which he passed in his work was unstable and he fell from it into the water and was drowned. His administrator sued in admiralty and recovered on the ground of failure of the employer to exercise reasonable care (White *v.* John W. Cowper Co., p. 98).

The extent of the recovery allowed in case of a maritime injury due to the negligence of fellow servants was considered by a circuit court of appeals in Great Lakes S. S. Co. *v.* Geiger (p. 96).

RAILROADS.

Railroad employments are somewhat in the situation of those of a maritime nature, i. e., they are subject to Federal control to such an extent that the State laws are of secondary importance. However, State laws apply in certain situations, with the result that great uncertainty and confusion ensue. Thus, in Chicago R. I. & P. R. Co. *v.* Cronin (p. 137), a coach cleaner, injured while attempting to assist in jacking up an engine in a roundhouse for repairs, was held entitled to recovery under a State law, over the contention of the company that, since the engine was one regularly used in interstate commerce, the Federal law should govern.

The Federal safety appliance act relates to equipment on roads engaged in interstate business, whether the particular instrumentality is employed in interstate or intrastate service. A brakeman whose death was due to defective couplers on an intrastate car was held entitled to recover in a suit for damages on account of the liability entailed by the Federal statute, recourse to the State compensation act not being necessary (Ross *v.* Schooley, p. 138).

The nature of the compliance required by the Federal safety appliance act was considered in a case in which the company claimed that it had made a substantial compliance, though admitting technical violation of the act. The court found no room for such a theory and held the company liable for damages consequent upon its failure actually to comply with the law (Hodgman *v.* Sandy River & R. L. R. Co., p. 138).

Another case involving sufficient compliance had for its subject matter the installation of grab irons on freight cars (Boehmer *v.* Penna. R. Co., p. 136). The injured man attempted to board a car which had grab irons only on diagonal corners, he thinking that all four corners were supplied. Action for damages was unsuccessful, the court holding that installation on opposite corners was a sufficient compliance with the law.

The scope of a State law enacted for the special benefit of railroad employees was considered in a Minnesota case (Seamer *v.* Great Northern R. Co., p. 118). The law was held to apply not merely to those employees who were engaged in the operation of trains, but also to office workers even though their place of employment was several blocks from the railroad.

Federal statute.—With the very general enactment of workmen's compensation laws applicable to intrastate employments of nearly all classes the importance of State liability statutes as regards railroad employment has diminished. However, Congress has as yet established no compensation system for employees in interstate commerce, and they form the principal groups of workers in the country

who are debarred from the benefits of compensation legislation, the Federal statute of 1908, amended in 1910, being practically their sole measure of relief. The act in question abrogated the defense of fellow service and modified that of contributory negligence, while no risks are assumed which arise from the violation of Federal statutes. On the other hand the doctrine of assumption of risks still operates in a fairly wide field. Thus, where a bridge worker was given a defective claw bar, the injury consequent upon its use was held in the trial court to be due to the negligence of the company in furnishing a defective tool. On appeal from the judgment in his favor the court of appeals ruled that the doctrine of assumption of risks barred recovery, but on the objection of one judge referred the case to the supreme court of the State. Here it was held that recovery was not barred but only reduced by reason of the employee's contributory negligence. A third appeal brought the case to the Supreme Court of the United States, which rejected the defense of contributory negligence but sustained that of assumption of risks, and sent the case back to the place of beginning for a new trial (Pryor *v.* Williams, p. 119).

The doctrine of assumed risks was held by the same court (Supreme Court of United States) not to have any proper place in the case of an injury to a switchman injured by the negligence of his engine foreman where the situation was one of emergency so that the employee had no time to appreciate and assume the risk (Chicago, R. I. & P. R. Co. *v.* Ward, p. 120). Similarly, the defense of assumed risks was disallowed when injury was obviously due to the failure of a railroad company to maintain its tracks in a suitable condition of repair (Kansas City, M. & O. R. Co. *v.* Roe, p. 120).

The vexed question of what constitutes interstate commerce seems hardly nearer its solution than it was at the beginning of litigation under the Federal act. In Phila. B. & W. R. Co. *v.* Smith (p. 122), a mess cook for a gang of carpenters repairing bridges along an interstate road was held to be engaged in interstate commerce. The same was found to be the case in Chicago & A. R. Co. *v.* Industrial Commission (p. 123), where a flagman at a crossing used by both interstate and intrastate trains was killed by an interstate train, but his dependents had secured an award under the State compensation law. On appeal this award was reversed and the Federal statute held exclusively applicable. A like conclusion was reached by a New Jersey court where a station agent was killed, while running alongside an interstate train from which he had taken letters and papers, by falling under the train. A compensation award was reversed, the court saying that as this train was interstate whatever he did in connection therewith partook of that nature and was under the Federal law (Carberry *v.* Delaware, L. & W. R. Co., p. 122).

A track worker engaged in constructing a fill to take the place of a trestle already in use in interstate commerce was said not to be engaged in new construction, but in interstate commerce work of a current nature, reversing a judgment of the Supreme Court of Idaho (Kinzell *v.* Chicago, M. & St. P. R. Co., p. 125).

A signal-tower man, also attending to pumping water to a tank which supplied interstate and intrastate trains, was held to be an interstate employee (Erie R. Co. *v.* Collins, p. 128). Involving the identical principle is the case, Southern Pacific Co. *v.* Industrial Accident Commission of California (p. 133); here a workman was electrocuted while cleaning the insulators of a steel tower which carried wires transmitting electricity to interstate and intrastate trains of the company, and the service was held to be interstate.

The Supreme Court of Michigan passed upon the status of a motorman operating electric street railways across the State line. The man was injured while at his work and brought his action at common law, the company claiming that he should have sued under the Federal statute. This contention was sustained against the objection that electric street railways were not included under this act (Nelson *v.* Ironwood & B. R. Co., p. 124).

The nature of the work was declared to be interstate in another case (Kusturin *v.* Chicago & A. R. Co., p. 129) in which the man was injured while removing old rails from a roadbed, this being regarded as a part of the general work of repairing the track.

The Supreme Court of the United States denied the applicability of the Pennsylvania compensation law in the case of a trainman locally employed in the distribution of loaded cars from a colliery to a train yard two miles distant. Though he himself was never on a train that went outside the State, the cars which he handled were designated for distribution beyond the State boundary, and the employment was correspondingly held interstate so that the award must be disallowed and proceedings had only under the Federal statute (Phila. & R. R. Co. *v.* Hancock, p. 127). The Federal statute was held not applicable, however, where a coal car consigned from outside the State had reached its destination and was being removed from a stub switch to a siding in the town (Del., L. & W. R. Co. *v.* Peck, p. 131). The interstate journey was said to have been at an end before the work in which the injury took place began. The Federal law was therefore not applicable, even though there was negligence on the part of the company in its equipment under the safety appliance act.

Similar to the Hancock case above was the decision of the Supreme Court of Illinois where a locomotive engineer was killed while running to a water tank in an interval between moving two interstate

shipments (Wangerow *v.* Industrial Board, p. 132). The court found that the only purpose of the movement was to pass from one act of interstate commerce to another, so that the State compensation law would not apply.

LIABILITY OF THIRD PARTY.

Where an employee was injured by reason of the negligence of another than his employer, such negligent third party was joined as party to an action and the case carried to a decision in favor of the plaintiff. On appeal the claim was advanced that actions against the employer under the Federal law and against the third party on his common-law liability could not be properly joined. The court admitted this, if the point had been timely raised, but at this stage of the proceedings it was too late, and the liability of each party was affirmed (Cott *v.* Erie R. Co. et al., p. 134).

A similar case was before the Georgia courts, where a demurrer had been interposed, and the question of the propriety of joining the statutory and common-law actions was submitted to the Supreme Court of Georgia. It declared the joinder not permissible (Lee *v.* Central of Georgia R. Co., p. 135), and this decision was on appeal sustained by the Supreme Court of the United States.

RELEASE.

Two cases are available considering the effect of an injured person's release of the employer for liability for injury, in so far as such release affects claims against a surgeon for malpractice. The Supreme Court of Wisconsin (Hooyman *v.* Reeve, p. 139) took the view that a broad release given the employer operated also as a release against all claims of any nature arising out of the injury including the alleged malpractice.

The opposite view was taken by the Supreme Court of Massachusetts (Purchase *v.* Seelye, p. 140), the release covering "all claims and damages" arising out of the injury. This was held to apply to the employer and not to the unskillful treatment by the physician, which could not have been anticipated.

OCCUPATIONAL DISEASE.

The Ohio workmen's compensation law is not inclusive as to all classes of industrial injury and is construed as not covering occupational disease. When, therefore, a suitor claimed damages by reason of the continuing effect of the conditions of his employment impairing health and eyesight, the United States Circuit Court of Appeals took the ground that a common-law right of action for damages existed and reversed a judgment which denied the plaintiff the right to sue (Zajkowski *v.* American Steel & Wire Co., p. 147).

WORKMEN'S COMPENSATION.

CONSTITUTIONALITY OF STATUTES.

Despite the far-reaching decisions of the Supreme Court sustaining the New York, Washington, and other laws embodying a variety of provisions, the question of constitutionality is still raised. The Montana statute was before the supreme court of that State in a case in which a plaintiff sued for damages at common law, the employer contending that the workmen's compensation act controlled. The court adopted this contention, declaring the abrogation of common-law defenses valid and that the industrial accident board is not a court such as to contravene the provisions of the State constitution (Shea *v.* North-Butte Mining Co., p. 329).

The Arizona statute is peculiar in that it offers an injured person the right to elect his remedy after the receipt of the injury. This, together with the other more common provisions of compensation laws, was held to be valid legislation by the Supreme Court of the United States (Arizona Copper Co., *v.* Hammer, p. 330).

The statute of Tennessee excluded coal-mining operators from its coverage, besides the more common exclusion of domestic and agricultural service, casual employees, etc., and the constitutionality of the act was challenged on the ground, among other things, that it constituted class legislation. This contention was rejected by the Supreme Court of the State, together with others relating to the right to jury trial, due process of law, etc. (Scott *v.* Nashville Bridge Co., p. 334). In one point the law was found unconstitutional, i. e., in its authorization of special fees for judges passing upon compensation claims, but this was said not to be an essential part of the law. Improper classification was likewise charged against the Texas statute which excluded farm laborers and gin laborers from its coverage. A case challenging the constitutionality of the law reached the Supreme Court of the United States, where the exclusion of gin laborers, farm laborers, and railroad employees was justified for reasons set forth in the opinion (Middleton *v.* Texas Power & Light Co., p. 339). The provision that the employee shall have no option where the employer elects was likewise held to be valid legislation.

The North Dakota law is made applicable to hazardous employments, but these are defined so as to include practically every occupation. An employer engaged in real estate and loan business contended that his office employees could not be said to be engaged in hazardous work so as to bring them under the act, but this contention was rejected by the supreme court of the State and the constitutionality of the law upheld (State ex rel. Amerand *v.* Hagan, p. 337).

The compensation law of Utah is subject to a provision of the constitution which provides that the right of action for death can not

be taken away or limited. The survivors of a deceased employee may therefore sue at common law for damages or take compensation under the act. Where the latter option was chosen by a widow in behalf of herself and her minor children it was held that her legal appointment as their guardian rendered her election binding upon the children and safeguarded the employer from any second liability (Utah Copper Co. *v.* Industrial Commission, p. 346).

The civil code of Louisiana established the right of a survivor to sue for damages for death, the enactment of the compensation act being later. This later enactment was held (Colorado *v.* Johnson Iron Works, p. 348) to supersede the provision of the code, so that the widow of a workman whose employer was under the compensation act must accept its provisions and may not sue for damages. A similar conclusion was reached in a Kentucky case (Grannison's Admr. *v.* Bates & Rogers Construction Co., p. 349), where the right to sue was claimed after the employee had elected to accept the provisions of the compensation act; this election was held binding upon both the employee and his personal representative.

The constitutionality of the Indiana statute was indirectly attacked in the case of a claim involving the death of a workman employed by an Indiana corporation, who was killed in Indiana while working under a contract made in Ohio, but claiming the status of a contract made in the District of Columbia, and purporting to exclude the operations of any compensation law (Carl Hagenbeck & Great Wallace Show Co. *v.* Randall, p. 343). Despite the complicated efforts to avoid liability, the claim was allowed as under the Indiana law, which was held constitutional and applicable in spite of the fact that the contract of employment was extraterritorial.

The constitutionality of a specific provision was involved in a New Jersey case (Bryant *v.* Lindsay, p. 344), the point being that of the right of the legislature to establish a special fund by contributions to be paid where injured workmen left no dependents. As formulated, this provision was held to be unconstitutional, not being offered as either a supplement or an amendment to the compensation act.

The application of compensation acts to work of a maritime nature has been the subject of much discussion since the introduction of legislation of this type. Following the denial of the right of the courts to apply their State compensation acts to longshoremen, etc., which had been done notably in New York and California, Congress undertook to amend the Federal judicial code so as to permit workmen in the various States to elect compensation under the State law as an alternative to an action in admiralty (act of October 6, 1917, 40 Stat. 395). This attempt to save to suitors the right of a common-

law remedy and the rights and remedies under the compensation law of any State would have furnished a choice among three options. The resultant situation was one of confusion. Thus in a United States court in the case of *The Howell* (257 Fed. 578), Judge Hand construed the amendment to the judicial code as giving the New York compensation law the exclusive status in such a case that it held in employments generally, so that an employer coming under the act was absolved from liability under the maritime law. A like court in Oregon (Rohde *v.* Grant Smith Porter Co., 259 Fed. 304) allowed recovery in an admiralty action, holding that the maritime law gave rights which "can not be barred, enlarged, or taken away by State legislation." A Federal court in Louisiana likewise refused to make the compensation law of that State the exclusive remedy, holding that the injured employee might elect (Hogan for use of Coffey *v.* Buja, 262 Fed. 224).

Other cases might be cited, but all are governed by the finding of the Supreme Court of the United States that the attempted amendment was invalid as establishing discordant legislation contrary to the purpose of the Constitution with regard to commerce, so that while Congress may act in the establishment of a uniform rule of general application, it can not validate diverse State laws making them applicable to subjects of maritime jurisdiction (Knickerbocker Ice Company *v.* Stewart, p. 302).

The compensation law of Porto Rico was held to be compulsory against the contention that the employer could legally elect whether or not he should accept the act (Camunas *v.* New York & P. R. S. S. Co., p. 327). A United States district court had declared the law elective, but the court of appeals took the opposite view.

PARTICULAR PROVISIONS OF THE LAW.

COVERAGE.

Occupations.—The California statute excludes employees in agricultural work, but the supreme court of the State declined to extend the meaning of this term to cover "fish farming" (Krobitzsch *v.* Industrial Accident Commission, p. 305). On the other hand a New York court refused to class ice harvesting done by a farm laborer for domestic supply as within the law, as it was not work "carried on by the employer for pecuniary gain," being merely incidental to farm purposes (Mullen *v.* Little, p. 306).

Work with a threshing machine owned by a group of farmers primarily for their own use was held to be agricultural labor even when employed at custom work, though the compensation commission of Utah had taken a contrary view (Jones *v.* Industrial Commission, p. 306).

Specific rulings are required where the law is limited to "hazardous" or "extrahazardous" occupations. The Supreme Court of Illinois held that the law of that State covered the conduct of a junk business where engines and boilers were stripped; also that a man working by piecework was not an independent contractor, but an employee under the act (Cinofsky *v.* Industrial Commission, p. 388). Likewise the Supreme Court of Washington refused to accept the claim of a woman employed in an office, but operating a stencil cutting machine part of the time, that she was not in hazardous work, saying that as to the stencil cutting her work was similar to the work of manufacturing, though her chief employment was clerical (Gowey *v.* Seattle Lighting Co., p. 390). She was therefore under the compensation act, and could not sue for damages.

Persons.—The quite customary exclusion of casual workers was held applicable in an Iowa case where a handy man agreed to do a bit of repairing on a building for nothing, following service under a contract. Injury while performing the later work was held to be "casual employment" for which no compensation could be obtained (Bedard *v.* Sweinhart, p. 323). A different conclusion was reached by the Maryland Court of Appeals in regard to a farmer and teamster engaged to do hauling for a fruit-packing establishment whenever his services might be required, the work being regarded as under a continuing engagement and not casual (State Accident Fund *v.* Jacobs, p. 324).

A miner loaned by his employer to render expert service in extinguishing a fire in the property of another company was held entitled to compensation from the latter company as against the contention that his work for it was casual (Tarr *v.* Hecla Coal & Coke Co., p. 322). Where, however, the local agent of a railroad company asked workmen of another employer to render assistance in closing a car door, an award was declared unwarranted as the accident had not occurred in the course of employment, the employment relation not having been formed (Farrington *v.* United States R. R. Administration, p. 373). Quite similar was the finding of the Illinois Supreme Court in regard to a volunteer who turned aside from his own employment, offering without request to do a dangerous piece of work, and suffering fatal injuries for which no compensation was allowed (George S. Mepham & Co. *v.* Industrial Commission, p. 376).

A workman employed to do a piece of work at a fixed time rate, but free to make use of his own methods of work in performing a single specific contract, was held by the Supreme Court of New Jersey to be an independent contractor and not an employee (Otmer *v.* Perry, p. 373). This defense was not allowed in an Indiana case where a workman was paid by the ton to unload coke, the court find-

ing him to be an employee and not an independent contractor (Muncie Foundry & Machine Co. *v.* Thompson, p. 374).

The miners in a coal mine in Iowa agreed to employ a person to act as shot firer for all blasting in the mine and had authority to discharge the man selected and paid by them. Nevertheless, the court held that a man so employed was in fact an employee of the company and entitled to compensation as such in case of injury (Bidwell Coal Co. *v.* Davidson, p. 375). The employment relation was held not to be interrupted where a general utility man and watchman employed by a company was killed while attempting to quiet a disorder on the company property, acting under his authority as a deputized sheriff (Engels Copper Mine Co. *v.* Industrial Accident Commission, p. 377). So also a director of a milling company who was also general manager and head miller of the company was held to be an employee, so that his dependents were entitled to compensation in case of his death from injury while at work (Millers' Mutual Casualty Co. *v.* Hoover, p. 379).

The relation of employment was held to exist in a case in which a city, which was under the act, contracted with a person not under the act for the removal of city garbage, an employee of the latter being classed as an employee of the city within the meaning of the act (City of Milwaukee *v.* Fera, p. 381).

A woman whose main support came from services rendered to her son-in-law and daughter as housekeeper was held not to be an employer under the California statute by reason of her ownership of some small dwellings from which she derived a meager income. An injury to a workman repairing the dwellings did not, therefore, charge her with the obligation of paying compensation, as she was not engaged in a trade or business (Lauzier *v.* Industrial Accident Com., p. 380).

AWARDS.

A phase of compensation administration that involves considerable difficulty in spite of its apparently simple nature is that of determining the average weekly wages which shall form the basis of compensation awards. In a New York case (Remo *v.* Skenandoa Cotton Co., p. 309) a night worker employed only five nights per week had been compensated on the basis of multiplying the average daily wage by 300 and dividing by 52 to secure the weekly wage. On appeal to the court this computation was set aside as one that could not be "reasonably and fairly" applied in the particular case.

The Maryland Court of Appeals declined to consider the money value of board where a workman was working for $50 a month and board, affirming an award based solely on the money paid (Picanardi

v. Emerson Hotel Co., p. 310). What seems to be a more equitable rule was applied in an Illinois case in which a deduction of wages for powder, tools, etc., was not allowed to reduce the wage basis for the award (Springfield Coal Mining Co. *v.* Industrial Commission, p. 313). Tips were said by a New York court to be a proper part of the earnings of Pullman porters (Bryant *v.* Pullman Co., p. 317).

Concurrent contracts with three employers to render janitor service were held to entitle the widow to compensation based on the aggregate weekly earnings of her deceased husband rather than on the amount paid by the individual employer in whose service he was injured (In re Howard, p. 311). The basis of aggregate weekly earnings was not allowed, however, in a Massachusetts case in which a workman gave his services under independent contracts to two different employers, benefits being restricted to the statutory percentage of the weekly earnings with the employer in whose service the injury occurred (King's case, p. 314).

The Pennsylvania compensation board, in computing wages, deducts from the 6-month period used as a basis Sundays, holidays, and absences not due to the fault of the workman. This last provision was held to cover time lost by strikes (Rakie *v.* Jefferson & Clearfield Coal & Iron Co., p. 316).

A conversion in part of a time award to a lump-sum payment was upheld by the Supreme Court of Michigan against the contention that the employer's consent was necessary and that lump-sum payments were contrary to the intent of the act (McMullen *v.* Gavette Const. Co., p. 317). The necessity for an expensive operation was held by a New Jersey court to be sufficient ground for a commutation to a lump sum over the employer's objection, the circumstances being regarded as unusual and warranting a waiver of the customary procedure (Jensen *v.* F. W. Woolworth Co., p. 436).

The power of the Industrial Commission of Colorado to refuse approval to a settlement entered into by the injured man and the insurer for a less amount than provided by the statute was upheld in Industrial Commission of Colorado *v.* London Guaranty & Accident Co. (p. 320). The Industrial Commission of Utah was likewise held by the supreme court of that State to have control over settlements, so that an agreement between the guardian of an injured man and his employer for a lump sum in full discharge of all liability was held invalid without approval by the commission (Reteuna *v.* Industrial Commission, p. 318). The power of the district court to enter judgment on such an unapproved agreement was declared to be correspondingly limited. The discretion of the commission as to the desirability of continuing payments was held to be for its own exercise under the circumstances found by it.

The right of a beneficiary to a mandamus to compel a school board to pay an award due her was upheld by the Supreme Court of Utah over the contention that an individual had no such right (Woodcock *v.* Board of Education, p. 321).

Another case that may be noted here involves the status of awards under the New Jersey law, which gives them the same preference as unpaid wages for labor. Wages for two months are given a preferred status under this law, and it was held that the provision of the compensation act must be construed as subject to the same limitation (Steel & Iron Mongers, Inc., *v.* Bonnite Insulator Co., p. 321).

Separate awards, one covering the period of disability prior to death, and the other a death benefit, were held by the Supreme Court of Connecticut to be the intent of the law in a case in which the right of the widow was said to be distinct from that of her injured husband during the period of his disability (Jackson *v.* Berlin Construction Co., p. 350).

An unusual case was that of Decker *v.* Mohawk Mining Company (p. 353), wherein a girl was in receipt of compensation on account of the death of her father, and during the compensation period her mother remarried and her stepfather received a fatal injury. Compensation was awarded on account of the latter's death against the contention of the employer that double compensation could not legally be awarded.

DEPENDENTS.

The Supreme Court of Illinois affirmed an award of the State industrial commission refusing compensation to the illegitimate child of a deceased workman, holding that the word "child" as used in the statute meant only legitimate children (Murrel *v.* Industrial Commission, p. 354). The decedent in this case was living with a supposed wife and their children, and a ruling by the Supreme Court of Connecticut in a case before it, based of course on the law of that State, seems much more equitable. In this case (Piccinim *v.* Connecticut Light & Power Co., p. 355) the court affirmed the award in favor of a common-law wife and her three children as belonging to the dependent family. This action accords also with the position of the Supreme Court of California in affirming an award where a man and woman, ignorant of the marriage laws, thought that the procuring of a marriage license was the only action necessary to make them husband and wife. An award by the commission was affirmed (Temescal Rock Co. *v.* Industrial Accident Commission, p. 360).

The effect of remarriage on the right of a widow to awards on account of the death of her husband was considered in a case before the Supreme Court of Rhode Island in which it was said the decree,

having been for a fixed period, was not subject to change by subsequent happenings, so that the compensation should continue for the full period of the award (Newton *v.* Rhode Island Company, p. 357). A similar construction of the Illinois law was made by the Supreme Court of that State under like circumstances, the right being classed as a vested right (Wangler Boiler & Sheet Metal Works Co. *v.* Industrial Commission, p. 358).

The Pennsylvania law terminates a widow's benefits on her remarriage, their maximum period being for 300 weeks, payments to children continuing until the age of 16 years is reached. On the termination of benefits to any beneficiary for any cause, surviving beneficiaries are to receive such benefits as they would have been entitled to if they had been sole survivors at the time of the death of the injured man. This provision was construed to sustain an award to a child under 16 entered upon the termination of the 300-week period of the mother's benefit, against the contention of the employer that such was not the purpose of the law (Catlin *v.* Wm. Pickett Co., p. 359). The status of a minor dependent, not a child of the deceased, was considered by the Supreme Court of Colorado in a case in which a sister 17½ years of age was the sole dependent of the deceased. Benefits to children terminate at 18, but the court held that the award of the commission, extending over about 6 years, must be carried out in these terms, as the beneficiary was not a "child" of the deceased and so did not come under the limitation as to 18 years (Hasselman *v.* Travelers Ins. Co., p. 352).

Partial dependency was held to sustain an award in a case in which a minor left his home to work, promising to send his mother all his earnings that he could spare from his support. His death ensued before his first pay day, but an award as for partial dependency was upheld by a Massachusetts court (Freeman's case, p. 356).

A provision of the New York compensation law directs the payment of $100 to the State treasurer where an employee dies from an industrial injury without leaving dependents. This was held to apply in a case in which an award had been made to the injured workman himself and benefits paid between the interval of the injury and the death, this fact being without significance in so far as the leaving of dependents entitled to benefits was concerned (Stempfier *v.* J. Rheinfrank & Co., p. 351).

DISABILITY.

The Supreme Court of Colorado construed the law of that State as warranting an estimate of the degree of disability on the basis of its effect upon the capacity of the injured man to continue the labor in which he was employed at the time of his injury. The commission

had made the award on this basis, and the lack of adaptability on the part of the injured man was cited as sustaining the reasonableness of such action (Globe Indemnity Co. *v.* Industrial Commission, p. 361). The loss of a negligible fraction of the first phalange of an index finger was held not to support an award for permanent partial disability, benefits being restricted to the amount due for the period of temporary total incapacity for work (Edward E. McMorran & Co. *v.* Industrial Commission, p. 364).

The Superior Court of Delaware sustained an order of the industrial accident board reducing benefits from the rate for temporary total disability to an award for partial disability in view of an offer of the employer to reemploy the workman at a reduced rate (Frank *v.* Deemer Steel Casting Co., p. 365).

The Supreme Court of Illinois affirmed an award as for the total loss of an eye where there was such loss of the power of accommodation that a defective eye, useful at all only by the aid of special lenses, was of no service in coordination with the uninjured eye (Juergens Bros. & Co. *v.* Industrial Commission, p. 366).

The New York law was amended in 1916 so as to authorize awards not only for actual disabling injuries, but also for serious facial disfigurements. This provision was upheld by the court of appeals of the State as constitutional (Sweeting *v.* American Knife Co., p. 369), the case being later appealed to the Supreme Court of the United States. Here, in connection with other cases, the decision of the court was upheld, the court saying that impairment of earning power could not be regarded as the sole ground upon which compulsory compensation might be based (p. 370). However, this doctrine was not allowed to have play in an Indiana case in which the injury was a mutilation but not a disfigurement (Centlivre Beverage Co. *v.* Ross, p. 453); but an identical injury was held by the Supreme Court of New Jersey to sustain an award (Hercules Powder Co. *v.* Morris County Court, p. 452).

Injuries to two fingers were followed by infections and poor recovery so as to affect the usefulness of the hand to the extent of one-half. A Minnesota court awarded benefits accordingly, over the employer's contention that the award should be based on the loss of the fingers and not the injury to the hand, and the supreme court sustained the award (State ex rel. Broderick Co. *v.* District Court of Ramsey County, p. 454). A similar case was similarly disposed of under the law of Nebraska (Updike Grain Co. *v.* Swanson, (p. 362).

Under the law of Maine compensation was refused for an injury which resulted in the loss of use of two fingers, but not in their amputation. The injuries affected two fingers of the left hand and the injured man, a painter, suffered no loss of earning capacity.

As he had suffered neither the loss of his fingers nor a reduction of wages, the court affirmed the decision rejecting the claim (Merchants' case, p. 363). A more liberal position was sustained by the Supreme Court of Pennsylvania in a case in which amputation about an inch below the elbow was compensated as for the loss of use of the entire arm against the contention of the employer that the disability should be classed only as loss of the hand (Pater *v.* Superior Steel Co., p. 364).

A workman who had received benefits for the loss of a finger according to the legal schedule later found that another finger and the tendons of his hand were so affected as to interfere with his resumption of employment. An additional award was therefore made to cover the period of total disability in the employment in which he was engaged when injured, and this was upheld by the Supreme Court of Michigan over the employer's contention that no greater compensation could be given for the loss of a finger than the law allowed for the loss of a hand. It was held that the statute covers disability and is not limited to specific schedule awards in such a case (Schimmel *v.* Detroit Pressed Steel Co., p. 461).

Where a workman who had previously lost the second finger of his left hand subsequently received an injury resulting in the loss of use of his hand, the question was raised whether the award should be for the loss of use of the hand or of the three fingers which the workman had at the time of the injury. An award as for the loss of use of the hand was affirmed by the Supreme Court of Illinois, the court ruling that the fact that the hand was not perfect at the time of the second injury did not render its loss less complete (Mark Mfg. Co. *v.* Industrial Commission, p. 457).

The requirement that the disability shall continue for two weeks found in a number of laws was construed by the Supreme Court of Kentucky as not requiring the disability to occur during the first two weeks succeeding the accident in order to give rise to a claim (Raffaghelle *v.* Russell, p. 367). The discretion of the trial court in allowing a lump-sum commutation in this case in lieu of the eight years' periodical benefits was held not to have been improperly exercised.

In determining the rights of a claimant to an award as for permanent total disability, where the action was for a lump sum as against a continuing payment, the plaintiff challenged the right of the insurer to demand a physical examination, and the trial court upheld him therein. On appeal to the Court of Civil Appeals of Texas this judgment was reversed and the authority to demand an examination was upheld (Texas Employers' Ins. Assn. *v.* Downing, p. 442).

A case of second injury resulting in the loss of three-fourths of the workman's vision was before the Supreme Court of Minnesota;

the left eye had had but one-half the normal vision before the second injury, which resulted in the entire destruction of the right eye and further injury to the left. Compensation was awarded on the basis of permanent partial disability covering a term of 300 weeks. This was sustained by the court as against the contention that the award should be as for the loss of one eye and separately for the loss of one-half the other eye, which would have resulted in reducing benefits one-half (State ex rel. Melrose Granite Co. *v.* District Court, p. 455).

Quite similar cases were passed upon by the Supreme Court of Louisiana (Brooks *v.* Peerless Oil Co., p. 459) and the Supreme Court of Iowa (Jennings *v.* Mason City Sewer Pipe Co., p. 461). In the former case the vision of the one remaining eye of the workman was so impaired as to make it impossible for him to reengage in his former employment or in fact in practically any employment for which he was qualified. An award as for permanent total disability was therefore affirmed. In the Iowa case there was total blindness following the loss of the second eye, and an award was made as for permanent total disability, but reduced by the schedule amount fixed for the loss of one eye. This was said to be "an effort on the part of the commissioner at attaining equity," his theory being that though the disability was total the injury was less than would have been the loss of two eyes.

Permanent total disability resulted from the loss of a leg by a workman who had previously lost an arm and had been employed as a watchman. The Illinois court adopted the position of the courts of Massachusetts and New York in classing this as permanent total disability, and affirmed a lump-sum award to be followed by a pension for life (Wabash R. Co. *v.* Industrial Commission, p. 458).

An unusual claim was made in a case before the Supreme Court of Rhode Island (Keyworth *v.* Atlantic Mills, p. 463) in which a workman suffered multiple injuries, resulting in the payment of compensation as for total disability for an indefinite period but not exceeding 500 weeks. This was held to be the full measure of benefits contemplated by the act, so that a claim for specific benefits for the loss of sight of an eye could not be granted.

INJURIES.

The question of industrial injury arose in a case in which a workman engaged in heavy but not unusual toil died from hemorrhage which developed immediately after the last piece of work was done. The employer contended that a preexisting disease of the heart was the cause and not an accident as that term is used in the compensation act. The Supreme Court of Illinois affirmed the award, and ordered execution of judgment on it (E. Baggott Co. *v.* Industrial

Commission, p. 390). Lobar pneumonia was said to have been caused by an accidental injury in a case under the Pennsylvania law, so as to warrant an award of compensation (Murdock *v.* New York News Bureau, p. 392).

The question of occupational diseases has been decided in a few States by mandatory legislation, though in most the matter has not received specific attention. Anthrax infection incurred through a pimple which a workman had scratched open while dressing in the morning was classed by the Illinois Supreme Court as an accidental injury and an award of compensation was affirmed (Chicago Rawhide Mfg. Co. *v.* Industrial Commission, p. 392). The New York Court of Appeals on the other hand was unable to take judicial notice of the probable presence of anthrax germs, so that no presumption could be indulged in favor of the proposition that a man working about hides in a tannery was likely to receive an anthrax germ into an open sore as a result of employment. An award of compensation was therefore reversed (Eldridge *v.* Endicott, Johnson & Co., p. 393). A similar result was arrived at by the Supreme Court of New York, Appellate Division, in denying an award granted by the industrial commission in the case of a workman who inhaled the disease-laden breath of a horse infected with glanders and became himself infected with the disease, dying therefrom (Richardson *v.* Greenburg, p. 394). It may be noted in connection with these two cases that the New York law is now amended so as to include certain occupational diseases, anthrax and glanders being among them.

The effect of excessive exposure to influenza due to employment as a hospital steward at the time of the epidemic of October, 1918, was held to be an "injury or disease rising out of the employment," entitling the widow to an award (City and County of San Francisco *v.* Industrial Accident Commission, p. 396). The same court extended this principle to cover the case of a safety engineer of a mining company who was requested by the superintendent to aid in the nursing of the patients in a small community of miners and their families residing at the mine. A few days afterwards he himself contracted influenza and was left with a weak heart, largely incapacitating him for work, and he was allowed compensation (Engels Copper Mining Co. *v.* Industrial Accident Commission, p. 398).

Though the Massachusetts law has been construed as governing occupational diseases, occupational neurosis of a cigar maker due to faulty posture, which was in turn the result of a physical deformity, was said not to come under the act. "Although the condition arose during the course of the employment it can not be found to have arisen from it" (Pimental's case, p. 399).

Disability due to infections following wounds accidentally caused are generally regarded as the proximate result of the original injury. This position was contested by the employer in a California case (Bethlehem Shipbuilding Corp. *v.* Industrial Accident Commission, p. 426), in which erysipelas of the face developed by the communication of infectious germs from an injured toe, but the Supreme Court affirmed the award.

ARISING OUT OF EMPLOYMENT.

The laws of most States, though not all, require that the injury shall arise out of the employment and also in course of the same. This provision was involved in a case before the Supreme Court of Illinois in which a workman whose overalls were greasy and oil soaked was burned to death as the result of the ignition of matches which he was carrying in his pocket. The practice was said to be so common that it was not unreasonable for the workman to have the matches, and their accidental ignition while at work was an accident within the law for which compensation should be allowed (Steel Sales Corp. *v.* Industrial Commission, p. 403).

The Supreme Court of New Hampshire affirmed an award in the case of a workman who was visiting about the shop in an interval of unemployment and was injured by an unguarded dangerous machine. The custom of visiting was said to be known to the employer so that the man was regarded as in the course of his employment at the time (Barber *v.* Jones Shoe Company, p. 418).

In Massachusetts compensation was allowed for the death of an insurance solicitor and collector, killed while attempting to catch a street car, as against the contention that his death was due to a common hazard, the court holding that he was exposed to these hazards as a result of his employment, so that they should be classed as hazards of the occupation (Moran's case, p. 404). The Supreme Court of Wisconsin took a like position with regard to a city salesman whose duties required much street travel (Schroeder & Daley Co. *v.* Industrial Commission, p. 428). The defense of "common hazard" was likewise rejected where a workman was caught among the bricks of a building in which he was employed which was blown down by a tornado, and escaping ammonia fumes also conduced to his death (Central Illinois Public Service Co. *v.* Industrial Commission, p. 407). Similarly the Supreme Court of Connecticut found that a park workman who took refuge under a tree as the only shelter at the time of a storm was subject to an unusual exposure on account of his employment and advised the affirmation of an award in his favor (Chiulla de Luca *v.* Board of Park Commissioners, p. 409).

Death due to a fight over the possession of a tool was held to be compensable as arising out of and in the course of employment under the Ohio law (Industrial Commission *v.* Pora, p. 405); so in Indiana where a workman, enraged at a remark of his fellow worker, threw a hammer at him inflicting fatal injuries (Mueller *v.* Klingman, p. 406); and in Nebraska where ill feeling had existed for some time between two workmen, due partly to their employment relations and partly to personal matters. A factor was the known quarrelsome disposition of the offending workman. An award of compensation was therefore affirmed by the supreme court over the disallowance of the court below (American Smelting & Refining Co. *v.* Cassil, p. 409). A point of interest in this decision was the credit given in the compensation award for an amount previously received by the claimant on account of insurance carried by the company on the life of the deceased workman at its own cost.

A workman fatally injured in a riot by strikers, while attempting to defend female fellow workers, was held to have been injured in the course of his employment, the injury also arising out of the same (Baum *v.* Industrial Commission, p. 415).

Pranks of fellow employees, when the custom is known to the employer, become an incident of the employment, so that an injury resulting therefrom would be classed as arising in the course of employment and compensable (White *v.* Kansas City Stock Yards Co., p. 402). The Pennsylvania law does not require that the injury arise out of the employment, and an unexplained death by a bullet wound, presumably not suicidal, was held compensable by the supreme court of that State (Keyes *v.* New York O. & W. Railway, p. 401).

The Supreme Court of Minnesota held that a woman employed as elevator starter by a hotel had not left her employment even though she had "punched out" and was dressed for the street, when she was on practically continuous duty and was presumptively attending to duties incident to her employment (State ex rel. Raddison Hotel *v.* District Court of Hennepin County, p. 411). The injury was fatal in this case, and the question arose as to whether her children were dependent, the husband having abandoned the family three years before the accident. Though not technically orphans, the children were held to be entitled to compensation under the law.

Injury received on the way to work was held to arise out of and in the course of employment, where it was necessary to follow a given route which was dangerous by reason of the constant movement of trains and cars (Great Lakes Dredge & Dock Co. *v.* Totzke, p. 413). It would seem reasonable that this principle should apply in a case where the employer furnishes the means of transportation for the workers in his service, and this was the position taken by the Su-

preme Court of Connecticut where such transportation was furnished (Scalia *v.* American Sumatra Tobacco Co., p. 414).

Where travel is a part of the employee's duty, the hazards may be regarded as incident to the service. Thus in a case before the Supreme Court of Pennsylvania (Haddock *v.* Edgewater Steel Co., p. 426) an employee returning home late at night from a trip undertaken as a part of his duty was killed by an automobile. The circumstances were regarded as surrounding his employment, and the widow was allowed compensation.

To what extent the continuity of the employment relation is interrupted at lunch time is a matter for determination in accordance with the facts. Thus where a workman had returned from his home before the expiration of the lunch hour and joined other employees in a room where they were accustomed to eat, the conduct that gave rise to the injury was held to be "entirely foreign to the business of the subscriber," so that no compensation should be paid (Rochford's case, p. 416). A contrary view was taken by the Supreme Court of Kansas where a girl 17 years old was injured during the lunch hour while at play in a manner known by the employer to be a custom. The injury was therefore regarded as arising out of and in the course of the employment (Thomas *v.* Proctor & Gamble Mfg. Co., p. 417).

The fact that an employee had allowed a stranger to do part of his work did not bar recovery where the injury was not caused by such act but was incurred in an attempt to perform a proper act in the employer's interest (Employers' Liability Assurance Corp. *v.* Industrial Accident Commission, p. 427).

INJURIES DUE TO THIRD PARTIES.

The Minnesota law authorizes a workman injured in the course of his employment by the negligence of a third party to sue such third party; however, if the latter is himself under the compensation law the recovery may not exceed the amount of compensation fixed by the statute. In accordance therewith, an injured workman sued a third party for his injury, the latter being under the statute, and it moved for a dismissal of the common-law action, asking the court either to grant or to deny compensation under the act. The court granted this request saying that, as the defendant invited the award and would not contest its liability up to the extent fixed by the statute, "there is nothing now to do but fix compensation." The suit was therefore dismissed and the case remanded for a determination of the amount of benefits due (Hansen *v.* Northwestern Fuel Co., p. 419). The limitation of the third party's liability to the amount payable as compensation under the law was, however, held not to

apply in a case where the negligent third party caused the injury by an act not connected with the conduct of his business, but purely in the pursuit of his personal affairs. Recovery in a larger amount was therefore affirmed, and the right to sue was sustained even though the injured man had entered into an agreement with his employer for the payment of compensation, such agreement and payment thereunder not being sufficient to transfer the right of action to the employer (Podgorski *v.* Kerwin, p. 421).

Under the Maryland law it was held that where compensation had been awarded a claimant, his election barred a suit for damages against the negligent third party, the law providing that such settlement should be in lieu of all rights of action against any person whomsoever (Mayor and Council of Hagerstown *v.* Schreiner, p. 420).

The sending of a letter stating that a widow was contemplating making a claim for the death of her husband was held by the Supreme Court of Colorado (Arkansas Valley Ry., Light & Power Co. *v.* Ballinger, p. 423), not to be an election such as would bar the bringing of a suit for damages against the third party liable for the injury.

A Federal law provides compensation for civil employees of the United States, which includes railway mail clerks; but the act was held not to preclude an action for damages against a negligent third party on account of injury to such an employee (Dahn *v.* McAdoo, Director General of Railroads, p. 424).

INSURANCE.

The Supreme Court of Colorado affirmed a decision of the court below as to the liability of a school district to pay insurance premiums into the State fund, over its contention that the district was not an employer under the act, and that in any case the proper method of procedure had not been adopted, the court rejecting both these contentions (School District No. 1 in City and County of Denver *v.* Industrial Commission, p. 428).

The legal battle as to the right of private insurance companies to do business in Ohio would seem to have reached its end, in the absence of further legislative action, in decisions by the supreme court of the State and by the United States Supreme Court upholding the authority of the commission to issue regulations to carry out those provisions of the law which deny to self-insurers the right to insure their liability in stock companies. The State court discussed at some length the grounds for the action taken by the legislature and declared the enactment of the law to be within its power and fully supporting the action of the commission (Thornton *v.* Duffy, p. 429). The Supreme Court of the United States briefly disposed of the

matter when it was taken before it, affirming the decision of the court below (p. 432).

As in many other States, self-insurance is permitted under the law in California where the industrial commission is satisfied with the solvency of the employer. However, the law permits the commission to require the deposit of securities to guarantee payment, and the commission was held to be within its rights when it required the deposit of bonds as a prerequisite to granting to a corporation the privilege of carrying its own insurance (Bank of Los Banos *v.* Industrial Accident Commission, p. 432).

Where employers have employees in different lines of work, some of them not lawfully under the provisions of the compensation act, employees in such work should not be considered in computing the amount of premiums due for compensation insurance. The foregoing was the finding of the Supreme Court of Washington where an employer had men who were engaged in dredging operations and were therefore in maritime employment (Puget Sound Bridge & Dredging Co. *v.* Industrial Insurance Commission, p. 434).

MEDICAL AND SURGICAL AID.

The provision that the employer must furnish necessary medical and surgical aid was held to be binding in a California case where there was knowledge on the employer's part of the need of treatment, even though the treatment was rendered by a physician selected by the injured man, the employer taking no action; but after the employee had indicated that no further medical services were required he could not secure additional services at the expense of the employer (Leadbetter *v.* Industrial Accident Commission, p. 437). Where the employer gives clear and adequate directions as to how suitable medical service is to be obtained, he is not to be held liable for service from a different source, even as against the defense of the claimant's ignorance leading to unintentional departure from the course prescribed by the employer (Cella *v.* Industrial Accident Commission, p. 439). Still more would it be true that a voluntary abandonment of the physician provided by the employer, followed by recourse to another, would not charge the employer with liability for the costs of the services of the second physician (Radil *v.* Morris & Co., p. 438). However, the employee's voluntary change of physicians will not be construed as working a forfeiture of the right to compensation as if for refusal to accept reasonable surgical, etc., services (Neary *v.* Philadelphia & Reading Coal & Iron Co., p. 439); but where an operation is necessary to restore working capacity and is not dangerous, refusal to undergo the operation was held by the Supreme Court of Michigan to suspend payments until the workman should submit (O'Brien *v.* Albert A. Albrecht Co., p. 446). The subject of concur-

rent awards was involved in this case, the workman having received a second injury while drawing compensation for the first. The law makes $10 per week the maximum, and this was held to apply, "whether it is paid by one employer or several."

The same court on the same date had before it a case (Rose *v.* Desmond Charcoal & Chemical Co., p. 441) in which a workman had drawn compensation for more than three years and refused to submit to an X-ray examination to determine his present condition. The industrial commission declined to terminate the payment of benefits on account of this refusal, but the supreme court took the opposite view and required the submission to an examination as a condition to the further receipt of benefits. The Supreme Court of Nebraska, on the other hand, refused to adopt this position in a case in which the employer's demand that the claimant submit to the examination was not supported by the opinion of physicians, and it appeared that no examination was necessary. On a new trial there was evidence that an X-ray picture was "a reasonable and necessary thing," but the trial court did not so find, and the supreme court refused to change its position in view of all the circumstances (U. S. Fidelity & Guaranty Co. *v.* Wickline, p. 444).

Where services in excess of the statutory requirement are rendered at the request of the employer, with an assurance of payment, the Supreme Court of Minnesota held that the statutory amount would not serve as a limitation on the employer's liability for medical benefits (Collins *v.* Joyce, p. 440).

The Supreme Court of Illinois held (Central Locomotive & Car Works *v.* Industrial Commission, p. 325) that a notice of claim for medical attendance was not sufficient in itself on which to base a much later claim for compensation.

ATTORNEYS' FEES.

In the Wickline case above, the injured woman had sought to secure the taxing of her attorney's fees as part of the costs for which she was entitled to reimbursement. The court held that as the law existed at the time this could not be done, though an amendment of 1919 changed the law in this regard. The power of the State board to determine the amounts of attorney's fees was upheld in a Kentucky case (Rawlings *v.* Workmen's Compensation Board, p. 308), in which the board had fixed a fee less than the attorney's claim, and less than the amount contracted for with the claimants, and less also than the statutory maximum; the attorney had a remedy in an action by appeal to the circuit court, so that a writ of mandamus could not be obtained. The Minnesota law was construed as making no provisions for attorneys' fees, and as they are not allowed in ordinary

civil actions the absence of a specific provision prevented a recovery (Johanson *v.* Lundin Brothers, p. 309).

MINORS ILLEGALLY EMPLOYED.

The Supreme Court of Indiana affirmed a judgment for damages in favor of minors illegally employed, holding that the compensation law covered only lawful employment (New Albany Box & Basket Co. *v.* Davidson, p. 448). In this case both the failure to secure a certificate and the employment of children under 16 years of age at dangerous machinery were involved. The same principle was applied by the Supreme Court of California in refusing to hold an insurance company liable for a compensation award made to a child employed without an age and schooling certificate (Maryland Casualty Co. *v.* Industrial Accident Commission, p. 449). On the other hand, the Supreme Court of Washington found the law of that State to be broad enough to cover all employments. civil suits for damages for personal injuries having been entirely abolished (Rasi *v.* Howard Mfg. Co., p. 447). The Legislature of Wisconsin has adopted a special provision with regard to the employment of children in violation of the child labor laws, providing that in such cases treble compensation shall be allowed for any injury incurred during the course of such illegal employment; this provision was held constitutional by the Supreme Court of the State (Brenner *v.* Heruben, p. 450).

ELECTION.

The effect of an election by the employer upon a minor was considered by the Supreme Court of Kansas in a case (Chicago R. I. & P. R. R. Co. *v.* Fuller, p. 371) in which the injured employee, 20 years of age, denied the applicability of the law to him on the ground that the matter is contractual, and that a minor is not bound by his contract. This contention was rejected, and an award of compensation affirmed, no suit for damages being permitted.

The Illinois statute prior to the amendment of 1919 was elective, with a presumptive election as to certain classes of employment. The owner of a number of buildings who had no other business than their management and maintenance had not affirmatively accepted the act and denied that he was subject to it. However, the supreme court took the view that he was engaged in a business or occupation subject to the presumptive provisions of the act, and an award in favor of one of his employees was affirmed (Storrs *v.* Industrial Commission, p. 372). In this connection reference may be made to a decision of the District Court of Appeal of California in the Lauzier case above (p. 42), where the maintenance of a few small houses was regarded as not being the " business " of the owner.

An election out of the law was attempted in a case that was before the Supreme Court of California in which a physical examination prior to employment disclosed the fact of the applicant's susceptibility to hernia. The company therefore required him to sign a release for any disability due to this cause, but the court held that the attempted release was of no avail, being directly forbidden by the statute (Hines, Director General of Railroads *v.* Industrial Accident Commission, p. 456).

Other cases not strictly involving the question of election may be here noted as they turn on the question of what law was applicable. In one of these the Supreme Court of Illinois (Chicago & A. R. Co. *v.* Industrial Commission, p. 456) sustained an award for compensation under the State law as against the contention that if any recovery was possible it must be under the Federal liability act. The employee in the case was a watchman guarding property in the company's yards in the State of Illinois. The court found that his duties constituted no real or substantial part of interstate commerce and denied the railroad company's contention, affirming the award.

A rather unusual case was before the Supreme Court of California, involving concurrent employments, one employer doing both an interstate and intrastate business, the other doing only an interstate business. Both were railroad companies, and the employee was killed while performing his duties, upon the simultaneous approach of trains of each company. The widow executed a release as to the company doing an interstate business and obtained an award against the other employer, who thereupon appealed, claiming that the injured man was not its employee, and that any redress available was under the Federal liability act. The court did not accept this position, and also held that any release that the widow might have executed would not affect the obligation of the employer under the State compensation law; the award was therefore affirmed (San Francisco-Oakland Terminal Railway *v.* Industrial Accident Commission, p. 382).

Under an ordinance of the city of St. Paul firemen injured in the course of employment are entitled to six months' pay during disability. The obligation of the city to pay this amount, without regard to the subsequently enacted workmen's compensation law, which was also applicable, was upheld by the Supreme Court of the State (Markley *v.* City of St. Paul, p. 383).

WILLFUL MISCONDUCT.

The California law provides increased benefits in cases where the injury is caused by the willful misconduct of the employer. The constitutionality of this provision was upheld, and it was applied to

a case (E. Clemens Horst Co. *v.* Industrial Accident Commission, p. 463), in which a female employee's hair was caught in an unguarded shaft near the place where her employment required her to be. This additional award was held not to be a penalty for misconduct but only an increased benefit properly due as compelling the employer to carry a greater proportion of the burden in such case. The Supreme Court of Iowa refused to allow an action for exemplary damages in a case in which the reckless negligence of the employer was said to be the cause of the injury for which compensation had been awarded (Stricklen *v.* Pearson Construction Co., p. 466). The court held that after the plaintiff had accepted compensation he had no standing to assert further liability.

The remaining cases under this head refer to the willful misconduct of the employee instead of the employer. In one of these (Indianapolis Light & Heat Co. *v.* Fitzwater, p. 465) the employer contended that the workman's injury was due to his failure to observe safety requirements prescribed by it. However, the court found that no great attempt had ever been made to enforce them and allowed the award to stand. The same court (Appellate Court of Indiana) refused to set aside an award in a case in which a workman met his death by continuing work in a place in which he had attempted to wear a respirator, but took it off, because, as he said, it did not work. The court held that it was a fair conclusion that the instrumentality had been put aside because out of order and there was no obstinacy or stubbornness involved, so that the award should stand (General American Tank Car Corp. *v.* Borchardt, p. 467). The Supreme Court of California likewise refused to cut off compensation where an injury was due to a hazard against which explicit instructions had been given, but where the action was impulsively taken to catch falling objects (Hyman Bros. Box & Label Co. *v.* Industrial Accident Commission, p. 468). Other cases noted in this connection before the same court involved the attempt to wipe off a stream of grease from moving machinery without regarding the warning "stop before oiling," etc. (Western Pacific R. R. Co. *v.* Industrial Accident Commission, p. 469); and one where a workman undertook to chip off a burr from a bar in which he was drilling holes without putting on the goggles which were specifically directed to be used in such cases. Here the customary award was reduced one-half under the law covering willful misconduct, as the workman had voluntarily and intentionally omitted the use of the safeguards directed, on the ground that he disliked them and they were "in his way" (McAdoo, Director General of Railroads *v.* Industrial Accident Commission, p. 470).

The Minnesota law denies compensation where intoxication is the proximate cause of the injury, the burden of proof being on the em-

ployer. Where an intoxicated fireman at a hotel fell from a stairway that had no railing, it was held that this fact, together with other causes of hazard, might be regarded as proximate causes, so that an award would not be disturbed (State ex rel. Green *v.* District Court of Ramsey County, p. 435).

EXTRATERRITORIALITY.

A prolonged discussion of the applicability of the California law to injuries occurring under home contracts but outside the territory of the State would seem to be terminated by the finding of the supreme court of the State in a case (Quong Ham Wah Co. *v.* Industrial Accident Commission, p. 385) in which an amendment to the compensation law declaring it applicable in such cases was upheld. The law as drafted was limited to workmen, residents of California, but it was held that the Constitution of the United States prevented discriminatory privileges, so that the law must be construed as applying to all citizens of the several States contracting in the State of California. As so construed the statute was upheld and declared applicable to an employee of a packing company injured in Alaska. The Supreme Court of the United States refused to review this action (p. 388).

A New York corporation doing part of its work in Pennsylvania paid compensation to a New York workman injured in Pennsylvania under a claim made by him in accordance with the Pennsylvania statute. A subsequent claim was made for the same injury under the New York law, which the commission allowed; the supreme court, appellate division, however, denied the right to this compensation on the ground that there was no New York contract sustaining such proceedings (Thompson *v.* Foundation Co., p. 388). The Supreme Court of Illinois was not able to find in its compensation law any provision that "can be construed to authorize compensation for an injury occurring outside of the State." An award allowed by the industrial commission was therefore reversed where the injured man was employed at the time on the Kentucky side of the Ohio River in excavation work connected with the construction of a bridge between the two States (Union Bridge & Construction Co. *v.* Industrial Commission, p. 384).

LABOR DISPUTES.

An unusual situation with regard to the instigation of labor disputes was considered by a United States Circuit Court of Appeals in Lamar *v.* United States, p. 168). The appellant was found guilty of attempting to instigate strikes to prevent war production and was held to have been guilty of conspiracy to restrain foreign trade and

war production, so that the Clayton Act limiting strike injunctions was no defense.

The widely-known Court of Industrial Relations of Kansas was found by the supreme court of the State to be constitutional in the face of contentions that it was not a legally constituted body (State ex rel. Court of Industrial Relations *v.* Howat et al., p. 170). The so-called court is not regarded as judicial in its character, but it may receive the aid of a district court in support of its decisions, so that offenders against it may properly be imprisoned.

LABOR ORGANIZATIONS.

BOYCOTT.

A case that has long been before the courts, and has received prior notice, is that of Clarkson *v.* Laiblan (p. 179), in which the plaintiff was in this instance awarded damages for loss of occupation by reason of the unlawful interference of a labor organization with his opportunities for employment. In another case the Court of Appeals of New York did not assess damages, but found that a combination of labor unions was unjustifiably and unlawfully interfering by boycott with the rights of the plaintiff, and an injunction was accordingly authorized (Auburn Draying Co. *v.* Wardell, p. 172).

Restraint of interstate commerce by boycott and secondary boycott was found by the Supreme Court of the United States to be carried on unlawfully in Duplex Printing Co. *v.* Deering (p. 174). The manufacturer at Battle Creek, Mich., had been subjected to strike, but the chief activities were in New York City and vicinity, and these activities were found to be not such as the Clayton Act made legal.

Combinations of manufacturers, rather than of laborers, were condemned in cases before the circuit court of appeals, one in the seventh circuit involving an attempted monopoly through a combination of manufacturers and union workers (Boyle *v.* United States, p. 181). Switchboard and like appliances for electrical installation were the subject of an agreement which was held unlawful in this case. Quite similar was the finding of the court of the third circuit, in which the tile industry was likewise made the subject of an agreement between dealers and the tile setters' union (Belfi *v.* United States, p. 183).

COLLECTIVE AGREEMENTS.

The effect of a trade or collective agreement, i. e., a contract between the employer and the members of a union, received consideration in a few cases of interest. Their validity was recognized in a case (Nederlandsch Amerikaansche Stoomvaart Maatschappij *v.* Steve-

dores & Longshoremen's Benev. Soc., p. 184) in which members of labor unions who were under contract to load and unload vessels at a fixed price refused to complete the work of unloading a vessel without an increase in pay. The court awarded damages for their violation of the contract. That such an agreement was legal, even though it debarred an outside worker from employment, the result of the contract being to establish a closed shop, was held by the Supreme Court of Massachusetts (Shinsky *v.* O'Neil, p. 187).

A similar conclusion was reached in a case of like nature that came before the New Jersey courts. Here the discharged workman claimed that a monopoly had been established in violation of a State law, but the statute was held not to apply (Reihing *v.* Local Union of Electrical Workers, p. 188).

The violation of an agreement with a plumbers' union led to the inability of a contractor to complete his contract, and his surety was held liable on the failure to conclude the work within the time specified. The insurance company claimed that it was exempt from liability on the ground that the inability to secure labor was due to a strike, but the court denied this contention, holding that the contractor's own act in violating the agreement was the moving cause in the difficulty, so that it could not be called a strike (Uden *v.* Schaefer, p. 190).

A contract between a railroad company and the union of which its employees were members was held to control rather than an award by the War Labor Board before which the railroad had refused to appear. The contract was terminable upon 30 days' written notice, which the employees gave, but the company refused to enter into any discussion and the work continued under the old terms. Subsequently, a demand for back pay on the basis of the award of the War Labor Board was brought, but was denied by the court, which held that the collective agreement still prevailed (Parker *v.* First Trust & Savings Bank, p. 186).

EXTORTION.

During the year 1918 an organization representing members and business agents of unions of painters, glaziers, wood finishers, etc., in the city of Chicago, established a set of rules for the violation of which it assessed penalties against employers, including the payment of certain sums to the unions. If the money was not forthcoming the plate glass in the employer's store was broken and could not be replaced without the payment of the penalty, which was frequently increased. A conspiracy was found and convictions and fines followed, the court finding that the series of acts constituted

different parts of one conspiracy, so that no particular one need be singled out as the basis for prosecution (People *v.* Curran, p. 191).

Though not involving criminal prosecution, an action for damages was carried to a successful conclusion in a case in which violence and the destruction of property attended the efforts of a labor union to compel the unionizing of the mines of a number of companies where the open shop was being maintained (United Mine Workers of America *v.* Coronado Coal Co., p. 192). Damages of $200,000 trebled under the antitrust act were, therefore, allowed but without the interest claimed.

MEMBERSHIP

It is a general rule that unions will be permitted to determine the qualifications of their members and their rights within the union. However, the court will give relief if arbitrary action is taken or inadequate provision is made for the safeguarding of rights.

Thus, in Staffan *v.* Cigar Makers International Union (p. 202), it was found that a member had been dropped without just cause, so that his widow was entitled to recover the insurance benefits which membership involved. On the other hand, an amendment to the constitution of a union which operated to forfeit the benefits which would have accrued prior to the change was held not to be unreasonable, and the anticipated beneficiary was held not entitled (Tierney *v.* Perkins, p. 201).

Charges of wrongdoing under the rules of the union led to the suspension of members of a railroad brotherhood, which involved the loss of insurance. Instead of appealing to the highest authority in the order after their suspension, the plaintiffs took the case to the courts, claiming wrongful expulsion. The matter was fully reviewed and the acts of the union were found, though harsh and drastic in some respects, not to be so unreasonable or unfair as to warrant outside interference (Simpson *v.* Grand International Brotherhood of Locomotive Engineers, and Smith *v.* Same, p. 233).

The same court (Court of Appeals, West Virginia) had before it the complaint of three members of the Brotherhood of Railway Trainmen, in which they sought to prevent a committee of the brotherhood from making an agreement with their employer modifying an old rule under which the complainants enjoyed certain benefits of which they would be deprived by the proposed new agreement. It was held that the action of the committee was in due form and presumably for the general good of the brotherhood, and that the old rule did not create a property interest that the complainants could defend (Burger *v.* McCarthy, p. 238).

In the broader field of the rights of unions themselves is a case (Gardener *v.* Newbert, p. 274) in which a local lodge was disfran-

chised and expelled from an international and a new lodge chartered to take its place to operate in the same territory. Members of the original lodge thereupon sought an injunction to prevent the international lodge from interfering with their original status. This was shown to involve interests in property and other valuable rights which were held by the court to be entitled to protection.

A very similar situation developed in a New York case involving a local union which had had long-continued relations with the international, but owing to personal differences officers and members of the local were suspended and finally the local itself. The court granted an injunction to protect the local organization both in its rights of international control and against a requirement that its members join another local (Bricklayers, Plasterers & Stone Masons Union *v.* Bowen, p. 275).

The same principle was applied to a manufacturers' organization in which an association of clothing manufacturers undertook to discipline a member for refusing to dismiss his workmen, in an attempt to compel the workmen's union to permit arbitration, and a fine of $2,000 was assessed. The employer refused to pay the fine and a suit was brought to enforce its collection, but the court refused to entertain the action on the ground that the association had no authority in law to fix an arbitrary assessment by way of a fine (American Men's & Boy's Clothing Manfrs. Assn. *v.* Proser, p. 280).

Involving the insurance feature rather than that of membership is another case that may be noted in this connection, in which a locomotive engineer lost his employment by reason of color blindness. His policy in the association to which he belonged called for benefits in case of loss of sight, but the court held that the impairment suffered did not warrant the payment of benefits under the terms of the policy (Fallin *v.* Locomotive Engineers Mutual Life & Accident Insurance Assn., p. 200).

An entirely different phase of the question of membership was involved in cases in which the matter of deportation of aliens was before the courts, and membership in the order of Industrial Workers of the World was found to be sufficient basis for upholding a deportation order, in view of its avowed program (Ex parte Bernat, p. 195).

A similar conclusion was arrived at where the question involved was that of canceling the naturalization certificate of a member of the I. W. W., citation being made from publications of the order as evidence of its nature (United States *v.* Swelgin, p. 197).

A third case involved the conviction of a member of the crime of criminal anarchy under a Washington statute, the conviction resulting from the admission into evidence of various documents of an inflammatory character issued by the order and in the possession of the defendant (State *v.* Lowery, p. 198).

Like the Bernat case, a case before the United States Court of Massachusetts considered the deportation of a considerable number of aliens, but as members of the Communist Party or the Communist Labor Party. The Departments of Labor and of Justice had cooperated in making a number of arrests, but on this trial it was found that the organizations named were not of an essentially illegal nature under the Federal statute relied upon, so that membership therein was not of itself a basis for deporting the persons arrested (Colyer *v.* Skeffington, p. 206).

The right of employers to discharge their employees "for any reason or no reason" naturally involves the right to discharge workmen for membership in labor unions. This principle was held to be applicable to city firemen in the employ of the fire department of Dallas, Tex. (McNatt *v.* Lawther, p. 208). A like situation led to a similar conclusion in the city of San Antonio (San Antonio Fire Fighters Union *v.* Bell, p. 210).

INTERFERENCE WITH EMPLOYMENT.

The Supreme Court of Georgia sustained the legal right of an employer to conduct his business as an open shop without interference by organizations from outside which sought to secure the violation of contracts which included an agreement not to join a labor union during the period of service (Callan *v.* Exposition Cotton Mills, p. 203).

A similar view was taken by a California court where a union of glassworkers sought to prevent employees of the plaintiff's company from carrying out their contracts by various inducements. An injunction was therefore granted against the threatened interference (Patterson Glass Co. *v.* Thomas, p. 203).

A different conclusion was arrived at in a Texas case (Sheehan *v.* Levy, p. 205), in which the court refused an injunction and damages as for interference with employment where a master plumber charged other master plumbers with complicity with a union of workers to prevent his obtaining men for his jobs; while the workmen were said to be within their rights in refusing to work if they chose to do so.

PICKETING.

The act of picketing is not illegal per se since the passage of the Clayton Act, but the effect of this statute has been widely discussed. Thus, in the United States District Court of Missouri it was held that no injunction could be granted against pickets who sought to make effective a strike to compel the maintenance of a closed shop (Kinlock Telephone Co. *v.* Local Union, p. 212). The fact that employees of a company were involved in this case distinguishes it from

those cases in which outside organizations are active, as in Moore *v.* Cooks, Waiters & Waitresses Union (p. 221), where picketing to compel the discharge of employees and the employment of union workers was held to be subject to injunction.

In another case (Rosenberg *v.* Retail Clerks Association, p. 223), picketing which interfered with the customers of a store was declared unjustified as constituting threat or menace against them which should be enjoined without requiring the owner to institute further proceedings.

The right of the owner of a motion-picture theater to operate his own machine without being subjected to picketing and called unfair to union labor was declared in a Missouri case, the maintenance of such a course being classed as unlawful conspiracy (Hughes *v.* Kansas City Motion-Picture Machine Operators Local, p. 214).

Quite similar to the situation in the Moore case, above, was one before the New York Supreme Court in which a restaurant corporation was the subject of picketing in an attempt to compel unionization, which the court held subject to injunction (Stuyvesant L. & B. Corporation *v.* Reiner, p. 211).

In an Illinois case a portion of the employees of a corporation went on strike and picketed the establishment, resorting to violence and intimidation to compel the remaining employees to quit work. A temporary injunction had been procured but without effect upon the picketing and other unlawful acts. The members of the union denied that they had violated the injunction, and also challenged the power of the court to issue the injunction. They were found guilty, however, and the judgment against them was affirmed by the supreme court (Lyon & Healy *v.* Piano etc. Workers International Union, p. 217).

A United States district court found the Clayton Act not applicable in a case (Dail-Overland Co. *v.* Willys-Overland (Inc.), p. 218) in which it appeared that overt acts had been done in furtherance of a conspiracy which were beyond any possible classification as the lawful carrying out of legitimate objects. There was restraint of commerce and a continued effort to interfere with production even after the evident failure of the strike. The original injunction was therefore continued.

An Arizona statute permits injunctions against picketing only when necessary to prevent injury to property rights and to prevent unlawful acts. This was held by the supreme court of the State (Truax *v.* Corrigan, p. 222) to be a constitutional enactment, the court saying also that the good will of the public while valuable to business success does not belong to any man as "a vested property right."

RESTRAINT OF TRADE.

An interesting group of decisions have been rendered in connection with the conditions affecting dock laborers, etc., in New York City. In June, 1919 the supreme court in special term had before it the case of a trucking company employing both union and nonunion men on terms satisfactory to all parties concerned. However, checkers, weighers, and clerks at the various terminals undertook to compel the employer to unionize his business by refusing to handle any goods delivered by his men. An injunction was allowed restraining the unions from thus refusing to handle goods offered for transportation, the injunction to remain in force until the trial on the merits (P. Reardon (Inc.) *v.* Caton and Reardon *v.* International Mercantile Marine Co., p. 225). Separate appeals were taken in these cases, the appellate division reversing the judgment of the court in special term in both cases. It was said that other trucking concerns in the city were transacting business without difficulty and that the demand on the employer did not appear to be unlawful or unreasonable. As to the mercantile marine company, it was said that to undertake to compel it to receive goods which its employees would not handle would result in an embargo on business generally and that furthermore the injunction was contrary to law.

Later a case involving a dealer in lumber who did a large export business was before the supreme court in special term, the question being the right of a group of unions to compel the company to maintain a closed shop. The former employees had gone on a strike but the business was continued on the open-shop plan. Its goods were therefore blacklisted, and steamship companies were notified that if they received any of this company's goods for transportation the employees of the steamship company would be called out. The court had before it the action of the appellate division in setting aside its injunctions in the Reardon cases, but distinguished the present case therefrom and issued an injunction directing the steamship companies and those employed about the docks to give impartial and uninterrupted service to the plaintiff as to all others offering business in the usual way (Burgess Bros. Co. *v.* Stewart, p. 229).

The latest decision noted in this series is by the United States Circuit Court of Appeals on February 2, 1921 (Buyer *v.* Guillan, p. 231). A restraining order had been issued in the first instance on the petition of Buyer to prevent interference with his shipments of goods, but this had been set aside, and it was from this latter action the appeal was taken to the court of appeals. This court found that the refusal of the employees of a steamboat company, loaders, checkers, weighers, etc., to accept for shipment goods handled by nonunion workers was unlawful interference with interstate commerce and

reversed the action of the court below, directing it to issue a preliminary injunction, in effect mandatory, directing the workers, so long as they remained in such employment as affected transportation, to handle alike all goods offered.

STRIKES.

The right of a union to care for striking employees by erecting shelter for them in the vicinity, to care for them after ejectment from the company's houses, was upheld by the Court of Appeals of Kentucky, which reversed a temporary injunction to the contrary issued by the courts below (Diamond Block Coal Co. *v.* United Mine Workers, p. 239).

An Oregon statute declaring labor organizations lawful and restricting the issue of injunctions against picketing was declared not applicable in a case (Heitkemper *v.* Central Labor Council of Portland, p. 241) where the only question involved was of recognition of the union, there being no dispute as to wages, hours, or employment conditions.

Quite similar circumstances in a Massachusetts case (Folsom Engraving Co. *v.* McNeil, p. 243) led to a like finding by the supreme court of that State which pointed out that a strike to enforce both a legal and an illegal purpose was of itself illegal and was therefore subject to injunction, in spite of a restrictive statute authorizing peaceful persuasion. Of like tenor was a decision by the United States Circuit Court of Appeals in California, affirming an order restraining a union from attempting to unionize a railway company by inducing violation of contract and the calling of a strike (Montgomery *v.* Pacific Electric Railway Co., p. 245).

Where certain activities of strikers were shown to be unlawful in the view of the court and an injunction against them had been granted, it was said on further proceedings that even though there was no violence the maintaining of a blacklist and an attempted boycott were illegal and would be specifically enjoined. However, the injunction did not go so far as to anticipate acts not yet committed, but the facts might be brought before the court at any time for an extension of the provisions of the injunction on a proper showing (Thomson Mach. Co. *v.* Brown, p. 247).

Far-reaching disturbances in the city of Omaha involved such large numbers of employers organized in a business men's association and of workers organized in their labor unions that an injunction was sought against both parties restricting the methods and activities of their collective and individual warfare. Only a part of the request was granted, but the supreme court refused to extend the scope of the injunction, saying that employers and workmen alike had

the right to associate in organizations for their personal benefit, and so long as they did not interfere with personal property rights the courts would not intervene (State *v.* Employers of Labor, p. 248).

In Cleveland, Ohio, a general disturbance led to an order by the mayor of the city directing the arrest of all persons coming thereto as strike breakers, the sole reason assigned being that the persons arrested were "suspicious persons." The prospective employer sought an injunction against this method of interfering with the flow of labor to its plant which was allowed by the district court (American Steel & Wire Co. *v.* Davis, p. 251).

The effect of a strike interfering with the completion of a contract was considered by the United States Circuit Court of Appeals in a case (*The Richland Queen*, p. 251) in which the owner of the boat sought to recover damages for loss of the use of the vessel owing to delay on repairs. The existence of a strike was held to be a reasonable excuse for the delay even though it was peaceable.

Where a collective agreement contained no provision for a closed shop, a strike to prevent the employment of a nonunion man was held not to be justified. The strike had resulted in the discharge of the worker, or at least in his withdrawal from service on request. However, he was granted an injunction, which was affirmed by the Supreme Court of Massachusetts, preventing the union from interfering with his employment (Smith *v.* Bowen, p. 254). The same court found a strike justifiable where representatives of a union came at the employer's appointment to discuss a closed-shop contract, but he violated his agreement and failed to meet with them, the case being one of "breach of good faith and square dealing"; however, the methods of picketing were such as to warrant an injunction, which had been violated. The question of contempt proceedings was therefore before the court, and it declared unconstitutional a statute which had undertaken to require a jury trial in lieu of summary procedure in determining punishment for contempt (Walton Lunch Co. *v.* Kearney, p. 255).

The constitutionality of a law of Oregon restricting the issue of injunctions was upheld by the supreme court of that State, and an injunction issued by a lower court was modified. The employer had violated a closed-shop contract, and the strike was declared to be justifiable, and picketing in the manner prescribed in the injunctive order was authorized (Greenfield *v.* Central Labor Council of Portland, p. 262). It is to be noted in this case that there was an actual dispute between employer and employees and not a mere outside activity as in the Heitkemper case noted above.

The Oregon statute quite closely resembles the Clayton Act; this latter act was held by a United States district court not to prevent the issue of an injunction in the case in hand, which showed "an out-

rageous condition of mass picketing" (Langenberg Hat Co. *v.* United Cloth Hat & Cap Makers of North America, p. 264).

A case before a New Jersey court was of particular interest because of the joint activities of 15 complainants, employers, against three local unions. The propriety of the joinder of the plaintiffs was upheld by the court on the ground of the identity of their interests and of the circumstances giving rise to their actions. A closed-shop contract was the end in view in the strikes, picketing, etc., and the court held that considering the scope of the purposes such action was illegal, as an attempt to establish monopoly. One of the defendant unions was found not to have been active, and the bill against it was dismissed, but as to the others an injunction was ordered (Baldwin Lumber Co. *v.* Local 560, International Brotherhood of Teamsters, etc., p. 259).

The matter of punishment for violation of injunctions has already been noted. A case of this sort was before the Supreme Court of Illinois in which a representative of the union had instructed the members to disregard the injunction, and he was thereupon tried for contempt and sentenced to jail. The case was appealed, the claim being made that though the injunction had been violated it was erroneous and therefore invalid. The appellate court therefore reversed the decision of the court below as to the fixing of a penalty, but on further appeal to the supreme court, this action was in turn reversed and the case was remanded to the trial court for further action (Ash-Madden-Rae Co. *v.* International Ladies' Garment Workers' Union, p. 265). Penalties were likewise assessed in a New York case (Kayser *v.* Fitzgerald, p. 267) in which the defendants were found to have advised the strikers that an injunction "did not amount to anything," and acts of violence and use of opprobrious epithets were continued. However, the Supreme Court of Texas ordered the discharge of a union officer who had disregarded an injunction against the use of "villifying" or "opprobrious" epithets, the court saying that the control of the freedom of speech was beyond the power of the court (Ex parte Tucker, p. 269).

An unusual distinction was drawn in a case before the United States Circuit Court of Appeals in Tennessee where a strike was being enforced by picketing. The workmen who wished to continue their service were mostly colored men and the pickets were white men. The point was raised on the appeal that the trial court had held that the degree of intimidation, while not necessarily sufficient to affect white men, was coercive as to the Negro. Without admitting the contention, or deciding whether judicial notice should be taken of the alleged difference, the court of appeals was not willing to disregard the findings of the trial judge. "The question is not one of color; it is one of individual or class intimidation." It was held in

this case that the Clayton Act limiting the issuing of injunctions to cases in which injury is threatened to a "property right" did not prevent the issuing of an injunction where the principal right was that of carrying on business, holding this would be in itself a property right (King *v.* Weiss & Lesh Mfg. Co., p. 270).

The question of the status of employees on strike was considered in the Greenfield case above, the court there holding that the declaration of the strike and a walkout of employees did not terminate the employment relation. The same point was involved in an Ohio case (Vonnegut Mach. Co. *v.* Toledo Mach. & Tool Co., p. 271), in which a Federal district court held that on account of the insufficiency of the reason for the employees leaving service, they must necessarily be regarded as strangers to their former employers' business. The action in this case was by one corporation seeking an injunction to restrain another from breaking its contract to deliver certain manufactured articles, charging a conspiracy to restrain interstate commerce. The injunction was granted, the judge holding that in view of the termination of employment relations the Clayton Act restricting the issue of injunction in case of dispute between employer and employee did not apply. The conflicting interests of two corporations were discussed also, though from a different standpoint, in a New Jersey case (Lehigh Structural Steel Co. *v.* Atlantic Smelting & Refining Works, p. 278), in which the latter company sought to compel the discontinuance of a contract which was being performed by the assistance of nonunion labor, the motive being to safeguard the complainant's business from interruption by reason of sympathetic strikes threatened if the contract named were actually carried out by nonunion workers. The construction company was granted an injunction to prevent both the complaining company and the union from interfering with its work by maintaining a strike, the court saying that "the principle of the closed shop, i. e., the monopolization of the labor market, has found no judicial sponsor."

The relations of rival organizations were involved in a case before the New York Supreme Court, trial term. The Amalgamated Clothing Workers had sought to secure control of the clothing manufacturing industry in the city of Rochester and were successful with a single exception. The employer in this case refused to recognize this organization, but fostered a local affiliated with the American Federation but made up principally of its own employees. However, the court recognized the right of the latter union to engage in the same activities and forms of control as the Amalgamated. An injunction against continued picketing, intimidation, threats and violence was, therefore, made permanent and directions given for the determination of the damages to be recovered against the offending union (Michaels *v.* Hillman, p. 257).

DECISIONS OF COURTS AFFECTING LABOR.

ALIENS—CONTRACT LABORERS—CLERKS—MANUAL LABORERS—*United States* v. *Union Bank of Canada, and United States* v. *Royal Dutch West India Mail Co., United States Circuit Court of Appeals, Second Circuit (Dec. 10, 1919), 262 Federal Reporter, page 91.*—The two cases named involve prosecutions brought by the United States for the violation of the Federal laws prohibiting the importation into this country of contract laborers, the United States appealing from adverse decisions in both cases. In the first case the Union Bank of Canada opened a branch in New York City and imported an accountant by the name of Schilling from the branch in Toronto, Canada. The second case involved the importation of a clerk from Holland, and the decision of the district court was reported in Bulletin No. 258, page 48.

The court combined the two cases, and affirmed the decisions of the district courts, holding that such employees as here involved are not manual laborers and therefore are not covered by the Federal statute. The opinion first cites the law and various decisions under it and concludes:

Without inquiring whether an accountant as defined by the defendant's rules is a member of a learned profession we affirm the judgment on the ground that Schilling was not a laborer within the meaning of the act.

In the second case * * * the defendant sent a clerk named Mook from its office in Amsterdam to be employed in its office in New York at a salary of $1,250 per annum, and paid the expenses of his transportation. There was an expectation to send him from New York to its office at Paramaribo, Dutch Guiana, after he had familiarized himself with the New York business. The grounds on which the verdict was directed were: First, that this employment at New York was a temporary one in a business of an international character; and, second, that Mook was not a contract laborer at all. Without considering the first reason we concur in the second.

Judgment affirmed in each case.

ALIENS—CONTRACT LABORERS—PENALTY—SUFFICIENCY OF COMPLAINT—*United States* v. *International Silver Co., United States*

District Court, District of Connecticut (Feb. 1, 1919), 255 Federal Reporter, page 694.—Mrs. George C. Pearson, a subject of Great Britain and a resident of Nova Scotia, wrote a letter to the defendant company asking if it had employment to offer to experienced hand burnishers and whether it had any work that could be offered her husband and son. The company replied that it had need for experienced hand burnishers and for unskilled men, and that if she were in the United States and applied for a position it could place her. Later Mr. Pearson, her husband, wrote to the company saying that Mrs. Pearson could not leave at that time but that he and his son were coming, provided they could be sure of obtaining employment. The company replied as follows:

DEAR SIR: Referring to yours of the 15th, will say that the conditions stated in your letter are satisfactory, and we will keep a place open for Mrs. Pearson. Kindly advise when you will report for duty.

The husband and son came to Meriden, where the company was located, but upon finding a strike on at the company's plant they both returned to Nova Scotia without having worked for the company. The company was sued for the $1,000 penalty for the violation of the "act to regulate the migration of aliens into the United States," approved February 20, 1907, as amended March 26, 1910, for contracting for the services of the husband and in a second count charged a second violation and claimed an additional penalty of $1,000 for contracting for the employment of the son. The company demurred to the complaint on the grounds that it failed to allege sufficient facts to show that the Pearsons were contract laborers within the act and because it was not alleged that defendant knew that the Pearsons were contract laborers, if such were the fact. In sustaining the demurrer to the complaint the court said, in part:

In the case at bar we have only the allegation set forth in the seventh paragraph of the complaint, and quoted in full it alleges:

"(7) That during the period covered by the correspondence mentioned in paragraphs 2, 3, 4 and 5 hereof, and for a further period of time, to wit, until on or about April 4, 1916, the said George C. Pearson was a contract laborer and was known to the defendant corporation to be a contract laborer, to wit, an ordinary unskilled workman."

Nowhere in the complaint is it alleged that the defendant knowingly and unlawfully assisted Pearson to migrate from Nova Scotia to the United States by knowingly and unlawfully prepaying his transportation, or inducing or soliciting him, or encouraging him, to so migrate; and nowhere in the complaint is it alleged that Pearson, whose immigration was assisted as above, was a contract laborer within the meaning of the statute; and nowhere in the complaint is it set forth that the defendant made to Pearson in Nova Scotia a "certain offer of employment"; and nowhere in the complaint does it appear, even if any offer was made, of what the offer consisted;

nor is it alleged that the defendant unlawfully assisted him to migrate by doing anything prohibited by the act; nor is it alleged that, induced by the offer or assisted in any way, did he migrate to the United States; nor does it appear anywhere in fact that any of the allegations set forth in the Dwight case (U. S. *v.* Dwight, 210 Fed. 81, Bul. 169, p. 47), which formed the gravamen of the complaint upon which Judge Dodge overruled the demurrer, are set forth in this complaint.

It follows that the demurrer to the first and second counts of the complaint must be sustained, for the first and second reasons above set forth. It therefore is unnecessary to discuss or decide the remaining reasons for demurrer.

The demurrer to the relief prayed for in the second count must be sustained upon the authority of United States *v.* N. Y. Central Ry. Co. (C. D.), 232 Fed. 179. On page 184 Judge Ray said:

"As there was but one solicitation, all one act, the defendant incurred one penalty."

So here there was but one transaction, all one act, and even if the allegations of the second count be sufficient to state a cause of action, there could be only one recovery.

The case was therefore dismissed.

BLACKLIST—MERCHANTS' CREDIT ASSOCIATION—PRIVILEGED COMMUNICATIONS—*Putnal* v. *Inman*, *Supreme Court of Florida* (*Dec. 16, 1918*), *80 Southern Reporter, page 316.*—The merchants of the town of Perry organized the Perry Merchants' Protective Association, of which Inman was a member, for the purpose of regulating the extension of credit. After reciting some of the methods employed by certain customers, who purchased from one merchant on credit and when their credit was exhausted, would then go to other merchants and buy on credit, the constitution and by-laws of the association required any of its members who for any reason no longer desired to extend credit to a customer to report to the attorney of the association the name of the customer, the amount of his indebtedness, and his own name. It was then the duty of the attorney to inform each of the other members of the association with reference to these facts, and if after such notification any member extended credit to such customer, he would thereby assume said customer's bill with the other merchant. The plaintiff, Putnal, was presented with a bill by Inman, which Putnal claimed he did not owe. Inman notified the association's attorney, who in turn notified one Blanton and one Bloodworth, both of whom were members of the association and also private clients of the attorney. Putnal sued for libel, claiming that the attorney's report by innuendo branded him as a "dead beat" and presented him as dishonest in his methods. Judgment was in his favor in the trial court, and in reversing this judgment the supreme court said, in part:

The constitution provided that when "any person has failed to pay his or her account," and "the merchant is no longer willing to carry the account of such defaulting person," he may turn the account over to the attorney for collection, and then it becomes the duty of the attorney to notify all the members of the association. He was not required to notify all the members that the plaintiff was such a person as described in the innuendoes, but merely that plaintiff was "in default, together with the amount of the account, and to whom it is due." According to the agreed statement of facts this was all that he did.

The matter of extending credit is a large part of modern business, and merchants have the right to organize for their own protection and agree to report to each other the name of a person to whom credit has been extended who has failed to pay his account, and agree that they will not extend credit to such person without assuming his indebtedness. This is not the same as blacklisting or boycotting by refusing to trade with him, but is only an agreement not to extend him credit without assuming whatever indebtedness he may owe to any other member of the association. (Woodhouse *v.* Powles, 43 Wash. 617, 86 Pac. 1063.)

The pivotal question in this case is the nature of the communication made by the defendant to the other members of the association through their attorney. If it was a privileged communication, no action will lie.

Even if Calhoun [the attorney], when he notified these parties, was acting as the attorney of the association and notified them in accordance with the requirements of the constitution, such notice was a privileged communication, and it does not appear that the privilege was abused by giving it undue publication by proclaiming it to persons other than members of the association.

There is nothing in the agreed statement of facts nor in the declaration itself to show malice on the part of the defendant, nor did the attorney of the association disregard the restraints and qualification imposed by law upon the publicity to be given such communications, nor did he exceed reasonable bounds in making such communication. As the communication made by Calhoun to the members of the association was privileged, there can be no recovery, and it is needless to discuss the many questions presented by the assignments of error on the pleadings.

COMPULSORY WORK LAW — CONSTITUTIONALITY — INVOLUNTARY SERVITUDE—*State* v. *McClure, Court of General Sessions of Delaware (Jan. 7, 1919), 105 Atlantic Reporter, page 712.*—McClure was indicted under what is known as the "Council of defense law of Delaware" of April 8, 1918 (Bul. 257, p. 29), which, among other things, provides that:

It shall be the duty of every male resident of this State between the ages of eighteen and fifty-five years who shall not be in the National Army or a public officer, to be employed in a useful or lawful occupation during said period [of the war].

McClure, upon a motion to quash the indictment, contended that said act is in violation of article 13 and section 1 of article 14 of the Constitution of the United States which provide that slavery or involuntary servitude except as punishment for crime shall be prohibited and no person shall be deprived of the equal protection of the laws and that life, liberty, or property shall not be taken from any citizen "without due process of law." In upholding the constitutionality of this statute the court said, in part:

Unless the power of the several States to enact legislation beneficial to the Federal Government while it is at war with a foreign country is expressly prohibited by the Constitution or such prohibition is a necessary implication from other powers granted to the Federal Government or denied to the States, the several States have such power.

We find nothing in the Constitution either expressed or implied which would deny to the several States such power.

If then it be true that the State has the same power to enact legislation to aid in carrying on the war that a sovereign State would have, restricted only by the provision that there shall not be involuntary servitude except as a punishment for crime, do the provisions of the council of defense act complained of impose such servitude, in view of the necessities incident to the carrying on of a great war? We are clearly of the opinion that it does not.

One of the objects of the act was to aid in winning the war by increasing the production of food and supplies and by saving the loss incident to the maintenance of those male citizens between the ages of 18 and 55 who were engaged in no useful or lawful occupation. War can not be carried on without food and supplies, nor can food and supplies be produced except by labor, and who are more able to labor than male citizens between the ages of 18 and 55?

One of the objects of the act as expressed in section 1 was to preserve order within the State. The passage of the act compelling male residents of the State between the ages of 18 and 55 to be employed during the period of the war and six months thereafter we believe was a reasonable exercise, under the circumstances, of the police powers vested in the legislature. In Webber *v.* Virginia, 103 U. S. 344, the Supreme Court of the United States defined police powers to be "those powers by which the health, good order, peace and general welfare of the community are promoted."

It is generally known that the demands of the National Government in waging the present war have greatly curtailed the means of preventing crime and reduced the number of men available to protect the lives and property of the public. It was proper for the legislature having this in mind to pass reasonable and just laws to preserve order within the State and to protect the lives and property within its borders by providing that male residents between certain ages should be engaged in some useful or lawful occupation.

For the reasons stated, motion to quash the indictment is denied.

COMPULSORY WORK LAW—CONSTITUTIONALITY—"VAGRANCY"—*Ex parte Hudgins, Supreme Court of Appeals of West Virginia (May 20, 1920), 103 Southeastern Reporter, page 327.*—Clifton Hudgins was found guilty in the McDowell County Court of violating the provisions of an act of 1919 (second extraordinary session), which sought to require every male resident of the State between the ages of 16 and 60 years, except bona fide students during school term, to be regularly and steadily employed for 36 hours per week in some lawful and recognized employment; otherwise to be held as a vagrant and subject to punishment therefor. Hudgins had been a soldier and served overseas in various battles, being discharged in May, 1919, and informed that his enlistment for the duration of the war was ended and the army disbanded. In stating these facts, Judge Miller, who delivered the opinion, regarded them as "perhaps not very material," but not to be overlooked in view of the nature of the law and the offense under consideration.

The act was to continue in force until six months after the termination of the war, and the offense was said to have been committed during the week beginning March 29, 1920. The court did not regard the question of whether or not the war was ended as important, since "we have reached the conclusion that the act is unconstitutional and ought to be so declared." The court first pointed out the difference between the present law and vagrancy statutes, in that the act under consideration was not conditioned on the possession of means by the offender or his obligation to others to furnish them with support. A contention made against the law was that it was an unjust and unreasonable restraint upon personal liberty. After noting the restrictions and limitations which may properly be placed upon personal liberty, to prevent crime, enforce duties in defense of the State, etc., the court said:

Tested by these general rules, what may be properly determined of the statute here involved? To bring it within these limitations it must have some reasonable relation to one or more of the subjects over which the State may properly exercise its police power. Manifestly the enactment of the statute was intended as a war measure, for it is limited in its effect to the period of the war and six months after termination thereof. The State, under our constitution, has no power to declare war; the war power, so far as it exists under the constitution and laws of this State, is in the governor as commander in chief of the military forces, except when called into the service of the United States, to call out such forces to execute the laws, suppress insurrection, and repel invasion. The statute in no way relates to the raising or organization of the military forces of the State, for State or Federal purposes.

It is apparent that the legislature has attempted to justify the measure on the theory that the persons against whom it was directed were, or might become, charges upon the public, but by its terms it is limited to the period of the war, and six months thereafter; and

that during that term the productive resources of the State should be brought up to the highest standard, for war purposes. With the State, however, this could amount only to a semblance of right. While greater production during the period of the war might be desirable, is that a subject with which the State had the right to deal? We think not. Certainly not by accusing all citizens coming within its provisions with vagrancy, and as criminals, without reference to their ability to support and maintain themselves and their dependents without work.

So the purpose of the statute was not to subserve any of the purposes for which a citizen may rightfully be deprived of his liberty. Its effect was to require every able-bodied male resident of the State, between the ages specified, regardless of his financial ability, to work, not simply long enough each day of the week to acquire means of support for himself and his dependents, but for the number of hours required.

It was said in Bailey *v.* Alabama, 219 U. S. 219, 31 Sup. Ct. 145, that, although the court might not impute to a State an actual motive to oppress by a statute, yet it should consider the material operation of such a statute and strike it down if it becomes an instrument of coercion forbidden by the Federal Constitution.

Our conclusion is that the petitioner is entitled to be discharged from custody, and it is so ordered.

CONTRACT OF EMPLOYMENT—APPRENTICES—BREACH—LIQUIDATED DAMAGES—*Putnam Machine Co.* v. *Mustakangas, Supreme Judicial Court of Massachusetts, Worcester (Oct. 18, 1920), 128 Northeastern Reporter, page 629.*—The Putnam Machine Co. entered into a contract with one, Mustakangas, whereby the latter placed his son with the company as an apprentice for a term of three years to learn the trade of machinist. The company agreed to furnish the son with suitable work and instruction, and the father relinquished all rights to his son's wages. It was further agreed that if the son failed to fulfill the contract the father would be liable for the payment of $100 as liquidated damages. The son it seems did not live up to the contract, and the company sued the father for the $100. The company was given a verdict, but having failed to present proof of damages was awarded only $1. Both parties appealed and the judgment was modified to be $100 and entered in favor of the plaintiff company. The decision is in part as follows:

There was a consideration for the contract. Although the agreement sued on was not a statutory indenture of apprenticeship and was not made in accordance with the statutes of the Commonwealth governing the relation of masters and apprentices (R. L., c. 155), under it the plaintiff as against the defendant, had the right to the services of his son; the contract was valid at common law, and an action could be maintained for its breach.

The defendant also contended that the plaintiff could not recover because it failed to prove the proper execution of the contract. He

admitted signing the agreement, and upon the "copy" delivered to him "was written by a typewriter 'Putnam Machine Company,' but it was not signed by anyone." It was not questioned that the contract was assented to and accepted by the plaintiff; it therefore became bound by its terms, even if the instrument was not signed by it.

There was no evidence that the plaintiff suffered damage by the breach of the contract and the judge instructed the jury they were to return a verdict for nominal damages only, to which instruction the plaintiff excepted. From the nature of the undertaking and the subject matter of the contract, it might be difficult to determine the exact amount of damages. The parties might well agree upon them when the contract was made and it does not appear that they are excessive. It is expressly stated that the defendant was to pay $100 as ascertained and liquidated damages if the agreement was not fulfilled by his son. There is no suggestion of a penalty, and the language indicates the intention of the parties to be that the sum agreed upon should be treated as liquidated damages, and not as a penalty. The instructions given on this point were erroneous. The plaintiff's exceptions must be sustained and judgment entered for the plaintiff in the sum of $100 with interest from the date of the writ.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—ENFORCEMENT—CONTRACT SEVERAL IN PERFORMANCE—*Englander* v. *Abramson-Kaplan Co., Supreme Court of New Jersey (Feb. 13, 1920), 109 Atlantic Reporter, page 307.*—The Abramson-Kaplan Co. was engaged in the manufacture of ladies' garments. There had been strikes and labor difficulties in this trade, and the company, to protect itself from future strikes, required Englander, whom it employed as a presser, to sign an agreement to remain in its employ and work to the end of the season, about October 15. Englander was also required to put up a $50 Liberty bond as security for the performance of the contract. Notwithstanding the contract, Englander struck in August, but was persuaded to continue at work until the ensuing Saturday upon the promise that he would be paid for his work. He struck, as he had promised to do, on the following Saturday. The company refused to pay him, and he sued for his compensation and his bond. The court held that although the agreement to work until October was entire, its performance was several and plaintiff was entitled to the amount he had earned, but that because of the breach of the contract the Liberty bond could not be recovered. The decision is in part as follows:

It is undisputed that the work was to be paid for by the piece from time to time as it was done. It is not suggested that the amount claimed was due on the Saturday in August when the plaintiff demanded it. By the contract itself, failure to pay by the defendant was a default on its part. For that default an action would nor-

mally lie at once. It is, however, suggested that because the contract was an entire contract and could not be fully performed before the middle of October, an action could not be maintained for money earned in August. The defendant's error, we think, is in failing to note that "although the agreement is entire the performance is several" (Badger *v.* Titcomb, 15 Pick. (Mass.) 409; 26 Am. Dec. 611); as the same court elsewhere stated it, "divisible in its operation" (Denny *v.* Williams, 5 Allen (Mass.), 1, 4). The question has been before this court (Skillman Hardware Co. *v.* Davis, 53 N. J. Law, 144, 20 Atl. 1080), and a result reached adverse to the present defendant's contention. We think legal principles require us to sustain the plaintiff's right of action upon the defendant's default. The defendant is protected by his right to sue for damages for breach of the contract to serve the whole term or to recoup in the present action. This he might have done by reason of the anticipatory breach by plaintiff (although this action was brought in August), but for the fact that the defendant, with knowledge that the plaintiff did not mean to perform on his part, nevertheless assented to the breach, in order to have pressing work done at once, instead of treating the anticipatory breach as putting an end to the contract. Under the circumstances we need not consider whether the parties meant that the security of the $50 bond should be the defendant's only remedy for plaintiff's breach. The case bears some analogy also to short deliveries in case of a contract of sale of goods under section 44 of the sales of goods act (4 Comp. St. 1910, p. 4657). Williston on Sales, 466. Section 76 of the statute defines "divisible contract to sell." It is, we think, of some consequence that contracts to sell and contracts for work and labor should be governed by the same legal principles. It is, at any rate, important to adhere to the rule holding defendants to responsibility for the value of the labor of others, where they have accepted the benefit with knowledge that an entire contract had not been fully performed (Bozarth *v.* Dudley, 44 N. J. Law, 304; 43 Am. Rep. 373), or would not be.

CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—RECOVERY—*Dunbar* v. *Orleans Metal Bed Co., Supreme Court of Louisiana (June 30, 1919), 82 Southern Reporter, page 889.*—Dunbar was employed under a written contract of employment for a period of two years to act as a salesman for the defendant company at a salary of $150 per month. After working under this contract for about three months he was discharged because "business is so exceedingly 'rotten' they have got to retrench." Dunbar thereupon brought suit under the Civil Code, article 2749, for the salary due him under the contract. He recovered judgment and the employer appealed. In affirming the decision the court said in part:

Any form of words, either written or verbal, which convey to the servant the idea that his services are no longer required and will not be accepted, will constitute a discharge. (20 A. & E. Enc. of Law, 26; 26 Cyc. 987.)

It is not pretended that defendant had any serious ground of complaint against plaintiff, or any ground whatever. According to the Civil Code, and numerous decisions of this court interpreting it, if a laborer (or clerk), hired for a certain time, be sent away without any serious ground of complaint before the time has expired, he is entitled to recover the whole of the "salaries" that he would have received had the full term of his service arrived. (C. C., art. 2749.) The right of action for the entire amount called for by the contract arises immediately, and the employer by whom he is discharged has no power, as a condition precedent to paying him, thereafter to require that he work out the term for which he was employed. (Sherburne *v.* Orleans Cotton Press, 15 La. 360.) Nor is his right of recovery under his first employment affected by the fact that he engages his services for the unexpired term to another employer. (Shea *v.* Schlatre, 1 Rob. 319.) Nor is it necessary that he should tender his services to the employer by whom he was discharged, or put him in default, since the whole amount of the salary called for by his contract becomes due and exigible upon and by reason of his discharge. (Tete *v.* Lanaux, Ex'r, 45 La. Ann. 1343, 14 South. 241.)

CONTRACT OF EMPLOYMENT—BREACH—TERM—*Lyons* v. *Pease Piano Co., Court of Errors and Appeals of New Jersey (Mar. 3, 1919), 107 Atlantic Reporter, page 66.*—Simpson B. Lyons brought suit for damages for the breach of a contract of hiring and recovered judgment. The defendant appealed. The relations between the parties was evidenced by various writings. Plaintiff was a salesman and undertook to sell defendant's pianos. The following letter states their relations as they stood when Lyons was discharged in May 19, 1917:

"I will accept your proposition on salary for the writer, i. e., $50 per week and 1% commission, on net sales over $60,000 made through our Newark store, this to include any and all sales, with the understanding my salary starts with the new year, January 1, 1917; all our reports run from January 1st to December 31st."

The defendant claimed that the contract of hiring, as evidenced by this and other letters, was in legal effect a hiring at will or by the week. The lower court held that the contract was for a yearly hiring. In affirming this decision the court said, in part:

The construction of the contract was properly conceded to the court by both parties, as a legal proposition. Where the term of employment involved is left by the writing in the sphere of doubt, and a practical method of determining it is the circumstance of weekly or monthly payments made during its continuance, as evidencing the mutual intent by the construction of the parties themselves, the settled rule is to resort to that circumstance as an aid in the proper construction of the contract.

As a result of the proposal and its modified acceptance, the plaintiff had a conversation with the president and vice president of de-

fendant company, and his yearly salary was discussed. It was conceded at the trial that plaintiff was expected to transact business in sales to the net amount of $60,000 per year. His salary was to begin on January 1, and his reports of business were to comprehend an annual period from January 1 to December 31. An appropriation of $1,200 per year was allotted to him for advertising purposes; and a concession was made to him of 1 per cent on net sales of over $60,000 for the year 1917.

These facts and circumstances, combined with the language of the acceptance, evince that the period contemplated was neither a hiring at will nor by the week, and that the trial court properly construed the contract as a yearly hiring. No other question is discussed in the briefs, and presumably the propriety of the submission to the jury of the question of the amount due to plaintiff under the contract is not contested.

CONTRACT OF EMPLOYMENT—COLLECTIVE AGREEMENTS—ENFORCEMENT—BREACH—STIPULATED DAMAGES—*Moody et al.* v. *Model Window Glass Co., Supreme Court of Arkansas (Sept. 27, 1920), 224 Southwestern Reporter, page 436.*—Moody and Gerard were window-glass workers and belonged to the National Window-Glass Workers' Union. They had been in the employ of the plaintiff company until it shut down its plant in 1917, when they went to California. The plaintiff's plant, which was at Fort Smith, Ark., had been operated as a union plant under an agreement known as the "national agreement" which was a general contract between the window-glass manufacturers of the United States and the National Window-Glass Workers. Article 5 of the agreement reads as follows:

ARTICLE 5. Any company hiring a member and said member upon arriving and reporting for duty, finding no vacancy existing or plant not ready to operate as per notification, shall pay said member at the rate of $20 per week until place is vacant or plant in operation, or, at the option of the member, said company shall defray all expenses incurred by said member from the time he left his home or place of starting until his return to destination.

Zenor, who was plaintiff's manager, had been a member of the union and was familiar with this article of the agreement. On September 6, 1918, he wrote to Moody and Gerard and asked them if they would come back when the plant reopened. They replied that they would, and Zenor wrote them stating the plant was expected to be reopened on December 9. Moody and Gerard were on hand on the date fixed, but the plant was not ready to start operations. The wage-scale agreement, unknown to them, expired December 8. Zenor paid Moody and Gerard the $20 agreed to in contract with the union for two weeks, but at the end of the third week refused to make any further payments. Moody and Gerard were without

employment for two additional weeks, aggregating five weeks in all. The company sued Moody and Gerard for the recovery of the $40 paid them, claiming that it had been given them merely as a loan. The lower court awarded judgment in favor of the company, and the defendants, whose counterclaims for the $20 per week for the remainder of the time they were unemployed had been dismissed, appealed. In reversing the judgment of the lower court, the court said in part:

Zenor testified that the wage scale between appellee and the union, of which appellants were members, expired December 8, and that he did not know why it was not renewed on that day.

It is undisputed that the letter of December 4 [announcing a delay in starting up] was not sent appellants; and it is also undisputed that appellants left California on December 3, relying upon appellee's letter of November 19 that the plant would start on December 9; and it is undisputed that the plant had, during appellants' previous employment, been run as a union plant, and therefore operated under the national agreement; and it is undenied that appellants supposed the wage scale was in effect when they left California. But it is not contended that the expiration of the wage scale abrogated other provisions of the national agreement, and the binding effect of article 5, set out above, was not impaired because the wage scale had expired.

We think the court below erred in its judgment. The facts stated constituted an implied contract, if not an express contract, to settle with appellants according to the terms of the national agreement. The correspondence set out above warranted appellants in believing, under the circumstances of the case, that they would be given employment, or be paid in accordance with the provisions of the national agreement, with reference to which the parties must be held to have contracted. Appellants paid their own transportation and expenses from California, and remained unemployed for five weeks; yet they ask no recovery on that account. They ask judgment only for the money coming to them under the agreement, with reference to which they contracted; and we think an erroneous judgment was entered by the court below, and that judgment will therefore be reversed, and the cause remanded for a new trial.

CONTRACT OF EMPLOYMENT—COLLECTIVE AGREEMENT—ENFORCEMENT—EFFECT AS TO PERSONS NOT MEMBERS OF UNION—RAILWAY BOARD OF ADJUSTMENT—*Gregg* v. *Starks et al., Court of Appeals of Kentucky (Oct. 1, 1920), 224 Southwestern Reporter, page 459.*—Gregg and the defendants, including one Pennybacker, were conductors on the Louisville & Nashville Railroad Co. The railroad company had entered into a contract with all its conductors fixing the terms and conditions of their service, including the stating of their seniority rights. The portion referring to the seniority privileges is as follows:

"Conductors displaced on account of reduction of crews, or other causes, will be permitted to exercise their seniority rights to any run held by a junior conductor, section (*j*) to govern passenger service."

"(*j*) Conductors will be required to participate in extra passenger work before being permitted to exercise their seniority rights to permanent passenger vacancies."

The controversy centers around the last three quoted words. Gregg had been 26 years with the company and for the last 20 years was a passenger conductor. Pennybacker, the only defendant who answered, had been in the company's service 31 years, the past 25 years as a freight conductor. Pennybacker had done certain extra passenger service and was given a regular passenger run. Later this train was dropped, and he laid claim to Gregg's run on the ground of seniority, but the company refused his claim. Later Pennybacker and the company agreed as to the facts and submitted the question to Railway Board of Adjustment No. 1, which was organized under the Federal control act of 1918. Gregg was not made a party to this proceeding. The board of adjustment awarded Gregg's run to Pennybacker and Gregg brought this action for an injunction to prevent his run being taken from him. The lower court refused the injunction and Gregg appealed. In sustaining the motion for the injunction the court spoke in part as follows:

It is contended for Gregg that such a construction of section (*j*) entirely ignores and disregards the last three words thereof, namely, "permanent passenger vacancies." He contends that these words must be considered, and that when considered the section as a whole can only mean that the right of a senior freight conductor to a regular passenger run is confined to permanent passenger vacancies, and can not be exercised where there is no vacancy, as is the case here. We must assume that these words were intended to have some force, and we are unable to attribute to them any meaning whatever except that given them by plaintiff; nor does counsel for defendant suggest anything else they could mean, but insists they have no qualifying effect whatever. To this we can not agree, but must hold that by its terms a freight conductor qualified for passenger service can not enter that service by displacing a junior occupant of a regular passenger run but must await a vacancy, when by reason of his seniority he will be given the run in preference to junior passenger conductors applying therefor.

The court then considered the authority of the railway board of adjustment and found that it could pass only upon questions arising during Federal control. This dispute having arisen since that time, the board's award was "wholly without legal effect."

Continuing, the court said:

It is insisted that plaintiff is not entitled to the benefits of the contract simply because, as shown by parol evidence, it was negotiated

between the railroad company and the Order of Railway Conductors, of which Pennybacker is and Gregg is not a member. There is nothing in the contract to indicate this or that it applies only to such of the conductors as are members of the order. It is not signed by the Order of Railway Conductors or by anyone for it or any of the conductors; neither is the name of the railroad company subscribed thereto, but it is signed by two of its officers, and upon its face purports to be an agreement between United States Railroad Administration (Louisville & Nashville Railroad Co.) and all of its conductors.

Mr. Turner, assistant superintendent of the transportation for the company, testified that Gregg was an employee of the company working under the same kind of contract as the one filed by him, which is not denied by any witness, and the mere fact that the contract was negotiated between the railroad company and an organization representing a part of its conductors can not exclude other conductors not members of the organization from its benefits, when the nonmember conductors and the railroad company recognized and treated it as the contract under which the services of such conductors were rendered and accepted.

CONTRACT OF EMPLOYMENT — ENFORCEMENT — LEGALITY WHEN MADE IN FOREIGN STATE—*Hatcher* v. *Idaho Gold & Ruby Mining Co., Supreme Court of Washington (Mar. 12, 1919), 179 Pacific Reporter, page 106.*—Hatcher entered into a contract with the mining company in Idaho whereby he was to work a mine for 60 cents per hour, payable partly in commissary supplies for his living during his employment, the balance to be paid in notes bearing 7 per cent interest and to be paid out of the proceeds of the operation of the mine. This contract was valid under the laws of Idaho but was invalid under the laws of Washington, where the suit was brought, where the payment of wages in anything but cash is prohibited. The plaintiff, Hatcher, brought suit for services rendered, disregarding the contract entirely on the ground that it was invalid in Washington, and that that State would not enforce it, as to do so would violate its public policy as expressed in the wage and employment statute—sections 6560 and 6561, Rem. Code. The lower court rendered a decision in accordance with this view, in favor of the plaintiff. In reversing this judgment Judge Parker, of the supreme court, said, in part:

These parties both voluntarily went into the State of Idaho and made this contract there. They thereby voluntarily submitted themselves to the laws of Idaho, in so far as their rights are concerned. And we think in seeking to enforce it in this State, either affirmatively or as a defense in an action between them directly involving it, they should be treated, and their rights measured, by our courts exactly as if they were residents of Idaho. * * * When a resident of this State voluntarily goes into another State and

there makes a contract wholly to be performed there, which contract is valid and binding under the laws of that State, and it is sought to be enforced by the other party thereto in the courts of this State, either as a basis for a cause of action or as a defense thereto, we are quite unable to see any sound reason why he should have any higher or better right to invoke the public policy of this State in avoidance of the contract than he would have if he were a nonresident of this State. Having voluntarily gone into Idaho and there entered into the contract, we think Hatcher is in no position to claim any special rights or privileges looking to the avoidance of it, merely because he is a resident of this State, and that he can not rightfully claim to be injured thereby as a resident of this State.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—PEONAGE—INVOLUNTARY SERVITUDE—*State* v. *Oliva, Supreme Court of Louisiana (Dec. 2, 1918), 80 Southern Reporter, page 195.*—Israel Oliva made a contract of hire and received advances on the strength of it. He then, without tendering back the advances, broke the contract and was arrested for misdemeanor for the violation of a statute forbidding such breach. The law in question was held unconstitutional in the district court of Vermilion Parish, and the indictment was quashed, whereupon the State appealed. The opinion of the supreme court, sustaining the position of the court below, is mainly as follows:

The thirteenth amendment to the Constitution of the United States, after declaring that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, ordains that Congress shall have power to enforce this article by appropriate legislation. Pursuant to the power thus delegated to it, Congress adopted section 1990 of the Revised Statutes (U. S. Comp. St. 1916, sec. 3944), which, in so far as it affects State legislation, is equal in authority to the amendment itself, and which reads as follows:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited," etc.

"Peonage" has been defined by the Supreme Court of the United States as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness, and indebtedness is the cord by which the victim is bound to the master's service. It matters not that the service was begun voluntarily by contract, for, if it is enforceable by criminal prosecution instead of a civil action for damages, it is nevertheless peonage. (See Bailey *v.* Alabama, 219 U. S. 219, 31 Sup. Ct. 145 [Bul. No. 93, p. 634], and the authorities therein cited.)

An analysis of the law (No. 54, Acts of 1906) under which the defendant is being prosecuted shows at a glance that it comes under the inhibition of the thirteenth amendment and the legislation adopted by Congress in pursuance thereof, as interpreted by the United States Supreme Court. It does not pretend to enforce a contract of hire except where money or goods have been advanced

on the faith of the contract, and then only in the instance where the laborer leaves without first tendering the return of the money or the value of the goods. This indebtedness becomes the cord by which the laborer is bound to the master's service, and the service is enforceable by the most potent means, the instrumentalities created by the State to punish lawlessness and crime.

Our attention has been called by the attorney general to the case of State *v.* Murray, 116 La. 655, 40 South. 930 [Bul. No. 67, p. 861], decided by this court in 1906, but whatever may have been said in that case in conflict with our present ruling is overruled.

The judgment appealed from is affirmed.

CONTRACT OF EMPLOYMENT—ENTICING AWAY SERVANT—PEONAGE—CONSTITUTIONALITY OF STATUTE—*Johns* v. *Patterson, Supreme Court of Arkansas (Apr. 21, 1919), 211 Southwestern Reporter, page 387.*—One Meyers made a contract with Patterson to work a crop for him on shares for the year 1918. Before the contract was completed Meyers left Patterson while owing him $51 and entered the employ of Johns. Patterson sued Johns for the $51 which Meyers owed him under a statute (Acts of 1905, p. 726) making the enticing away of another's servant a misdemeanor and requiring the guilty party to defray all damages resulting from his act. Johns' counsel contended that this act was unconstitutional because it conflicts with the peonage act of Congress (act Mar. 2, 1867, c. 187, 14 Stat. 546; U. S. Comp. St., sec. 3944). In dismissing this contention of the defendant the court said in part:

We do not think that the contention of counsel for the defendant is well taken. A comparison of the two statutes will show that they have wholly different objects in view. Congress undertook to prevent, either directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or obligation. In other words the gist of the offense denounced by the act of Congress is the holding of persons in unwilling servitude in payment of a debt. (United States *v.* Reynolds, 235 U. S. 133, 35 Sup. Ct. 86 [Bul. No. 189, p. 177].)

On the other hand the State statute was enacted for the purpose of providing a penal and civil liability against third persons who with knowledge of an existing contract of employment induce the laborer to quit to the injury of the employer.

Peonage is based on a condition of compulsory service by the debtor for the payment of his debt. The State statute under consideration has no such purpose, but was enacted for the purpose of fixing the criminal and civil liability of a third party for the violation of contracts of service. Our State statute was based upon the common-law rule and was upheld by this court in the following cases: Tucker *v.* State, 86 Ark. 436, 111 S. W. 275; Park *v.* Depriest, 210 S. W. 777.

The essence of peonage is the compulsory service in payment of debt. So it will be seen that neither the plain language of the statute, nor the construction placed upon it by the court makes it in any sense in conflict with the peonage act of Congress.

The appeal was brought by the defendant and although the foregoing contention was ruled against him, a reversal was had on the ground that the trial court erred in refusing an instruction to direct a verdict in favor of the defendant if it should be found that Meyers had quit Patterson's employ before he was employed by the defendant Johns.

CONTRACT OF EMPLOYMENT—ENTICING AWAY SERVANT—PEONAGE—EMPLOYMENT OF SERVANT WHO QUITS EMPLOYMENT OF ANOTHER—*Shaw* v. *Fisher*, *Supreme Court of South Carolina*, *Feb. 23, 1920*), *102 Southeastern Reporter*, *page 325*.—John L. Shaw entered into a contract with one Carver in March, 1916, whereby the latter was to work as a share cropper until the end of the year 1916. In June Carver left Shaw and took up his abode in a house on the plantation of the defendant, for whom he went to work. As a reason for breaking his contract with Shaw, Carver stated that the farmer was so contentious and hard to get along with that he would "die and go to hell" rather than to have worked for him any longer. Shaw brought suit against Fisher for damages (1) for enticing away his servant and (2) for harboring his said servant after notice that he was under contract to him. The trial court, which rendered judgment in favor of the plaintiff, gave the jury the following instruction as to the law which should govern in cases of this kind:

It must now be considered clear law that a person who wrongfully and maliciously, or which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as a servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. [Sec. 2596, vol. 7, Labatt's Master and Servant.]

The defendant admitted that the law as to the enticing away of a servant had been correctly stated, but contended that the law had been incorrectly stated as to the employment of a servant who had already quit the employment of another, and for this reason appealed. The decision was reversed. The opinion of the supreme court is in part as follows:

The issue is one of grave concern both to employers and employees, and we have given it consideration commensurate with its importance.

No doubt the law declared to the jury was at one time the common law of England, and we will assume that it was also the common law in this country prior to the adoption of the thirteenth and fourteenth amendments to the Federal Constitution. But those amendments superseded and annulled all law—statutory or common law—

which was in conflict with them. And we think the law as declared to the jury in this case as to the liability of one for harboring the servant of another does conflict with the spirit and intent of both those amendments.

The court cited Clyatt *v.* United States, 197 U. S. 207, 215, 25 Sup. Ct. 429, Bul. No. 60, p. 695, quoting therefrom, and continued:

If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract, for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract, which was condemned as violative of the thirteenth amendment in Ex parte Hollman (79 S. C. 9, 60 S. E. 19). The prohibition is as effective against indirect as it is against direct actions and laws—statutes or decisions—which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect.

Of course, the sanction of the obligation of the contract and the liability to pay damages for breach thereof inhere in every contract, and these alone do not amount to that compulsion which is prohibited so long as the employee has the liberty at any time to elect to break the contract, subject only to the legal consequences—an action for damages—just like any other contractor. But if the law should penalize all who give him employment after he has breached his contract the effect would be to deny to him the same freedom that every other contractor enjoys, to wit, that of electing at any time to break his contract, subject only to his liability for damages. To that extent liberty of action and freedom of contract is guaranteed by the fourteenth amendment. (Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240; Truax *v.* Raich, 239 U. S. 33, 36 Sup. Ct. 7.)

If Carver, of his own volition and without enticement from defendant, put an end to his contract with plaintiff, as we have seen he had the constitutional right to do, with or without cause, subject only to liability for damages for an unwarranted breach, he had the right thereafter to contract with defendant or any other person for his labor, and those who gave him employment are under no legal liability to plaintiff. Their right to hire him is determined by his right to hire to them. (Truax *v.* Raich, 239 U. S. 33, 36 Sup Ct. 7 [Bul. No. 189, p. 53].)

In this view of the case it becomes unnecessary to consider the error assigned in the charge as to the measure of damages resulting from the harboring of Carver. The other exceptions are overruled.

CONTRACT OF EMPLOYMENT—SEAMEN—WRONGFUL DISCHARGE—STATE STATUTE OF FRAUDS—*Union Fish Co.* v. *Erickson, Supreme Court of the United States (Jan. 7, 1919), 39 Supreme Court Reporter, page 112.*—The defendant company employed Erickson under an oral contract to take charge of a vessel as master, conduct it to

Pirate Cove, Alaska, and operate it there for a year. The contract was made in California where the statute of frauds provides that contracts not to be performed within a year are void unless in writing. Erickson proceeded to Pirate Cove and performed his duties until, as he alleges, he was wrongfully discharged by the company. He brought libel in admiralty to recover damages for the breach of his contract, and the defendant claims that, in view of the above statute, there was no contract and that the discharge was because of Erickson's wrongful conduct. A decree was awarded Erickson by the district court, and, on appeal, was affirmed by the circuit court of appeals. The Supreme Court in affirming the decree, said in part:

The question presented and argued here concerns the application of the California statute of frauds, which it is alleged rendered the contract void because not to be performed within one year from the making thereof.

In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly on the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made.

If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a State may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States.

We think the circuit court of appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner.

EMPLOYER AND EMPLOYEE—PUPIL CONDUCTOR—ACTION FOR DAMAGES—*Fineberg* v. *Public Service Railway Co., Supreme Court of New Jersey (Nov. 25, 1919), 108 Atlantic Reporter, page 311.*—The plaintiff, Fineberg, made an application on May 8, 1918, for a position in the service of the defendant as a conductor. He was sent to the school for conductors, which he attended for three days and then left. On the 17th of June he signed an agreement with defendant whereby it was agreed that the workmen's compensation act of 1913 would govern the parties in "any relation of employer and employee into which they have or may enter." On the occasion of the accident Fineberg was on board one of the defendant's cars being instructed as a conductor. The car in which he was riding turned over while passing a switch and pinned him beneath the rear platform, causing

him injuries for which he sought to recover in a common-law action for damages. At the time of the injury Fineberg was still an applicant for the position and was not being paid while he was being instructed. He was awarded damages, and the defendant company appealed from the decision of the lower court denying a motion for nonsuit. Defendant claimed (1) that the action should have been brought under the workmen's compensation act and (2) that Fineberg was merely a licensee while on defendant's car. In affirming the decision the court said, in part:

It is clear that the plaintiff was not an employee of the defendant at the time of the accident, and the State compensation act therefore does not apply to him. But two questions are before this court, presented by the defendant's grounds of appeal, viz: The refusal of the court to grant defendant's motion for a nonsuit; and the refusal of the court to grant defendant's motion for a direction of a verdict in its favor.

The solution of the entire inquiry thus presented, it will be observed, is dependent upon the legal status occupied by the plaintiff at the time of the accident. Manifestly he was not in the defendant's employ, because his employment obviously was dependent and conditioned upon his qualification to serve under the instructions then being extended to him. The relation of master and servant, therefore, is not the determining rule of liability.

That the situation here presented involves more than the possession of a mere license, which usually inures only to the benefit of the license, without any reciprocal benefit to the licensor, must be obvious from the fact that a tentative or conditional agreement existed between the parties, which was expected by its terms to ripen into a contract of service, mutually beneficial to both, and from which would be finally evolved the legal status of master and servant.

In either aspect of the situation the defendant was under the legal obligation to exercise due care under the circumstances, and to the jury in this instance was properly committed the solution of that issue of fact.

The judgment under review will be therefore affirmed with costs.

EMPLOYER AND EMPLOYEE—SERVICE LETTER—CONSTITUTIONALITY OF STATUTE—BLACKLISTING—*Dickinson* v. *Perry*, *Supreme Court of Oklahoma* (*May 27, 1919*), *181 Pacific Reporter*, *page 504*.—Daniel J. Perry had been employed for nine years by the Chicago, Rock Island & Pacific Railway Co., of which Dickinson was the receiver as a switchman. While in the discharge of his duties he was thrown from a box car by reason of a defective brake. The company voluntarily compensated him for his injuries. When he was discharged from the hospital where he had been sent by the company, the physician gave him a letter stating that he was again able to work. He applied to the yardmaster of the company and declared himself willing to

resume his old duties. The yardmaster said he must go to the superintendent as he could not reemploy him. The superintendent declared that according to the doctor's report he could not reemploy him. Perry then asked for a service letter and received the following:

That Daniel Jackson Perry has been employed on the Indian Territory division of the Chicago, Rock Island & Pacific Railway Co. as a switchman from November 1, 1904, to July 1, 1913. Dismissed: Account responsibility in case of personal injury to himself June 30, 1913. Services otherwise satisfactory.

H. F. RETTIG, *Superintendent.*

He again applied to the superintendent for reemployment, and upon being refused he applied to four other railroads for employment, exhibiting his service letter, and in each case he was refused. Whereupon he brought suit against Dickinson as receiver of the railway company for damages for giving him a service letter containing statements which were not true and for blacklisting him. The question was submitted to the jury and a verdict was rendered giving Perry $3,000 damages. The receiver appealed but the judgment was affirmed. The court, discussing the constitutionality of the law requiring employers to issue service letters, said, in part:

Whether or not the custom still prevails, it appears that at one time it was the rule among railway companies and other corporations to keep a list of employees who were discharged or left the service and to furnish such list to other railway companies and employers. Any reason which might be agreed upon among employers was sufficient for "blacklisting" employees, thereby possibly preventing their again securing employment in their accustomed occupation or trade. It was this abuse, among other things, which caused the legislatures of various States to enact laws declaring blacklisting unlawful and requiring corporations to give a letter to employees discharged or leaving the service setting forth the reasons for the discharge of the employee or of his leaving the service and the nature of the service rendered by the employee.

The idea of requiring employers to give employees leaving their service a letter showing the character of work performed while in their service is not a new one. The common law recognized a moral obligation resting upon the employers to give a "character" to servants leaving the employment of their masters, but no legal obligation of this nature existed until laws touching these matters were enacted.

The legislation is attacked herein upon the grounds that it is in violation of section 7 of article 2 of the constitution of Oklahoma, which provides that no person shall be deprived of life, liberty, or property without due process of law; that it is in violation of section 22, article 2, of the constitution of Oklahoma, in that it denies the right of free speech, and that it is in violation of the Constitution of the United States and the fourteenth amendment thereof, in

that it denies to the defendant due process of law and equal protection of the law.

The right of contract may be arbitrarily interfered with and comes within the protection of the provisions of the constitution of the State of Oklahoma and the United States protecting the life, liberty, and property of the citizens of the State. But the right of contract is not an absolute and unyielding right. It is subject to limitations in the interest of the public welfare.

There is nothing in the law contested which attempts to prevent a corporation from hiring whomsoever it pleases, or from discharging its employees when it sees fit. Neither is there anything in the law which requires a corporation to give a letter of recommendation to employees discharged or leaving service. All that is required is a statement of the employer showing the character of services rendered by the employee and the reason for his leaving the service of his employer. It is a certificate which, when the facts are favorable to the employee, may assist him in securing other work along the line of his trade, and is a certificate to which he feels that in justice he is entitled.

The service-letter law is in line with the spirit of a progressive age. It aims to protect the wage earner in his right to work and labor for himself and for those who are dependent upon him. It aims to protect him from a condition that might pauperize him and his family and indirectly reflect itself in the conditions of society. (Cheek *v.* Prudential Insurance Co. of America, 192 S. W. 387 [Bul. No. 246, p. 75].)

We think that the legislation attacked does not deny to the defendant due process of law, that it does not constitute an illegal infringement upon the right to contract, and that it is within the police power of the State.

It is argued that this legislation is a denial and abridgment of the right of free speech. Labatt, Master and Servant, volume 8, section 2867, suggests:

"The theory that a constitutional provision which merely purports to secure freedom of speech includes by implication a guaranty of the 'liberty of silence' seems to involve some very questionable logic."

With this statement we fully agree. The right of free speech is not an absolute one; neither is the right to remain silent. One does not have the absolute right to speak that which may injure the public or an individual, or to remain silent when silence would work a similar result. (Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. 247.)

The right of free speech guaranteed by the Constitution of the United States and the constitutions of the various States does not include the absolute right to remain silent under all conditions and when doing so may injure the rights of others in public. A corporation exists and does business within the State under and by virtue of the laws of the State. It is subject to such reasonable restrictions as the State may see fit to impose, and these restrictions may include the requirement to give information necessary to the public welfare. We hold that the giving of a service letter to employees discharged or leaving the service is the giving of information which concerns and affects the public welfare, and is a reasonable requirement which

may be imposed by statute, as was done by the Legislature of Oklahoma.

In connection with the foregoing, the court noted the contrary conclusions reached by the supreme court of Georgia, in Wallace *v.* R. Co., 94 Ga. 732, 22 S. E. 579, Bul. No. 2, p. 201; of Kansas, in Atchison, T. & S. F. R. Co. *v.* Brown, 80 Kans. 312, 102 Pac. 459, Bul. No. 84, p. 416; and of Texas, in St. Louis S. W. R. Co. *v.* Griffin, 106 Texas, 477, 171 S. W. 703, Bul. No. 189, p. 61, but added:

We believe that the better reasoning favors the sustaining of this and similar legislation.

The judgment is affirmed.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—DUTY OF EMPLOYEE—DAMAGES—*Vulcan Detinning Co.* v. *Assmann et al., Supreme Court of New York, Appellate Division (Dec. 20, 1918), 173 New York Supplement, page 334.*—The Vulcan company spent large sums of money and employed expensive experts for a period of several years for the purpose of evolving a scheme by which tin might be separated from tin scrap in such a manner as to make the process available for commercial use. Adolph Kern, one of the defendants, was the vice president and general manager and a dominant figure in the conduct of the Vulcan company's affairs. The investigations of the Vulcan company revealed a new system of detinning by means of the use of chlorine gas, which system, however, seemed to have been anticipated by the patents of Von Kugelgen and Seward. The Vulcan company thereupon bought a license from the patentees. Kern, in his position of power, of course knew all the secrets revealed by the Vulcan company's investigations, knew of the license acquired from the patentees, and knew of the people from whom the Vulcan company purchased its scrap. While still an employee of the Vulcan company, Kern negotiated with the above-mentioned patentees for the purchase of the patents and with one Assmann for the incorporation of the Republic company for detinning tin scrap. Kern also gave the Republic company the benefit of all information he received as a result of the Vulcan company's investigations. The Vulcan company sued Assmann, Kern, and others for damages for the revelation and use of its trade secrets. The complaint was dismissed by the lower court. This court affirmed the lower court's decision as to Assmann and certain other defendants, but as to Kern and certain former employees of the Vulcan company it reversed the judgment, saying in part:

In this case, while Kern did not himself sign a secrecy contract, he required everyone else to, and the evidence leaves no room to doubt that he understood that the plaintiff regarded everything done in

connection with developing this process as secret, and required it to be kept secret. Kern's information concerning the development of this process was of the most confidential character.

"Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to its interests." (2 Story, Eq., sec. 952.)

As was said in the leading case of Morison *v.* Moat, 21 L. J. (N. S.), ch. 248:

"There is no doubt whatever that when a party who has a secret in trade employs persons under a contract, express or implied, or under duty, express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer."

Neither process of manufacture, nor machinery, nor machinery installation need be patentable to be protected as trade secrets. Kern was not only turning over to the Republic company the results of the plaintiff's experiments and its consequent decisions, as indubitably shown by the dates of the various plans and contracts, and the other circumstances hereinabove shown, while in the plaintiff's employment, but, which makes the case even more aggravated, it was he who instigated and persuaded Assmann to form the Republic company and set it up against the plaintiff. This was certainly far from living up to the rule in Nichol *v.* Martyn, 2 Espinasse, 732, where it was said:

"A servant, while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business."

As to Kern, therefore, and those classed with him, the case was remanded to the trial court for a new hearing, the case against the others being dismissed.

EMPLOYERS' LIABILITY—ADMIRALTY—ELECTION OF REMEDY—INJURY TO STEVEDORE—*Siebert* v. *Patapsco Ship Ceiling & Stevedore Co., United States District Court, District of Maryland (Nov. 7, 1918), 253 Federal Reporter, page 685.*—Siebert, the complainant, was employed by the defendant company as a stevedore, and on the occasion of the accident he was working in the hold of a ship. Through the negligence of the foreman of the defendant a hatch beam was left over the hatch and was not bolted in place. The hook used to raise and lower the cargo caught under the beam and pulled it out of its support, causing it to fall on Siebert, who was very seriously injured as a result and was compelled to have his leg amputated. While still in the hospital an attorney came with a paper for him to sign by which he notified the defendant of his injuries and his election to recover under the workmen's compensation act of Maryland. Not fully realizing what he was doing, he signed the notice, and it was served on the employer. The attorney filed a claim with the industrial com-

mission, which was not heard because Siebert was in the hospital. When Siebert recovered sufficiently, he placed his case in the hands of another lawyer and asked to have the claim withdrawn, which the industrial commission permitted to be done, and Siebert brought this action in admiralty. The defendant company denied Siebert's right to bring such an action, alleging that he had already made his election to recover under the compensation act. District Judge Rose, in giving judgment in favor of Siebert, spoke, in part, as follows:

Every rational system of jurisprudence strives to insure, as far as may be, that a man shall not lose important rights merely because he has done some formal thing in excusable ignorance of its nature and significance.

The act of Congress approved October 6, 1917 (40 Stat. 395, c. 97), gave an employee, injured on water, the right to avail himself of the workmen's compensation law of the State. This result was accomplished by amending paragraph 3 of section 24 of the Judicial Code (act Mar. 3, 1911, c. 231, 36 Stat. 1091; Comp. St. 1916, sec. 991). The amending statute added the words, "and to claimants the rights and remedies of the workmen's compensation law of any State."[1] So far as I know, it has never been held that the mere institution of a common-law suit to recover for a maritime tort precluded the plaintiff from subsequently seeking relief in admiralty.

The judge, having decided that the action in admiralty before him could be maintained, proceeded to consider the merits of the case. After reviewing the fact that the defendant had issued instructions that hatch beams should always be removed and that such instructions were habitually disregarded by the foremen, he proceeded as follows:

So generally was the instruction ignored, and so easy would it have been for the employer to have discovered that fact, that it can not now be successfully claimed that by merely issuing the order it had done all that was incumbent on it to make sure that the men were given a safe place in which to work. That obligation it could not delegate. Moreover, the foreman, or "chargeman," who should have seen that the beam was removed or bolted in, was, upon the evidence, a vice principal, rather than a fellow servant of the libelant. He had full charge of the loading of the ship and the men employed in doing it. Subject to his orders were the gang leaders, who had the right to employ and discharge the workmen—in the modern vernacular, the power of "hiring and firing." The men who did the actual work were bound to obey the orders of the foreman. I am satisfied, although he denies it, that he gave the order not to remove some of the beams, including the one which fell on the libelant, and the libelant and his fellow workmen, if they were to maintain their places, had no choice other than to do what he told them to do. The employer must be held liable.

The costs of medical attendance, of the artificial limb, and the loss of wages of the libelant while in the hospital, total $791. I will allow

[1] Held unconstitutional. See p. 302.

$3,000 more as compensation for his suffering and permanent injuries, or an aggregate of $3,791.

A decree against the employer for that amount will be signed.

EMPLOYERS' LIABILITY—ADMIRALTY—ELECTION OF REMEDY—LONGSHOREMAN—*Dziengelewsky* v. *Turner & Blanchard, Supreme Court of New York, Special Term, Kings County (Apr., 1919), 176 New York Supplement, page 729.*—Turner & Blanchard were engaged in loading a steamship and for this purpose had moored a lighter alongside the steamship. A companionway belonging to the ship connected the ship with the lighter. Dziengelewsky was employed by the defendant as a longshoreman and was occupied in loading the vessel. He was required to use the ship's companionway in his work. While he and three other workmen were leaving the steamship, the companionway broke down and he was thrown into the water and drowned. Dziengelewsky's widow sued the defendant for damages in a suit at common law. The defendant claims that the action must be maintained under the workmen's compensation act. In refusing to grant a motion to set aside a verdict in favor of the widow the court said, in part:

The plaintiff urges that her right to recover finds full support under the Federal Judiciary Code (Act Cong. Mar. 3, 1911, c. 231, 36 Stat. 1087) as amended prior to the happening of the accident hereinbefore mentioned, and that the plaintiff is expressly given the right to bring her action in the State courts and to assert her common-law rights and to have recovery therefor. The plaintiff cites the case of Southern Pacific Co. *v.* Jensen, 244 U. S. 205, 37 Sup. Ct. 524, as a supporting authority, and contends that in such cases as that of plaintiff there is the right to elect whether to take compensation under the workmen's compensation law of the State of New York or whether to bring an action at common law, as plaintiff has elected to do in this case. (Nilsen *v.* American Bridge Co., 221 N. Y. 12, 116 N. E. 383.)

A careful reading of the briefs submitted on this motion, and a full consideration of the arguments made and the cases cited, convinced this court that the plaintiff was within the law by coming in the State court and asserting her common-law right to recover damages for the loss of her husband while engaged in maritime work. (See Liverani *v.* Clark & Son, 176 N. Y. Supp. 725.)

The decision in this case was followed by the court at the trial term in a subsequent case (Simpson *v.* Atlantic Coast Shipping Co., 176 N. Y. Supp. 731).

EMPLOYERS' LIABILITY—ADMIRALTY—EXTENT OF RECOVERY—*Great Lakes S. S. Co.* v. *Geiger, United States Circuit Court of Appeals,*

Sixth Circuit (Nov. 5, 1919), 261 Federal Reporter, page 275.—Charles E. Geiger was employed by the appellant company as a seaman on the Great Lakes, sailing from a port on Lake Erie to the head of Lake Superior and return. In the course of the voyage he suffered an injury by reason of the negligence of his fellow workers and not of the ship, for which he received adequate treatment at the steamer's cost and wages to the end of the voyage as per contract. His disability continued for 13 weeks, during which time the cost of his maintenance was $10 per week. Geiger sued in admiralty to recover for his injuries and was allowed maintenance and wages for the period of disability, amounting to $374.14, which included interest from the time when payable. The case was appealed on the ground that the court below had wrongly construed the law in allowing wages for the full time of the disability, or rather for the period succeeding the termination of the contract.

The court of appeals admitted the correctness of this contention, saying in part:

It is settled that injuries suffered under circumstances such as here presented are maritime in their nature and within the jurisdiction of admiralty, and that under general admiralty law the vessel owner is, broadly speaking, liable only for maintenance, cure, and the wages of a seaman injured in the service of his ship through the sole negligence of members of the crew. [Cases cited.] In neither of these cases did the issues require a determination of the period for which wages are recoverable. The question is one of general admiralty law; the right of recovery for maintenance and cure and wages not being created by Federal statute.

Judge Knappen then discussed a number of cases as throwing a measure of light on the question, after which he said:

The record in the instant case contains no statement that the libelant's shipment contract extended beyond the voyage in question, and the contrary has been, in brief and argument, at least impliedly assumed. Our conclusion is that, upon the record presented, libelant's right to wages is, as a matter of law, confined to the end of the voyage, and that the award below was in this respect unwarranted. We do not decide what the rule would be had the contract of employment extened beyond the end of the voyage.

The award for maintenance was proper; and, this being so, we think libelant plainly entitled to interest from the time its payment was due, as a part of the damages, if on no other ground. The decree of the district court is accordingly reversed, with directions to enter a new decree in favor of libelant for $130 plus interest thereon. In view of the nature of this case, no costs will be awarded in this court. Respondent [the steamship company], in fact, does not so ask.

EMPLOYERS' LIABILITY—ADMIRALTY—LONGSHOREMAN—SAFE PLACE TO WORK—*White* v. *John W. Cowper Co., United States District Court, Western District of New York (July 31, 1919), 260 Federal Reporter, page 350.*—The defendant company was engaged in some construction work and employed one Falzone as a laborer. Falzone was engaged in unloading a barge of sand moored in navigable waters. In doing his work Falzone was required to pass from the barge to a scow over a gangplank made of three boards fastened together with a cleat. This gangplank was very springy, and when Falzone commenced his work it was nearly level. Later, however, the barge, becoming lighter as it was unloaded, rose higher in the water, and a pile driver having been placed on the scow made the latter sink lower in the water. This caused the gangplank to tilt so that it was about 4½ feet higher at one end than at the other. In passing over the gangplank with a wheelbarrow load of sand Falzone fell into the water and was drowned. His administrator, White, sued for damages in admiralty. In awarding him damages the court held in part as follows:

The main grounds of negligence attributed to respondent are fault for not sufficiently stiffening the gangplank by a stiffening timber placed lengthwise on the underside thereof, and, generally, failure to supply a reasonably safe place to work, in that by placing the pile driver on the construction boat a dangerous incline of the gangplank was created, which the deceased could not have anticipated. While it is true that the master does not insure the safety of the employee, he is nevertheless required to exercise reasonable care, in view of the character of the work, to furnish a suitable place for its performance and reasonably safe materials to enable the workman to do the work with reasonable safety to himself; and in admiralty he is liable for the acts and negligence of the crew in that regard.

The deceased made no objection to working under the original conditions, and may not have regarded it hazardous to do so. It does not appear how often he went over the gangplank in the afternoon just before the accident; but as the work did not begin until 1.30, after the noonday meal, and as the increased peril does not seem to have been comprehended by him, he, in my opinion, neither assumed the additional risk, nor was he guilty of contributory negligence.

As to jurisdiction: The barge was moored in navigable waters, and the character of the work was such as to confer a right to redress in admiralty. (Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733.)

In view of the insufficiency of proof as to surviving dependents, the award was limited to $1,800 and costs.

EMPLOYERS' LIABILITY — ADMIRALTY — LONGSHOREMAN INJURED WHILE ON LAND—*Smalls* v. *Atlantic Coast Shipping Co., United*

States District Court, Eastern District of Virginia (Dec. 15, 1919), 261 Federal Reporter, page 928.—Smalls was engaged as a longshoreman in unloading steel rails from a steamship lying at a pier into railroad cars. It seems that the steel winch of the vessel which was used for this purpose was defective and by reason of such defect Smalls was injured. He was on land when he received his injuries. This action was brought in the form of a libel in admiralty against the defendant company, which excepted to the libel. In sustaining the exceptions the court held that the action was not one that might be brought in an admiralty court. The decision is as follows:

This cause is now before the court upon exceptions filed by the respondent to the libel, which present the question of whether the cause of action is one properly the subject of maritime jurisdiction, it appearing upon the face of the libel that the injury to the libelant occurred on land, and not on water.

The case is a very close one, of unusual interest, and was argued with much ability, the libelant's proctor especially presenting with much force the fact that the occurrence was so related to the water as under modern decisions to bring it within the admiralty jurisdiction.

The court, having given much thought to the question presented, and appreciating the force and reasonableness of the contentions made, has come to the conclusion that the exception is well taken, and that the cause of action sued for can not be maintained under maritime law, under the great weight of authority relating to and controlling the same.

The libel will therefore be dismissed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—COMPARATIVE NEGLIGENCE—*Dunn* v. *Great Northern Ry. Co., Supreme Court of Minnesota (Dec. 6, 1918), 169 Northwestern Reporter, page 602.*—Dunn was in the employ of the defendant in a bridge crew. He was riding on the tracks of the defendant railroad with some of his fellow workmen on a gasoline motor car driven by the foreman. This car was about 5 feet wide and 6 or 7 feet long. It was about the size of an ordinary hand car, but the wheels were larger and it was somewhat more heavily built. Planks extended lengthwise of the car on either side over the wheels, and on these planks the men sat with their feet dangling over the sides of the car. The car was being driven at the rate of 30 miles an hour, and the day was windy and cold. In endeavoring to put on his mackinaw Dunn fell or was thrown from the car and was injured. In an action for personal injuries Dunn recovered judgment in the lower court and the defendant appealed. Judge Dibell, in affirming the judgment, said in part:

The plaintiff assumed the ordinary risks necessarily attendant upon riding upon such a car and all other appreciated risks. He

did not as a matter of law assume the risk attendant upon riding upon the car driven as it was at the time under the conditions obtaining; nor was the risk as a matter of law one of his own making.

The plaintiff may have been contributorily negligent. The accident occurred in South Dakota. In South Dakota the doctrine of comparative negligence is adopted by statute. Contributory negligence did not bar a recovery, although it reduced the amount of it.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—DUTY OF EMPLOYER TO GIVE INSTRUCTIONS—*Dean* v. *H. Koppers Company, Court of Appeals of the District of Columbia (Feb. 2, 1920), 48 Washington Law Reporter, page 150 (263 Fed. 626)*.—Dean was employed by the H. Koppers Co. as a laborer to aid in the hauling, unloading, and installing of gas appliances for the Washington Gas Light Co. A heavy tank had been removed from the wagon on which it was delivered, and the foreman ordered Dean and some other laborers to remove the wagon. Some of the men got behind the wagon and pushed, and Dean and another took hold of the tongue of the wagon and pulled. While so progressing the right front wheel struck an obstacle, causing the tongue of the wagon to swing around and strike plaintiff, inflicting upon him the injuries for which he unsuccessfully sued. He alleged that the work of moving the wagon was not properly a part of his duties and that the employer failed to warn him of the dangers of the work. The court of appeals affirmed the decision of the lower court in favor of the defendant, saying in part:

This brings us to the question of assumed risk—a doctrine which grows out of contract. This is coupled with the duty of the employer to instruct the employee of dangers attendant upon the duties assigned him. The duty of warning and instruction is not incumbent upon the employer where the duty assigned, as here, is simple and the dangers, if any, are obvious. "The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand, and if he neglects to observe and consequently remains in ignorance of perils of the employment the fault is his own, not that of the employer." (18 R. C. L. 570.) The court, however, submitted the facts to the jury with a clear statement of the law of assumed risk applicable thereto, and the verdict of the jury is conclusive.

We find nothing to support the contention of plaintiff that assisting in the removal of the wagon was not within the scope of his employment or that the risk was not as open and obvious to him as it was to the defendant.

The judgment is affirmed with costs.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—MINOR EMPLOYEE—ORDER TO WORK FASTER—*Stam* v. *Ogden Packing & Provision Co., Supreme Court of Utah (Dec. 17, 1918), 177 Pacific Reporter, page 218.*—The defendant company was engaged in the business of slaughtering and preparing meat for consumption. It owned and operated a machine designed to clean animal intestines for sausage casings. Stam, a boy 16 years of age, was employed and put to work by the company to feed and operate one of these machines. He had had, prior to the time of the injury, about three months' experience in their operation. On the day of the accident the foreman of the company told Stam to hurry his work to finish a supply of casings, but did not give Stam any warning. Stam, in compliance with this order, worked fast, and as a result of his increased haste he got his hand caught and so cut and lacerated that it had to be amputated first at the wrist and later above the wrist. He brings action for damages against his employer. Judgment was awarded him in the lower court. In affirming the judgment of the lower court Judge Thurman said in part:

In this case it is clear to the court that the plaintiff's knowledge and understanding of the machine in question, the manner of operating it, and appreciation of the dangers incident thereto, were such that, if there had been no abnormal or unusual condition intervening at the time of the accident, he would, as a matter of law, be held to have assumed the risk, and in such case many of the authorities cited by the appellant would be in point.

But another element enters into the case at bar, and one that must be considered and determined in order to do justice to the parties before the court. As shown by the evidence, just before the accident happened, something out of the ordinary occurred. The plaintiff was suddenly ordered by his foreman to work faster in order to dispose of the uncleaned casings. Plaintiff, immediately, in obedience to the order, commenced to feed the machine faster, and his hand was thereupon caught between the rollers and drawn into the machine. It will be observed that this sudden order was not accompanied with a warning to be careful. This, it seems to the court, is the turning point on this particular question.

In this case we do not assert that the order to the plaintiff to work faster, standing alone, constituted negligence; but we do maintain that considering the age of the plaintiff, the character of the work, and all the attendant circumstances, the giving of the order, unaccompanied by some kind of warning to the plaintiff to be careful, made it essentially a case for the jury. It is only in cases where it is clear that there is no negligence, or that there is contributory negligence, or that the party complaining assumed the risk in question, that we can interfere with a finding or verdict as a matter of law. This doctrine has been so frequently, and in so many cases, enunciated by this court, that it is not necessary to make specific references to cases. Besides this, it is a proposition that is well-nigh universal.

It is our opinion that the trial court did not err in refusing to direct a verdict for the defendant.

EMPLOYERS' LIABILITY—COMMON-LAW ACTION—WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—*Helme* v. *Great Western Milling Co., District Court of Appeal, Second District, of California (Oct. 3, 1919), 185 Pacific Reporter, page 510.*—Helme was employed by the defendant company to operate a bran packer, his duty being to keep the bran which passed through this machine loose so that it would not clog. On the occasion of the accident a portion of the mechanism became clogged and caused a belt to slip off a pulley in the basement. Helme went into the basement to put the belt back on the pulley, and while attempting to do this his arm came in contact with some exposed and unhoused gears and was injured. The basement was poorly lighted and the exposed gears were not readily observable.

Ordinarily an accident case of this kind would have to be brought under the workmen's compensation act, but Helme sued for damages for personal injuries, claiming he was entitled to do so by section 12, subdivision "b," of that act (Stats. 1913, p. 283). This declares that an action for damages may be brought by an injured employee where the employer has been guilty of (1) gross negligence or willful misconduct, (2) where the act or failure to act which is the cause of the injury is the personal act or failure to act of the employer and (3) where the act or omission indicates a willful disregard for the safety of the employees. Judgment was awarded Helme in the sum of $3,500, and the employer appealed. In reversing the judgment the court held in part as follows:

Here the failure to act, which is charged as the cause of the injury, was the failure to inclose the gears in a housing, or otherwise to keep them from being exposed. Therefore, to entitle plaintiff to recover in this action he must allege, and by a preponderance of the evidence prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "willful misconduct"; (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of the defendant corporation, as, for example, a director or directors; and (3) that such failure to house the gears indicates a willful disregard of the life, limb, and bodily safety of defendant's employees. Unless, by failing to house the gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the industrial accident commission, or with some safety requirement expressly defined and provided for by the act itself, it can not successfully be claimed that defendant was guilty of either "gross negligence" or "willful misconduct."

"Gross negligence" is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there

is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequence, without the exertion of effort to avoid it.

The mere failure to keep the gears in a housing, apart from any willful disregard of some order of the commission, or of some particular safety provision of the act itself, does not evince such an utter disregard of consequences as to suggest some degree of intent to cause the injury, or to justify the belief that there was a conscious indifference to consequences.

The evidence fails to show that the commission ever made or served any order requiring the gears to be housed or incased, or any other order with which defendant has neglected to comply.

In the absence of any such general or special order by the commission with respect to the gears, defendant's duty must be measured by the general requirements of the act itself.

The judgment was therefore reversed.

EMPLOYERS' LIABILITY — COMMON-LAW DEFENSES — SAFE APPLIANCES—*E. H. Parrish & Co.* v. *Pulley, Supreme Court of Appeals of Virginia (Nov. 20, 1919), 101 Southeastern Reporter, page 236.*— Pulley was employed by the defendant company as a stonemason. During the course of the work it became necessary to hoist and set in place a heavy stone. To do this an "A" derrick was moved into place against the wall of the building under construction. The derrick was held in place by two guy ropes, one end of which was attached to the top of the derrick; the other end of the back guy rope was fastened to a girder, and that of the front guy rope to a crowbar sunk half way into the roadway at an angle of 60 degrees and with the small end up. Landes, the defendant's foreman in charge of the work, fastened the front guy rope. In order to operate the derrick for the purpose of hoisting the stone, it was necessary to move it a trifle and to do this Pulley commenced to move the foot of the derrick with a crowbar. While doing this the vibration caused the front guy rope to work off its anchorage, and the derrick fell over and knocked Pulley to the ground, breaking his arm and dislocating his shoulder. He sued for damages for negligence of the employer by reason of the faulty way in which the front guy rope was fastened, and was awarded judgment. The employer appealed, alleging assumption of risk, fellow service, contributory negligence, and a denial of negligence on its part. In affirming the judgment the court said in part:

The suggestion that Landes, in tying the rope to the crowbar, was a fellow servant is not sound. A servant may in the performance of one act be a fellow servant and in the performance of another be a vice principal. (Norfolk & W. Ry. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226.) But it appears from the testimony of Landes, directly

or inferentially, that it was the duty of the defendants, not only to furnish the derrick, but also to erect it and move it when necessary, and that the plaintiff was not required to furnish anything but his trowel and hammer. This duty was therefore the master's duty, and was not assignable, and if there was negligence in the discharge of it, the negligence was that of the master. In addition to this, Singleton, one of the defendants, was present assisting in this work, and the negligent manner in which the work was done was, in part, his negligence. While a representative of the master may become a fellow servant if engaged in a mere operative act, the master never can. The servant never under any circumstances impliedly assumes any risk of negligence on the part of the master, and if his personal negligence proximately contributes to the injury of the servant, he is liable as though he only were at fault. The same is true where the injury is the result of the concurrent negligence of the master and a fellow servant. If the master is a partnership, then all the partners are liable, as the negligence of one is the negligence of all. (Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521.)

Having ascertained that the slipping of the rope off the crowbar was the proximate cause of the injury, the jury could not have found that the plaintiff assumed that risk. Under the evidence, it was not an ordinary risk incident to the business in which he was engaged, nor was the danger from insecurely fastening the guy rope, under the circumstances detailed, an open and obvious one.

We are unable to find anything in the record to justify the conclusion that the plaintiff was guilty of negligence proximately contributing to his injury. It is true that the derrick was plumb when erected, and would probably have remained so if it had not been touched, but no stone could ever have been hoisted unless the derrick was adjusted for that purpose, and the means of adjusting was by pinching. It is also true that the plaintiff pinched the derrick in order to adjust it to the work to be done, but it was put there to be pinched, and it was the plaintiff's duty to pinch it. In no other way could the derrick be utilized. The record, however, fails to disclose any negligence on the part of the plaintiff in the manner in which he pinched it. A servant has the right to assume that a tool or appliance furnished him by the master is a reasonably safe tool or appliance with which to do the work assigned to him. (Richmond Ry. Co. *v.* Williams, 86 Va. 165, 167, 9 S. E. 990, 19 Am. St. Rep. 876.)

EMPLOYERS' LIABILITY — COMMON-LAW DEFENSES — SAFE PLACE AND APPLIANCES—*Beck* v. *Sylva Tanning Co., Supreme Court of North Carolina* (*Dec. 20, 1919*), *101 Southeastern Reporter, page 498.*—Beck was employed by the defendant company, his duties requiring him to fill tubs with chips over which boiling fluids were poured in order to extract certain acids from the wood. While engaged at his task Beck stumbled over some chips which had negligently been permitted to accumulate in the walkway and fell into a tub, the lid of which had negligently been left off, and he was seriously burned about the feet and legs. The locality about the tub was

dark, owing to the fact that some lights which had been broken had not been replaced. Beck sued for damages and recovered a verdict of $300, and the employer appealed. The employer claimed that Beck was contributorily negligent because it was his and his fellow-employees' duty to clean the walkways, put the lid on the tub, and to replace broken light bulbs. It also claimed that if Beck was not negligent then his injuries were caused by the negligence of fellow servants, and that he assumed the risk of his employment and therefore he could not recover. In affirming the award of damages the court said in part:

It is unquestionably the duty of the master to use proper care in providing a reasonably safe place where the servant may do his work, and reasonably safe machinery, implements, etc., with which to do the work assigned to him, and this duty is a primary and an absolute one, which he can not delegate to another without at the same time incurring the risk of himself becoming liable for the neglect of his agent, so intrusted with the performance of this duty which belongs to the master, for in such a case the negligence of the agent, or fellow servant, if he is appointed to act for the master, is the latter's neglect also. (Hicks *v.* Mfg. Co., 138 N. C. 319, 50 S. E. 703.)

The charge of the court as to assumption of risk and contributory negligence was plainly correct, and in strict accordance with the precedents. There was strong evidence of negligence, and we can see very little, if any, of assumption of risk or contributory negligence; but the charge gave the defendant the full benefit of both pleas, and we do not see how the judge could have gone further than he did, in favor of these defenses, without transgressing the well-settled principles.

EMPLOYERS' LIABILITY—COURSE OF EMPLOYMENT—ASSAULT BY SUPERINTENDENT ON EMPLOYEE—*De Leon* v. *Doyhof Fish Products Co., Supreme Court of Washington (Nov. 27, 1918), 176 Pacific Reporter, page 355.*—The home office of the defendant company was in Seattle. It operated a cannery in Alaska over which it placed one Scott as superintendent with very broad powers to conduct the business. De Leon was employed by the Alaska cannery and was afterwards suspected of attempting to create unrest and discontent among the laborers of the cannery. Scott, in an effort to set things right, sent for De Leon. When De Leon put in an appearance Scott roundly abused him and finally, without provocation, assaulted him. De Leon brought this suit for damages against the defendant company and recovered judgment. The company appealed, declaring that it was not liable for the torts of its servants, and that the assault was not in the scope of the superintendent's employment. In affirming the judgment in favor of the plaintiff, the court said in part:

When a party is sued for assault and battery by his servant upon another, liability must depend either upon proof of an express direc-

tion or upon such facts and circumstances as will imply direction or authority, and this inference may be drawn by the jury from competent attending facts and circumstances, and if a servant is engaged in the discharge of his duties to the master and is acting for the betterment or well-being of his business, and in so doing wantonly or maliciously injures another, the master is liable to the person so injured. Having given his servant general power to maintain discipline within the bounds of his own discretion, the respondent made itself, under the elementary principles of law, liable for the abuse of that power.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—AGE LIMIT—CONTRIBUTORY NEGLIGENCE—EFFECT OF STATUTE—*Karpeles* v. *Heine, Court of Appeals of New York (July 15, 1919), 124 Northeastern Reporter, page 101.*—The defendant Heine was the owner of a tenement house containing 24 apartments. The building was in charge of a superintendent, who had authority to hire and discharge the operator of the house elevator. Karpeles, the plaintiff, was a boy 13 years of age and lived in the apartments. He was greatly interested in the operation of the elevator, and when he heard that the regular operator was about to leave his employment he asked the superintendent for the job. On the day of the accident the old operator, an applicant for his job, Karpeles, and the superintendent were on the ground floor of the building. A window cleaner entered the elevator and desired to go to the third floor. Karpeles ran into the elevator and said he would take him up, but the window cleaner refused to permit him to do so until the superintendent intervened and assured him that it was all right for plaintiff to take him up. Karpeles took the window cleaner to the third floor, discharged him, and returned to the second floor, where he left the elevator for some purpose. When he returned, unknown to him, the elevator had ascended of its own volition and he unwittingly walked into the open shaft and fell to the ground below, sustaining injuries, for damages for which he brought this action. Section 93 of chapter 31, Consolidated Laws of New York, absolutely prohibits the employment of a minor under 16 years of age to operate an elevator. The trial court refused to allow damages and entered judgment in favor of the defendant on the ground that Karpeles had been guilty of contributory negligence. On appeal this decision was affirmed by the appellate division. (167 N. Y. Supp. 925; see Bul. No. 258, p. 64). Karpeles again appealed and the supreme court reversed the lower court's decision on the ground that the violation of the statute created an absolute liability on the part of the employer which can not be defended on a plea of contributory negligence, and ordered a new trial. The opinion of the court is in part as follows:

Except where a child is so young as to be incapable of exercising judgment or discretion, the law of contributory negligence applies when the person injured is an infant the same as when he is an adult, although the age, judgment, intelligence, and experience of the child must be taken into account in determining whether he was negligent. (Ihl *v.* Forty-Second Street etc. R. R. Co., 47 N. Y. 317, 7 Am. Rep. 450.)

A person under the age of 16 years has not the experience or mature judgment of an older person. The statute arbitrarily declares that—

"No child under the age of sixteen years shall be employed or permitted to have the care, custody, or management of or to operate an elevator either for freight or passengers." (Sec. 93, Labor Law, ch. 31, Consol. Laws.)

The prohibition is without qualification or condition. It was enacted to wholly prevent a person of such immature age from running an elevator and exposing himself to the danger incident thereto, and at the same time to relieve persons who are carried on an elevator from the danger which would result from committing the care, custody, management, or operation of the elevator to a person under 16 years of age. It is based upon the legislative determination that a person under 16 years of age has not the experience, judgment, or caution required of one who is to assume the care, custody, management, or operation of an elevator.

The employment of a person under 16 years of age to run an elevator is unlawful. Where a statutory prohibition is not a mere regulation or dependent upon some other fact, such as obtaining a certificate of the capacity of an infant, but is absolute and unqualified, its violation is in itself a basis of liability by the employer to a person who is injured as the proximate result of his employment contrary to the provisions thereof. In such a case the liability is per se. (Amberg *v.* Kinley, 214 N. Y. 531, 108 N. E. 830.)

The judgment of the lower court was therefore reversed and a new trial ordered.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—LAUNDRY MACHINE OPERATOR—*Sanitary Laundry Co.* v. *Adams, Court of Appeals of Kentucky (Jan. 24, 1919), 208 Southwestern Reporter, page 6.*—The laws of Kentucky (subsec. 9 of section 331a of the Kentucky Statutes) prohibit the employment of children under 16 years of age in connection with the operation of laundering machinery. Virginia Adams was a girl under 16 years of age. She misrepresented her age and was employed by the defendant laundry company. While operating a mangle she sustained injuries to one of her hands. She brought action for damages and recovered in the lower court. In affirming the judgment the court said in part:

It has been held by all courts, so far as we are aware, that where a master employs an infant in contravention of a statute and the infant

sustains injuries proximately resulting from and having a causal connection with the employment, the master is liable and can not escape such liability through the intervention of any of the ordinary defenses available against adults, including the affirmative ones of contributory negligence, assumed risk, etc. [Cases cited, including L., H. & St. L. Ry. Co. *v.* Lyons, 155 Ky. 396, 159 S. W. 971; Bul. No. 152, p. 111.]

In the Lyons case above referred to this court had under consideration the effect of the employment of infants contrary to the provisions of our statute, and after considerable discussion in which cogent reasons for denying the defense are stated, summed up its conclusion by stating:

"We therefore hold that neither the doctrine relating to assumed risk or fellow servants or contributory negligence has any place in the application of this statute. The employer takes all the risk; the child none. It is true this construction makes the employer the insurer of the safety of the child, and so he should be. The lives and limbs of children are too valuable to be sacrificed in dangerous employments; and if an employer, in violation of the statute, engages the services of a child in such employment, he must see to it that no harm comes to him; or, if he does, he must compensate him in so far as money can do for the injury inflicted."

With reference to the defense that the child was by her own prior acts estopped from bringing a suit for damages, the court said:

There are other cases from this court holding that under peculiar circumstances, an infant would be estopped, especially if he had rendered himself unable to restore the consideration. But it does not necessarily follow that because this court in such cases, contrary to the general rule upon the subject (22 Cyc. 512, 610, 611), applies the doctrine of estoppel to infants, that a master may plead estoppel against his infant servant, who was employed contrary to statutory provisions, so as to obtain the benefit of defensive pleas which would have been applicable but for the infancy of the servant. To so hold would result in indiscriminate evasions of the statute, and permit the parties to accomplish by indirection that which is expressly prohibited by the statute in furtherance of a wholesome public policy. The courts have quite generally declined to permit this to be done. Cases cited, among others: Sturges & Burn Mfg. Co. *v.* Beauchamp, 231 U. S. 320, 34 Sup. Ct. 60; Bul. No. 169, p. 64.

It would therefore seem that upon authority, as well as upon reason, the defense of estoppel herein urged could not prevail.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—WORKMEN'S COMPENSATION ACT—MACHINERY—*Schwartz* v. *Argo Mills Co.*, *Court of Errors and Appeals of New Jersey* (*Nov. 18, 1918*), *105 Atlantic Reporter, page 199.*—Schwartz, a minor under the age of 16 years, was employed by the defendant company and his employment certificate was placed on file. Schwartz's duties were at first the operating of an elevator. Later

he was given the duty of emptying cans into which a moving transverse piece of machinery dumped waste from the carding machines. While emptying a can he lost his balance and accidentally got his hand caught in the moving portion of the machine and was severely injured. Both he and his father brought actions for damages based on an act (as amended P. L. 1914, p. 488) prohibiting employers from permitting minors under the age of 16 years to work between fixed or transversing parts of any machine while in motion. The trial court refused to let the case go to the jury, holding "that plaintiff was not working between fixed or transversing parts of machinery and was therefore not being required to work in a forbidden place" and granted the defendant nonsuits in both cases. In reversing this judgment and awarding a new trial the appeal court said in part:

We are of the opinion that this was error. The clear intent of the legislature is to forbid children from being put at work when part of the appliance is stationary and part in motion. The machine in question consisted of two parts, one the moving part for combing the cotton, and the other the can to receive the waste; they were parts of the machinery necessary to accomplish the purpose of combing the cotton, and while the can was movable it was so only for the purpose of permitting the removal of the waste, a necessary part of the production of the machine, and a jury might well find it to be within the legislative meaning of a fixed part used in conjunction with the moving part of the machine, which was the direct cause of the injury.

That the common-law rules and not the workmen's compensation act is applicable to the situation now presented was settled by this court in Hetzel *v.* Wasson Piston Ring Co., 89 N. J. Law, 201, 98 Alt. 306 [Bul. No. 224, pp. 74, 75]. If the plaintiff proved the foregoing facts, he was at least entitled to the judgment of the jury as to the inferences to be drawn.

We think that the plaintiff was entitled to have the jury say, among other things, whether he was put to work in a place forbidden by law under such conditions as amounted to negligence on the part of the defendant, and that the nonsuit can not be supported by this record.

EMPLOYER'S LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—WORKMEN'S COMPENSATION ACT—SUIT FOR DAMAGES—*Wolff* v. *Fulton Bag & Cotton Mills, Supreme Court of New York, Appellate Division, Second Department (Dec. 6, 1918), 173 New York Supplement, page 75.*—Mary Wolff, a minor under the age of 16 years, was employed by the defendant company and put to work operating a power press. The company had failed to procure an employment certificate from the plaintiff Wolff, as required by

the labor law. It had also failed to provide the machine with proper guards. The plaintiff in operating the machine had her hand crushed and amputation followed. She disregarded the workmen's compensation law and gave notice and brought action as required by the employers' liability provisions of the labor law. The lower court sustained the defendant company's plea that the workmen's compensation law was a bar to a recovery of damages under the employers' liability provisions. In reversing this judgment and granting the plaintiff right to proceed with her case the appellate division said, in part:

We reach the conclusion that the workmen's act is not a bar to the plaintiff's common-law action for damages. Her employment in the defendant's factory on the day of the accident was unlawful, the defendant had no right to employ her, and in doing so it was guilty of a misdemeanor. (Penal Law, sec. 1275 (Consol. Laws, c. 40).)

We think that, in enacting the workmen's compensation law with reference to the rights and remedies of employers and employees the legislature referred to legal employment. To construe the law as permitting an employer, who has employed children illegally in work expressly forbidden by law, to insist that they are deprived of their common-law rights and must look to the compensation act for relief, would be to nullify the provisions of the labor law and to disregard the public policy of the State.

The judgment of the lower court was therefore reversed.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—LIABILITY FOR ACTS OF SERVANTS—*People* v. *Sheffield Farms-Slawson-Decker Co., Court of Appeals of New York (Dec. 10, 1918), 121 Northeastern Reporter, page 474.*—The defendant company is engaged in the sale of milk. It employs 125 drivers to deliver the milk. It has a rule, of which all of its drivers are aware, forbidding the permitting of anyone not in the employ of the defendant to ride on the wagons or assist them in their work. This rule had been violated a number of times, but the only discipline meted out by the company was reprimands. One employee had been arrested and convicted for employing a child under the age of 14 years, but he had not been discharged. Schmidt, one of defendant's drivers, employed a boy of 13 years and paid him himself. His purpose, it seems, was to prevent the theft of milk bottles and was thus of benefit to the defendant. The defendant had inspectors and was aware that its rule had been violated in a number of cases, but it had had no actual knowledge of the employment of the boy by Schmidt. This action is brought by the State of New York to prosecute the defendant for the violation of section 162 of the labor law (Consol. Laws, ch. 31), and de-

fendant was convicted and fined $20. Defendant appealed. The court of appeals, in affirming the conviction spoke, in part, as follows:

The employer is, therefore, chargeable with the sufferance of illegal conditions of delegates of his power. But to say that does not tell us how sufferance may be implied. We do not construe the statute with all the rigor urged by counsel for the people. Not every casual service rendered by a child at the instance of a servant is "suffered" by the master. Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence. Whatever reasonable supervision by one's self or one's agents would discover and prevent, that, if continued, will be taken as suffered. Within that rule, the cases must be rare where the prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided. But where work is done away from the plant, the inference of sufference weakens as the opportunity for supervision lessens. On the other hand, we think the statute draws no distinction between sufferance and permission. This is apparent from its scheme as revealed in related sections. (Labor law, secs. 70, 161, 93, 131.) The two words are used indiscriminately. In such circumstances each case may take some color from the other. Permission, like sufferance connotes something less than consent. Sufferance, like permission, connotes some opportunity for knowledge. Thus viewed, the scheme of the statute becomes consistent and uniform.

Our conclusion is that there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of this child; that the omission to discover and prevent was a sufferance of the work; that for the resulting violation of the statute a fine was properly imposed.

EMPLOYER'S LIABILITY—EMPLOYMENT OF MINORS—INJURY TO SERVANT—CARE REQUIRED—FAILURE TO WARN OF DANGERS—*Brown v. Atchison T. & S. F. Ry. Co., Supreme Court of Kansas (Apr. 12, 1919), 180 Pacific Reporter, page 211.*—A foreman of the railway company in its water service was doing some work in connection with a masonry well which was located in the bed of the Walnut River about 50 to 60 feet from the bank and surrounded by water 20 feet deep. Some driftwood had become lodged against the well which it was found desirable to have removed. This necessitated the use of a boat, and having none for this purpose the foreman engaged Willie Brown, a boy of 17 years, who had a boat, to assist in this work. Brown proceeded to work as directed by the foreman until instructed to cease and go after the man who was on top of the well and who had been assisting him in removing the drift. When his boat reached the well, the masonry gave way and it fell into the water drawing the boat in the vortex and partially filling it. Brown and the man on the well fell into the water and Brown was drowned.

Action was brought for damages for his death and recovery was had, from which judgment the company appealed, on the ground that a rule of the company prohibited the employment of minors without the consent of their parents, and therefore Brown had not been an employee and the company had owed him no duty of protection. The court in affirming the judgment for plaintiff said in part:

The point is made in behalf of the company that, even if the foreman did undertake to employ Willie Brown, his act was not binding upon the company because of this rule. If the point were otherwise good, it might be met by the suggestion that the employment of the boy was within the apparent scope of the foreman's authority (Townsend *v.* Railway Co., 88 Kan. 260, 128 Pac. 389), or that the foreman was authorized to employ the boy at once, notwithstanding his minority, by reason of the emergency with which he was confronted. However, we deem it unnecessary to invoke either of the principles referred to. The rule of the company that, when a minor is employed, the written consent of the parents shall be required, does not, in our judgment, prevent the relation of employer and employee being established between the company and a minor without such consent, so far at least as to render the company liable for an injury received by him while working for it, caused by its failure to take such precautions for his protection as it owes to employees generally. But, however that may be, we hold that a minor who without notice of such a rule performs services for the company at the instance of the person authorized to employ workmen for that purpose is, while so engaged, entitled to the care and protection ordinarily due from an employer to an employee.

There was clearly room for a reasonable conclusion that, if the boy had been warned of the likelihood of the well falling, and of the probable effect of its fall, he might have proceeded with more caution and saved himself. This is perhaps what the jury had in mind in saying that the company neglected to provide necessary means for escape. At all events we consider the evidence as justifying the verdict against the defendant on the ground of negligence in failing to warn the boy of the danger he was incurring.

EMPLOYERS' LIABILITY—FACTORY REGULATIONS—FAILURE TO PROVIDE SAFETY DEVICES—GOGGLES—*Emerson-Brantingham Co.* v. *Crowe, Appellate Court of Indiana (Nov. 26, 1919), 125 Northeastern Reporter, page 223.*—This was an action for damages for personal injuries sustained by Crowe while working for the Emerson-Brantingham Co., brought under chapter 236, Acts of 1911 (sec. 3862a et seq., Burns' R. S. 1914). This act imposes upon all employers the duty of providing safe and tested tools, appliances, and mechanisms and also requires them to make all machinery and equipment safe and to provide safety appliances and devices. The employer's foreman directed Crowe to aid in making a "cold cut," which it seems

was a process of cutting a piece of steel with a cold chisel and sledge hammer. Crowe was not provided with goggles or any other safety device. During the course of cutting the piece of steel a sliver flew off and struck Crowe in the left eye, injuring it so badly that it had to be removed. The injury also impaired the sight in the other eye. A verdict in the sum of $4,800 was returned for Crowe and the employer appealed. In affirming the decision the court said in part:

It is contended by appellant that the words, "every device, care, and precaution," are general, and following, as they do, the specific words that such owner shall "require that all appliances, tools, all contrivances, and everything whatsoever used therein, are carefully selected, inspected, and tested so as to detect and exclude defects and dangerous conditions * * * and that all dangerous contrivance; tools, * * * are securely * * * covered or otherwise protected, with safety arrangements and appliances to the fullest extent possible," must be construed to mean, under the doctrine of ejusdem generis, guards, precautions, and safety devices about machines and tools of the same or of similar character to those enumerated, and not goggles, or mere appliance attached to, or worn upon, the person of the employee.

The doctrine involved here has been so thoroughly discussed in the case of United States Cement Co. *v.* Cooper, 172 Ind. 599, 88 N. E. 69, that further discussion is needless. From a study of the act involved, as a whole, it clearly appears that the purpose of the lawmaking body was to provide a general plan for the safety and health of factory laborers, and to that end, having specifically named machinery, appliances, tools, etc., terms intended to cover everything within the plant, as included in the class that must be safe, and safely guarded, thereby exhausting the class, it goes further, and by a blanket mandate says that the owner or operator must use "every device, care, and precaution" which it is practicable and possible to use for the protection of the employee. Whether the failure to use some device, not included in those specifically named, goggles, for instance, is negligence, is a question of fact for the jury. We hold that the first paragraph of complaint states a cause of action, and that the demurrer thereto was properly overruled. In the second paragraph of complaint it is averred that appellee's injuries were received while performing a service which he was ordered and directed to perform, by his foreman, whose orders he was bound to obey, and that he was unacquainted with the nature and character of the work, and he had never prior to said time engaged or assisted in said work and had no means of knowing and did not know of the dangers and hazards of such work, and that appellant's foreman well knew of such dangers and hazards. Appellant contends that the danger to which appellee was subjected by obeying appellant's orders was a matter of common knowledge, and that therefore he was entitled to no warning from appellant. Granting the assertion, still appellant certainly owed it to its own protection to warn appellee, for it is expressly provided in section 8020b, Burns' R. S. 1914, that the fact that

hazards and dangers inherent or apparent contributed to the injury is not a defense, and further that the injured employee shall not be held guilty of negligence or contributory negligence where the injury resulted from such employee's obedience to any order or direction which he was under obligation to obey, and by section 8020c such employee does not assume the risk by such obedience to orders or directions. If the danger was inherent and apparent, and well known to appellant, and yet unknown to and not assumed by appellee, certainly it was negligence on the part of appellant to order and direct performance without giving warning of such danger to appellee. The second paragraph of complaint states a cause of action, and the demurrer thereto was properly overruled.

Finally, the appellant contends that the amount of damages was excessive, citing in support thereof the Acts of 1915, page 400, being the workmen's compensation act, by which it appears by appellant's computation that the appellee would have received under this act the sum of $594; but it must be kept in mind that the compensation provided for in this act is only for the loss of earning capacity and does not include damages for any loss of any member of the body or any damages for pain or for suffering. (Centlivre Beverage Co. *v.* Ross, 124 N. E. 220, decided at this term.) The workmen's compensation act can not be a criterion by which the damages in this case can be measured, and we can not say, as a matter of law, that the damages were excessive. There was sufficient evidence to sustain the verdict, and it was not contrary to law.

The judgment is affirmed.

EMPLOYERS' LIABILITY—FELLOW SERVANTS—VICE PRINCIPALS—DUAL CAPACITY—*Morin* v. *Rainey et al., St. Louis Court of Appeals, Missouri (Jan. 7, 1919), 207 Southwestern Reporter, page 858.*—Morin was a Croatian and unable to speak the English language and was injured by reason of the negligence of Rainey while in the employ of the codefendant, the American Car & Foundry Co. The foundry company was engaged in making car wheels and used electric motor trucks operated upon tracks to transport the molten metal to the molds. Morin had been engaged in skimming molten metal, when Rainey, who operated the electric trucks from a platform by means of a controller, directed him to devote his time to adjusting the position of the pots upon the trucks and in which the molten metal was transported. Morin was under the direction of Rainey, although both were under a common foreman. Rainey directed Morin to adjust a pot upon a truck, which Morin proceeded to do. It was necessary that Morin go between the trucks to do this, and while he was there Rainey without giving warning started the trucks, with the result that Morin was injured and lost a leg. The defendant company claims that Rainey was a fellow servant, and that therefore it is not liable, and that even if Rainey was a vice principal he was

also a fellow servant so far as Morin was concerned. The opinion of the court is in part as follows:

If one servant is clothed with power to direct and control other servants or another servant in the performance of some branch of the master's work, the master is liable for negligence on the part of such superior servant in the exercise of such power and authority conferred upon him.

The "dual-capacity doctrine" has long been recognized in this State. And it has long been settled that where one servant is injured by the negligent act of another servant occupying a dual capacity, it is the character of the act and not the rank of the servant that determines the question of the master's liability for such negligence. (See English *v.* Rand Shoe Co., 145 Mo. App. 450, 122 S. W. 747.)

In our view of the facts plaintiff's injury was due to the negligence of Rainey as a vice principal (the master's negligence) combined with his negligence as a fellow servant. And it is well settled that when the negligence of the master is combined with that of a fellow servant in producing the injury, the negligence of neither being the sole, efficient cause, both the master and the fellow servant are liable, and the injured servant may maintain his action against either or both.

But there is another view of the case which in our judgment leaves no room for doubt as to the liability of the defendent. When plaintiff went upon the track between these trucks he did so, not of his own initiative, but in obedience to the express command of the master then and there issued by the vice principal Rainey; and having thus sent the plaintiff into this position to perform the work in question it became the personal, nondelegable duty of the master to exercise ordinary care to keep safe the place where the plaintiff was thus required to work. And the plaintiff was entitled, within reason, to rely upon the implied assurance that this duty would be performed. This is a duty which the defendant can not shift to or put upon others so as to exculpate himself from liability when an injury happens by reason of its nonperformance. If the master deputizes such a duty to a servant, no matter how low the latter may be in rank or scale of employment, as to that duty the acts of such servant become in law the acts of the master.

EMPLOYER'S LIABILITY—FELLOW SERVANTS—RELATIONS OF COWORKERS—VOLUNTEERS—*Gulfport & M. C. Traction Co.* v. *Faulk, Supreme Court of Mississippi, Division A (Jan. 13, 1919), 80 Southern Reporter, page 340.*—Faulk was employed by the traction company and was put to work with a man named Chambers as a "trouble shooter." Chambers had been with the company a long time, was an experienced chauffeur, and was provided with a Ford automobile for the purpose of riding along the company's tracks in his occupation of "trouble shooter." Faulk and Chambers sometimes worked together and at other times worked alone. Chambers assumed authority over

Faulk when they were together, although he was being paid less. On one occasion while working together Chambers indicated to Faulk at the completion of the work that he, Faulk, was to crank the machine, which Faulk proceeded to do. The machine kicked and Faulk was injured and sued for damages. In reversing the judgment of the lower court in Faulk's favor the court said in part:

There was no testimony whatever to show that Chambers was a superior agent of the appellee or had the right to direct or control his services. They were merely fellow servants of equal dignity. It is well settled that the authority of an agent to bind his principal rests upon the powers conferred upon him by the principal. (Milling Co. *v.* Phillips, 117 Miss. 204, 78 South. 6.)

The assumption of authority of one servant to control another, and the acquiescence of the second servant to this control, does not render the employer liable in the absence of authority conferred upon the servant by the master.

It was no part of the appellee's duties to crank or have anything whatever to do with this automobile except to ride in it. In attempting to crank it he was a mere "volunteer," and the appellant is not responsible for his injury.

EMPLOYERS' LIABILITY—MINE REGULATIONS—VIOLATION—OPERATING ELECTRIC TROLLEY SYSTEM IN GASEOUS PORTION OF MINE—*Jaras* v. *Wright et. al., Supreme Court of Pennsylvania (Feb. 10, 1919), 106 Atlantic Reporter, page 798.*—The defendants, receivers of the Merchants Coal Co., operated an electric trolley haulage system in the Oreanda mine at Boswell. On August 9, 1915, a portion of the mine became gaseous and was closed. On August 20 work was again resumed. On the morning of August 31 Dip Entry No. 8 was found by the fire boss to be gaseous, and he erected a barricade and posted danger notices to prevent men from working in that entry. Later in the morning the barricade and signs were removed and Jaras and others went to work in the entry. Thereafter the electric locomotive was run into that portion of the mine and an explosion was caused from a spark made by the running of the trolley pole along the trolley wire. Jaras was killed. Jaras's widow sued for damages, and the jury rendered a verdict for $7,500. Notwithstanding this, the court rendered judgment for the defendants, and the plaintiff appealed. On the appeal the decision was reversed and judgment in accordance with the verdict directed, the court saying in part:

Plaintiff's statement of claim sets forth as her cause of action, inter alia, a violation of article 11, section 6, of the act of June 9, 1911 (P. L. 798), which provides that —

"Electric haulage by locomotives operated from a trolley wire is not permissible in any gaseous portions of mines, except upon intake air, fresh from the outside."

At the trial evidence was produced to show that this portion of the mine was gaseous; that it was not supplied with intake air fresh from the outside, but by air contaminated by being brought through other gaseous portions of the mine; and that the explosion resulted from a spark caused by the running of the trolley pole along the trolley wire.

In its opinion entering judgment for defendants non obstante veredicto, the court below states that the facts were as hereinbefore set forth, but holds that "the removal of the fence, turning on the current, and operation of the locomotive was the proximate cause" of the injury. With that conclusion we can not agree. The removal of the barricade was not the proximate cause, for the explosion would have occurred even though it had then been in place. The turning on of the current of electricity was not the proximate cause, for the electric current could have been run indefinitely over the trolley wire and no explosion take place; so the evidence shows, and so everyone knows who watches at night a trolley wire of one of our electric railways. Nor was the gaseous condition of the mine, or the presence or absence of intake air fresh from the outside, the proximate cause, for either or both could have existed in that mine and no explosion have occurred. It follows that the proximate cause must have been the running of the trolley pole along the highly charged trolley wire, just as the evidence shows and the jury found; and as it was so run in a gaseous portion of the mine, where there was no intake air fresh from the outside, defendants violated an express statutory duty which they owed to decedent, and, the jury having found that he had not been guilty of contributory negligence, they are liable to plaintiff for their dereliction of duty.

EMPLOYERS' LIABILITY—NEGLIGENCE OF PHYSICIAN—NEGLIGENCE IN SELECTION OF PHYSICIAN—*Smith* v. *Buckeye Cotton Oil Co.*, *Supreme Court of Arkansas* (*May 19, 1919*), *212 Southwestern Reporter*, *page 88.*—Smith was employed by the defendant company. He was directed to wipe an engine and while doing so got his fingers caught and crushed in the machinery. He was then directed to go to a physician employed by the company to treat its injured employees. The company's physician treated Smith's injuries in such a way that it became necessary for all of the fingers on his injured hand to be amputated. This suit was brought against the company for the negligent treatment of plaintiff's injuries by the company's physician. Judgment was awarded in favor of the defendant on a directed verdict. The judgment on appeal was affirmed. In stating the law of the defendant's liability in such a case the court said:

We have a case, therefore, in which the pleadings and proof show only that an injured employee was directed to, and placed in charge of, a physician who was guilty of negligence in his treatment of the case. But this allegation and this proof did not make a case for the jury. Where the employer owes his employee the duty of furnishing medical attention, or undertakes to discharge that duty, he does not

become liable for the physician's negligence or lack of skill, but is liable only when he fails in the discharge of his duty to exercise ordinary care to select a physician possessing the requisite skill and learning and one who would give the patient the attention and treatment which the case requires. This is the doctrine of the case of Ark. Midland Ry. Co. *v.* Pearson, 98 Ark. 399, 135 S. W. 917, and of St. L., I. M. & S. R. Co. *v.* Taylor, 113 Ark. 445, 168 S. W. 564.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—CONSTITUTIONALITY OF STATUTE — OFFICE EMPLOYEES — *Seamer* v. *Great Northern Ry. Co., Supreme Court of Minnesota (May 16, 1919), 172 Northwestern Reporter, page 765.*—Sarah O. Seamer was employed by the defendant railway company as a clerk in its offices, which were located in a building several blocks from the railroad. She was injured in the course of her employment through the negligence of a fellow servant as she was entering a passenger elevator in the building, and sued to recover damages under a State law relating to railroads. The defendant, after attacking the constitutionality of the law, alleged that the act under which Seamer sued did not include her or persons performing her class of work. The railway also sought to maintain that the statute violated the United States Constitution in that it denied it the equal protection of the laws. The lower court granted judgment in favor of the defendant on a motion for judgment on the pleadings; a motion by the plaintiff for a new trial was also denied, whereupon she appealed. The supreme court reversed the order denying a new trial, holding the law constitutional and applicable to such a case.

The first contention related merely to the title of the act, which the court held sufficient. The next was as to the application of the law to a person in the position of the plaintiff—i. e., not connected directly with the operation of trains. The act provides first of all:

> That every company, person, or corporation owning or operating, as a common carrier or otherwise, a steam railroad or railway in the State of Minnesota, shall be liable in damages to any employee suffering injury while engaged in such employment. * * *

The court recognized that an earlier law had been held to apply only to those employees who were subject to railroad hazards, due to the thought that "unless so limited it was unconstitutional as class legislation. Such reason, as will be noticed later, is not persuasive now."

The court then recited the development of ideas as to classification, and concluded:

> We think we are in harmony with the State courts generally, and with the Supreme Court of the United States, in its consideration of

State legislation claimed to be in violation of the fourteenth amendment, when we hold as we do that the act of 1915, when applied to one employed by a common carrier steam railroad and working as was the plaintiff, does not offend the State or Federal Constitution. This is the only constitutional question before us.

Order reversed.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—DEFECTIVE TOOL—*Pryor et al.* v. *Williams, United States Supreme Court (Nov. 8, 1920), 41 Supreme Court Reporter, page 36.*—Allega Williams, who had been reared on a farm, became employed by the Wabash Railroad for which Pryor and another were the receivers, his employment continuing from August to November, 1915, when he was injured. Williams was engaged in tearing down a bridge on the line of the railroad. He had been given a clawbar by his employer and directed to draw some bolts. He made only a hasty and casual inspection of the top side of the clawbar and thus did not notice that on the bottom side the claws "had become so rounded and dull by long usage that they could not be made to grab the shank securely." When he proceeded to use the clawbar it slipped from the bolt, causing him to lose his balance and fall 12 feet to the ground. He brought suit for damages under the Federal employees' liability act, as the railroad was engaged in interstate commerce. The defendant charged him with negligence, assumption of risk, and contributory negligence. The verdict was for Williams in the sum of $5,000, and an appeal was taken to the Kansas City Court of Appeals. This court regarded the defect as so obvious in the simple tool that the employee "must be held to have appreciated the danger and to have voluntarily assumed it." It therefore reversed the judgment, but on account of an objection by one judge referred the case to the supreme court of the State, which ruled that the company was negligent in furnishing the defective tool and the employee only negligent in using it, so that under the Federal law recovery was not barred but only reduced in amount. The award of damages was therefore affirmed, and the company took the case to the Supreme Court of the United States on a writ of certiorari.

Here it was held that the supreme court of the State had erred in classing the act of the employee as contributory negligence, and that the question should have been submitted to the jury with an instruction as to assumption of risk that made possible a denial of all liability on the part of the employer. The judgment of the trial and supreme courts was therefore reversed and the case remanded.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—INJURY TO SWITCHMAN—*Chicago, R. I. & P. Ry. Co. et al.* v. *Ward, Supreme Court of the United States (Mar. 1, 1920), 40 Supreme Court Reporter, page 275.*—Fred Ward was employed by the Chicago, Rock Island & Pacific Railway Co. as a switchman and was injured while engaged in interstate commerce. Ward was working with Carney, an engine foreman, and was on the top of a box car ready to apply the brakes after the string of cars, of which his was one, was uncoupled. Through the negligence of Carney the cars were not uncoupled at the proper time, but the engine was ordered to slow down in such a way that when the slack in the couplings was taken up Ward was thrown from the top of the car on which he was working and sustained injuries for which he brought suit under the Federal employers' liability act. He was awarded a judgment by the trial court, which decision was affirmed by the Supreme Court of Oklahoma (173 Pac. 212), and the defendants bring certiorari to the United States Supreme Court. The defendants claim that the trial court erred in charging the jury that Ward did not assume the risks of employment. The court, in ruling on this point, considered the evidence and came to the conclusion that the situation in which Ward found himself was an emergency and the question of assumption of risk should not have been brought up. The opinion as rendered by Mr. Justice Day is, in part, as follows:

The Federal employers' liability act places a coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of the assumption of risk.

The testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. For the lack of proper care on the part of the representative of the railroad company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representative's negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed had opportunity to know and appreciate it and therefore assume the risk.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—SAFE PLACE TO WORK—*Kansas City, M. & O. Ry. Co.* v. *Roe, Supreme Court of Oklahoma (Apr. 15, 1919), 180*

Pacific Reporter, page 371.—Roe was in the employ of the defendant railway as a foreman of a switching crew, and while fulfilling his duties he was killed, by reason of the engine on which he was riding becoming derailed and turning over, the escaping water and steam scalding him. Roe had been sent to Clinton to have his engine cleaned. The orders under which he was sent there included both a running order and a slow order. The slow order was given because the tracks were in very poor repair; the tracks were also covered with snow. On the return trip from Clinton to Altus running orders were given, but no slow order was given, and it was on this trip that the accident occurred. Action for damages was brought and a judgment for plaintiff's administrator followed, whereupon the defendant appealed, alleging assumption of risk. In affirming the judgment against the railway, the court said in part:

The law applicable to the defense of assumption of risk, under the Federal employers' liability act, is that of the common law as it existed prior to the passage of that act, except where the common carrier has violated some section enacted for the safety of employees. Since plaintiff does not contend that the evidence in this case shows that there has been any violation of any such statute, the defense of assumption of risk, as it existed at common law, is open to the defendant.

On the issue of the assumption of risk by a servant who has sustained injuries where the evidence is harmonious and consistent and the circumstances are such that all reasonable men must reach the same conclusion, the question whether plaintiff assumed the risk is one of law for the determination of the court; but, where the facts are controverted or are such that different inferences may be drawn therefrom, the question as to the assumption of risk should be submitted to the jury under proper instructions from the court.

The undisputed evidence in this case is that the defendant company's roadbed was in a bad state of repair, which created an extraordinary risk attributable to the negligence of the company.

It can not be said that, merely because the deceased and the engineer on the switch engine had a slow order on the trip to Clinton, this fact imputed to the deceased knowledge that there were rotten and broken ties and other defective conditions under the snow.

There is also evidence in the record from experienced railroad men that, when an order is given on one trip, it spends its force when the trip is completed, and, if they are directed to return over the same route without the order being renewed or another given, they have a right to assume that the bad places have been repaired; but, not withstanding the fact that they did not have a slow order, the engineer, Trumbo, testified that he was proceeding slowly over the place of the accident, and, as he thought, with perfect safety. It is well settled that a railroad company is liable to an employee for an injury to said employee proximately resulting from the negligence of the railway company in permitting its tracks to get out of repair and remain in an unsafe condition.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—BAGGAGE AGENT AT STATION—WORKMEN'S COMPENSATION LAW—*Carberry* v. *Delaware, L. & W. Ry. Co., Court of Errors and Appeals of New Jersey (Nov. 17, 1919), 108 Atlantic Reporter, page 364.*—Carberry was employed by the defendant company as a baggage agent at a station in New Jersey. His duties consisted in meeting all trains, both State and interstate, stopping at the station, receiving from them mail and baggage, and delivering such baggage and mail as was to be put aboard outbound trains. He met a train from Binghamton, N. Y., and received some letters and papers. As the train started he grabbed a handrail, and while running alongside the train speaking to a trainman he struck a snow bank and fell under the train and was killed. His administratrix brought action for compensation under the workmen's compensation act and was granted an award, which on appeal was reversed by the supreme court on the ground that Carberry, when killed, was engaged in interstate commerce, and that the case was governed by the Federal employers' liability act. The administratrix appealed. In affirming the decision the court said, in part:

We agree with the supreme court that the proofs demonstrated conclusively that the decedent was engaged in interstate commerce at the time of his injury and death.

It seems to have been argued in the supreme court that he was not engaged in an act of "interstate commerce," because it is not shown that any of the articles delivered or received came from out of the State or was going out of the State, or that the conversation was upon an interstate matter. But that is not the test. It was plainly part of his interstate duty to meet the train and see if anything of an interstate character had to be done as respected that particular stop, and such interstate relation to the train continued as long as the communication between him and the train was kept up. It can not be said that he was engaged in intrastate commerce for the instant he might be receiving a piece of intrastate baggage, and changed to interstate commerce with the next piece.

Since the decedent at the time he was killed was engaged in interstate commerce, compensation can not be awarded his administratrix under the New Jersey workmen's compensation act, the Federal employers' liability act being exclusive in such case. (Rounsaville *v.* Central Railroad Co., 90 N. J. Law 176, 101 Atl. 182; Erie R. Co. *v.* Winfield, 244 U. S. 170, 37 Sup. Ct. 556 [Bul. No. 246, p. 265].)

The judgment of the supreme court will be affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—COOK INJURED IN CAMP CAR—*Philadelphia, B. & W. R. Co.* v. *Smith, United States Supreme Court (May 19, 1919), 39 Supreme Court Reporter, page 396.*—Smith was employed by the railway company as a mess cook for a gang of bridge car-

penters. He worked in a camp car, which was moved from place to place over an interstate road as the needs of the bridges on which the carpenters were employed demanded. While at work in the camp car Smith was injured by the negligent act of a locomotive engineer in striking a car next to the camp car, both of which were on a siding. Smith sued under the Federal employers' liability act and recovered judgment. The case was appealed, and the Maryland Court of Appeals affirmed the judgment, holding that the work Smith was doing when injured was interstate commerce work and that he properly sued under the Federal employers' liability act. (Bul. No. 258, p. 75.) Subsequently appeal was again taken, to the United States Supreme Court, and the decision was again affirmed, the court unanimously holding that Smith was employed, as the carpenters were, in interstate commerce, within the meaning of the employers' liability act, Mr. Justice Pitney saying in part:

Taking it to be settled by the decision of this court in Pedersen *v.* Delaware, L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85], that the repair of bridges in use as instrumentalities of intrstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. Hence he was employed, as they were, in interstate commerce within the meaning of the employers' liability act.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CROSSING FLAGMAN—*Chicago & A. R. Co.* v. *Industrial Commission et al., Supreme Court of Illinois (June 18, 1919), 124 Northeastern Reporter, page 344.*—This was a proceeding brought by the administrator of one Clark, deceased, for compensation for his death under the provisions of the Illinois workmen's compensation act. Clark was employed as a crossing flagman on Sangamon Avenue in the city of Springfield where the Chicago & Alton Railroad and Chicago, Peoria & St. Louis Railroad converged and crossed the public highway. An ordinance of the city of Springfield required that the two railways maintain a flagman at this crossing, and pursuant to an agreement between the railroad companies the Chicago & Alton Railroad employed Clark. The tracks were

used indiscriminately by both interstate and intrastate trains. Clark was killed by an interstate train, and his employer claims that he was at the time of his injury engaged in interstate commerce and therefore no recovery could be had under the workmen's compensation law, but that the Federal employers' liability act applied. In reversing the award for compensation and holding that Clark had been engaged in interstate commerce the court said in part:

Several questions are raised and argued in the briefs. It is first necessary to consider and decide whether there can be a recovery in this cause under the Illinois workmen's compensation act (Hurd's Rev. St. 1917, c. 48, secs. 126–152i), or whether the cause is comprehended within the meaning and scope of the Federal employers' liability act (act Apr. 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St., pp. 8657–8665). It is contended by the plaintiff in error that the deceased was employed in interstate commerce and if this position is sustained it will be unnecessary to consider the other questions involved.

The Federal employers' liability act makes it clear that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce under conditions set forth in the act.

In the instant case deceased was engaged in the maintenance of the good order of the tracks of plaintiff in error—one of the instrumentalities used by it in the transportation of goods in interstate commerce.

It has been contended by defendant in error that while the deceased may have been killed by a train engaged in interstate commerce he was not killed by a train of the plaintiff in error; therefore he was not engaged in interstate commerce of his employer. We cannot agree with this view. If an employee is engaged in protecting the instrumentalities of the interstate commerce of his master and is killed in the course of this employment, his injuries arise out of his employment, and the cause is one within the scope of the Federal employers' liability act, regardless of who inflicts the injury causing the death.

We therefore conclude that Thomas Clark, deceased, was at the time of his injury employed in interstate commerce, and that the liability of the plaintiff in error is entirely fixed and governed by the Federal employers' liability act. It follows that the industrial commission did not have jurisdiction of this proceeding, and the circuit court erred in not quashing the proceedings, record, and award of the industrial commission.

The judgment of the circuit court is reversed and the cause remanded.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ELECTRIC STREET RAILWAYS—*Nelson* v. *Ironwood & B. Ry. & Light Co., Supreme Court of Michigan (Dec. 27, 1918), 170 Northwestern Reporter, page 45.*—Nelson was employed

as a motor man by the defendant company, which operated a street railway system between Bessemer, Mich., and the village of Giles, Wis. The railway ran through the city of Ironwood, Mich., where Nelson began his run, which extended to the village of Jessieville, a suburb of Ironwood, and return. When he returned, he turned the car over to another crew, which took it to Hurley, Wis. It will be noticed that the company's business was interstate and Nelson's car was engaged in such business, although Nelson himself did not leave the State of Michigan on his own run. On the day of the accident Nelson had taken his car to Jessieville and was returning when his car's trolley flew off and he was compelled to go to the rear of the car between the tracks to replace it. While manipulating the rope to replace the trolley another car, approaching at a high rate of speed and without warning, struck Nelson's car and caught him between the two cars, injuring him severely. Neither party had elected to come under the workmen's compensation act. Nelson brought action at common law and the defendant company opposes this, claiming that action should be brought under the Federal employers' liability act. Nelson contended that electric street railways did not come under the Federal act and that he was not at the time of his injury engaged in interstate commerce. The court, in holding that the Federal law applied, rendered its decision, in part, as follows:

In our opinion, it must be said that it was the intent of Congress by the act in question to include street railways that were engaged in interstate commerce, and therefore, if it can be said that plaintiff was engaged in interstate commerce at the time of the accident, his action should have been brought under the Federal act.

It is the contention of the plaintiff that, even if it should be held that the defendant, in the operation of its street railway, was under the Federal act, plaintiff was not at the time of the accident engaged in interstate commerce, and was not, therefore, subject to the provisions of that act. With this contention we can not agree. In the instant case the street car on which the plaintiff was employed was an instrumentality clearly engaged in interstate commerce and the case comes within the test laid down in Shanks *v.* D. L. & W. R. Co., 239 U. S. 556, 36 Sup. Ct. 188 [Bul. No. 224, p. 97], where it is stated that the question is:

"Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

The car upon which the plaintiff was employed went from one State into the other, and, the plaintiff being employed thereon, the case is clearly within the test above set forth, and it must therefore be said that he was engaged in interstate commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FILLING IN ROADBED—*Kinzell* v. *Chicago, M. & St. P. Ry. Co., United States Supreme Court (May 19, 1919)*,

39 Supreme Court Reporter, page 412.—Kinzell was injured while in the employ of the defendant railway company, and he brought action for damages under the Federal employers' liability act. The railway company contends that the work Kinzell was doing was not interstate commerce work according to the statute. The railway company was engaged in filling in a gulch with earth and stones. The gulch was bridged by a trestle and interstate trains passed over it daily. The work had reached such a stage that when earth was dumped alongside the track some of it would sometimes fall back on the rails and between them, necessitating the use of a "bulldozer," which was a contrivance for pushing the earth from the rails and spreading it. Kinzell was employed about this "dozer," and also with a shovel in removing earth and stones from between the tracks. He was injured as a result of the negligent use of the "dozer." The opinion of the court is in part as follows:

With these facts before it, the Supreme Court of Idaho, in its judgment which we are reviewing, reversed the judgment of the lower court in Kinzell's favor solely upon the ground that he was not employed in interstate commerce at the time he was injured, and gave this as the reason for its conclusion:

"We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

It being admitted that the railway company was engaged in interstate commerce, the only question for decision is whether the petitioner was employed in such commerce within the meaning of the act as construed by this court.

In Pederson *v.* Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85], it is stated that a guide to a decision of such a case as we have here may be found in the questions: Was the work being done independently of the interstate commerce in which the company was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?

He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or as the superintendent of the railway company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it. Thus the case falls plainly within the scope of the decisions which we have cited, supra, and, regardless of what might have been said of the fill before, it had clearly become a part of the interstate railway when the petitioner was injured, for it had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and integral part of, the conducting of interstate transportation over the bridge.

We can not doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is therefore reversed and the case remanded for further proceedings not inconsistent with this opinion.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—LOCAL COAL TRAIN—WORKMEN'S COMPENSATION ACT NOT APPLICABLE—*Philadelphia & R. Ry. Co.* v. *Hancock, United States Supreme Court (June 1, 1920), 40 Supreme Court Reporter, page 512.*—Hancock was killed while working as a trainman for the Philadelphia & Reading Railway Co. His widow brought action for compensation and an award was made in her favor, which on appeal was affirmed by the Supreme Court of Pennsylvania. The company appealed to the United States Supreme Court, declaring that as deceased had been engaged in interstate commerce at the time of his death recovery of damages by his widow must be had under the Federal employers' liability act and not under the State workmen's compensation law. The Supreme Court accepted this view and reversed the decision affirming the award of compensation. The decision of the court as rendered by Mr. Justice McReynolds is in part as follows:

If, when the accident occurred, the husband was employed in commerce between States, the challenged judgment must be reversed, and he was so employed if any of the cars in his train contained interstate freight. (Employers' liability act, Apr. 22, 1908, c. 149, 35 Stat. 65, Comp. St. 8657–8665 [cases cited].)

The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap colliery to Locust Summit yard, two miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number and contained certain code letters indicating that such car with its load would move beyond the State.

Pursuing the ordinary course these cars were hauled to Locust Summit yard and placed upon appropriate tracks; there the duties of the first crew in respect of them terminated. Later, having gathered them into a train, another crew moved them some 10 miles to Shamokin scales, where they were inspected, weighed, and billed to specifically designated consignees in another State. In due time they passed to their final destinations over proper lines. Freight charges at through rates were assessed and paid for the entire distance beginning at the mine.

Respondent maintains that the coal in cars ticketed for transportation as above described did not become part of interstate commerce until such cars reached Shamokin scales and were there weighed and billed. But we think former opinions of this court require the contrary conclusion. The coal was in the course of transportation to another State when the cars left the mine. There was no interruption of the movement; it always continued toward points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another State.

The judgment of the State court was therefore reversed and the cause remanded for a new trial.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—OPERATION OF WATER-PUMPING STATION—*Erie R. Co.* v. *Collins, United States Supreme Court (May 17, 1920), 40 Supreme Court Reporter, page 450.*—William M. Collins was employed by the Erie Railroad Co. in the operation of a signal tower and a water tank at the town of Burns, N. Y. In the signal tower he set signals for trains engaged in both interstate and intrastate commerce and at the water tank he pumped and supplied water to both interstate and intrastate trains. The water tank was equipped with a gasoline pumping engine. The engine was defective and blew up, seriously injuring Collins and greatly disfiguring him. He brought suit for damages under the Federal employers' liability act and was awarded a verdict by a jury and granted judgment by a Federal district court. The railroad company then appealed to the circuit court of appeals, where the judgment was affirmed, whereupon the company brought the case to the Supreme Court on a writ of certiorari. The sole contention was whether or not Collins was engaged in interstate commerce. The Supreme Court, in holding that he was so engaged, and affirming the decision of the trial court, reviewed the cases cited and concluded:

These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the difference between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

In the Pedersen case (229 U. S. 146, 33 Sup. Ct. 642 [Bul. No. 152, p. 85]) it was said that the questions which naturally arise: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" Or as said in Shanks *v.* D., L. & W. R. R. Co. (239 U. S. 556, 36 Sup. Ct. 188 [Bul. No. 224, p. 97]) was the "work so closely related to it (interstate commerce) as to be practically a part of it?" The answer must be in the

affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied.

Another case (Erie R. Co. *v.* Szary, 40 Sup. Ct. 454) was decided on the same grounds as the above, where a workman who was engaged in drying sand for engines engaged in both interstate and intrastate commerce was injured while getting a drink of water. It was declared that he was engaged in interstate commerce when injured.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING OLD RAILS FROM ROADBED—*Kusturin* v. *Chicago & A. R. Co., Supreme Court of Illinois (February 20, 1919), 122 Northeastern Reporter, page 512.*—Kusturin was in the employ of the defendant railroad company which was engaged in interstate commerce. Near Romeo the railroad maintains four tracks, two main and two passing tracks, which are ballasted. Two weeks previous to the accident the rails of these tracks were removed and new ones put in their places. The old rails were allowed to lie upon the roadbed. Kusturin and his fellow employees were engaged in retamping the ties and removing the old rails. While loading an old rail on a flat car under the supervision of a foreman one end of the rail was thrown too soon causing the rail to fall upon Kusturin's foot and crushing it. He brought action under the Federal employers' liability act for damages and the railroad contested his right to bring the action on the ground that he was not at the time he was injured engaged in interstate commerce. Judgment was allowed to Kusturin and on appeal to the appellate court the judgment was affirmed (209 Ill. App. 55) and the defendant brought error. In affirming the judgment the court said in part:

The law governing the facts of the case considered often presents a close question in this class of cases, and its application to such facts by courts at times seems subtle; but, having in mind that Congress has no power to deal with the question, except under its power to regulate interstate commerce, it will be seen that precision in applying the provisions of the Federal employers' liability act is perhaps justifiable. As this is a Federal question, the views held by the Federal court of last resort are therefore controlling. That court, in the case of New York Central & Hudson River Railroad Co. *v.*

Carr, 238 U. S. 260, 35 Sup. Ct. 780 [Bul. No. 189, p. 92], states the doctrine underlying this class of cases as follows:

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

The court, after reviewing the various cases holding both with and against its decision, continued as follows:

It will thus be seen from this late case that the Federal court took the view that an employee is within the Federal employers' liability act if the employment in which he is engaged at the time of his injury is an incident to interstate commerce, even though it might likewise be an incident to intrastate commerce. In the case at bar the scope of the employment of the plaintiff was that of repairing of tracks. Such repair work is, as we have seen, so connected with interstate commerce as to be a part thereof. The work of loading these old rails, while not the actual work of bolting in new rails, was yet a part of the cleaning-up process made necessary by putting in new rails. This work could not be said to in any way be an incident to intrastate commerce. This case is therefore to be distinguished from those cases where the employment is changed from work which is a part of interstate commerce to that which is a part of intrastate commerce.

We are of the opinion that the removal of such old rails was a part of the general work of repairing the track. The fact that if those old rails remained on the right of way they would not have interfered with the use of the track in interstate commerce is not controlling in determining the question of whether the work of removing them was practically a part of the repairing of the road. As we view the matter, the removal of these old rails was an incident to such repairing and necessary to a proper upkeep of the track. To hold that such work was not a part of repairing the track would be analogous to holding that while the building of a scaffold which surrounds a house under construction is a necessary part of the work of construction, the removal of such scaffold when the house is finished is not. A house surrounded by a scaffold could, no doubt, be used without such scaffold being taken down; but no one would contend that it was not properly a part of the work of completing such a house to remove the scaffold when its presence is no longer necessary. So, in the repairing of the track, the removal of the old rails is analogous to the removing of the tools used in making such repairs or the removal of the hand car on which the materials were conveyed to the place where the work was done. It was within the scope of the work necessary to keep the track and roadbed in that condition which good railroading demands, whether such railroading be interstate or intrastate.

We are therefore of the opinion that defendant in error at the time of his injury was engaged in interstate commerce and therefore came within the purview of the act.

For an opposite conclusion on identical facts, see Perez *v.* Union Pacific Co. (Utah Sup. Ct.), 173 Pac. 236, Bul. No. 258, p. 77.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT—INJURY TO SWITCHMAN—*Delaware, L. & W. R. Co. v. Peck, United States Circuit Court of Appeals, Second Circuit (Dec. 11, 1918), 255 Federal Reporter, page 261.*—R. G. Peck was employed as a switchman by the railroad company, and while he was setting a brake on an open coal car at Delawanna, N. J., which was being switched from one siding to another, he was injured, losing his left arm and leg. The coal car had come from Pennsylvania and was consigned to the Thomas A. Hart Co. at Delawanna. When the car arrived this company directed the car to be placed on the stub end of the "old switch," but later they directed that the car be switched from the "old switch" to "Hart siding," and it was during this operation that Peck was injured. Peck brought action under the Federal employers' liability act and recovered judgment, and the railroad brings writ of error to this court on the ground that Peck at the time of his injury was not engaged in interstate commerce. Peck contends also that the Federal safety appliance act was violated in that the brake and brake step of the coal car were defective. In reversing the judgment of the lower court in favor of Peck, the court rendered, in part, the following decision:

Upon the undisputed facts we think the plaintiff was not engaged in interstate commerce, and that the interstate journey had ended at least when the car was placed by the direction of the Hart Co. at the stub end of the old switch, and that the judge should have so held as a matter of law. All switching thereafter in the yard for the convenience of the consignee was intrastate commerce. This is in accordance with our understanding of the decision of the Supreme Court in Lehigh Valley Railroad Co. *v.* Barlow, 244 U. S. 183, 37 Sup. Ct. 515 [Bul. No. 246, p. 95], reversing the decision of the Court of Appeals of the State of New York.

But it is contended that, even if the plaintiff were engaged in intrastate commerce, the defendant is absolutely liable under the Federal safety appliance act, without regard to any question of negligence, because the car was not equipped with an efficient hand brake and proper brake step. This act laid down requirements as to railroad equipment with which all carriers engaged in interstate commerce must comply under the penalty of $100 for each and every violation. Of course, one of the class intended to be protected by the act injured by the failure of a carrier to comply with it is entitled to recover damages (Texas & Pacific Railway Co. *v.* Rigsby, 241 U. S. 33, 36 Sup. Ct. 482), but not under the Federal employers' liability act, unless he were at the time engaged in interstate commerce, which this plaintiff was not.

At this point the court stated that the injury was received in the State of New Jersey, in which the status of employer and employee is fixed by the workman's compensation law, "which we regard as

excluding all other jurisdictions,"[1] thus also precluding a common-law action, capable of being brought wherever the defendant could be found. Section II of the compensation law regulates elective compensation, which is presumed in the absence of positive action to the contrary. Proceeding, the court said:

The answer sets up this act as a defense and alleges that there was no provision in the contract that section II should not apply, and that the plaintiff had given no notice to the defendant before the accident; wherefore he could not maintain the action. At the trial the defendant offered to prove these allegations, but the court refused to permit it, and the defendant excepted. We think this was error. The New Jersey act creates a system to be enforced by the court of common pleas of the county of New Jersey which would have jurisdiction in a civil case. The employee is required to give notice of the injury to the employer within a fixed time. The compensation to be paid for the loss of a leg or a hand is a fixed proportion of the employee's daily wages for a fixed number of weeks, and this compensation may be commuted by the court of common pleas into one or more lump sums. That court is also to settle at the request of either of the parties any dispute about compensation. For these reasons we are of the opinion that the plaintiff can not maintain this action in the District Court for the Southern District of New York. There are some decisions of the courts of New York to a similar effect. The judgment is reversed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHMAN—*Wangerow* v. *Industrial Board, Supreme Court of Illinois (Dec. 18, 1918), 121 Northeastern Reporter, page 724.*—William Wangerow was employed by the Chicago Junction Railway Co., which was engaged in the business of switching cars for meat packers in the vicinity of the Union Stock Yards in Chicago. Wangerow went to work one morning and assisted in switching a train of cars containing some interstate business. His engine then proceeded without any cars to get water and another train also containing interstate shipments, and while so proceeding he was thrown from the front fender of the engine and was run over, sustaining injuries which resulted in his death. His widow brought proceedings under the workmen's compensation act of Illinois, but the industrial board refused to grant an award, whereupon she applied for a writ of certiorari and the case was certified to the supreme court. In affirming the decision of the industrial board the court said in part:

The question to be decided is whether the workmen's compensation act of Illinois or the Federal employers' liability act applies.

[1] An opposite conclusion is reached in Ross *v.* Schooley, p. 138. See also the case of Texas etc. R. Co. *v.* Rigsby (cited above), Bul. No. 224, pp. 205, 207.

If Wangerow was engaged in interstate commerce at the time of his injury, then the Federal act applies and there is no liability under the Illinois workmen's compensation act.

Whether the work done is interstate or intrastate depends upon the immediate purpose for which such work is done.

In the case at bar the crew of which Wangerow was a member was at the time of the accident moving the engine, with no cars attached, from the work of setting the Laurel Street train, containing interstate cars, back toward Ashland Avenue for the purpose of there moving the State Line train, also containing interstate cars. In each case the moving of these trains was an act of interstate commerce. The only purpose in crossing over the tracks where the injury occurred was to move the engine from the point of completion of one act of interstate commerce to the point of commencement of another act of interstate commerce. That purpose controls, and Wangerow was engaged in interstate commerce at the time of the injury. This being true, the workmen's compensation act of Illinois did not apply.

EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WORK ON POWER LINE SUPPLYING ELECTRICITY TO INTERSTATE TRAINS—WORKMEN'S COMPENSATION—*Southern Pacific Co.* v. *Industrial Accident Commission of California et al., United States Supreme Court (Jan. 5, 1920), 40 Supreme Court Reporter, page 130.*—A lineman by the name of William T. Butler was killed by an accident arising out of and in the course of his employment with the Southern Pacific Co. Butler was engaged in wiping insulators on a steel tower which supported electric wires that supplied the company's electric trains when he received a shock and was thrown from the tower, receiving injuries from which he later died. The company's trains were engaged in both interstate and intrastate commerce, and the electric wires from which Butler received the shock were on the main line and supplied this traffic with power. The only point in dispute is whether the work Butler was performing was a part of interstate commerce, and thus without the scope of the workmen's compensation act of California (Stat. 1917, p. 831). The California Supreme Court affirmed the award of the industrial commission holding that the work Butler was performing when he was killed was not in interstate commerce (171 Pac., 1071, Bul. No. 258, p. 221). In arriving at this decision the State court relied on Chicago, B. & Q. R. Co. *v.* Harrington (241 U. S. 177, 36 Sup. Ct. 517, Bul. No. 224, p. 105), where the United States Supreme Court held that the removing of coal from a storage track to a loading shed for the use of interstate trains was not work in interstate commerce. The Southern Pacific Co. brought certiorari, and the judgment of the Supreme Court of California was reversed. The decision is in part as follows:

Generally when applicability of the Federal employers' liability act is uncertain the character of the employment in relation to commerce may be adequately tested by inquiring whether at the time of the injury the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. (Pedersen *v.* Delaware, L. & W. R. R. Co., 229 U. S. 146, 151, 33 Sup. Ct. 648 [and other cases cited].)

Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIABILITY OF THIRD PARTY—JOINDER OF PARTIES—*Cott* v. *Erie R. Co. et al., Supreme Court of New York, Appellate Division, Fourth Department (Dec. 5, 1919), 179 New York Supplement, page 488.*—The Buffalo Creek Railroad Co. connected the railway lines of the Erie Railroad with those of the Lehigh Valley Railway and was operated under a lease jointly by both railroads. Cott was employed by the Lehigh Valley Railroad Co. and was killed in the course of his employment while engaged in interstate commerce. The accident occurred on the Buffalo Creek Railroad and was due to the negligent act of leaving open a switch connecting the main track with a lumberyard spur. Cott's administratrix brought action against both the Erie and the Lehigh Valley Railroads, against the Erie at common law and against the Lehigh Valley under the Federal statute, and recovered judgments against both. The Erie Railroad Co. claims that the court erred in not permitting the Federal employers' liability act to be applied to it. The decision of the court affirming judgment is in part as follows:

The duty of keeping the track and switch in proper condition for use rested upon the Lehigh and Erie companies jointly as lessees and operators of the Buffalo Creek Railroad Company, but plaintiff's intestate being at the time an employee of the Lehigh and engaged with it in interstate commerce the liability of the Lehigh is governed exclusively by the Federal employers' liability act, and the negligence relied on and submitted to the jury is by reason of a "defect or insufficiency" in its "tracks and roadbed" being one of the grounds of liability in section 1 of the Federal act. But as the relation of master and servant did not exist as between the Erie Company and plain-

tiff's intestate, the Federal act does not apply or affect the liability of the Erie Company, which is governed by the common law.

In behalf of the Erie Company it is urged on this appeal that plaintiff's sole remedy is under the Federal employers' liability act, and that, recovery under that act having been had by the jury's verdict against the Lehigh, there can be no further recovery against the Erie. It is quite true that the Federal act is controlling in cases where it applies, and that the liability imposed by that act is exclusive of all other liability as between an injured employee and his employer, but the act has no application whatever to an injury inflicted upon an employee engaged in interstate commerce by a third party who is not an employer.

The judgments were therefore affirmed.

On this hearing the point was raised that the joinder of the common-law and statutory actions was improper. The court admitted that it was subject to demurrer to the complaint, but no action having been timely taken the question could not now be raised.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIABILITY OF THIRD PARTY—JOINDER OF PARTIES—EMPLOYER AND FELLOW SERVANT—*Lee* v. *Central of Georgia Ry. Co. et al., Supreme Court of the United States (Mar. 1, 1920), 40 Supreme Court Reporter, page 254.*—Lee was injured while in the employ of the Central of Georgia Railway Co., being at the time engaged in interstate commerce. He claimed that his injuries were the result of the joint negligence of the employer and an engineer. He sued both of them jointly to recover damages from the company under the Federal employers' liability act (Comp. St., secs. 8657–8665) and from the individual defendant under the common law. Lee stated his cause of action in a single count against both defendants. The defendants demurred on the ground of misjoinder of causes of action, but the demurrers were overruled and judgment was rendered for the plaintiff, whereupon the defendants appealed. The Georgia Court of Appeals certified the case to the State supreme court, which declared the joinder not permissible. The court of appeals then reversed the decision of the trial court, and Lee appealed to the United States Supreme Court, declaring that he was being deprived of his rights under a Federal law. The United States Supreme Court affirmed the decision reversing the trial court. The following is in part the opinion handed down by Mr. Justice Brandeis:

The Federal employers' liability act does not modify in any respect rights of employees against one another existing at common law. To deny to a plaintiff the right to join in one count a cause against another employee with a cause of action against the employer in no way abridges any substantive right of the plaintiff against the employer. The argument that plaintiff has been discriminated

against because he is an interstate employee is answered, if answer be necessary, by the fact that the Supreme Court of Georgia has applied the same rule in Western & Atlantic R. R. et al. *v.* Smith, 144 Ga. 737, 87 S. E. 1082 (22 Ga. App. 437, 96 S. E. 230), where it refused under the State employers' liability act (Civ. Code 1910, 2782 et seq.) to permit the plaintiff to join with the employer another railroad whose concurrent negligence was alleged to have contributed in producing the injury complained of. If the Supreme Court of Georgia had in this case permitted the joinder, we might have been required to determine whether, in view of the practice prevailing in Georgia, such decision would not impair the employer's opportunity to make the defenses to which it is entitled by the Federal law. For, as stated by its supreme court in this case (147 Ga. 428, 431, 94 S. E. 558, 560):

"If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, section 4512 (providing for verdicts in different amounts against the several defendants), is not applicable to personal torts."

But we have no occasion to consider this question. Refusal to permit the joinder did not deny any right of plaintiff conferred by Federal law.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE—SAFETY APPLIANCE ACT—GRAB IRONS ON CARS—*Boehmer* v. *Pennsylvania R. Co., United States Supreme Court (Apr. 19, 1920), 40 Supreme Court Reporter, page 409.*—Boehmer was employed by the defendant company as a brakeman. While working about his train at night he became injured. The injury occurred when Boehmer attempted to board a car which had grabirons only on diagonal corners, he having in the darkness reached for a grabiron on a corner of the car where there was none, under the mistaken belief that the car was equipped with grabirons on all four corners. He claimed that the car was improperly equipped and sued under the Federal safety appliance act. In affirming the judgment of the circuit court of appeals in favor of the defendant (252 Fed. 553, 165 C. C. A. 3), Mr. Justice McReynolds, expressing the opinion of the court, said in part:

Section 4 of the safety appliance act of 1893 (27 Stat., 531 Comp. St. 8608), provides:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure

grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Petitioner insists that the act of 1893 was designed for the safety of employees and specified grabirons or handholds in the end and sides of each car as one of the essential requirements. That while it did not specifically command that these should be placed at all four corners, this was the obvious intent. But the courts below concurred in rejecting that construction, and we can not say they erred in so doing. Section 4 must be interpreted and applied in view of practical railroad opinions; and having considered these the courts below ruled against petitioner's theory.

Likewise, we accept the concurrent judgment of the lower courts, that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. (Chicago Junction Railway Co. *v.* King 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173.)

The judgment is affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—INTERSTATE COMMERCE—REPAIRING LOCOMOTIVE—*Chicago, R. I. & P. Ry. Co.* v. *Cronin, Supreme Court of Oklahoma (Dec. 10, 1918), 176 Pacific Reporter, page 919.*—Cronin, who was employed as a coach cleaner by the railroad company, was directed to aid in jacking up an engine. He and one other man proceeded to do this, but were unsuccessful owing to the fact that it was too heavy for them. Cronin's assistant let go without notice and the lever came down with a jerk, striking Cronin and injuring him. The engine was one regularly used in interstate commerce, but was at the time in a roundhouse for repairs. The court, in affirming a judgment in favor of Cronin in an action brought under the State employers' liability act, said in part:

It is contended that the judgment must be reversed for the reason that the trial court tried the cause as governed by the laws of the State and not the Federal liability act; the theory of the company being that Cronin was engaged in interstate commerce because he was working on an engine which, when in service, pulled an interstate passenger train. The engine had been taken out of service and placed in the shop for repairs. It was not being used in commerce of any kind; it was "dead." The fact that the repairs had been made and the engine placed back in service in time to make its regular trip from Sayre, Okla., to Amarillo, Tex., does not necessarily mean that the engine was not out of service in the meantime. We can not agree with the plaintiff in error (railway company) that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was "dead," undergoing the repairs necessary to placing it in commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCE ACT — INTERSTATE COMMERCE — EFFECT OF STATE COMPENSATION ACTS—*Ross* v. *Schooley, United States Circuit Court of Appeals, Seventh Circuit (Jan. 7, 1919), 257 Federal Reporter, page 290.*— Schooley, an employee of the defendant (appellant here), met his death in Illinois by reason of defective car couplers. Ross is the receiver for the Toledo, St. Louis & Western Railroad Co. Schooley's administratrix omitted to aver and prove that at the time of the accident he was engaged in interstate commerce. Because of this Ross contends that Schooley's exclusive right and remedy were under the Illinois workmen's compensation act. The railroad on which Schooley was working was an interstate railroad engaged in interstate business, but at the time of the injury Schooley was working on intrastate cars. On the question of the necessity that the plaintiff, in order to recover under the Federal safety appliance act, must have been himself engaged in interstate commerce at the time of the injury, the court, affirming the decision of the lower court in favor of the plaintiff, said in part:

Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the safety appliance act, no State legislature can alter or impair the Federal right by passing compensation acts.

It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employees and travelers, regardless of their participation in interstate commerce. A State legislature therefore has no more power to curtail the Federal right of an employee than of a traveler.

What effect a State compensation law has upon the right under the safety appliance act of an employee, who was injured through defective appliances while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result that would make the operativeness of the act dependent upon legislative wills of the several States, and which aligns that act with the employers' liability act in substantive and procedural effect, is supported by our understanding of Schlemmer *v.* Buffalo etc. Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407 [Bul. No. 71, p. 385]; New York etc. R. Co. *v.* Winfield, 244 U. S. 147, 37 Sup. Ct. 546 [Bul. No. 246, p. 260].

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCE ACT—POWER BRAKES—*Hodgman* v. *Sandy River & R. L. R., Supreme Judicial Court of Maine (June 18, 1919), 107 Atlantic Reporter, page 30.*—This was an action for damages by the widow of Hodgman for the death of her husband who had been an engineer in

the employ of the defendant. Hodgman's death occurred by the derailment of a locomotive which he was operating. It appears that although the locomotive had been equipped with a device to make it balance more evenly on its springs, the Federal safety appliance act of 1893 (ch. 196, 27 Stat. 531), requiring that locomotives engaged in interstate commerce must be equipped with power driving wheel brakes, had not been complied with. The defendant railroad in appealing claims that it had made a substantial compliance with the safety appliance law and that the deceased had been negligent in running the engine too fast. In deciding the points the court said in part:

The defendant's counsel frankly admits that "technically the defendant was in violation of the safety appliance act" (U. S. Comp. St., secs. 8605–8612) and argues that improvements were made which amount to a substantial compliance with the statute, but we find no warrant for saying that a mechanical contrivance for equalizing the distributing of the weight on the springs, an improvement in no way affecting the speed of any engine, is a substantial compliance with the statute requirement that the engine shall be equipped with a power-driven wheel brake.

Counsel further argues that an additional and vital question was, "Did the absence of the driver brakes from the engine contribute in whole or in part to the speed of the train?" and insists that it did not. This, like all the other questions here noted, was the subject of very careful inquiry both in the examination in chief and in cross-examination, and was necessarily, from the very nature of the case, a leading question, and as necessarily associated with all the other questions submitted to the jury. That it was submitted to the jury with proper instruction is apparent.

In our view there can be no such thing as substantial compliance shown to relieve the defendant from strict compliance with the statute.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—RELEASE—EFFECT OF RELEASE AS TO SURGEON CHARGED WITH MALPRACTICE—*Hooyman* v. *Reeve*, *Supreme Court of Wisconsin* (*Jan. 7, 1919*), *170 Northwestern Reporter, page 282*.—The plaintiff Hooyman was injured while in the employ of the Appleton Coated Paper Co. and Dr. Reeve was employed as physician and surgeon of the company to attend his injuries. Some time after the injuries were sustained Hooyman executed a release to the Appleton Coated Paper Co. for the consideration of $3,000 by which he acknowledged full satisfaction and discharge of all claims, accrued or to accrue, in respect to all injuries or injurious results, direct or indirect, arising from or to arise from the injuries sustained by him. This action is now brought by Hooyman for the malpractice

of the doctor, Reeve. The defendant Reeve claims that the release to the paper company operates as a release as to him also. The lower court granted the plaintiff judgment. On appeal this court reversed the lower court, speaking in part as follows:

Now it seems clear from the facts stated in the answer including the release that the plaintiff accepted the payment mentioned in the release in full satisfaction for all injuries sustained, including the injuries caused by the alleged malpractice. The plaintiff being paid for all damages which he sustained, has no cause of action against the defendant for the same claim or any part of it.

The receipt is very broad, and manifestly was intended to cover all damages sustained by plaintiff, as well for the alleged malpractice as for the original injuries. The receipt acknowledges "full satisfaction and discharge of all claims, accrued or to accrue, in respect to all injuries or injurious results, direct or indirect, arising or to arise from" the accident in question. The plaintiff obtained satisfaction for injuries sustained, and is entitled to but one satisfaction.

We are convinced that the answer set up a good defense, and that the demurrer (to it by plaintiff) should have been overruled.

EMPLOYERS' LIABILITY—RELEASE—EFFECT OF RELEASE AS TO SURGEON GUILTY OF MALPRACTICE—*Purchase* v. *Seelye, Supreme Judicial Court of Massachusetts (Dec. 30, 1918), 121 Northeastern Reporter, page 413.*—Edward R. Purchase was injured while in the employ of the Boston & Albany Railroad. His injury was a rupture in his right groin and he went to the defendant physician for treatment. Dr. Seelye, the defendant surgeon, performed an operation on the plaintiff's left side. When the plaintiff called the surgeon's attention to this fact the surgeon said that he had mistaken him for another patient who had hernia in his left side. Later Purchase, the plaintiff, executed a release to the railroad company "of all claims and demands" he might have against it as a result of the injury sustained while working on the road "arising or which may arise out of said injury." He then brought action for damages against the surgeon for negligent treatment and recovered judgment, which on appeal was affirmed. The defendant surgeon claimed that the release to the railroad company operated as a release to him also. The court below adopted this view, and the plaintiff excepted. The supreme court sustained the exceptions, saying in part:

The railroad company could not be held liable because of his mistaken belief that he was operating upon some other person other than the plaintiff; such a mistake was not an act of negligence which could be found to flow legitimately as a natural and probable consequence of the original injury, and a ruling in effect to the contrary could not properly have been made. The fact that the mistake made

by the defendant might possibly occur is not enough to charge the railroad company with liability; the unskillful or improper treatment must have been legally and constructively anticipated by the original wrongdoer as a rational and probable result of the first injury. This is the true test of responsibility, and it can not be extended to cover the facts in the present case as shown by the record.

We are of the opinion that the act of the defendant in operating on the wrong side was a wholly wrongful, independent, and intervening cause for which the original wrongdoer was in no way responsible.

If we assume that the release is valid and a bar to any claim which the plaintiff had against the railroad company, still a majority of the court are of the opinion, for the reasons stated, that it is not a defense to the present action and was not admissible in evidence.

The finding of the court below that the release was a bar to the suit against the surgeon was therefore overruled.

EMPLOYERS' LIABILITY—RULES OR ORDERS OF EMPLOYERS TO EMPLOYEES—COMPLYING WITH COMMAND CAUSE OF INJURY—*Fillippon* v. *Albion Vein Slate Co., United States Supreme Court (May 19, 1919), 39 Supreme Court Reporter, page 435.*—The action was brought by Donato Fillippon, a former employee of the defendant, for damages for the loss of his right arm. Fillippon was employed as a "rubbish man" or general laborer by the defendant company about its slate quarry. When large blocks of slate were blasted loose it became necessary to block them up in order that chains might be placed around them. It was customary when it was necessary to push a wedge or block far under the block to do so with the aid of a stick. Fillippon was placing some wedges under a large block of slate when it became necessary to use a stick. He requested permission from the foreman to get a stick, but was commanded to place the wedge under the block with his hand. While he was doing this the rock slipped and fell upon his arm, crushing it so that it had to be amputated. The circuit court of appeals affirmed a judgment of the trial court, which had refused to allow damages on the ground that he was guilty of contributory negligence. In reversing this decision and sending it back for further proceedings the court rendered an opinion in part as follows:

The case was governed by the law of Pennsylvania, where the injury was received and the trial took place. (Rev. Stat., sec. 721 (Comp. St., sec. 1538).) The law of that State, as it stood when the cause of action arose, is expressed in repeated decisions of its court of last resort to the following effect:

"Where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much

so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

In the present case the trial judge recognized this to be the applicable rule of law when originally instructing the jury, for he said:

"Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous."

But this was neutralized and the jury probably led astray, when in the supplementary instruction they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the heavy block of slate with his hand, he fully appreciated the attendant danger and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent, that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to "go ahead, go ahead"; and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous.

The judgment refusing damages was therefore reversed and the case remanded for a new trial.

EMPLOYERS' LIABILITY—SAFE APPLIANCES—DEFECTIVE TOOL—*Arkansas Cent. R. Co.* v. *Goad*, *Supreme Court of Arkansas* (*Nov. 18, 1918*), *206 Southwestern Reporter*, *page 901*.—Goad was an experienced railroad section hand. He was employed by the defendant railroad company in that capacity and was put to work nipping ties while other employees spiked the rails to the ties. To do this work one placed an iron bar, called a lining bar, under the tie and raised it up so that it rested firmly against the rail. Goad was given an old and worn lining bar with which to perform the service. The tool had been in use for over 20 years and had never been inspected or repaired, and as a result it was worn smooth and defective. While nipping a tie Goad's bar slipped and he fell 3 or 4 feet against a jack, injuring his side and resulting in traumatic pneumonia. Goad

brought this action for damages and recovered in the lower court. On appeal the judgment was affirmed, the court saying in part:

Counsel for the company invokes what is commonly called the "simple-tool doctrine," and cites in his brief cases from other courts holding that certain tools are of a nature so simple as that no duty of inspection or repair is due the servant from the master, and we are asked to say as a matter of law that the lining bar which the appellee was using at the time of his injury was a tool of this character. We are, however, unable to accept this view. We said in the case of Arnold *v.* Doniphan Lbr. Co., 130 Ark. 486, 198 S. W. 117, that the simple-tool doctrine, as such, had never had recognition by this court, and in the case of C. R. I. & P. Ry. Co. *v.* Smith, 107 Ark. 512, 156 S. W. 166, we said that no hard and fast rule could be laid down by which the courts could determine in a given case whether or not a tool or appliance furnished a servant for his use was of a nature so simple that the master, exercising ordinary care in furnishing his servants reasonably safe tools with which to perform their work, should have inspected it. We think that the case of Railway Co. *v.* Smith, supra, is similar in principle to the instant case, and announces the doctrine which is controlling here. That was a case in which the defective tool was a hammer, and it was there insisted (as here insisted) that no duty of inspection was owing to the servant. We there said that:

"Neither can we say, as a question of law, that under all the facts and circumstances adduced in evidence that an unskilled laborer of ordinary intelligence should have known that the hammer was defective and should have known and appreciated the dangers that he was exposed to by reason thereof."

EMPLOYERS' LIABILITY—SAFE INSTRUMENTALITIES—GUARDS FOR COGWHEELS—AGRICULTURAL WORK—CORN SHELLER—*Hainer* v. *Churchill, Supreme Court of Iowa, (Sept. 16, 1919), 173 Northwestern Reporter, page 882.*—The defendant Churchill owned a steam-traction engine, which he used for corn shelling, road grading, threshing of grain, and similar work. He employed Hainer to operate the engine and assist in the work performed. While engaged in shelling some corn Hainer was seriously injured by having his hand caught in the exposed cogs of the sheller and so crushed that the hand had to be amputated. Hainer sued for damages under a statute (Iowa Code Supp., sec. 4999a2) providing in part as follows:

It shall be the duty of the owner, agent, superintendent, or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and * * * all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded.

He was allowed damages and the defendant appealed, claiming that a proper interpretation of the phrase "manufacturing or other establishment" would exclude his work from the scope of the law, because he was not engaged in manufacturing or any similar work. The court refused to take this view, declaring that the statute should be given a broad interpretation, but ruled, however, that the statute was not intended to cover agricultural machinery and reversed the decision. The opinion in part is as follows:

In these days there are very few lines of human labor in which the aid of machinery is not more or less common. In agriculture, in which, until more recent years, other motive power than that of man and his domestic animals was unknown, the employment of steam, gas, and electricity is becoming increasingly common, and the machinery for farm work becomes more and more varied. So, too, the agricultural laborer who serves others for hire is able often to equip himself with machines and power appliances by which he accomplishes larger results in materially less time than was possible under more primitive conditions.

But there is a material distinction which every one recognizes between employments in agriculture and employments in manufacture, mechanics, and other industrial pursuits having no immediate connection with or dependent upon the cultivation of the soil. The distinction is clear, though there may be and are border-line instances, where it may become confused in application. The reason for the statutory protection afforded by Code Supp., p. 4999a2, is very persuasive as relates to the latter class, but is by no means so apparent in the former. In the former, machinery is much more universally employed; it is much more complicated and employees in vastly greater numbers work about it and are exposed to its dangers. This distinction is impliedly recognized in the statute, and in so far as machinery and employees are engaged in strictly agricultural or farm labor we are of the opinion the law to which we have referred has no application. That corn shredding by machinery falls within the class of agricultural or farm labor has already been decided by this court. (Slycord *v.* Horn, 179 Iowa, 936, 162 N. W. 249.) And there is no sound reason for otherwise classing the work of corn shelling. The job which defendant undertook to perform for Augustine was a farm labor, and plaintiff in assisting therein was engaged in an agricultural employment, and he has no right of action under the provisions of Code Supp., p. 4999a2.

EMPLOYERS' LIABILITY—SAFE PLACE—FIRE ESCAPES—CONSTITUTIONALITY OF STATUTE—*Dotson* v. *Louisiana Central Lumber Co., Supreme Court of Louisiana (Nov. 4, 1918), 80 Southern Reporter, page 205.*—This action is a suit for damages by Bertha Dotson for the death of her husband while in the employ of the defendant company. Dotson had been employed by the lumber company as a saw filer and was put to work on the third floor of the company's mill. The mill was not provided with fire escapes and there was

only one method of egress from the third floor, which was an internal stairway. A fire broke out between the first and second floors which was accompanied by a dense smoke which ascended some band-saw shafts and speedily enveloped the building. Dotson was caught on the third floor and was presumably asphyxiated and burned to death. The company defends itself on the ground that the plaintiff failed to allege the particular facts from which she deduces that the fire originated through defendant's negligence; and on the ground that the fire escape law which it had violated is unconstitutional. Judge Leche, in affirming the judgment of the lower court in favor of the plaintiff, said in part:

In the present case the deceased, an employee of the defendant, was carrying out the duties of his employment in the place provided by his employer for the performance of such duties when he was overwhelmed and lost his life by a fire which was kindled out of his sight, in appliances under the control and in the presence of defendant's agents. Under these circumstances, such an unusual fire must be presumed to have originated through defendant's fault, and its cause is certainly more properly within the knowledge of defendant than of the plaintiff. We are therefore of the opinion that the doctrine of res ipsa loquitur most aptly applies to this case, and that the burden is upon the defendant to clear itself of imputed negligence.

Defendant's attack upon the constitutionality of act 171 of 1914 rests on the assertion that it creates a civil liability by one person or class of persons in favor of other persons, that no mention thereof is made in the title, and therefore that the provision creating such liability contravenes the provisions of article 31 of the constitution. Defendant further contends that said act is not self-operative and not alleged to have been made operative by the State labor commissioner or the State fire marshal, and therefore that its provisions can not be invoked against it in this case.

The purpose of the act, as clearly stated in its title, is to preserve the safety of persons from the dangers of fire and panic in certain buildings. The several provisions in the body of the act make it the duty of owners of buildings having more than two stories to erect fire escapes, and the specifications for such fire escapes are minutely detailed. The duty to erect such fire escapes is mandatory except where the State labor commissioner finds that such fire escapes are not necessary. We do not understand the act to say or to mean that the duty to erect fire escapes only arises or comes into existence after notice by the State labor commissioner or fire marshal has been served upon the owner of the building, though it may be that before an owner may be criminally prosecuted such notice may be served upon him. We are therefore clearly of the opinion that the duty to erect fire escapes is imposed upon owners of such buildings by the law itself, without action or intervention either by the State labor commissioner or the fire marshal, and to that extent the act is self-operative. The nonperformance of that duty then becomes negligence per se. It seems equally clear to us that the provision

of section 4 of the act, which does not create but only recognizes a right of action for damages, is constitutional and not in contravention of article 31 of the constitution. If the last paragraph of section 4 were effaced and eliminated from the act, defendant's alleged liability, resting upon the provisions of article 2315, C. C., would not be thereby affected or lessened.

Judge O'Niell concurred in the decree but disagreed that the doctrine of res ipsa loquitur should apply to the case, stating that in his opinion the violation of the fire escape law was sufficient to uphold the plaintiff's case.

EMPLOYERS' LIABILITY—SAFE PLACE—SCAFFOLDING—*Propulonris* v. *Goebel Const. Co., Supreme Court of Missouri, Division No. 2 (July 5, 1919), 213 Southwestern Reporter, page 792.*—Propulonris was a common laborer in the employ of the defendant company. He and three other workmen were working on a scaffold suspended by chains from the roof of the building in which they were working on some concrete forms when the scaffold or platform gave way and precipitated the men to the floor below. Plaintiff was injured in this fall and upon bringing suit therefor recovered damages. The defendant employer appealed claiming the plaintiff was required and had failed to prove any specific act of negligence on its part. The court affirmed the judgment in favor of Propulonris and said in part:

However, was it necessary to prove a specific act of negligence as the cause of the falling of the scaffold? Where the statute imposes a duty to provide safety appliances of any kind for protection of persons from injury, the failure of the duty imposed is negligence per se.

It is contended by the defendant that besides the mere fact that the platform gave way there would have to be some proof of a specific defect in it. The statute, section 7843, requires that the structure "shall be well and safely supported * * * and so secured as to insure the safety of persons working thereon." The use of this language would indicate that a collapse or giving way of such platform and consequent injury would raise a prima facie presumption that the employer had failed of his duty and would place the burden upon him to show that it gave way without any negligence on his part.

EMPLOYER'S LIABILITY—SAFE PLACE—WARNING TO WORKMEN—POISONING FROM HANDLING CREOSOTED TIES—*Collins* v. *Pecos & N. T. Ry. Co., Commission of Appeals of Texas (May 28, 1919), 212 Southwestern Reporter, page 477.*—While in the employ of the defendant railway company and at work in charge of a section gang of laborers which was engaged in unloading some railroad ties which had been

treated with a preservative known as "creosote" and which were still wet, Collins, the plaintiff, got his face and hands poisoned as a result of contact with the wet "creosote." The poison caused constitutional disorders in Collins, so that he was permanently injured. Judgment was awarded to plaintiff, but on appeal the decision of the lower court was reversed by the court of appeals on the ground that "creosote" not having been known by chemists or physicians to cause constitutional disorders before, such effect on Collins could not have been foreseen so as to require the defendant company to warn him of the danger. In reversing the court of appeals and affirming the judgment of the trial court in favor of Collins, the commission of appeals said in part:

We believe that the correct rule for determining negligence is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the servant the duty is incumbent to exercise such care demanded by the relationship as will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty. We are not willing to subscribe to the rule that requires the master to anticipate all ensuing results which flow from the breach before duty arises to exercise care to prevent the consequences. Anticipation is applied in the determination of negligence vel non. If no injury may be anticipated, no duty is breached by a failure to exercise care; but if anticipated injury may result, then the duty arises. Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation. Negligence may exist abstractly, but to render it actionable it must be concretely incorporated into some injury.

In the instant case defendant's negligence caused anticipated injury. The testimony is conflicting as to whether the permanent injuries flowed from that negligence naturally and were the proximate consequences of same. There is evidence in the record requiring the submission of this question to the jury, and upon which it was authorized to find that issue for the plaintiff.

EMPLOYER'S LIABILITY — WORKMEN'S COMPENSATION — OCCUPATIONAL DISEASES—*Zajkowski* v. *American Steel & Wire Co.*, *United States Circuit Court of Appeals*, *Sixth Circuit* (*Dec. 5, 1918*), *258 Federal Reporter*, *page 9*.—Mike Zajkowski was employed by the defendant company and for two years had been intrusted with the operation of a rolling mill. The rolls he operated were used to turn out a high grade of steel sheets, which before coming to the mill were treated with various oils and chemicals and upon leaving the mill were very shiny and glossy, "almost as bright as a mirror." Plaintiff was compelled in the performance of his duties and the inspection of his work to strain his eyesight more and more as time went on. This

was due to the glare of strong lights reflected from the bright metal. Finally the combined action of the chemicals used to treat the metal and the excessively bright lights reflected into his eyes caused plaintiff to lose his eyesight and his health, so that he was no longer able to work. He sued defendant for damages. Judgment was rendered in favor of the employer on the ground that under the workmen's compensation act of the State (Ohio), it was immune from any right of action. In reversing this judgment the court held, in part:

In the view of the learned trial judge, the workmen's compensation act (102 Ohio Laws, p. 524) gave to defendant immunity from any right of action that might otherwise have accrued to plaintiff under the facts alleged in his petition. Laying that act to one side for the present, we think the petition states facts constituting a cause of action for damages due to an occupational disease which was incident to the work plaintiff was performing. Diseases of occupation have been the subjects of much concern and investigation both abroad and in our own country. Such diseases, of course, signify causes and conditions, whether natural or artificial, which attend the performance of work and injuriously affect the persons exposed.

The case set out in the petition falls well within principles of the common law. The general rule is that where an employer places and continues an employee for a substantial length of time in the regular performance of work and under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employee a disorder of serious and injurious character, regardless of the name by which the disease is known, it is the duty of the employer to warn and instruct the employee as to the dangers and to furnish him with reasonably effective means to avoid them, and where as the direct result of failure to perform this duty an employee in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover. (Wiseman *v.* Carter White Lead Co., 100 Nebr. 584, 160 N. W. 985; Thompson *v.* United Laboratories Co., 221 Mass. 276, 108 N. E. 1042; Fox *v.* Peninsular etc. Works, 84 Mich. 676, 48 N. W. 203; Wagner *v.* Jayne Chemical Co., 147 Pa. 475, 23 Atl. 772; Meany *v.* Standard Oil Co. (N. J.), 55 Atl. 653; Pigeon *v.* Fuller, 156 Calif. 691, 105 Pac. 976.)

Furthermore, recognition of the right of recovery upon facts such as are stated in the instant case is found in both constitutional and statutory provisions of Ohio. By amendment of September 3, 1912, to article 2 of the Ohio constitution (Page's Annotated Constitution, ed. 1913, pp. 171 to 217, p. 35), provision was made looking to the compensation of "workmen and their dependents, for death, injuries, or occupational disease, occasioned in the course of such workmen's employment," through laws to be passed by the general assembly; section 35 providing, however, that—

"No right of action shall be taken away from any employee when the injury, disease, or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health, and safety of employees."

The court then noted an act of the Ohio Legislature of May 6, 1913 (sec. 6330–1 of the Code), which provides that:

Every employer shall, without cost to the employees, provide reasonably effective devices, means and methods to prevent the contraction by his employees of illness or disease incident to the work or process in which such employees are engaged.

Continuing, the court said:

We thus come to the ruling below. In considering the petition the district judge said:

"If it does not state a cause of action under the workmen's compensation law and within the exception of the workmen's compensation law, it does not seem to me that the petition states any kind of cause of action."

We are, however, convinced that this act has no bearing upon the instant case. The act, as the name usually given to it indicates, provides for the collection of a State insurance fund and its disbursement among employees. According to the title of the act, the fund is designed "for the benefit of injured and the dependents of killed employees" (103 Ohio Laws, 72, approved Mar. 14, 1913). Section 13 defines employers to whom the act is applicable. Section 22 provides for employers' payments of premiums. Section 23 is, in part, as follows:

"Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employee, wherever occurring, during the period covered by such premium so paid into the State insurance fund. * * *"

The saving clause so referred to is found in section 29, which in substance provides that "where a personal injury is suffered by any employee or where death results to an employee from personal injury * * * while in the course of employment," an employer who has paid his premiums shall not be liable unless such injury or death shall have arisen from the "willful act" of the employer or from the employer's failure to comply with any "lawful requirement for the protection of the lives and safety of employees," but in either of the latter events "nothing in this act contained shall affect the civil liability of such employer."

It is to be observed that the act is limited to compensation for "injury" or "death" of employees; it makes no provision in that behalf for disease. We have seen that the constitution permits the passage of laws providing compensation for employees or their dependents in cases of "death, injuries, or occupational disease."

It results, in view of the controlling authority of these decisions, that the compensation act is inapplicable, and it need not be said that the exemption from liability given by section 23 of the compensation act to employers who comply with the provisions of section 22, and the exceptions contained in section 29 in relation to employers who are open to the charge of willful acts or failure to perform any lawful requirement within the meaning of that section, are not of present importance. It can not be that the compensation act was designed to take away any right of action as respects a claim, like the one here involved, which the act does not purport to include or to allow to be paid out of the insurance fund. Any view to the contrary must ascribe to the general assembly at once a pur-

pose to frustrate the power vested by the Constitution in respect of occupational disease and a lack of purpose through section 6330–1 to grant relief of any character to employees contracting such disease. That statute was passed after the compensation act, and, as already shown, was intended to create and preserve rights of action where the duty it imposes is violated.

The industrial commission act was approved March 18, 1913 (103 Ohio Laws, 95, 110), while, as we have said before, section 6330–1 was approved the following May 6 (Id. 819, 824), and no reference was made in the last statute either to the compensation act or the industrial commission act. Section 6330–1 stands alone as the latest expression of the legislative will; it is in terms both complete and imperative; it should be given effect.

When it is remembered that plaintiff's action is based upon alleged negligence of defendant and freedom from fault of his own, the conclusion must follow that it was error to deny a right of recovery, both under the common law and section 6330–1.

Accordingly the judgment is reversed with costs and the case is remanded for further proceedings not inconsistent with this opinion.

EMPLOYMENT OF WOMEN—SEATS FOR FEMALES EMPLOYED IN RESTAURANTS—CONSTITUTIONALITY OF STATUTE—*Glanges* v. *State*, *Court of Criminal Appeals of Texas* (*Mar. 24, 1920*), *220 Southwestern Reporter, page 95.*—Glanges ran a restaurant and having failed to comply with a law requiring him to provide seats for his female employees who were not engaged in active duties he was indicted and found guilty for a violation of the law. He appealed, alleging that the act was unconstitutional. The court reversed the judgment of conviction for other reasons, but upheld the constitutionality of the act. The opinion on this point is in part as follows:

In motion to quash the indictment, attacks are made upon the validity and constitutionality of the law. We are furnished with no brief or citation of authorities supporting the criticism, and we are aware of no reason why the act is not a lawful exercise of legislative authority. The right of the legislature, in the exercise of the police power, to pass laws to safeguard the health of women employees has so often been affirmed by the courts that it can not now be considered an open question. (Ruling Case Law, vol. 16, 480; Muller *v.* Oregon, 208 U. S. 412, 28 Sup. Ct. 324 [Bul. No. 75, p. 631]. We find nothing in the provision questioned in the present law which would condemn it as unreasonable. In a statute of the State of Indiana requiring employers of coal miners to furnish washing facilities, the same principle was involved. This statute was upheld by the Indiana courts (Booth *v.* State, 179 Ind. 405, 100 N. E. 563), and by the Supreme Court of the United States (Booth *v.* Indiana, 237 U. S. 391, 35 Sup. Ct. 617 [Bul. No. 189, p. 171]).

Restaurants, by the terms of the statute, are in a separate class from merchandise establishments, and are not included in the clause in the statute which exempts from its operation mercantile establishments in towns in which the population is 3,000 or less. (Ex parte Brown, 21 S. D. 515, 114 N. W. 303.)

EMPLOYMENT OFFICES—EMIGRANT AGENTS—LICENSE FEES—CONSTITUTIONALITY OF STATUTE—*State* v. *Reeves*, *Supreme Court of South Carolina* (*July 14, 1919*), *99 Southeastern Reporter, page 841.*—The Criminal Code, section 896, of South Carolina prohibits anyone from carrying on the business of an emigrant agent without having first obtained a license, for which he must pay the sum of $2,000 per year. Reeves, without securing a license, hired about 10 laborers to be employed beyond the limits of the State. He was indicted and found guilty of the violation of the above act and appealed on the grounds that the law was unconstitutional in that (1) it undertook to prohibit an act recognized to be lawful and (2) that it placed upon a business a license fee which was not a graduated fee but a prohibitory and discriminatory fee. In affirming the judgment of conviction and upholding the constitutionality of the act the court said in part:

When the doing of an act comes within the police power, the legislature has the authority to prohibit it entirely or to enact such regulations as it may deem advisable. If it undertakes to regulate such an act by requiring a license, the object is the protection of the public, and it is not intended for the benefit of the licensee. The defendant, therefore, has no right to complain, even though the statute may be regarded as prohibitory in its effect.

The statute now under consideration was construed by the court in the case of State *v.* Napier, 63 S. C. 60, 41 S. E. 13 [Bul. No. 42, p. 1110] and all the grounds then urged against its constitutionality, including the provision as to uniformity of taxation in section 1, art. 10, were overruled. The question now presented was not, however, before the court in that case. It was not the intention of the Constitution to require that the license tax on occupations, falling within the police power, should be graduated. Such a requirement would not be of any benefit to the public, but would limit the power of police, which has been defined as the State's right of self-defense. (State *v.* Aiken, 42 S. C. 222, 20 S. E. 221.)

EMPLOYMENT OFFICES—LICENSES—APPLICATION OF ORDINANCE—*Wilson* v. *City and County of Denver*, *Supreme Court of Colorado* (*Jan. 6, 1919*), *178 Pacific Reporter, page 17.*—O. C. Wilson had been engaged in the business of running an employment bureau, which was called the Interstate Business Exchange Corporation, and which only found positions for technical, executive, or clerical applicants, but did not find positions for artisans, laborers, or domestic servants. The city of Denver passed an ordinance requiring private employment agencies to secure licenses, and providing that such licensed agencies could not charge as a fee for their services more than 5 per cent for males and 3 per cent for females of one month's wages and board. It is Wilson's contention that because of the use

of the words "wages and board" it was clear that the ordinance did not apply to him or his business, and that the license fee paid by him under protest was not properly assessed. Wilson had been convicted of a violation of the ordinance by charging more than the limited 5 per cent. The court in reversing the lower court and declaring that the ordinance did not apply to such businesses as defendant's said in part:

When we consider the use of the term "board" in connection with "wages" in that part of the ordinance which prescribes fees to be charged, and the only part which mentions the compensation, it is clear that it was not intended to apply to persons seeking technical or clerical positions. These terms must be held to limit the application of the general language of the ordinance; and we come to this conclusion more readily because, as stated by the New York court above mentioned (People *v.* City of Buffalo, 57 Hun, 577, 11 N. Y. Supp. 314), men in the class just mentioned do not need the protection in question; and, that being so, to include them in this limitation of the right to contract freely would be an unnecessary, and therefore unauthorized, exercise of the police power.

The right to carry on a legitimate business is a property right, and it can not be taken away or abridged by an exercise of the police power unless it appears:

"First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." (Lawton *v.* Steele, 152 U. S. 133, 14 Sup. Ct. 499.)

This ordinance does not meet either of said requirements.

FACTORY REGULATIONS—SPRINKLER SYSTEM—CONSTITUTIONALITY OF STATUTE—*People ex rel. Cockroft* v. *Miller et al., Board of Appeals, Supreme Court of New York, Appellate Division, First Department (May 2, 1919), 176 New York Supplement, page 206.*—The defendants, Miller and others, constituting the board of standards and appeals, sustained three orders of the fire commissioner of New York City requiring Cockroft to provide, among other things, a sprinkler system in the Cockroft Building. Cockroft brought a writ of certiorari to the appellate division. In so far as the order of the fire commissioner relating to the sprinkler system was concerned the decision was affirmed. Cockroft claimed that the law requiring a sprinkler system (sec. 83b of the labor law, Consol. Laws, ch. 31) did not apply to employers or to stenographers and office employees, and that the law was unconstitutional. In refuting these allegations the court said in part:

The next and more serious question is the construction of the provision referring to a factory building in which "more than 200 people are regularly employed above the seventh floor." The con-

tention of the appellant is that this means "employees" in the sense in which that term is defined in section 2 as above quoted—that is to say, mechanics, workingmen, or laborers—and accordingly all employers and nonfactory employees, such as accountants, clerks, stenographers, and the like, should be excluded in making the count of persons to determine the necessity for installing a sprinkler system. * * * The legislature has with evident intention omitted to make the number of "employees" the measure of the requirement to install a sprinkler system, and has made the measure, instead, the number of "people regularly employed."

While it may be generally true that the act was passed in the interest of workingmen, and many of the provisions specifically refer to them, the intent of this "sprinkler section" was to protect human life from fire perils. The number of persons working on a given floor of a building, or working above the seventh floor obviously has a direct relation to such a fire peril as panic. It therefore seems reasonable to conclude that the legislature meant to make the measure of this particular requirement for sprinklers the presence of more than 200 people who are regularly employed above the seventh floor, giving the usual and ordinary interpretation to the words "people employed." As there were 254 persons employed and engaged at work above the seventh floor of this building, exclusive of the 100 employers, we are of the opinion that the building came within the requirements of section 83b, governing the installation of automatic sprinklers.

Finally, it is claimed that section 83b of the labor law is unconstitutional, if held applicable to such a building as the Cockroft Building, occupied mainly by manufacturing jewelers, who do not work with or upon inflammable materials and whose offices present no fire risk whatever, and because there was no testimony and no data before the factory investigating commission with respect to the type of building here involved. We have already held the act constitutional as applicable to such a building as this. (Cockroft *v.* Mitchell, 173 N. Y. S. 903.)

The order as to the installation of automatic sprinklers was therefore affirmed.

FACTORY REGULATIONS—WASH ROOMS—RAILROAD ROUNDHOUSES—CONSTITUTIONALITY OF STATUTE—*People* v. *Cleveland, C. C. & St. L. Ry. Co., Supreme Court of Illinois (June 18, 1919), 123 Northeastern Reporter, page 579.*—The defendant railway company was prosecuted for the violation of a law requiring certain establishments to maintain wash rooms. Section 1 of this act (Laws of 1913, p. 359) is as follows:

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

room at a convenient place in or adjacent to such mine, mill, foundry, shop, or other place of employment for the use of such employees.

The defendant was found guilty and fined. It then brought certiorari to the supreme court on the grounds that the act was unconstitutional and that it did not apply to railroad roundhouses. The constitutionality of the act was upheld but its application to roundhouses such as defendant's was denied and the judgment was reversed. The decision in part is as follows:

The purpose of the act as declared by the title is to protect the health of employees and secure the public comfort, and it was enacted under the police power, with suitable provisions against liability to disease or offense to those with whom the employees come in contact after leaving their places of employment. The act applies to all places of employment where the prescribed conditions exist, and as a police regulation and applied to such conditions it is constitutional and valid. (People *v.* Solomon, 265 Ill. 28, 106 N. E. 458 [Bul. No. 169, p. 115].) The conditions so prescribed are that the employment is one in which employees become covered with grease, smoke, grime, and perspiration to such an extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing will endanger their health or their condition be offensive to the public. If the evidence showed that these conditions existed in the place of employment provided and maintained by the plaintiff in error, the judgment was right; if it did not, the judgment was wrong.

The act does not apply to every place of employment in which men become dirty or perspire, but only to those where they become covered with grease, smoke, dust, grime, and perspiration to the extent specified in the act. In warm weather all persons perspire, whether at work or play, and there are numerous kinds of employment in which the employees get grease on their clothing or become dirty with smoke or dust, but not to the extent specified in the act. Neither their health nor the public comfort is involved. That is true of the ordinary blacksmith shop, the garage, or the supply house for farm machinery. There was no justifiable inference to be drawn from the evidence that the employees of the plaintiff in error were in such a condition after leaving their work that without washing and cleansing their bodies and changing their clothing their health would be endangered or their condition be offensive to the public. This is not saying that there must be opinion or expert evidence of such probable consequences, nor that a jury may not determine that question from the facts proved in the light of common experience, but the evidence must be sufficient to justify the inference of fact. The evidence did not bring the roundhouse and machine shop within the terms of the statute.

HOURS OF LABOR—FACTORY EMPLOYEES—TEN-HOUR LAW—EMPLOYEE NOT WORKING ABOUT MACHINERY—*Handy* v. *Mercantile Lumber Co., Supreme Court of Mississippi (Feb. 9, 1920), 83 Southern Reporter, page 674.*—Handy was employed by the Mercantile Lum-

ber Co. in unloading carloads of lumber which other employees transported to the mill, where it was planed. It was not required of Handy that he work at or anywhere near the machinery. He had been permitted to work all day and all night continuously. At 4 o'clock a. m., while descending from the railroad car in which he had been working, to locate his fellow employees, he lost his grip and fell between the cars, breaking his leg and sustaining other injuries. He claims that he fell because of his fatigued and weakened condition resulting from long hours of continuous labor. He brought suit for damages for personal injuries, alleging the violation of the State law, which makes it "unlawful for any person, firm, or corporation engaged in manufacturing or repairing to work their employees more than 10 hours per day," with exceptions as to emergencies (ch. 239, Acts of 1916).

Handy's complaint was dismissed by the lower court on demurrer, and he appealed. The supreme court affirmed the decision, saying in part:

> The particular work performed by the plaintiff on the night of his injury was that of unloading cars by giving the lumber to other servants on a platform, and these other servants then loaded the lumber on two-wheeled carts and rolled the lumber then into the planing mill near by. From the declaration it will thus be seen that the plaintiff was not engaged in working with the machinery, that he was not working about the machinery, that his work had nothing to do with the starting or stopping of the machinery, that his movements did not have to conform to the movements of the machinery. He could have unloaded the car while the machinery was not running. On the other hand, the machinery could be running while plaintiff was idle. There is no such connection between the work of the plaintiff and the operation of the machinery that brings the plaintiff within the protection of this law. It was not necessary for the plaintiff to go where the machinery was running. So far as the declaration shows, he may have been many feet away from any part of the machinery. Such an employee does not come within the protection of this law.

HOURS OF LABOR—PUBLIC EMPLOYEES—EMPLOYEES ON "PUBLIC WORKS"—CITY FIREMEN—*Danielson* v. *City of Bakersfield et al., Supreme Court of California (Oct. 27, 1920), 193 Pacific Reporter, page 242.*—Under the constitution of the State of California "laborers, workmen, or mechanics" on public works may not be required to work more than eight hours per day. Danielson was a paid fireman for the city of Bakersfield and was required to work more than eight hours per day. He accordingly brought suit against the city. The trial court rendered judgment in favor of the defendant city and plaintiff appealed. In affirming the decision the supreme court handed down the following decision:

The only question in this case is whether or not a paid fire department, maintained by a municipal corporation in this State, comes within the provisions of several laws establishing an eight-hour day. The constitution (art. 20, sec. 17) provides that the time of service of all "laborers, workmen, or mechanics" employed upon any public works by the State, a county, or a municipality is eight hours only. We think it is perfectly obvious that a fireman is not either a laborer, workman, or mechanic as referred to in that section. Section 3245 of the Political Code contains the provision that eight hours constitutes a legal day's work in all cases where the same is performed under the authority of the State, or of any city or county within the State, and that a stipulation to that effect must be made a part of all contracts to which the State, county, or city is a party. Section 653c of the Penal Code provides that the time of service of any laborer, workman, or mechanic employed upon any public works, or upon any works for the State, shall be limited to eight hours a day, and imposes a penalty upon anyone violating this provision. Section 142 of the Bakersfield charter provides that the time of service of any laborer, workman, or mechanic employed upon any public works or upon work done for the city, shall be limited and restricted to eight hours a day. All of these provisions have substantially the same meaning.

It is the opinion of the court that they do not refer to or include firemen in a paid fire department of a city, but, on the contrary, refer to persons engaged as workmen of some kind upon public work, or employed by some city or other public authority, and actually engaged in labor. The court below correctly held that they do not apply to firemen of the city of Bakersfield.

HOURS OF LABOR—RAILROADS—ADAMSON LAW—EFFECT OF AGREEMENT BETWEEN RAILROAD AND ITS EMPLOYEES—*Fort Smith & W. R. Co. et al.* v. *Mills et al.*, *United States Supreme Court* (*June 1, 1920*), *40 Supreme Court Reporter, page 526.*—The Fort Smith & Western Railroad Co. went into the hands of a receiver, Arthur Mills, the defendant. The company had an agreement with its employees regulating wages and hours of labor with which both parties were satisfied, and by which, though insolvent, the road was able to continue operation. Upon the passage of the Adamson eight-hour law by Congress, the receiver, by reason of threats of prosecution thereunder by the district attorney, proposed to substitute another agreement containing the much more onerous terms of the act. This action in equity was thereupon brought to prevent the receiver from complying with the act and to prevent the district attorney from prosecuting him. It was declared that if the act was permitted to apply to this case it was void under the fifth amendment to the Constitution, as taking property without due process of law. The district court dismissed the case, and upon appeal to the Supreme Court it was decided that the law did not apply to cases of this kind.

The opinion of the court as expressed by Mr. Justice Holmes is in part as follows:

The act in question, known as the Adamson law, was passed to meet the emergency created by the threat of a general railroad strike. It fixed eight hours as a day's work and provided that for some months, pending an investigation, the compensation of employees of railroads subject to the act to regulate commerce should not be "reduced below the present standard day's wage," and that time in excess of eight hours should be paid for pro rata at the same rate. The time has expired long since but the rights of the parties require a decision of the case.

In Wilson *v.* New, 243 U. S. 332, 37 Sup. Ct. 298 [Bul. No. 224, p. 144], it was decided that the act was within the constitutional power of Congress to regulate commerce among the States; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroad to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law.

But the bill in Wilson *v.* New raised only the general objections to acts that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss. See Brooks-Scanlon Co. *v.* Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183. It was not decided that there might not be circumstances to which the act could not be applied consistently with the fifth amendment, or that the act in spite of its universal language must be construed to reach literally every carrier by railroad subject to the act to regulate commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to this act. But the statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required or to have been intended to make trouble rather than to allay it. We can not suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before, and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads.

But that is the present case. An insolvent road has succeeded in making satisfactory terms with its men, enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allega-

tions of the bill and must assume that the men were not merely negatively refraining from demands under the act, but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson law has in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed import an exception in a case like this.

HOURS OF LABOR—RAILROADS—ADAMSON LAW—SWITCH TENDER NOT COVERED—*Coke* v. *Illinois Cent. R. Co., United States District Court, Western District of Tennessee (Jan. 17, 1919), 255 Federal Reporter, page 190.*—H. P. Coke was employed by the railroad company as a switch tender. The duties of a switch tender are to open or close switches to facilitate the movements of trains and are given to one man in order to relieve the train crews of this work. Coke brought this action for $274, claiming that he was hired for $75 per month and that he was required to work 12 hours per day and that as a result of the Adamson law he was entitled to compensation for overtime. The Adamson law referred to provides that:

Beginning January 1, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad * * * and who are now or who may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads.

District Judge McCall in rendering judgment in favor of the employer gave in part the following opinion:

Broadly speaking, the act might be construed to include every employee of such railroad from president down to section hand, who was in any capacity actually engaged in doing those things necessary to the operation of trains, such as directing their operation in a supervisory way, maintaining the roadway, lining up switches for their operation, or aboard the trains manually operating them, etc.

Assuming, but not deciding, that plaintiff was actually engaged in some capacity in operation of trains, the question arises: Did Congress intend by the Adamson Act to include and provide for employees engaged in the work the plaintiff was doing? It is too much to say that the terms of the act are clear and unambiguous. In such circumstance it is well settled that in determining the scope, intention, and meaning of the acts of Congress, to give effect to them courts may properly have recourse to public documents and proceedings in Congress had pending the piece of legislation in question, and it may properly look at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

The court feels warranted in saying that it is of common knowledge derived from the message of the President pressing the prompt enactment of the law in question, delivered orally to the Congress, from the Congressional Record, as well as from all the great newspapers and periodicals of the day, that the Adamson law was enacted at the instance of four bodies of organized railway employees, to wit, Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen. The members of these four organizations were all employees whose duties were discharged aboard railway trains, such as conductors, engineers, firemen, and railway trainmen, which latter term would include all those whose duties were performed "on the engines and on the cars." While it was thought by the four brotherhoods mentioned that the legislature provided for their best interest, and they demanded it, yet it is fair to say, judging from the Congressional Record, that it was enacted by Congress primarily to prevent a calamity to the country which was thought sure to follow in case it was not enacted, if the brotherhoods, in case it was not enacted, should carry into effect their declared purpose to call a strike and thus stop trains moving in interstate commerce and tie up the commercial interests of the country.

The validity of the act was before the Supreme Court of the United States in Wilson *v.* New, 243 U. S. 332, 37 Sup. Ct. 298 [Bul. No. 224, p. 144], wherein it was held to be constitutional. The point was made in that case that the act was void for unlawful inequality and arbitrary classification, in that it only included employees actually engaged in the operation of trains, and did not include other railroad employees. The Supreme Court sustained the classification on the ground that only those actually engaged in the operation of trains (not including switchmen) were threatening to strike, and that it was therefore proper to pass legislation which affected only those who were so threatening, apparently meaning thereby to say that the legislation applied only to the Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen.

Clearly the Adamson law does not apply to all employees of railroads engaged in interstate commerce, nor does it apply to all those who are actually engaged in doing some of the things necessary for the operation of trains. It would seem, therefore, reasonable and proper to follow the line of cleavage which the Congress intended to establish, as gathered from the contemporaneous history of events attending the consideration and passage of the law. When the act is thus considered in the light of the utterances of the President, the Congressional Record, the hearings before the Committee on Interstate Commerce, and the report of the Wage Commission, it appears that Congress was dealing with the four brotherhoods only, and intended the legislation to apply only to those doing the work performed by the brotherhoods. That is to say, to trainmen who worked "on the engines and in the cars." This conclusion is greatly strengthened by the language of the Supreme Court of the United States in Wilson *v.* New, supra.

HOURS OF LABOR OF WOMEN—EMPLOYMENT IN LAUNDRIES—COLLECTING STATIONS—*District of Columbia* v. *Marshall, Police Court of the District of Columbia (Jan. 27, 1920), 48 Washington Law Reporter, page 86.*—The District of Columbia brought a criminal charge against the defendant, who is the owner of a laundry, for the violation of sections 1, 4, and 5 of an act of Congress approved February 24, 1914, and entitled "An act to regulate the hours of employment and safeguard the health of females employed in the District of Columbia." This law limits the hours of labor of all female employees "employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in the District of Columbia" to eight per day or forty-eight per week. In addition to his plant, the defendant also maintains nine substations or branches at which soiled clothing is received and the cleaned clothing returned, but at which no washing or cleaning of any kind is engaged in. An employee in one of these substations was required or permitted to work longer than eight hours in one day, whereupon this prosecution was brought against the employer for the violation of the aforementioned act. He contended that the act being penal should be strictly construed, and so construed could not be held to include such employments as that at the collecting station. The court differed with this contention, and held that the act was a remedial statute and should therefore be liberally construed, but notwithstanding this attitude it held that the employment did not come within the purview of he law, the post of the employment not being in any true sense of the term a laundry.

HOURS OF LABOR OF WOMEN—HOTEL EMPLOYEES—EXEMPTION OF RAILROAD HOTELS AND EATING HOUSES—CONSTITUTIONALITY—*Dominion Hotel (Inc.)* v. *State of Arizona, Supreme Court of the United States (Mar. 24, 1919), 39 Supreme Court Reporter, page 273.*—Under a prosecution brought by the State of Arizona against the Dominion Hotel (Inc.) for the violation of a law of the State prohibiting the employment of women in hotels for longer periods than eight hours and providing also that said eight hours of service must be performed within a period of twelve hours, the defendant was found guilty. This decision was sustained by the State supreme court, and a writ of error was brought to the Supreme Court of the United States on the ground that the provision in the statute exempting railroad hotels from the application of the law denied to the defendant the equal protection of the laws, and was therefore under the fourteenth amendment of the Federal Constitution unconstitu-

tional. The Supreme Court in refusing to declare the statute void said in part:

The fourteenth amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State "may be determined by degrees of evil or exercised in cases where detriment is especially experienced." (Armour & Co. *v.* North Dakota, 240 U. S. 510, 36 Sup. Ct. 440.) It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were mathematically exact. The only question is whether we can say on our judicial knowledge that the Legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. (Hebe Co. *v.* Shaw, 248 U. S. 297, 39 Sup. Ct. 125.) Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we can not know.

Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree, and the constant business of the law is to draw such lines.

We can not pronounce the statute void.

Judgment affirmed.

HOURS OF LABOR OF WOMEN—MEALTIME INCLUDED IN WORKING HOURS—ABSENCE FROM WORK—*Haddad* v. *State, Court of Criminal Appeals of Texas (Feb. 4, 1920), 218 Southwestern Reporter, page 506.*—Haddad was convicted for the violation of article 1451h of the Penal Code, which prohibits an employer from permitting his female employee to work more than 9 hours per day, or 54 hours per week. Haddad operated a café and required his waitresses to work from 8 a. m. to 1 p. m. and from 3 p. m. to 7 p. m. each day for every day in the week. He appealed from the decision of conviction, declaring that the court should have deducted from the weekly working hours one hour per day, which was alleged to have been consumed by the employee in eating her meals, and also that the time taken off by the employee when she was absent from her work should be deducted from the weekly working period. The court rejected the first of these

contentions, but agreed with the second and reversed the decision. The opinion is as follows:

It is contended that the time she used in eating her meals, or practically one hour a day, should be discounted from the nine hours if she only worked one day, or the one hour per day should be discounted from the 54 hours. If this is correct, then her employer was entitled to a discount as against the 54 hours of 7 hours; that he should not be charged under the allegation or theory of 54 hours with the time that she was visiting about the town and the one or two evenings when she failed to present herself in her employment and was absent. We are of the opinion that the time she occupied at meals should not be discounted from her terms of employment; that she was in the cafe and was ready to discharge her duties, and sometimes was called from her meals while eating to wait upon customers. This we think shows that she was in the employ of her employer, and he was not entitled to credit as against the 54 hours for such time. But we are further of opinion that her absence on other occasions above mentioned should be deducted from the 54 hours. She was not working under employment, was absent from it, and was not subject to the calls of duty of her employer, but she was in position where she could not work nor be required to work. This was voluntary on her part. She was not rendering any service or in position to do so. This became a serious issue on the trial of the case.

The court then considered the refusal of the trial judge to charge the jury in accordance with the foregoing views, to which the defendant had excepted, and the judgment was reversed and the cause remanded.

HOURS OF SERVICE—RAILROADS—INTERSTATE COMMERCE—COMMON CARRIER WITHIN MEANING OF ACT—*United States* v. *Brooklyn Eastern District Terminal, Supreme Court of the United States (Mar. 24, 1919), 39 Supreme Court Reporter, page 283.*—The United States brought action against the defendant company for the violation of the hours of service act of March 4, 1907 (ch. 2939, 34 Stat. 1415), which prohibits any common carrier by railroad engaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period than 16 consecutive hours, and the trial court entered judgment against the defendant company. Upon appeal the circuit court of appeals (239 Fed. 287) reversed this judgment and the Government brought the case to the Supreme Court on a writ of certiorari, and the judgment was again reversed and the defendant adjudged guilty of having violated the statute. The defendant company is engaged in providing terminal facilities and a depot for the accumulation of goods to be shipped either to or from the New York Harbor for some 10 railroads and several steamship companies with which it has separate contracts. It does business for no other concerns. Its facilities consist of a number of barges and

ferries and about a mile of railroad for switching purposes, over which it transports both intrastate and interstate goods to and from its union freight station. It is the contention of the defendant company that inasmuch as it operates under contracts and does not accept business from concerns with whom it has no contract it is not a common carrier. Mr. Justice Brandeis delivered the opinion of the court, which is in part as follows:

The hours of service act declares (in the first section) that, "the term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease." Hence, neither the character of the terminal's railroad nor its independent ownership excludes it from the scope of the act. But the terminal contends that it is not subject to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform.

The services rendered by the Terminal are public in their nature, and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the 10 railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the hours of service law. The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer and exempts the Terminal, because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employees and the public.

But a common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another. The relation of agency may preclude contractual obligations to the shippers, but it can not change the obligations of the carrier concerning the physical operation of the railroad under the hours of service act.

The judgment of the court of appeals was therefore reversed, and that of the district court, holding the company guilty, was affirmed.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR—INTERSTATE COMMERCE—*United States* v. *Atlanta Terminal Co., United States Circuit Court of Appeals, Fifth Circuit* (*Oct. 15, 1919*), *260*

Federal Reporter, page 779.—The Atlanta Terminal Co. was incorporated as a railroad company and maintained a railroad terminal wholly within the State of Georgia. It owned railroad tracks and owned and operated switches and signal towers, but it did not own any engines or trains nor did it employ engineers, conductors, or brakemen. It also maintained offices through which telegraphic messages and train orders were transmitted. The railroad trains which used the terminal were engaged in interstate commerce, and the passengers moving to and from the city through the terminal were transported from and to other States. The United States brought a civil suit to recover a penalty from the defendant for the violation of the hours of service act. The employee concerned was a telegraph operator who transmitted the train orders for the movement of the trains using the terminal. The defendant denied it was a common carrier within the meaning of the law and denied that it was engaged in the transportation of passengers or property. The district court directed a verdict for the defendant. In reversing this decision the court of appeals said in part:

That the defendant, under the facts stated, was a common carrier of passengers and baggage, has been settled by the decisions of the Supreme Court, notably the cases of United States *v.* Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83, and United States *v.* Brooklyn Eastern District Terminal, 249 U. S. 296, 39 Sup. Ct. 283 [above]. In the latter case the hours of service act was held to apply to a terminal company, which performed similar duties and in a similar manner to those performed by the defendant under the facts stipulated.

Direction and control are as much a part of transportation as are the physical acts of running the engine or handling the train. It is also true that trains, in motion, could only enter and leave the terminal tracks through switches thrown by signal men of defendant, and upon signals given the train crews by defendant's signal men. These acts were acts of transportation, and the defendant was engaged in transportation of passengers and baggage, upon a railroad, while doing them. The fact that the railroad company engaged jointly with defendant in the transportation does not change the conclusion reached.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR—MEALTIME—*Chicago, R. I. & P. Ry. Co.* v. *United States, United States Circuit Court of Appeals, Eighth Circuit (Oct. 28, 1918), 253 Federal Reporter, page 555.*—The United States brought action against the railway company for the violation of the hours of service act and from a judgment for the United States the defendant brings error. Circuit Judge Hook, in affirming the judgment, rendered the following opinion:

The railway company was held by the trial court to have violated section 2 of the hours of service act of March 4, 1907 (34 Stat. 1415, c. 2939; Comp. St. 1916, sec. 8678), by requiring or permitting a telegraph operator in one of its day and night stations to remain on duty more than 9 hours in a 24-hour period. On November 25, 1913, the operator went on duty at 2 p. m. and left at 11.40 p. m., but in the meantime had been absent an hour for supper. The question in the case depends upon the conditions of his absence for supper, and is whether the time should be deducted from the 9 hours and 40 minutes or whether he was still on duty within the intent of the statute.

The usual daily service of the operator was from 2 p. m. to 11 p. m., with an hour for rest and his evening meal. The hour, generally from 6 o'clock to 7, was not definitely fixed, but depended upon the requirements of the work. The understanding between him and the company, and the practice, was that, though at some time he should have his hour off, it was alterable and adjustable to the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law.

It is enough to cite Missouri, Kansas & Texas R. Co. *v.* United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144 [Bul. No. 152, pp. 128, 129].

The judgment is affirmed.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR—STATION CONTINUOUSLY OPERATED NIGHT AND DAY—*United States* v. *Baker*, *United States District Court, Southern District of Texas* (*November 10, 1919*), *261 Federal Reporter, page 703*.—The United States by a complaint containing 10 counts brought a criminal action against James A. Baker, receiver of the International & Great Northern Railway, for the violation of the hours of service act (Mar. 4, 1907, ch. 2939, 34 Stat. 1415), which prohibits employees of railroads serving as telegraph operators, train dispatchers, etc., from being required or permitted to work longer than 9 hours in a 24-hour period in stations operated continuously night and day. The law permits 13 hours' work in offices operated only in the daytime.

The defendant as receiver of the railway operated a station at Navasota, Tex., where a telegrapher, M. Menger, was required to work from 7 o'clock a. m. to 6 o'clock p. m. When the time came to close the office, if he had any train messages which had not been delivered owing to the nonarrival of the trains before 7 o'clock p. m., Menger was required to take such undelivered messages to the Houston & Texas Central Railroad Co.'s operator at the Santa Fe tower at Navasota. In the morning on coming to work Menger would go over to the tower and get any messages which the tower

operator had not delivered. During the period when Menger was off duty the station was closed and train messages were transmitted to the tower operator under an agreement between the Houston & Texas Central Railroad and the defendant. Baker admits all these facts, but claims that the station was only a "day station" and that the facts do not show that it was operated continuously night and day. The court held that the transmission of messages under an agreement with another road during a part of the 24-hour period did not serve to make the station a day station, and a judgment of conviction was entered. The decision is in part as follows:

The question of whether or not the defendant had any control or authority over the operatives of the H. & T. C. who handled the messages pertaining to the receiver's road during the absence of the regular operator is wholly immaterial. The slightest reflection upon the scope and purpose of the act will satisfy any candid mind that the law is concerned not with the method by which messages are accepted and received, but merely with the fact of prohibiting the employment at work for more than 13 hours of any operator at an office operated continuously night and day. If the contention of the defendant that the fact that for a part of the 24-hour period its messages were handled by persons employed not by itself, but by another company, makes the station a daytime station only, were sound, the act could be nullified throughout the length and breadth of the United States wherever conditions of joint operation existed, as at Navasota, by one company running its office 12 hours, the other 12 hours, and interchanging service with each other during the period that the respective operators hired by each were off duty.

Such a result, if reached by design, would not be tolerated; nor does the fact that the result is reached without design in anywise change the legal effect of the situation. What the law is concerned with in this case is not the method by which the receiver provides for the handling and transmission of his messages during the night hours, but with the fact that during some period of the 24 hours he obliges his operator to remain on duty more than 9 hours. What the precise nature of the arrangements the receiver made with the Houston & Texas Central was is wholly immaterial in this case, since the fact is undisputed that the receiver did have arrangements at the place, Navasota, for receiving messages day and night, and did for a part of the time at that place have an operator working more than nine hours.

Judgment for $100 was therefore rendered on each of the 10 counts.

HOURS OF SERVICE—RAILROADS—YARD MOVEMENTS OF TRAINS—*Pennsylvania R. Co.* v. *United States, United States Circuit Court of Appeals, Third Circuit (May 24, 1920), 265 Federal Reporter, page 609.*—Lathero was employed by the railroad company as a car dropper and as a brakeman. He worked in the company's yards at

Hollidaysburg, Pa., as a car dropper, where he rode cars which were being moved about the yards in the process of distribution to make up full trains. Later in the day he would go to Altoona, where he acted as a brakeman in connection with an engine which was engaged in making up trains in the yards. None of his duties required him to work on the main line of the railroad, but all movements were performed in the yards. These duties occupied more than 16 hours in the aggregate during a 24-hour period. The United States brought action against the railroad for the violation of the hours of service act of March 4, 1907 (34 Stat. 1415, 8 Comp. Stat. 1916, p. 9448), and recovered judgment. In affirming the decision the court said in part:

The railroad company's sole insistment is that the act applies only to movements of trains over main-line tracks, and not to mere yard movements, such as were made in this case. In construing the act it must be borne in mind that its purpose, as expressed in its title, was to promote the safety of employees, as well as travelers, upon railroads. Of course in carrying out this purpose, the mischief sought to be avoided was the mental and physical exhaustion of employees liable to result from permitting or requiring them to remain on duty for excessive lengths of time. The act provides that the term "railroad," as used in the act, shall include "all the road in use by any common carrier operating a railroad."

As is well pointed out in the opinion of the learned judge of the court below, no train is excluded from the provisions of the act, except wrecking or relief trains, and there is no limitation as respects the kind of movement or the place in which it shall be made. In this situation, bearing in mind the purpose of the legislation and appreciating that men may as easily become exhausted by overwork in the movement of trains in and about yards as they may in so-called main-line movements, and thus imperil their own, as well as the safety and lives of others, we would have no hesitation, even if we considered this a case of first impression, in holding that Lathero, while at work in the Altoona yards, was engaged in or connected with the movement of a train, and hence that the railroad company is subject to the penalty prescribed in the act for a violation thereof. As was said by Mr. Justice Lurton in Chicago, Ind. & L. Ry. Co. *v.* Hackett, 228 U. S. 559, 564, 33 Sup. Ct. 581, 584 (57 L. Ed. 966), in construing a statute of Indiana, to hold that yard movements such as were made in the Altoona yard were not movements of a train "would be to make the act meaningless as to the most dangerous class of work which falls to the lot of railroad employees."

INVENTIONS BY EMPLOYEES—"TIME OF EMPLOYMENT"—*Moore* v. *United States, Supreme Court of the United States (Apr. 14, 1919), 39 Supreme Court Reporter, page 322.*—David F. Moore was employed by the United States as a wood calker in a navy yard, and during the period covered by this employment he perfected an inven-

tion known as a reefing iron for use on the decks, sides, and bottoms of vessels where wood calking is done. An act of Congress of June 25, 1910 (36 Stat. 851, ch. 423), provides that where the Government uses a patent without obtaining a license for such use from the patentee he shall be compensated therefor, but this act does not apply where the device was discovered or invented by an employee of the United States "during the time of his employment or service."

Moore's invention was extensively used by the United States, and he requested compensation, which was refused. The Court of Claims rejected the claim, so this appeal was taken to the Supreme Court, which affirmed the position taken by the Court of Claims. Moore claimed that he had been at work on his invention for a number of years, from 1903 to 1914; furthermore, that he had expended no time on it during the hours of his employment by the Government, but only while at home during his absence from duty in the navy yard. It was held, however, that the statute clearly covered the full time of his employment, the concluding sentences of the decision rendered by Mr. Justice Clarke being as follows:

> No matter what the appellant may have done prior to May, 1914, it was in that month, he avers, that he completed his invention, and during the whole of that month he was in the employment or service of the Government. To give the effect contended for to the allegation that the appellant confined his work on his invention to the hours when he was not actually on duty, but while he was in the Government employ, would be to amend the statute, not to construe or interpret it.

LABOR DISPUTES—INSTIGATION—CONSPIRACY TO RESTRAIN TRADE—SHERMAN ANTITRUST LAW—STRIKES TO RESTRAIN COMMERCE—CLAYTON ACT—*Lamar et al.* v. *United States*, *United States Circuit Court of Appeals, Second Circuit* (*June 4, 1919*), *260 Federal Reporter, page 561.*—This action was a criminal prosecution by the United States against various defendants under the Sherman Act (July 2, 1890, ch. 647, 26 Stat. 209) for a conspiracy "to restrain foreign trade and commerce" and to "restrain, hinder, and prevent the transportation" of munitions of war manufactured in the United States in said foreign trade and commerce. Three of the defendants, Rintelen, Lamar, and Martin, were found guilty, convicted, and sentenced. Lamar and Martin brought a writ of error to review the judgment.

Rintelen was a German, who came to this country provided with funds to the extent of $500,000, for the purpose of preventing the United States from manufacturing or shipping supplies to the belligerent nations at war in Europe in 1915. To accomplish this pur-

pose his plan was to instigate strikes and create labor difficulties in the plants and factories manufacturing "munitions of war." Lamar and Martin were associated with him in this endeavor. Although he parted with much of his money for this purpose, he was unsuccessful in producing any results. Circuit Judge Hough in presenting the opinion of the court affirming the judgment of conviction said in part:

So far as the lack of success of the plaintiffs in error is relied on, it is enough to point out what was specifically held in the Nash case, 33 Sup. Ct. 780, that conspiracy under the Sherman Act is proved by proving the forbidden meeting of minds; it is like a common-law conspiracy, not like those denounced by section 37, Criminal Code (act Mar. 4, 1909, ch. 321, 35 Stat. 1096, Comp. St., p. 10201), where an overt act is a necessary ingredient of crime. Likewise, any lack of intent to violate the statute can not be relied on here. Personal intent usually, and certainly here, means no more than an intention to do what was done; therefore, if (as the jury found) defendants intended to hinder and restain export trade in war munitions, the fact that they had no suspicion of thereby violating the Sherman Act is a matter of no importance, and is immaterial.

It is further contended that, assuming everything covered by the evidence as proven and all the legal rules above adverted to as correct, it still remains true that the only suggested means or method of restraining trade was to strike—to induce laborers to peacefully quit work; and such acts are lawful under the statute of October 15, 1914, commonly known as the Clayton Act (38 Stat. 730, ch. 323). It is said to follow that, if doing this lawful act should produce restraint of trade, the later statute prevents the operation of the earlier.

Whether the Clayton Act has to the extent indicated nullified the Sherman Act is a question that need not be discussed; but we do hold it as clear that no change has been wrought in the law of conspiracy as applicable to this case. It may be that, where the intent of those who foment strikes or themselves quit work after and as a result of agreement with their fellow workmen is to advance their own wage interests, or otherwise improve their conditions of life, the Clayton Act produces legality by forbidding legal interference with their doings. This may be admitted for argument's sake, without expressing opinion. But we do hold that where it is charged (as here) that the intent was solely to restrain foreign trade, and where it is proved (as here) that the proposed instigation of strikes bore no relation whatever to the welfare of the strikers, then at most and best the strike becomes nothing more than an instrument or means, legal in itself, but used only for an illegal end.

The argument for plaintiffs in error confounds the means with the end. The end or object of the proven conspiracy was not to call strikes, but to restrain or rather suppress foreign trade. That object is as illegal as ever; the Clayton Act assuredly does not legalize it. If that be granted, the elementary rules of law apply, and legality of means can not excuse illegality of purpose or object.

LABOR DISPUTES—INVESTIGATION AND ADJUSTMENT—COURT OF INDUSTRIAL RELATIONS—KANSAS—CONSTITUTIONALITY OF STATUTE—*State ex rel. Court of Industrial Relations et al.* v. *Howat et al., Supreme Court of Kansas (July 19, 1920), 191 Pacific Reporter, page 585.*—The Kansas Court of Industrial Relations was investigating conditions existing in the mining industry in Cherokee and Crawford Counties. Howat and three other persons were subpœnaed by the district court to appear before the court of industrial relations and testify as to conditions prevailing in that locality. This they refused to do, whereupon they were adjudged guilty of contempt of court and ordered confined. This action is a proceeding for a writ of habeas corpus designed to secure their release. They argue that the law creating the court of industrial relations is unconstitutional and that they are therefore being unlawfully imprisoned. In upholding the constitutionality of the law and remanding the petitioners to custody the court said in part:

Most of the constitutional objections raised by the defendants are directed to provisions of the act creating the court of industrial relations, the validity or invalidity of which can have no possible bearing upon the disposition of the present case. The statute makes the new body the successor of the Public Utilities Commission, the functions of which are devolved upon it. (Laws 1920, ch. 29, 2.) It therefore has a legal existence, unless that commission was a nullity, which is not suggested. The legislature has undertaken to grant it, among other additional powers, those of investigating certain controversies relating to the operation of various industries, including coal mining, and of taking evidence and making findings thereon. (Section 7.) Its proceedings are required to be reported to the governor. (Section 27.) It is clear that it would be competent for the legislature to authorize an administrative tribunal to make such investigations, findings, and reports even if no further purpose were to be accomplished than to give publicity to existing conditions and provide data upon which subsequent legislation might be based. The act also undertakes to empower the court to make orders with reference to the conduct of the industry—among other things to regulate wages. (Section 8.) Whether or not the legislature could confer all the powers so attempted to be given—for instance, that to which specific reference has just been made—we have no doubt whatever that it could invest the industrial court with some of them. The legislature may, of course, enact statutes designed (for example) to protect the health and safety of miners, and may authorize an administrative body to make rules in that connection having the force of laws. (Richards *v.* Coal Co., 104 Kans. 330, 179 Pac. 380; 12 C. J. 847–853.) Regulations of that kind would be within the scope of the act under consideration. Inasmuch as the police power extends to the protection of the welfare and convenience as well as the health, safety, and morals of the public, it may manifestly be invoked, as in the present instance, to prevent the interruption in the production of a commodity so vitally necessary to the people of this State as coal, so long as the means employed are not for some special reason obnoxious to con-

stitutional provisions. There is abundant field for the operation of the act under consideration, even if every portion of it to which a specific objection has been urged were entirely eliminated.

It is quite clear that the part of the act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference to the effect of partial invalidity. However one section of it reads as follows:

"If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court." (Laws 1920, ch. 29, sec. 28.)

The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced, notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the legislature desired the unobjectionable part to become a law irrespective of the validity of the remainder. Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative extent, and requires the court to give effect to all portions of the statute that do not in themselves violate some constitutional provision.

The occasion for the aid of the district court being invoked to require the attendance of witnesses before the court of industrial relations arises from the well-understood fact that the latter body, in spite of its name, is an administrative and not strictly a judicial tribunal and is therefore regarded as incapable of enforcing its own process. (Cases cited.) The defendants argue that the district court, under the statute, is without authority to compel the attendance of a witness before any other tribunal than itself. The industrial court act, however, contains this provision:

"In case any person shall fail or refuse to obey any summons or subpœna issued by said court (of industrial relations) after due service then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpœna." (Laws 1920, ch. 29, sec. 11.)

We interpet this language as authorizing the procedure here followed—the issuance and service of an order by the district court requiring the defendants to appear before the court of industrial relations and their commitment for contempt for refusing to obey that order. The district court, being one of general jurisdiction, is obviously a proper tribunal to which to apply for the proper aid, and the method pursued is one naturally adapted to the end sought. The constitutionality of the provision quoted has not been challenged except by an objection relating to the title, which will be mentioned later. A similar feature of the Federal law relating to the attendance of witnesses before the Interstate Commerce Commission has been upheld against the contention that the action of a court in requiring a witness to appear before an administrative body was nonjudicial. (Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.)

The title of the act under consideration reads:

"An act creating the court of industrial relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act."

The contention is made that this is insufficient, and the provision of the State constitution with reference thereto (art. 2, sec. 16) is therefore violated because the title refers to a court, and the body undertaken to be created is not judicial in its character. The word "court" is often employed in statutes otherwise than in its strict technical sense and is applied to various tribunals not judicial in their character.

A number of the objections offered were then recited, the court concluding that none of them was involved in the present case. The final contention was that the Federal Congress had acted in the field, so that the State was without power to legislate. As to this the court said that while Federal action might in some respects limit the field of operations of the State law, the State still had power to conduct investigations along at least some of the lines named in the act, and nothing appeared to indicate a restriction on the court's powers as involved in the case in hand. The judgment of the court below was therefore affirmed.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — INJUNCTION — DRAYAGE AND HAULING—*Auburn Draying Co.* v. *Wardell et al.*, *Court of Appeals of New York* (*July 15, 1919*), *124 Northeastern Reporter, page 97.*—The Auburn Draying Co. was engaged in the hauling and trucking business in the city of Auburn and employed from 30 to 45 men, the greater number of whom did not belong to a labor union. In Auburn there existed 22 labor unions, each representing a trade or occupation. These unions were members of a larger organization called the Central Labor Union, all being unincorporated. The defendant, Teamsters Union No. 679, was a member of the Central Labor Union. Its representatives approached the plaintiff and demanded that it compel its workmen to join the union or employ only men who did belong to the union. This the plaintiff refused to do, stating that its men could do as they chose and that they were free to join the union if they wished. The defendant, Teamsters Union No. 679, thereupon passed a resolution declaring the plaintiff an unfair employer and notified the Central Labor Union, which passed a like resolution. The unions thereupon brought pressure to bear on plaintiff's customers by threats of labor difficulties, strikes, etc., so that, in fear for their own businesses, they refused to permit it to do their hauling for them. In consequence of this boycott against plaintiff, it was seriously and materially damaged. In a suit for an injunction against

the defendants, the plaintiff was twice successful and the defendants appealed. In affirming the judgment in favor of the plaintiff, the court of appeals said, in part:

The defendants, in concerted actions and measures, interfered with the property rights and the property of the plaintiff. As a part of its property was the right to be employed by, to do work for, to transact business with, and to receive compensation from all those who voluntarily sought or desired to thus engage with it. Personal liberty or the right of property embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor and the employment of one's individual and industrial resources. The right is not and can not be absolute. It is subject to the condition that its exercise in the particular transaction shall not be inconsistent with the public interests or hurtful to the public order or detrimental to the common good. Moreover, it is common and reciprocal to all citizens. An unrestrained and unlimited exercise on the part of some persons would clash with and encounter the exercise of a similar freedom on the part of others. The question then arises whether the interference with the action of the one is justified by the exercise of some right of the interfering other. The right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others. The law recognizes the right, and holds and enforces that an invasion of it, without a cause or reason which the law deems essential or useful in the existence or betterment of organized society, is a legal and actionable wrong which may be compensated or restrained. The action and measures initiated and sustained by the defendants worked serious injury to the property of the plaintiff, in consequence of which it sustained substantial damages.

The rights, in virtue of which the defendants would justify the interference and the injury, are: (*a*) That of laborers to associate; (*b*) to bring within the labor organizations as members all laborers; (*c*) through the coherent and solidified power and influence flowing from association and united efforts to secure for all laborers higher wages, shorter hours, arbitration of labor disputes, and better working conditions. Beyond question those rights exist. Labor unions are, and for a long time have been, recognized by the courts of this country as a legitimate and useful part of the industrial system. Associations of laborers, to accomplish lawful objects by legal means, have been always recognized and protected by the law of this State. The law does not tolerate inequality in the existence and enforcement of rights or the definition and redress of wrongs, and the first condition of individual freedom and opportunity is servitude of law. In the instant case the contest did not arise because the members of union No. 679, or members of the same occupation and of other unions, chose not to work for the plaintiff or for or with men who did engage in business with it, or sought to persuade, in an orderly and proper manner, persons generally to abstain from business transactions with it. It did not arise in the ordinary and natural exercise by the unions of the right to control their own labor and of the right of association. It arose because the defendants, constituting the entire union population of the city of Auburn, inaugu-

rated and carried on, affirmatively and aggressively, through the agencies of fear and coercion, a comprehensive exclusion of the plaintiff from the business of the community, in order to compel it to unionize its business. On the part of the defendants there was organized coercion of the plaintiff into compliance with the demand of the unions that it compel its employees to join union No. 679, by combining to compel third persons to refrain from having any business relations with it. The defendants were an organized combination, with a unified intent and purpose, causing irreparable damage to the business and property of the plaintiff. Financial pressure, loss of business, interference with freedom of action were imposed by them in order to force the unionization. The law should be, and is, that the means were unjustifiable and unlawful, and the defendants should be enjoined from using them.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — INJUNCTION — SECONDARY BOYCOTTS — CLAYTON ACT — PENDING SUITS — *Duplex Printing Co.* v. *Deering et al., United States Supreme Court (Jan. 3, 1921), 41 Supreme Court Reporter, page 172.*—The Duplex Printing Press Co. is a Michigan corporation engaged in the manufacture of large and complicated printing presses such as are used for printing daily newspapers. The company maintained a plant at Battle Creek, Mich., at which they employed about 200 machinists, in addition to an office force, and a field force, which supervised the erection of the presses, in all about 250 persons. The International Association of Machinists called a strike of these employees for the purpose of effecting recognition of the union, but only 11 factory workers and 3 field supervisors adhered to the call and struck. The defection of so small a number did not seriously interfere with the continuation of the operation of the factory or the sales and shipment in interstate commerce. The International Association of Machinists, having a membership of more than 60,000, thereupon adopted and carried out an elaborate country-wide plan for enforcing a boycott of the Duplex Co.'s presses. The methods adopted to enforce this boycott, as expressed in the language of the court, were as follows:

The acts embraced the following, with others: Warning customers that it would be better for them not to purchase, or, having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they

assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses. In some cases the threats were undisguised, in other cases polite in form but none the less sinister in purpose and effect.

This boycott campaign centered around New York City. The Duplex Co. brought action against Deering and Bramby, individually and as business agents of district No. 15 of the International Association of Machinists, for an injunction to restrain the boycott. The defendants contended that the Clayton Act prevented the United States District Court for the Southern District of New York from granting an injunction against a labor union. The court adopted this view, dismissing the bill (247 Fed. 192). On appeal to the circuit court of appeals this decision was upheld (252 Fed. 722), and the Duplex Co. again appealed. In reversing the decision of the lower courts and granting an injunction to restrain the acts above noted Mr. Justice Pitney, delivering the majority opinion of the court, said in part:

The jurisdiction of the Federal court was invoked both by reason of diverse citizenship and on the ground that defendants were engaged in a conspiracy to restrain complainant's interstate trade and commerce in printing presses, contrary to the Sherman Antitrust Act of July 2, 1890 (ch. 647, 26 Stat. 209). The suit was begun before, but brought to hearing after the passage of the Clayton Act of October 15, 1914 (ch. 323, 38 Stat. 730). Both parties invoked the provisions of the latter act, and both courts treated them as applicable. Complainant relied also upon the common law; but we shall deal first with the effect of the acts of Congress.

The judges agreed that the interference with interstate commerce was such as ought to be enjoined, unless the Clayton Act of October 15, 1914, forbade such injunction.

That act was passed after the beginning of the suit, but more than two years before it was brought to hearing. We are clear that the courts below were right in giving effect to it, the real question being whether they gave it the proper effect. In so far as the act (*a*) provided for relief by injunction to private suitors, (*b*) imposed conditions upon granting such relief under particular circumstances, and (*c*) otherwise modified the Sherman Act, it was effective from the time of its passage and applicable to pending suits for injunction. Obviously this form of relief operates only in futuro, and the right to it must be determined as of the time of the hearing.

The Clayton Act, in section 1, includes the Sherman Act in a definition of "antitrust laws," and in section 16 (38 Stat. 737) gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the antitrust laws under the conditions and principles regulating the granting of such relief by courts of equity.

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act.

Looking first to the former act, the thing declared illegal by its first section (26 Stat. 209) is: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means.

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott," that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

Mr. Justice Pitney then quoted from two earlier decisions of the court, and continued:

It is settled by these decisions (Loewe *v.* Lawler, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622], Eastern States Lumber Assn. *v.* U. S., 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53]), that such a restraint produced by peaceable persuasion is as much within

the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the circuit court of appeals was divided; the majority holding that under section 20, "perhaps in conjunction with section 6," there could be no injunction. As to section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred.

The principal reliance is upon section 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases with respect to (*a*) the terms and conditions of the relief and the practice to be pursued, and (*b*) the character of acts that are to be exempted from the restraint; and in the concluding words it declares (*c*) that none of the acts specified be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment."

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no such restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, * * * involving or growing out of a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context and mean only that those acts are not to be so held when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the antitrust and other laws of the United States to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the circuit court of appeals appear to have entertained the view that the words "employers and employees," as used in section 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong"; and that, as

there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of the machinists' union in calling a strike at the factory—section 20 operated to permit members of the machinists' union elsewhere—some 60,000 in number—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce—and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war.

Nor can section 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of section 20, which contain no mention of labor organizations, so as to produce an inconsistency with section 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization.

To instigate a sympathetic strike in aid of a secondary boycott can not be deemed "peaceful and lawful" persuasion. The majority of the circuit court of appeals, very properly treating the case as involving a secondary boycott, based the decision upon the views that it was the purpose of section 20 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." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this.

In the case of the Clayton Act the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now section 20. But they contain extracts from judicial opinions and a then recent textbook sustaining the "primary boycott," and expressing an adverse view as to the secondary or coercive boycott, and on the whole are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The ques-

tion whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative. The subject, he declared in substance or effect, was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confining boycotting to the parties to the dispute, allowing parties to cease to patronize and to ask others to cease to patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law, and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added.

Reaching the conclusion, as we do, that complainant has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or local statutes, there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

There was a dissenting opinion by Mr. Justice Brandeis, with whom concurred Justices Holmes and Clark, in which it was declared that in interpreting the Clayton Act the restrictive provisions should be made to apply to all employers and to all workingmen, whether in the employ of the former or not. They also stated that they believed the course of action of the union and its members was justified at common law.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — INTERFERENCE WITH EMPLOYMENT — DAMAGES — *Clarkson* v. *Laiblan et al., St. Louis Court of Appeals, Missouri (Dec. 2, 1919), 216 Southwestern Reporter, page 1029.*—Clarkson was a journeyman roofer by occupation and as such belonged to Local Union No. 1, International Brotherhood of Composition Roofers, Damp and Waterproof Workers, of St. Louis and vicinity. After working as a roofer from 1903 to 1906, Clarkson became a contracting roofer and thereby lost his membership in the union. In 1909 he sold out his business to the St. Louis Roofing Co. and secured employment with that company as a journeyman roofer. The union demanded that Clarkson be discharged and not again employed by the company until all the union employees of the company who were out of work were reemployed. This demand was made under a threat of calling a

strike of the company's workers and for that reason was complied with. Clarkson then applied for membership in the union on two separate occassions, but was each time wrongfully refused readmittance to the union. Thereupon Clarkson undertook by contract to fulfill certain of the St. Louis Roofing Co.'s roofing contracts. When this was discovered by one Garvey, who was the business agent of the union, he went to the company and again threatened to call a strike of the company's employees unless the company annulled its contracts with Clarkson. The company complied with the union's demand as made by Garvey, who reported what he had done to the members of the union.

This action is brought by Clarkson against members of the union for damages for the interference with his contracts with the roofing company. The defendants demurred to the complaint but the demurrer was overruled and a decision was rendered by the St. Louis circuit court in favor of Clarkson. The union members appealed, and in affirming the decision the court of appeals said in part:

It is alleged that said roofers' union and its officers and agents, being these defendants, did willfully and maliciously conspire together and with each other to prevent plaintiff from following his trade as a roofer, and have willfully and maliciously conspired together and with each other to cause plaintiff to lose his employment and contracts with said St. Louis Roofing Co., and that the said acts were malicious, and that by reason thereof plaintiff has been caused to lose his said employment and contracts with St. Louis Roofing Co., to his loss and damage.

We think the demurrer was well ruled, and that, where the defendants, through their agent, as alleged, resorted to methods which in effect deprived the St. Louis Roofing Co. of its free will in the matter of carrying out the contract with plaintiff which it desired to do, in that case the acts of the defendants would be considered the proximate cause of the damage, and therefore as giving a cause of action. (Clarkson *v.* Laiblan et al., 178 Mo. App. 708, 161 S. W. 660; Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997.)

While the evidence in the record is conflicting as to the rules, customs, and usages of the union and also as to Business Agent Garvey's authority, we think there is sufficient evidence in the record to uphold the verdict of the jury in behalf of plaintiff.

While it is true that there is no specific by-law of the union which conferred authority upon Garvey, the business agent, to order a strike, it does appear clearly from the evidence that it was his duty to visit the union shops at regular intervals to see that none but union men were employed, and according to the testimony of Mr. Laiblan, the president of the union, he (Garvey) was to use his own judgment.

As the evidence tended to show that these acts on the part of Garvey were within the scope of his authority as business agent of the union, the officers and members of the union, being these defendants, were bound thereby.

It follows from this that there was evidence in the case tending to support the allegations of the petition, and that the court did not err in failing to give defendants' peremptory instruction to the effect that plaintiff could not recover.

Defendants make the further point that the punitive damages assessed are excessive. The verdict was for the sum of $1,200 punitive damages and $55 compensatory damages. It appeared that this cause has been before three juries, and that each of the juries rendered a verdict in behalf of the plaintiff, and in each case for damages in sums larger than was given in the present verdict. The acts of the defendants, through Garvey, the business agent, were necessarily humiliating and annoying to the plaintiff. There are eight defendants to bear the burden of this verdict. We do not think that the verdict under the circumstances is excessive.

We rule that the case was fairly tried under proper instructions. Finding no reversible error in the record, the commissioner recommends that the judgment be affirmed.

This case is based upon the same facts as to the suit for injunction as in Clarkson *v.* Laiblan et al., 178 Mo. App. 708, 161 S. W. 660 (Bul. 169, p. 313), reference to which was made in the foregoing decision.

LABOR ORGANIZATIONS—BOYCOTT—CONSPIRACY—MONOPOLY—RESTRAINT OF INTERSTATE COMMERCE—SWITCHBOARD MANUFACTURERS—*Boyle et al.* v. *United States, United States Circuit Court of Appeals, Seventh Circuit (Apr. 4, 1919), 259 Federal Reporter, page 803.*—Michael Boyle and various other members of labor unions together with certain manufacturers were indicted, tried, and convicted of unlawful conspiracy and violation of the Sherman Antitrust Act (July 2, 1890, ch. 647, 26 Stat. 209).

Prior to 1909 manufacturers of electrical switch and panel boards outside of both Chicago and Illinois sold and shipped their appliances in interstate commerce, finding a market in Chicago. In 1910 the employees and the electricians of employers located in Chicago and engaged in the manufacture of switch and telephone panel boards organized and struck to unionize the businesses. Some employers held out, others gave in. The employers protested against the union wage scale, declaring that if adopted they could not meet competition with outside firms which employed nonunion labor. Thereupon certain employers and the labor unions entered into an agreement whereby the former were to adopt the union wage scale and the latter were to undertake to bring about a condition which would make it imposssible for any but union-made switchboards and panels to be installed in Chicago. In furtherance of this agreement the labor unions caused the destruction of switchboards brought into the State and made by nonunion labor; they also refused to install any

but union-made appliances or to operate them. The result was that it became imposible for switchboards and panels not made in Chicago and by union labor to be installed or used. The defendants appealed from the judgment of conviction. In affirming the judgment of the district court the court of appeals said in part:

Section 1 of the antitrust act reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal."

That the parties entered into a combination, that they reduced their agreement in part to writing is conceded. That the parties combined to restrain the shipment of commodities from points outside of the State of Illinois to the city of Chicago is fairly inferable from a part of the written agreement. The employers were anxious to avoid competition from nonunion shops. The employees desired to unionize the shops. They agreed that:

"This increase in scale is to go into effect only in case the party of the second part has succeeded before October 1, 1911, in bringing about a condition which will permit of none but union label switchboard work to be installed in the city of Chicago."

While the practices by which the second party was to bring about this result were not set forth, it is at least inferable even from this agreement alone that outside made switchboards would not be installed in the city of Chicago.

The reasons which actuated the parties to thus conspire and combine may have been and doubtless were quite different. The manufacturer was induced to enter into the agreement because of a desire to eliminate competition. He also wanted to settle his labor problem. The representatives of the unions were actuated by a different motive. But it was not the motive, but the common and concerted action of the parties for the unlawful purpose of restraining interstate commerce for which plaintiffs in error were indicted and convicted.

Nor was the Government barred by the statute of limitations. Plaintiffs in error were not tried for entering into the written contract of April 1, 1911, but were convicted of the unlawful conspiracy to restrain trade which was a continuing conspiracy or combination. While the parties entering into such unlawful combination might have withdrawn from such combination and thereby have relieved themselves from further liability, and the statute of limitations would have begun to run from the time of such withdrawal, yet it required some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created.

Complaint is also made because of the admission of evidence over objection. The Government introduced testimony showing that plaintiff in error Boyle on various occasions made builders pay him considerable sums of money under threat of a strike or a boycott. For example, one witness testified that he had paid Boyle $500 to get a certain switchboard installed; another, that Boyle exacted of him $3,000 in order that he might install a certain switchboard; and still another testified that Boyle required a church to pay $200 as a penalty for installing certain electrical apparatus. Still another witness

testified that Boyle exacted a payment of $20,000 in order to get immunity from strikes, etc., and at a time when there was no difficulty whatever between the builder and the employees. Plaintiffs in error contend that this evidence was not only inadmissible but highly prejudicial to their cause.

That such testimony, if erroneously admitted, was prejudicial must be conceded. For it requires no stretch of the imagination to conceive of a jury taking a prejudice against a party who is thus pictured in the rôle of a blackmailer, a highwayman, a betrayer of labor, and a leech on commerce. But the test of admissibility does not turn upon its effect upon the jury, but on its relevancy to the issues made by the charges set forth in the indictment.

The Government charged a conspiracy or combination to restrain interstate commerce. A prima facie case of conspiracy was established. Boyle was one of the coconspirators. As the object of the conspiracy, switchboards and panel boards made outside of Chicago were not to find a market in the city of Chicago. This object—this interference with interstate commerce—was to be brought about by threatened strikes, by boycotts, or by the exaction of graft to prevent strikes and boycotts. What more direct or immediate restraint upon the sale and installation of switchboards and panel boards made outside of Chicago than a burden of $3,000 or $5,000 upon the builder who sought to install them? It was as effective a means of preventing their installation in Chicago as threatened strikes. The testimony was receivable as an act of one of the coconspirators in furtherance of the object of the conspiracy.

The judgment is affirmed.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — MONOPOLY — RESTRAINT OF INTERSTATE COMMERCE—TILE DEALERS' COMBINATION—*Belfi et al.* v. *United States*, *United States Circuit Court of Appeals*, *Third Circuit* (*June 18, 1919*), *259 Federal Reporter*, *page 822*.—The tile industry has been divided into three classes, (1) the manufacturer, (2) the dealer, and (3) the tile setter. In Philadelphia about 90 per cent of the tile dealers formed themselves into a trade combination known as the Philadelphia Tile, Mantel & Grate Association. The tile setters in Philadelphia and vicinity were organized as a labor union and had in its membership nearly all the tile setters in the vicinity.

The dealers' association entered into a written agreement with the labor union covering hours of labor, wage scales, etc. It was also agreed, but not in writing, that the dealers would employ none other than union tile setters and that the union members would not set tiles for dealers who were not members of the association, and furthermore they agreed not to set the tiles of any manufacturer who sold tiles to a nonmember dealer. All the tile manufacturers except one were located outside of Pennsylvania. The dealers and the members of the labor union were charged and convicted of unlawful conspiracy in restraint of interstate trade under the Sherman Antitrust

Act (July 2, 1890, ch. 647, 26 Stat. 209), and they appealed. In affirming the judgment the court said in part:

The defendants, who are tile dealers engaged in the retail tile business in Philadelphia and vicinity, had joined together and associated themselves in a trade organization known as the Philadelphia Tile, Mantel & Grate Association, ostensibly for the correction of trade abuses and evil practices and the promotion of sound business policies. This association, though admittedly a trade combination, was not regarded by the trial court to be in and of itself a combination violative of the Federal statute against unlawful restraints and monopolies. The controversy, therefore, concerns not the unlawfulness of the combination but the unlawfulness of the conduct of some of its members in carrying out its conceivably lawful purposes. This conduct consisted, as it is alleged by the indictment, in excluding trade competitors from membership in the association, in the refusal of association dealers to buy tiles from manufacturers that sold tiles to nonmember dealers, and in entering into agreements with a tile setters' labor union, whereby association dealers obtained from the union, first, preference over nonmember dealers in the employment of union tile setters, and, second, a promise by the union to supply no tile setters to tile dealers outside of the association, thereby creating a boycott of nonmember tile dealers by making it impossible for them to get materials for their business and labor with which to carry it on.

As all tile manufactories in the country save one are located in States other than the State of Pennsylvania, an interference with commerce caused by the refusal of tile setters to set tile and of tile manufacturers to sell tile is necessarily interstate in character. The jury having found that the defendants had by their acts restrained commerce, and that restraint being of commerce that was interstate in character, the only question for us to decide is whether the restraint to interstate commerce thus occasioned by the defendants was so indirect and remote that the trial judge should have declared as a matter of law that it was not such restraint as is contemplated by the statute.

It is sufficient to say that we believe the acts charged against the defendants named in the judgment now under review—over and beyond the articles of association by which they were bound and the written contract with the labor union into which their association had entered—were such, if committed, as did have a direct and immediate effect upon interstate commerce in tiles, resulting in its unlawful restraint.

The judgment of the court below was therefore affirmed, with costs, except as to two defendants, as to whom the judgment was reversed and a new trial granted, there being an apparent lack of evidence to sustain their conviction.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—BREACH BY EMPLOYEES—DAMAGES—*Nederlandsch Amerikaansche Stoomvaart Maatschappij* v. *Stevedores and Longshoremen's Benev. Soc. et al., United*

States District Court, Eastern District of Louisiana (Apr. 6, 1920), 265 Federal Reporter, page 397.—This is an action in the form of a libel in personam for damages for the breach of a contract brought by the plaintiff (better known as the Holland-American Line) against the Stevedores and Longshoremen's Benevolent Society and the Longshoremen's Protective Union Benevolent Association. The two defendants are labor unions, one composed of white men and the other of colored men. The two unions entered into a contract with all ship agents and employing stevedores at the port of New Orleans for a period of three years, fixing the hours of labor and the price per hour, with provisions for extra pay for certain cargoes, overtime, night work, and Sunday labor. Labor was to be divided equally between the two unions and nonunion labor was to be employed only when union labor could not be had. The stevedores' foremen were all to be union members. The regular rate for ordinary cargoes was 80 cents per hour. A steamship of the plaintiff, the steamship *Amsteldijk*, put into port with an ordinary cargo of kainit, an ingredient used in making fertilizers. Union men started to unload the vessel at the usual rate of 80 cents per hour for such cargoes and quit at the regular time on Saturday. On Monday morning, however, contrary to the provisions of their contract, they refused to return to work unless they were paid 90 cents per hour. The presidents of the unions could not make the men return to work and nonunion men would not work where union men were striking. The ship was delayed in unloading for seven days, when finally the union men returned to work. The Holland-American Line is suing for damages for demurrage. In awarding judgment in the plaintiff's favor District Judge Foster rendered the following decision:

The contract is inartificially drawn and in terms imposes no obligation on respondents to furnish labor. It must be given a reasonable construction, however, and so as to maintain its validity, if possible. The contract absolutely binds all of the ship agents and employing stevedores of the port of New Orleans to employ none but members of the respondent unions, if they are available. By it the respondents establish the principle of collective bargaining, obtain the closed shop, 44-hour week, extra rates of pay for overtime, and their own working conditions, all that union labor, so far, has ever contended for. I think the contract is valid and imposes the reciprocal obligation on respondents to work according to the contract in good faith. There is no doubt the action of the men was arbitrary and amounted to a breach of the contract.

It is shown that the officers of the unions have no control whatever over the members. There is no provision in the by-laws by which they may be suspended, or expelled, or disciplined in any way, for refusing to abide by the contract. The contract and the award of the national adjustment commission were not accepted and did not become binding on the unions until ratified by general meetings of all

the members. It is shown that some of the men who quit work did not seek employment elsewhere, but remained in the vicinity of the vessel. The foreman, a member of the union, did not seek to employ nonunion men. He testified nonunion men will not work when union men are on strike. The action of the union men in this case had all the elements of a strike. Considering the control exercised over the nonunion men, the fact that the foreman was a member of the union, whom the stevedore was forced to employ, and that union men were available, though unwilling to work, I think the testimony of the foreman is conclusive, though there is some testimony of a general character that nonunion men might have been secured. Under these conditions the respondents are responsible for the action of a considerable number of their members, as here shown.

This brings up the question of damages. Undoubtedly the ship was delayed and demurrage accrued; but this might have been avoided by paying the extra wages demanded. The recovery should be confined to what it would have cost for additional wages to unload the ship at the rate demanded. As the evidence is not certain on that point, the case will be referred to a commissioner to ascertain the damages. Libelant to have a decree for that amount, with interest at 5 per cent from date of decree until paid. Respondents to pay all costs, to be divided between them equally.

LABOR ORGANIZATIONS — COLLECTIVE AGREEMENTS — DECISION OF WAR LABOR BOARD—RETROACTIVE PAY—*Parker et al.* v. *First Trust & Savings Bank et al., United States Circuit Court of Appeals, Ninth Circuit (Sept. 7, 1920), 266 Federal Reporter, page 961.*—The motormen and conductors of the Spokane & Inland Empire Railroad Co., Washington, belonged to the Amalgamated Association of Street and Electric Railway Employees, a union and a corporation. The employees worked under an agreement made in July, 1918, with the railroad by which the scale of wages, etc., were fixed and which provided that the contract could be terminated upon 30 days' written notice. On July 8, 1919, the employees gave notice that they wanted the agreement reopened to fix a new wage scale. The company refused to increase the wages and the employees submitted the case to the War Labor Board, but the railroad refused to appear before or have any dealings with that board. The board recommended an increase in wages, but the company would not grant the increase. Later it made a flat increase in wages, but would not make it retroactive. The railroad went into the hands of a receiver, and the employees filed this claim against it for their "back pay" on the basis of the award of the War Labor Board. The claim was disallowed and the employees appealed. In affirming the decision the court said, in part:

We find it impossible to arrive at the conclusion that the contract of employment between the association and the railroad company

was terminated upon the expiration of the 30 days' notice, and that from the expiration of such notice the men became entitled to recover as upon a quantum meruit. Even though the course pursued under prior similar contracts was that, when differences arose, adjustments of wages operated retroactively in favor of the men, the evidence as to this particular contract affirmatively shows that one of the parties positively refused to yield to any relinquishment, and stated as a ground inability to pay increased wages.

Nor can it be held that the railroad company was bound by the decision of the War Labor Board, for it is proven beyond all question that the representatives of the company always declined to submit the question of wages to the War Labor Board. The circumstance that the company refused to appear before the board, and that it refrained from having any communication with it, but strengthens the conclusion that the railroad company did not intend to subject the matter to the arbitrament of that board. And as further evidence that the contract was kept alive we have the circumstance that the men continued to work, accepted wages provided for under the scale embodied in the contract of February 10, 1918, and never made any agreement for increased wages with the company.

LABOR ORGANIZATIONS — COLLECTIVE AGREEMENTS — LEGALITY — "POLICY OF UNION"—CLOSED SHOP—*Shinsky* v. *O'Neil et al., Supreme Judicial Court of Massachusetts (Feb. 4, 1919), 121 Northeastern Reporter, page 790.*—David Shinsky, who is a shoe laster, was expelled from the United Shoe Workers of America and from the local union of that association in the city of Lynn. He thereafter sought employment in that city. He was refused employment by two employers on the ground that they had made agreements with the United Shoe Workers whereby they agreed to hire only union labor so long as the union could supply the requisite help. A third one, after employing him, discharged him upon learning that he did not belong to the union; the reason given was that it had a price-list agreement with the union and was not desirous of displeasing the union and causing a strike. Shinsky brought action against the members of the union; the case was submitted to a master, who reported, whereupon the superior court dismissed the bill. The master's report was not excepted to. He found that the policy of the union was to secure all the work possible for its members rather than have it go to unaffiliated workers and to obtain the highest possible prices for their work. It was also declared to be the policy of the union to secure and increase the number of closed shops. It was also found that the union endeavored to make members such workmen as were employed but who were not already members. If they were unsuccessful, they notified the employer. In

affirming the decree dismissing the bill the court, speaking through Judge Loring, said in part:

The plaintiff's contentions on these findings is that the master has found that a part of the general policy of the union is legal and part illegal; that it follows from this that the policy as a whole is illegal.

We are not able to accede to this contention of the plaintiff. It is established that workmen can combine to get the advantage of bargaining for their common benefit in respect to the terms and conditions upon and under which they should work. It is further established that if they are successful in getting the bargain they wish they can insert in the agreement setting forth that bargain a clause providing that all work of the employer shall be given to them or that a preference shall be given to them in the employment of workmen. So much is established. Workmen can not hope to secure the advantages of bargaining for the common benefit unless their combination, their organization, their union (call it what you please) is a large and a strong one. If any member of the combination or union were to testify that he did not wish "to enlarge and strengthen the union organization," no one would believe him. No one would believe that a member of a union organized to secure the advantages of bargaining for the common benefit could hope to succeed unless all the members of the union did their best "to enlarge and strengthen the union organization." So far as this finding of the master is concerned we are of the opinion that the policy of the United Shoe Workers of America "to enlarge and strengthen the union organization" is an incident, and a necessary incident, to a successful combination to secure the advantages of bargaining for the common benefit. What we have said with respect to this finding of the master is equally true of the other finding relied upon by the plaintiff, namely, "a part of the policy of the union is to secure and increase in number what are sometimes called 'closed shops.'" We understand by this that the master means that it is the policy of the United Shoe Workers of America "to secure and increase in number" shops where the employer agrees to give all the work to members of the union, or at any rate to make a preference in their favor in employing workmen.

A union which has an agreement with an employer providing (inter alia) that all the work shall be given to the members of the union or that a preference shall be given to members of the union in employing workmen would open itself to serious criticism if it refused to admit to membership men qualified to perform the work done by members of the union in question. By having as a part of its policy "the custom" of not refusing membership to workmen who wish to join such a union avoids subjecting itself to this criticism. We are of the opinion that the finding of the master here relied upon can not be taken to mean anything more than this.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—MONOPOLIES—INTERFERENCE WITH EMPLOYMENT—*Reihing* v. *Local Union No. 52, International Brotherhood of Electrical Workers, Court of Errors*

and Appeals of New Jersey (Mar. 1, 1920), 109 Atlantic Reporter, page 367.—Edward Reihing was employed by George R. Royce as an electrician. The defendant union had entered into agreements with the greater number of master electricians in the city of Newark, of whom Royce was one, whereby the unions agreed to furnish and the master electricians to employ only such persons as were members of the union. The agreement was in effect a written understanding of collective bargaining. The sections of this contract which are of particular interest in this case are as follows:

Section 7, which provides:

"No man not a member of the I. B. E. W. (the defendant) and holding a working card of permit from this local union, shall be employed at any time by the party of the first part (the contractor) at electrical work, except work covered and controlled by another local union of the I. B. E. W."

"Section 9. Labor shall not be furnished to any one not a regular electrical contractor unless the prevailing rate for labor charged by the electrical contractor is paid for the same."

"Section 11. Any firm, corporation, or individual engaged in the electrical contracting trade refusing to sign this agreement will be considered unfair by this local union."

Reihing applied for membership in the union and was given a temporary card. Upon his failure to pass the necessary entrance examination this card was withdrawn from him and he was refused membership in the union. Reihing claims that the union interfered with his employment and that Royce discharged him because he did not belong to the union, but the court found that proof of this "manifestly failed." He also claimed that the contract between the union and Royce was in violation of P. L. 1913, p. 25, ch. 13, which is the New Jersey antimonopoly law. The trial court entered a judgment of nonsuit against the plaintiff and he appealed. In affirming the decision the appeals court said in part:

The statute in question is one of those popularly known as the "seven sisters" or "antitrust laws." The title is an act to define trusts, and to provide criminal penalties and punishment of corporations, to promote free competition in commerce and all classes of business, etc. It speaks in terms of business or commerce, produce, merchandise, or commodity. It provides for a penalty. The offense is a misdemeanor. In addition to such punishment provided on conviction of a misdemeanor, the charter of an offending corporation may be revoked by the attorney general of the State. It does not provide for the recovery of damages by a civil action. It is quite clear that the case under consideration is not brought within the terms or spirit of that statute. This is the only point considered or decided by the court. The statute in question, therefore, does not help the plaintiff's case.

It is urged, even though the above statute is not applicable, the case is controlled by our decision in the case of Brennan *v.* United

Hatters, 73 N. J. Law, 729, 65 Atl. 165, and by the case of Connors *v.* Connolly in the Supreme Court of Errors of Connecticut, 86 Conn. 641, 86 Atl. 600, and under those cases a right of action can be maintained under the common law. This case is clearly distinguished from those cases on essential points. They are not applicable. In the former, the gist of the action was the damage caused to the plaintiff by an unwarranted interference with him, in his employment as a hatter. That case is cited with approval in the Connors case.

We conclude that it was not error for the trial court to enter a judgment of nonsuit. The judgment is therefore affirmed, with costs.

LABOR ORGANIZATIONS — COLLECTIVE AGREEMENTS — STRIKES—REFUSAL TO WORK—LIABILITY ON SURETY BOND—*Uden* v. *Schaefer et al., Supreme Court of Washington (Mar. 22, 1920), 188 Pacific Reporter, page 395.*—The contracting plumbers of Seattle, Wash., were associated together under an organization known as the Seattle Plumbing and Heating Engineers' Association. Schaefer, the defendant, was a member in good standing in this association. The association had agreed with the plumbers' unions not to employ any plumbers who were not members of the union, and the unions agreed that none of their members would work for anyone who was not a member of the association.

One Uden was building an apartment house and called for bids from members of the association to install the heating and plumbing. All the bids were too high. Schaefer afterwards reduced his bid from $19,000 to $17,000 and came to an understanding with Uden. In accordance with the usual custom Schaefer furnished a surety bond for the penal amount of $3,000, which Uden accepted. The surety was the Maryland Casualty Co. Among other things the bond provided that "the surety shall not be liable for any damages resulting from so-called strikes or labor difficulties, or from mobs, riots, fire," etc.

For the manner in which Schaefer procured his contract with Uden he was suspended from membership by the engineers' association. When this became known to the unions, Schaefer's plumbers left him and he was unable to secure other plumbers, either union or nonunion. As a result of this condition he forfeited his contract and Uden sued him and his surety for the difference between the price in Schaefer's contract and the lowest price by which the job could be done under a new contract. The Maryland Casualty Co. contends that it is not liable because the failure to fulfill the contract was due to a strike or labor difficulty. The court held the surety liable, saying in part:

In our opinion, the facts do not exonerate the appellant from the obligations of its bond. In the common acceptation of the term, it is not a "strike" for the workmen of an employer to quit his employment and go elsewhere, without any intention of returning; nor is it

a "strike" for workmen to refuse to enter into the employment of a particular contractor. A "strike," in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body when they quit without intention to return to the work, whatever may be the reason that moves them to do so. It is a matter of common knowledge that during the late war period many employers of labor, because of the great demand for labor had difficulty in employing and keeping a sufficient number of workmen. Many of such employers lost workmen in considerable numbers, who had long been in their employment, and for a time had practically to suspend operations. No one, however, supposed that the quitting of these workmen constituted a "strike." Schaefer's situation here was not different. By his own act he had placed himself in a position where certain workmen could not remain in or enter into his employment without violating their agreement, and others he could not obtain, and in no sense can this be denominated a strike.

The addition of the phrase "labor difficulties" to the term "so-called strikes" does not enlarge the meaning of the latter. It is rather definitive than expansive of it. In other words, the phrase is but explanative of the meaning of the word "strike," and any act of the workmen which would not constitute a strike would not constitute a labor difficulty.

The judgment is affirmed.

LABOR ORGANIZATIONS—CONSPIRACY—EXTORTION—BLACKLISTING OF EMPLOYERS—*People* v. *Curran et al., Supreme Court of Illinois* (*Dec. 18, 1918*), *121 Northeastern Reporter, page 637*.—The defendants were members and business agents of labor unions—the Painters' District Council, the Glaziers' Union, the Wood Finishers' Union, and the Fixtures Hangers' Union. The facts in the case as found by the court were in brief as follows:

These unions maintained a headquarters in the balcony of a saloon, where they had desks and telephone booths. Whenever an employer of labor in the city violated some rule or requirement of the unions he was notified to pay a certain sum of money to said unions. If he refused, the plate glass in his store was broken, and when he went to a glass dealer to have it replaced they refused to replace it and directed said employer to the saloon where the unions maintained their headquarters. When the employer went to said headquarters he was informed that he must pay a certain sum of money, usually larger than the first demand. The violation by the employer of the union rules or requirements in many cases was unintentional, or a very minor offense, or really no offense at all, but merely fancied on the part of the members of the unions. Some of the rules were unreasonable. Isadore Hoffman employed an electrician who showed

a card of Union Local 376, which had seceded from one union and had formed another, which was unknown to Hoffman. The union which took its place, Local 134, claimed that Local 376 was irregular. For this act Hoffman was required to pay $300, and when he refused his glass windows were broken. Before he could get new windows he was compelled to pay $400. A charge of conspiracy was brought against 25 of the members of these unions in an indictment containing 16 counts charging conspiracy at common law. Fourteen were convicted, 2 paid their fines, and the remaining 12 appealed. In affirming the convictions the court said, in part:

The principal objection is that, as the counts contain the essentials of an offense under the Criminal Code (Hurd's Rev. St. 1917, ch. 33, secs. 1–594), they should have concluded against the form of the statute. If an act is an offense both against the common law and the statute, the prosecutor may proceed under either the statute or the common law, or both. It was not necessary, to constitute the offense of conspiracy at common law, that the object of the conspiracy should constitute a criminal act, but it was sufficient that the object was unlawful though not indictable. The court did not err in denying a motion to quash the indictment or any count thereof.

It is argued that the court erred in ruling on the admission of evidence. There was evidence, already stated, of more than 50 cases, all substantially alike, and the objection is that there was no evidence connecting any of the defendants with the breaking of glass and smashing the windows. Some of the counts charged a conspiracy against persons to the grand jurors unknown, and it was proper to prove all the instances if they implicated the plaintiff in error. Where certain events having a natural connection follow each other frequently with uniformity, the necessary inference is that they are referable to the same cause. The evidence was that the black list was made, the windows broken, the dealers in glass refused to furnish glass and directed the owner to the saloon where the plaintiffs in error, who made the blacklist, made their headquarters, and extorted money from him as a condition of removing his property from the list and having his glass reset. These facts lead to the irresistible conclusion that they were all parts of one systematic scheme and that the breaking of the glass was caused by the plaintiff in error.

It is claimed that the court erred in not requiring the people to elect upon which count or counts they would proceed. The conspiracies charged in the various counts were different parts of one conspiracy, and the right to demand an election does not exist in such a case. (Andrews *v.* People, 117 Ill. 195, 7 N. E. 265.)

LABOR ORGANIZATIONS — CONSPIRACY—LIABILITY FOR DAMAGES—TORTS OF MEMBERS—*United Mine Workers of America et al.* v. *Coronado Coal Co. et al., United States Circuit Court of Appeals, Eighth Circuit (Apr. 28, 1919), 258 Federal Reporter, page 829.*—This case first came up for hearing before the circuit court on a demurrer in 1916, when the action was instituted by Dowd as receiver for certain

coal mines against the United Mine Workers of America. The demurrer was dismissed and a trial ordered. The present case was an action for damages for the destruction of property by the United Mine Workers. Dowd, who had represented nine coal-mining corporations whose stock was all controlled by one company, was succeeded by the Coronado Coal Co. et al. The nine coal-mining companies operated mines owned or leased by them in Arkansas and maintained what is called an "open shop." The companies refused to sign agreements with the labor unions to unionize their mines.

The United Mine Workers of America, the defendant, is an international association of coal mine workers, the national headquarters of which is in Indianapolis, Ind. This association is composed of a national or controlling union, under which there are district unions, and under the latter, local unions. It was and is the policy of the united mine workers eventually to bring about the operation of all mines by union labor, and it devoted its energies to this end.

After repeated but unsuccessful attempts by the United Mine Workers to get the plaintiff mining companies to agree to operate their mines with only union labor, the mine workers proceeded to do what they could to coerce the companies to accede to their wishes. Incidents of violence occurred against the property and employees of the plaintiff mines, and an injunction was sought and secured. The injunction, however, seems to have had little effect upon the mine workers' activities. The unions held several conventions at which they declared it to be their purpose either to make the mines using nonunion labor to unionize their mines or to put them out of business.

The union later purchased arms and ammunition in considerable quantities and distributed them among the union miners of the district where plaintiffs' mines were located. An attack was made by the union miners upon the property and employees of the plaintiffs' mines. The mine property was dynamited and burned and many employees were injured, some being killed, and the action for damages followed.

The case was submitted to a jury which rendered a verdict for the plaintiffs in the sum of $200,000, which was trebled under the provisions of the Sherman Antitrust Act. Interest was also awarded from the date of the destruction of the property to the date of the judgment. The United Mine Workers appealed, urging 184 assignments of error. The judgment was affirmed in every particular except the interest, which was ordered to be remitted. The opinion is in part as follows:

The defendants insist that it was error to hold the unions which were made defendants as entities, against which an action could be

instituted, process had, and judgment recovered; they being unincorporated labor unions.

This question was determined by this court on the former hearing, sub nomine Dowd *v.* United Mine Workers of America, 235 Fed. 1, 148 C. C. A. 495 [Bul. 224, p. 168], and it was there held that under the Sherman Antitrust Act these unincorporated unions may be sued by one injured in his business or property by reason of anything done which is forbidden by the Sherman Act. That decision is the law of the case, and cannot now be again reviewed.

Other contentions were then considered and rejected, after which the court said:

The objection to the introduction of the United Mine Workers' Journal is equally untenable. The secretary of the organization testified that—

"It is the official publication of the organization, published by authority and under the supervision of the International Executive Board of the United Mine Workers of America; that its editor is appointed by the president of the International Union."

Therefore the editorials, which were published in almost every issue of the Journal, must be deemed the acts of the organization. They were clearly admissible. As the action is one for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

The main issue in this cause, so far as the national organization and its officers were concerned, was whether the torts committed by some of the defendants were in pursuance of an unlawful conspiracy to compel the plaintiffs and other coal mine operators to unionize their mines, and were authorized, encouraged, advised, and, if not authorized, ratified by the national organization and its officers, after they had been committed. The court did not err in admitting these journals in evidence. (Clune *v.* United States; 159 U. S. 590, 593, 16 Sup. Ct. 125 [Bul. No. 2, p. 213]; Hitchman Coal Co. *v.* Mitchell, 245 U. S. 229, 249, 38 Sup. Ct. 65 [Bul. No. 246, p. 145]; Louie *v.* United States, 218 Fed. 36, 41, 134 C. C. A. 58.)

That corporations, and this association must be treated as such in this action, are liable for the torts of their members or employees, when encouraged in the commission of them, or if ratified thereafter, is well settled. (Philadelphia etc. R. R. *v.* Quigley, 62 U. S. (21 How.) 202; Denver etc. Ry. *v.* Harris, 122 U. S. 597, 7 Sup. Ct. 1286; Stewart *v.* Wright, 147 Fed. 321, 327, 77 C. C. A. 499.)

The admission in evidence of the indictment and pleas of guilty of some of the defendants, members of the local unions, for the destruction of this property, was clearly proper against those defendants, as admissions made by them, and if their unlawful acts were applauded and approved by their codefendants, after having encouraged them in their unlawful acts, such approval is a ratification of these unlawful acts, and makes them liable. (Loewe *v.* Lawler, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622].)

Whether the acts of those defendants amounted to a ratification was a question to be determined by the jury from the evidence under

proper instructions. If the unlawful acts were in pursuance of a conspiracy, and were committed before the unlawful conspiracy had been abandoned, or the object of the conspiracy completed, all persons who were members of the conspiracy or made themselves parties thereto at any time before the conspiracy had been abandoned, or its object completed, are responsible.

The correspondence between the officials of the Remington Arms Co., showing the purchase of arms and ammunition and payment therefor, by the officers of the United Mine Workers of America, their shipment to Hartford, Ark., to the officers of the district and local unions, their distribution by them to the striking members, shortly before the battle which resulted finally in the destruction of plaintiff's mines, and their use by them, was admissible as tending to show that the organization aided and encouraged the commission of the torts. But in no event could the admission be prejudicial to the defendants, for there was ample testimony showing that those who committed these wrongs were members of the union, armed with guns and ammunition, which were freely used on the occasion alleged in the complaint.

It is contended that the evidence fails to establish a conspiracy in violation of the Sherman Act, which is the gist of the action, and therefore it is claimed there can be no recovery in this action. A great deal of the testimony relating to the organization of the mine workers, their acts to accomplish the object of absolute control of all coal mines, is almost identical with that set out in the opinion of the district judge in Hitchman Coal & Coke Co. *v.* Mitchell, 202 Fed. 512 [Bul. 152, p. 137], to which reference is made, in order to shorten this opinion.

The evidence, to our minds, as it was in the opinion of the learned trial judge and the jury, established the conspiracy practically beyond question. It is much stronger than that in the Hitchman Coal & Coke Co. case. To review it fully, covering as it does over 3,000 pages of the printed record, would only tend to prolong this opinion and serve no useful purpose. The law requires that, in order to entitle defendants to such a direction, the court must give the evidence the strongest probative effect, and view it in the light most favorable to the plaintiffs, and, if there is any substantial evidence to sustain the allegations in the complaint, a peremptory instruction must be refused. This is too well settled to require the citation of authorities. A careful reading of the evidence satisfies that it fully sustains the conclusions of the learned trial judge on these motions.

The judgment of the court below was therefore affirmed, subject to an agreement to remit the interest allowed; otherwise a new trial would be granted.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—MEMBERSHIP AS GROUND FOR DEPORTATION—UNDESIRABLE ALIENS—SABOTAGE—*Ex parte Bernat and Ex parte Dixon, United States District Court, Western District of Washington, N. D. (Dec. 17, 1918), 255 Federal Reporter, page 429.*—Bernat and Dixon were both members of

the Industrial Workers of the World and both were aliens. The Commissioner General of Immigration of the Department of Labor ordered that both of them be deported as undesirable aliens and on the ground that each of them "has been found advocating and teaching the unlawful destruction of property." Dixon is a subject of England and Bernat a subject of Russia, and each of them brings petition on the ground that they were denied a fair hearing. Because the facts are similar and the issue identical, both cases were decided together. After stating the facts, the court said:

If the alien has been accorded a fair, though summary hearing, and the finding is supported by competent testimony, however slight, the court may not interfere.

The court thereupon examined the testimony and found that both aliens were active members of the Industrial Workers of the World; that both were in good standing; that they knew and understood the purposes and doctrines of that order, and that they both adhered to and practiced them; that they had read the literature and propaganda of the order, and that they advocated its teachings. The court then reviewed some of the literature of the I. W. W. and quoted at length from some of the publications. As illustrative of the methods of the I. W. W. the following was quoted from "The I. W. W., Its History, Structure, and Methods," by Vincent St. John and others:

"Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede to the demands of the workers."

The court quoted several definitions of sabotage by I. W. W. writers, one of them being by Andre Tridon in the New Unionism and is as follows:

"We may distinguish three forms of sabotage.
"(1) Active sabotage, which consists in damaging of goods or machinery. * * *
"(3) Obstructionism, or passive sabotage, which consists in carrying out orders, literally, regardless of consequences."

Excerpts were also quoted from the Industrial Workers of the World, and one of the I. W. W. songs was also quoted. In conclusion the court upheld the ruling of the commissioner general, saying:

From the activity, as disclosed in the record, the court can not say that there is no evidence upon which to predicate the finding of the commissioner general in each case; and it would appear that the conclusion of the commissioner general, based upon the facts as stated, is within the purpose and intent of the Congress in enacting section 19 of the act of June 5, 1917, ch. 29, 39 Stat. 889 (U. S. Comp. St. sec. 4289¼jj), and this is emphasized by the passage of the act of October 16, 1918, entitled: "An act to exclude and expel from the

United States aliens who are members of anarchistic or similar classes."

The application for writ will be denied in each case.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—MEMBERSHIP AS PROOF OF POLITICAL PRINCIPLES—POLICIES—RIGHT OF MEMBERS TO CITIZENSHIP—*United States* v. *Swelgin*, *United States District Court, District of Oregon* (*May 22, 1918*), *254 Federal Reporter, page 884*.—Carl Swelgin, a native of Germany, had, on his application in due form, been admitted to citizenship in the United States in May, 1913. Suit was subsequently brought to vacate and annul the certificate of naturalization on the ground that neither at the present time nor at the time he was naturalized and during the preceding five-year period was Swelgin "attached to the principles of the Constitution of the United States," nor is he "well disposed to the good order and happiness of the same."

It was therefore claimed that his certificate of naturalization was procured by deception and fraud practiced on the court, warranting its cancellation. This contention prevailed, Judge Wolverton saying in part:

The proofs show, and the defendant admits, that he became a member of the organization known as the "Industrial Workers of the World" in December, 1911, and was such member at the time he was admitted as a citizen of the United States, and ever since has been a member thereof. I should qualify that, because the witness said that there was a time following August, 1913, for a period of two or three years, that he was not a member; but he thereafter did become a member, and has continued such ever since. Not only this, but he has been active in the order, in promoting its propaganda, and furthering the cause that the order espouses. He asserts his firm belief in the principles enunciated in the preamble and constitution of the order, and admits that he is in full sympathy with the propaganda and practices thereof. Among other things, he indorses the sabotage recently practiced upon the timber and lumber industries in the Northwest, and when asked if he was willing to join the forces of his country against Germany, he answered, in effect, that he entertained conscientious scruples against entering the Army. He further states that the views he entertained respecting these subjects at the time and previous to his naturalization were the same as he now holds and adheres to. So that his attitude of mind then respecting the principles and practices of the order of the Industrial Workers of the World was the same as his attitude now, to which he firmly adheres.

No further evidence is necessary for establishing his purposes and designs as it relates to organized government and the peace and tranquillity of society, and we have only to inquire, touching the doctrine and principles of the organization, whether they are promotive of or inimical to the maintenance and stability of organized

government, and whether they are calculated to promote peace and good order in society, or whether they are adapted by design to the demoralization and degradation thereof.

Quotations were then made from the preamble of the constitution of the I. W. W., and from its documents and publications of various kinds, among them being an expression from a pamphlet:

With a free society, without class rule and exploitation, a society of free cooperation, we have that which corresponds with the absence of government, "anarchism."

And from one of its newspapers, The Industrial Worker, published at Spokane, Wash., issue of May 8, 1912:

The I. W. W. opposes the institution of the State. It holds that State or governmental control of industry would merely introduce a different form of slavery. Government implies governors and governed, a ruling and a subject class. No man is great enough or good enough to rule another.

The I. W. W. is creating its own ideas of morality and ethical conduct, as opposed to the current conceptions of what constitutes "right" and "wrong."

Other expressions quoted were:

Toward the existence of government the I. W. W. is openly hostile.

It is antipatriotic.

The kernel of evil lies in the very existence of the State, and violence is an economic factor.

Judge Wolverton then said:

No one can read these pamphlets and pronunciamento of the order without concluding, by fair and impartial deduction, that it is not only ultrasocialistic but anarchistic. It is really opposed to all forms of government. It advocates lawlessness, and constructs its own morals, which are not in accord with well ordered society. Its adherents are antipatriotic. They own no allegiance to any organized government. And I am unable to understand by what right such of them as come from another country can claim that they are entitled to be admitted to citizenship under the Stars and Stripes.

When, therefore, the defendant declared that he was attached to the principles of the Constitution of the United States, and was well disposed to the good order and happiness of the same, he made avowal of that which was not in his heart, and thereby deceived the court. And, further, he was a disbeliever in and opposed to organized government, and he fraudulently misled the court as to that.

The annulment of the defendant's certificate of naturalization was therefore directed.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—PURPOSES OF ORGANIZATION—CONSPIRACY—ANARCHY—*State* v. *Lowery*, *Supreme Court of Washington*, *177 Pacific Reporter*, *page 355*.—

Fred Lowery was convicted of the crime of criminal anarchy, denounced by Rem. & Bal. Code, section 2563, and he appeals. The complaint charged him in the language of the statute with membership in the Industrial Workers of the World and that such organization had for its aims, objects, and purposes the violent, felonious, and anarchistic overthrowing of the Government of the United States, and with having committed acts of an anarchical nature. To this complaint Lowery demurred and his demurrer was overruled. The court in affirming the overruling of the demurrer said in part:

It (the complaint) charges in plain, clear, and concise language the violation of subdivisions (1) and (4) of section 2563, Rem. & Bal. Code, by alleging that the defendant advocated the overthrow of organized government by unlawful means, to wit, by an organization known as the Industrial Workers of the World, which organization has for its purpose the anarchistic overthrow of government, and that the defendant was also guilty, in that he was a member of, or had voluntarily assembled with, this organization formed to propagate anarchical doctrine. The information is surely sufficient to notify the defendant of the charge which he is called upon to defend against; it specifies the time, the place, and the means by which the crime is alleged to have been committed, and it so charges it that a person of common understanding can not mistake its meaning.

The defendant had in his possession when apprehended various written propaganda most of which was of an inflammatory character issued by the Industrial Workers of the World. These documents were admitted in evidence against the defendant as showing the aims, objects, and methods of the Industrial Workers of the World by whose authority they were published. Defendant protested against the admission of this evidence. On this point the court said in part:

This was all admissible against the defendant, there having been introduced evidence, sufficient to go to the jury, establishing that the defendant himself was not only associated with, but was a member of, such organization. The defendant claims that he is not responsible for the recitals contained in the exhibits. That is beside the question, because the defendant made these doctrines his own by accepting membership in the organization by which they were promulgated, and an exposition of whose principles they represent. They were also admissible on the theory that they were declarations of coconspirators engaged with the defendant in the furtherance of an unlawful purpose.

The defendant next claimed error on the part of the trial court in excluding testimony which he offered through certain witnesses as to what the members of a mediation commission, an unofficial organization appointed by the President of the United States to investigate the causes of labor unrest, had reported. The purpose here

was to establish by this testimony that the Industrial Workers of the World were not in fact an anarchical organization. In dismissing this assignment of error that court said in part:

The persons making the report were not the Industrial Workers of the World, nor, so far as disclosed, were in any way associated or affiliated with that organization. The statements contained in the report, therefore, could not have come from that organization nor can they be considered as the authorized statement of the principles of the organization. There is nothing in the report to indicate that the ones making it were specially delegated to investigate the organization, nor is there any suggestion that the persons making the report could not have been secured as witnesses, and, if they were qualified, to have testified to the reputation of the Industrial Workers of the World, as did other witnesses put on the stand by the defendant for that purpose. It is certainly not permissible for a witness on the stand to testify as to what some one else, even though cloaked with the title of a mediation commissioner, may have thought from his investigation of the Industrial Workers of the World as to their doctrines. This violates all the rules of hearsay testimony.

The judgment of conviction was affirmed.

LABOR ORGANIZATIONS—INSURANCE BENEFITS—COLOR BLINDNESS AS LOSS OF SIGHT—*Fallin* v. *Locomotive Engineers' Mut. Life & Accident Ins. Assn., Court of Appeals of Georgia, Division No. 2 (Feb. 10, 1920), 102 Southeastern Reporter, page 177.*—Fallin was insured by the defendant association against death and accident. He became color blind, and because he was thereby incapacitated from following his vocation the same as if he had become totally blind, he demanded his insurance for total and permanent blindness. The association refused to give him any benefits and he sued. The lower court sustained a demurrer to his complaint and he appealed. In affirming the decision the court said:

Where a certificate or policy of insurance issued by the Locomotive Engineers' Mutual Life & Accident Insurance Association contains the following: "Any member of this association * * * sustaining the total or permanent loss of sight in one or both eyes shall receive the full amount of his insurance. * * * This association will not recognize a claim for the insurance of any certificate holder for impaired eyesight, but for total and permanent blindness only, in one or both eyes"—and a suit is brought against such association seeking to recover for total and permanent blindness the petition alleging that the plaintiff had become color blind in both eyes, under the terms of the policy or certificate the company is not liable, as color blindness does not amount to total and permanent blindness within the meaning of the policy. The court did not err in sustaining the general demurrer and dismissing the case.

This case is directly contrary to an earlier decision handed down by the Supreme Court of Nebraska in Routt *v.* Brotherhood of Railway Trainmen, 165 N. W. p. 141, noted in Bulletin No. 246, p. 68.

LABOR ORGANIZATIONS—INSURANCE BENEFITS—EFFECT OF AMENDMENT TO CONSTITUTION—*Tierney* v. *Perkins, City of Albany Court, New York (Dec. 23, 1919), 179 New York Supplement, page 297.*—Mrs. Tierney, the deceased wife of the plaintiff, had once been a cigar packer and in 1894 joined the Cigarmakers International Union of America, of which Perkins is the president. She regularly paid her dues up to the time of her death and was according to the constitution of the union entitled to indicate to whom the insurance benefit was to be paid. The constitution of the union when Mrs. Tierney joined it provided that upon her death a death benefit would be paid to her dependent relatives or to a beneficiary indicated by her in writing, or in the absence of the former or the failure to do the latter to her "heirs at law." Mrs. Tierney had never, prior to her death in 1914, designated in writing any beneficiary, nor did she leave surviving her any dependent relatives. The constitution of the union was amended in 1912 so that death benefits would be payable as before, except that undesignated "heirs at law" could not take, but that in the event of failure to name a beneficiary or in the absence of surviving dependent relatives the benefits would be forfeited. The defendants claim that according to the constitution of the union at the death of Mrs. Tierney the plaintiff was not entitled to the death benefits and therefore he ought not be permitted to recover. Tierney claims, however, that the constitution as it was when his wife joined the union should govern his claim to the benefits. The court held that the amendment to the constitution was not unreasonable and that the benefits had been forfeited. The following is the opinion in part:

When Mrs. Tierney became a member of the defendant organization, she entered into a contract with them, and the terms of that contract are those specified in the constitution as it then existed, and her rights must be determined under that constitution and such amendments thereto as were reasonable in their nature and operation.

Mrs. Tierney, up to the moment of her demise, could have prevented a forfeiture to the defendant by simply filing a written designation, and so long as this privilege was reserved to her, it can not be said that the defendant association exceeded its authority in adopting this amendment.

I have given very careful and thorough consideration to this case, realizing that the plaintiff's wife for 20 years had contributed her dues to the defendant union and undoubtedly expected that the benefit would be paid upon her death; but I am unable to find any recognized authority which proves the invalidity of this amended constitution, and consequently I am bound to declare that she forfeited the benefit by failure to take advantage of the privileges which the new constitution extended. In view of the conclusion reached aforesaid, it will be unnecessary for the court to discuss the other questions raised in this case.

LABOR ORGANIZATIONS—INSURANCE BENEFITS—FORFEITURE OF MEMBERSHIP—WAIVER—*Staffan v. Cigarmakers' International Union of America, Supreme Court of Michigan (Dec. 27, 1918), 169 Northwestern Reporter, page 876.*—The plaintiff, Mrs. Staffan, is the widow of Chauncey L. Staffan, who had been a member of the defendant union since 1894. He died October 11, 1917. The defendant has headquarters in the city of Chicago and is made up of local unions maintained all over the United States, Canada, and Porto Rico, whose members are engaged in cigar making. The parent body and the local unions of which it is made up operate under a constitution which the members take an obligation to support. The constitution provided that a member would be suspended if he failed to pay his dues for more than eight weeks, whereupon if he wished to be reinstated he must pay $5. It also provided that if a member had been such continuously for 15 years his widow would be entitled to $500 benefit and $50 funeral expenses. Staffan had during his membership fallen in arrears in his dues in excess of the eight weeks period a number of times, but he had never been suspended by the local union nor by the headquarters officers, and he was always allowed to pay the back dues, so that on the day he was dropped from the rolls as insane he was less than eight weeks in arrears. The union refused to pay the widow the $550 benefits due on the ground that under the constitutional provision Staffan had automatically been suspended. The court, in affirming the judgment of the lower court allowing recovery of the benefit, rendered a decision from which the following is quoted:

It is elementary that the law abhors forfeitures and will avoid them whenever reasonable ground can be found for so doing. We are of the opinion that the facts in this case bring it clearly within the rule laid down in Wallace *v.* Mystic Circle, 121 Mich. 263, 80 N. W. 6, wherein we quoted with approval the following:

"If the company has, by its course of conduct, acts, or declarations or by any language in the policy, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to the payment of the premium on the day stipulated would not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement and will be estopped from setting up the condition as cause for forfeiture. In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the nonpayment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the insured, or by the acts and declarations of his authorized agents, has induced in the mind of the insured an honest belief that the terms and conditions of the policy declaring a forfeiture in event of nonpayment on the day and in the manner prescribed will not be enforced, but that payment will be accepted on a subsequent day and

in a different manner, and when such belief has been induced and the insured has acted on it the insurer will be estopped from insisting on the forfeiture."

The judgment is affirmed.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—INJUNCTION—*Callan et al.* v. *Exposition Cotton Mills, Supreme Court of Georgia (May 14, 1919), 99 Southeastern Reporter, page 300.*—The Exposition Cotton Mills required in its business a large number of laborers skilled in the particular trade, which it employed under contracts terminable at will. The mills determined to operate the business on a nonunion basis and to that end made a rule that no person who belonged to a labor union should be employed in the business, and that if any employee should at any time join a labor union his employment would immediately cease. This rule was promulgated among all of the employees and assented to by them impliedly by continuing to work under the rule after its promulgation or expressly. It was declared by the court that the employer had a contractual relation with the employees so assenting, and that where strangers who, knowing of the status, conspire to coerce the employer to abandon this policy of employing nonunion labor and to cause a breach of the contractual relation between the employer and employees, and who in pursuance of such conspiracy make inflammatory speeches to the employees at and near the business place of the employer and denunciatory of the business and its owners, endeavoring thereby to induce the employees to break their contracts of employment by joining a labor union in such large numbers as would force the employer to assent to the unionizing of the laborers or would render it impossible to carry on the business, equity will protect the employer by injunction against such strangers. (Hitchman Coal Co. *v.* Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145].)

It was also decided that the lower court did not err under the pleadings and evidence in granting to the Exposition Cotton Mills an interlocutory injunction against Callan and others, who had attempted to induce its employees to join a union.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—INJUNCTION—*Patterson Glass Co.* v. *Thomas et al., District Court of Appeals, Third District, California (June 12, 1919), 183 Pacific Reporter, page 190.*—The Patterson Glass Co. was about to open and operate an establishment for the manufacturing and selling of window glass in Stockton, Calif. The company required for this

work a large number of skilled artisans. It had 75 artisans with whom it had made contracts for the season of 1917–18 under the terms of which the employer was required to give seven days' notice before dismissing any employee and each employee was to give like notice before quitting the company's employment. Thirty more artisans were required for the company's work. It therefore engaged this number of workers in various eastern cities, with whom were made contracts of employment containing the above provisions. In Cleveland, Ohio, there existed an unincorporated association of persons who were engaged as workmen in the manufacture of glass. The purpose of this labor union was to establish and fix the wages, hours, etc., of its members. The wages were fixed according to the value of the product produced by their labor, and in order to limit the output of the product and thus increase its price the union forbade its members from working at their calling during certain periods of the year. In this case the Patterson Glass Co. opened its factory on September 15, 1917, and its employees were at the time working under wages and conditions which were satisfactory to them. The union had issued an order to its members forbidding them to engage in work before December 1, 1917. The union proceeded to urge the company's employees to abandon their contracts and return to the eastern cities from which they had come, promising if they did so to pay their living expenses and transportation costs. The company was not able to secure other skilled workers in California. It therefore sued for an injunction against the members of the union to prevent and enjoin them from "knowingly and intentionally causing and attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by any like inducement or persuasion, any employee of the plaintiff under contract of hire to break such contract to render service" to it. A demurrer to the petition was sustained, thus denying the relief sought. In reversing the decision of the trial court the appeal court used in part the following language:

> The men who were there at work had voluntarily entered into these contracts, and were engaged in the performance of their duties when defendants appeared upon the scene and commenced their propaganda and persuasions, as alleged in the complaint, to induce these men to quit work, the result of which, if successful, would necessarily cause plaintiff to shut down its establishment and cease its productive activities. That such an injury may not be adequately compensated in damages, but may only be thwarted by injunctive relief, is manifest.
>
> We think that by fair implication it sufficiently appears that defendants knew that the employees of plaintiff were working under a contract with plaintiff. An inference that they were ignorant of the fact that a contract existed is inconsistent with the averments of the complaint.

The right to injunctive relief is no longer questioned, and it is no justification that defendants acted without ill will but in good faith, in pursuance of the provisions of the constitution of the union prohibiting its members from working with nonunion men, the employer not being aware of or a party to such provisions.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—RIGHT OF WORKMEN TO ORGANIZE—*Sheehan* v. *Levy et al., Court of Civil Appeals of Texas (June 28, 1919), 215 Southwestern Reporter, page 229.*—Sheehan was a master plumber engaged in the contracting plumbing business in Dallas, Tex. He had a number of contracts on hand to install plumbing in various buildings which required the employment of journeymen plumbers. Other master plumbers of the city had formed an association and had demanded that Sheehan also become a member. They declared that if he refused they would compel the plumbers' union to order its members not to work for him. The journeymen plumbers had a trade-union called Local No. 100. Sheehan employed only such journeymen as belonged to this union. The plumbers' union, Local No. 100, issued an order prohibiting its members from working for Sheehan, with the result that he was not able to fulfill his contracts. He thereupon sued the Master Plumbers' Association and the Local No. 100 of the United Association of Journeymen Plumbers for damages and for an injunction, but he was unsuccessful and judgment was rendered in favor of the defendants.

The court of appeals sustained this judgment, saying that as the trial court had found as a matter of fact, which the present court could not disturb, that the evidence offered by the Master Plumbers' Association completely exonerated its members from the charge of complicity in the action of the local union in withdrawing its members from the plaintiff's service, there was no ground for an injunction against the association.

As to the action of the journeymen plumbers in withdrawing their members, the court said:

It is declared by statute in this State to be lawful for any and all persons engaged in any kind of work or labor, manual or mental, to associate themselves together and form trades-unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal services in their respective pursuits and employments; and that it shall not be held unlawful for any member or members of such trades-union or other organization or association, or any other person, to induce, by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit, in which

such person may then be engaged. (Vernon's Sayles' Civil Statute, art. 5245.) Aside from this statute, it is well settled, eliminating the earlier decisions, that a person has the right to work for and with whom he pleases, and that laboring people may "organize for the purposes of promoting their common welfare, elevating their standard of skill, advancing and maintaining their wages, fixing the hours of labor and the rate of wages paid, obtaining employment for their members." The case at bar is one in the nature of a strike, and we see no good reason for saying that article 5245 is not applicable. But aside from this statute, and for reasons indicated, we think appellant was not entitled to the injunctive relief sought.

The judgment is affirmed.

LABOR ORGANIZATIONS—MEMBERSHIP AS GROUND FOR DEPORTATION—GENERAL STRIKE—"FORCE"—COMMUNIST LABOR PARTY—*Colyer et al.* v. *Skeffington et al.*, *United States District Court, District of Massachusetts* (*June 23, 1920*), *265 Federal Reporter, pages 17, 58, 59, 61, 63, 79.*—On October 16, 1918, Congress enacted a law providing in part (sec. 1) as follows:

That * * * aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States * * * shall be excluded from admission into the United States.

Under this law wholesale arrests were made of all persons who could be found who belonged to the Communist Party or the Communist Labor Party. The Department of Justice operatives made the arrests and the Bureau of Immigration officials conducted the hearings of those arrested. Many of the persons arrested were citizens of the United States. After holding the arrested persons for varying lengths of time most of them were discharged. Those who were not discharged were held for deportation, and brought this action for writs of habeas corpus for their release. It appears that the sole charge against these aliens is membership in the Communist Party or Communist Labor Party, these parties being held by the commissioner of immigration at Boston to be organizations that advocate and teach the overthrow of the Government by force or violence. Many irregularities in the arrests and the proceedings before the commissioner of immigration were discussed by the court. The petitioners contend among other things that the Communist Labor Party or Communist Party does not advocate violence of any sort and that it is not an illegal organization under the act of Congress.

On this point Circuit Judge George W. Anderson said in part:

The immigration authorities have no legal right to deport these aliens unless there was some evidence tending to show that the

Communist Party "believes in, advocates, or teaches the overthrow of the United States by force or violence" within the fair meaning of the words "overthrow," "force," and "violence" as used in this statute.

This problem may be most conveniently approached by considering first what the evidence shows that the Communist Party is not, and also what it is. It is not a militaristic organization. It is antimilitaristic—pacifist. There is therefore not a scintilla of evidence warranting a finding that the Communists are committed to the "overthrow of the Government of the United States" by violence or military force or by the use of weapons or bombs or of any other devices for destroying or injuring life or property. "Violence" is no part of their program.

But their nonreliance upon parliamentarism is not enough to ground an inference that they adopt violence as an alternative. In this regard the Secretary of Labor seems to me to have fallen into error. No organized set of human beings can be found to be committed to the proposition of overturning a great Government by violence unless their plan of organization admits at least the possibility of the existence of violence. The organization and the avowed purposes of the Communists exclude such possibility.

On what, then, does the Communist Party rely for effecting the radical change in the scope and functions of the Government which it urges; changes which its own manifesto describes as "revolutionary"? Upon creating "mass consciousness," "mass action," the concrete and effective expression of which is the general strike.

Stated as a generalization, their proposition is that under capitalistic society the mass of the workers, who are alleged to do the really productive work, are exploited and robbed by the minority; that, as a resultant of "mass consciousness" and "mass solidarity," the real workers may say to society: "We will hereafter work on our own terms or not at all." This theory is easy of statement and superficially pleasing and plausible. But, translated into practical, political action, it means nothing but advocacy of the general strike as a political weapon; otherwise, it is nothing but idle words: "Vox, et praeterea nihil."

It is no proper part of the present function of this court to analyze and comment upon the gross errors, historic, economic, and logical, into which the Communists fall in their differentiation of workers from nonworkers, or to depreciate their unconstructive, impractical notions of a political and economic society managed only by those whom they now erroneously classify as "workers." The present task is merely to determine what "force" they really seek to use in order to effect the changes they urge, and thus to reach a conclusion as to whether that force is the sort of force condemned by the statute of October 16, 1918.

The conclusion is irresistible that the only force worth discussion, believed in or advocated by this party, is the general strike; otherwise, its methods are those of ordinary political and social propaganda.

Analysis, then, brings me to this crucial question: Did Congress intend by the use of the word "force" in this statute to condemn the general strike when advocated as a political weapon by aliens?

There is clearly no evidence that the Communist Party advocated the use of any other kind of force in their attempts to change our political institutions.

The present problem is purely one of statutory construction: Did Congress, by the act of October 16, 1918, providing for the expulsion of aliens seeking to overthrow our Government by force or violence, intend thereby to outlaw the general strike, at any rate when advocated by aliens?

I am unable to believe that such was the purpose of Congress. It is not the natural interpretation of the words. It does not accord with the historic genesis of the statute. Moreover, this statute should be interpreted in the light of legislative precedents and of analogous legislation. It is familiar history that for about a century the tendency of lawmaking bodies has been to legalize and to facilitate, not to outlaw, strikes as forces in the industrial conflict. The trend of American legislation has been to limit the power of the courts to interfere with strikes by injunction.

Coming now to the second question in the problem above stated. Was there evidence before the Secretary upon which he might have found the Communist Party committed to the "overthrow" of our Government "by force or violence"? The necessary result of the foregoing analysis of the evidence, in the light of the interpretation of the statute adopted, is to require an answer in the negative.

This conclusion that the statute does not outlaw the general strike as a political weapon, and that there is no evidence of the advocacy of any other kind of force, makes it unnecessary to determine whether there was any evidence before the Secretary of Labor that the Communists believed in, advocated, or sought the "overthrow" of our Government.

LABOR ORGANIZATIONS—MEMBERSHIP AS GROUND FOR DISCHARGE—CITY FIREMEN—*McNatt et al. v. Lawther, Mayor, et al., Court of Civil Appeals of Texas (June 9, 1920), 223 Southwestern Reporter, page 503.*—McNatt and the other plaintiffs were firemen in the employ of the fire department of the city of Dallas. Prior to January, 1918, they, together with other firemen in the city, organized themselves and became members of a local union affiliated with the American Federation of Labor. The mayor and commissioners of the city demanded that they withdraw from the union upon penalty of being discharged from the city's employ. The plaintiffs refused to comply with this demand and were suspended. Later, in accordance with the provisions of the city charter, they were given a hearing and discharged. This provision of the charter is as follows:

All policemen and firemen of the city of Dallas shall hold their position during good behavior and shall not be removed from same except for such cause as in the opinion of the board of commissioners renders them unfit to remain in the service of the city and after written notice, giving the grounds for such discharge or removal, and an opportunity to be heard on such charges or reasons.

This action is for a writ of mandamus to compel the mayor and commissioners to reinstate the plaintiffs in the city's employ on the grounds that section 5244 of the Revised Statutes, which made membership in unions lawful, controlled in this case and could not be made a reason for discharge; and on the ground that the rule of the fire department prohibiting membership in the union was purely arbitrary and capricious. The lower court sustained a general demurrer to the petition and the plaintiffs appealed. The decision was affirmed, however, and judgment rendered for the city officials. The reasons for the decision are set forth in the following extracts from the opinion:

The petition in the case before us shows that a hearing was had on the charges made against the plaintiffs. It does not disclose what evidence was offered on the hearing, and it will, of course, be presumed that the evidence supported the charge. So that the only question for us to determine is whether the charge itself, if sustained, was sufficient to authorize the removal.

It is appellants' contention that their action in becoming members of the union was lawful, under the express provisions of article 5244 of the Revised Statutes, and could not form the basis of any charge for removal from their positions. This article reads as follows:

"It shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades-unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments."

The act merely announced that there was no prohibition of law against such unions. But, on the other hand, it did not seek to regulate the attitude of the employer toward the organization of unions among his employees, and we take it that, if the employer should see fit to prohibit his employees from becoming members of such "trades unions" on pain of discharge in case of violation of such prohibition, such act would not be in violation of this law. (Martin's Modern Law of Labor Unions, sec. 258.) This would have been plain, we think, without any statement to such effect in the law, but the act itself declares that—

"Nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employees." (R. S. art. 5246.)

If the act had sought to impose any restrictions upon the freedom of the employer in such matter, it would probably be held unconstitutional. (Coppage *v.* Kansas, 236 U. S. 1, 35 Sup. Ct. 240 [Bul. No. 169, p. 147].)

The court then quoted an ordinance of the city of Dallas which forbids members of the fire and police departments of the city to organize any association without first securing the approval of the

proper officials, such organization being subject to dissolution if determined to be detrimental.

The opinion continued:

We refer to this ordinance as merely explaining the reference in the charge to the rule and regulations of the fire department, which it was charged the plaintiffs had violated, and while the petition itself did not refer to such ordinance, it can be fairly inferred from the allegations of the petition, which set out the charge preferred against the firemen, that such charge was made in view of such or similar rules, duly promulgated for the regulation of the fire department.

The board of commissioners of the city of Dallas had the interest of the public, as well as the employees of the city, to consider. In addition to the consideration stated in the quotations above referred to, the commissioners may have taken into consideration the effect of the increased probability of strikes by the policemen or firemen of the city, as a body, if such employees were permitted to become members of an organization which might bind them to act as a body in such matters. The dire consequences of such a strike has been exemplified in the comparatively recent strike of the policemen of the city of Boston. The adoption of the ordinance referred to or similar rules and regulations may have been the result of a purpose to minimize, as far as possible, the probability of some such calamity in the city of Dallas. We are not called upon to express an opinion as to whether such rules were wise or not. We do conclude, however, that we can not say that the adoption and enforcement thereof by the constituted authorities of the city was arbitrary or capricious.

We think the court correctly sustained the demurrer to the petition, and its judgment will be affirmed.

LABOR ORGANIZATIONS—MEMBERSHIP AS GROUND FOR DISCHARGE—INJUNCTION TO PREVENT DISCHARGE OF UNION MEMBERS—*San Antonio Fire Fighters' Local Union No. 84* v. *Bell et al., Court of Civil Appeals of Texas, San Antonio (June 19, 1920), 223 Southwestern Reporter, page 506.*—The members of the city of San Antonio's fire department organized themselves into a union and became affiliated with the American Federation of Labor. The mayor and commissioners issued an order forbidding the members of the fire department to become members or to remain in the union. The San Antonio Fire Fighters' Local Union No. 84, which is the union the members of the fire department had joined, brought this action against the mayor and commissioners of the city of San Antonio to restrain them from discharging from the city's employ any members of the fire department because of their membership in the union. The court sustained a general demurrer to the petition and the plaintiff appealed. In sustaining the decision in favor of the defendant the court said in part:

The general rule is that in the absence of a contract the employer has the authority to discharge an employee, with or without reason, and the only change made in that rule so far as the city of San Antonio is concerned is that charges must be preferred in writing and the trial must be public on those charges. It must be inferred that the legislature intended that the charges must not be frivolous or trivial, for such charges would be fraudulent. It must be presumed that before any of the appellant's members are removed or discharged proper charges in writing will be filed and a just trial had thereunder. (City of San Antonio *v.* Tobin, 101 S. W., 269; White *v.* Manning, 46 Tex. Civ. App. 298, 102 S. W. 1161; City of San Antonio *v.* Newnan, 218 S. W. 128.)

It can not be said as a matter of law that a municipal corporation has no right or authority, as must be the claim of appellant if there is any basis for its suit, to determine that membership in a certain organization renders its appointees inefficient or untrustworthy, and even without admission on the part of one of the affiants that he owed a higher duty to his union than his city in case of orders for a strike upon the part of the firemen it can not be assumed that a fair trial will not be given the members of the union.

It is not alleged in the petition that membership in the union would not affect the loyalty of the members of the city nor make them subject to orders that would interfere with the public service and the discharge at all times of their duties. It is not alleged that they would not obey a strike order coming from the proper union authorities nor that there would be no interference with the service if a member should at any time be removed or discharged from the service of the city; but the original petition merely states that firemen are about to be discharged because they are members of a union which subscribes "to principles, rules, and regulations promulgated or prescribed by the American Federation of Labor for the benefit and protection of its members," without indicating what the "principles, rules, and regulations" may be. Such rules and regulations may be deemed by the commissioners inimical to the interests of the city, and this court has no authority to anticipate that they will abuse their discretion should they entertain such an opinion and act upon it.

Judgment affirmed.

LABOR ORGANIZATIONS — PICKETING — INJUNCTION — ATTEMPT TO UNIONIZE RESTAURANT—*Stuyvesant L. & B. Corporation* v. *Reiner, Supreme Court of New York, Special term (February, 1920), 181 New York Supplement, page 212.*—The Stuyvesant L. & B. Corporation was a restaurant company employing from 20 to 30 waiters and kitchen help. The principal officers of the restaurant had previously been members of Waiters' Union Local No. 1, of which the defendant, Reiner, is the treasurer. The restaurant had no dispute with its employees, who were satisfied with the wages, conditions, and hours of labor. Some of the employees were members of the union. Reiner wanted to unionize the plaintiff's business. When plaintiff refused

to agree to employ union labor exclusively, Reiner threatened to call a strike. When Reiner came to plaintiff's place and blew a whistle the employees refused to strike, but on the contrary made an affidavit in which they declared they did not desire to strike, whereupon Reiner caused plaintiff's restaurant to be picketed. The usual threats to and intimidation of plaintiff's employees and annoyance to its customers were indulged in. This action was brought to secure an injunction to prevent further picketing of plaintiff's restaurant. In granting the injunction the court said in part:

We have thus a case in which all of the employees of plaintiff refuse to join the union, and where the employer refuses to submit to a compulsory acquiescence in the defendant's demands to engage only employees who belong to a union. It is a commonplace that labor organizations are lawful bodies, which may seek by lawful means to secure adequate compensation for their services, fair hours of labor, proper conditions under which to work, or to accomplish any other legitimate objects. The conduct of the defendants, however, is not only coercive upon the plaintiff, but also upon their employees. It is tantamount to saying to these employees: Unless you join the union you will be deprived of your positions and prevented from securing work elsewhere. It is a direct interference with the exercise of their right of freedom of action in a matter in which they alone should decide.

The right to join a union implies the right not to join one.

The facts established in this action come peculiarly within the condemnation of law. The defendants had no grievance against plaintiff, other than that it and its employees were not in accord with their views about unionizing the plaintiff's business. It is no answer to say that picketing has been held to be lawful if peacefully conducted. But picketing, even though ostensibly peaceable, may not be employed when its purpose is in effect a malicious and wanton interference with another's business or vocation. As a matter of fact, there is no strike here at all. The picketing is therefore a malicious act and unlawful. Since no overt act of interference with the plaintiff's business is shown, other than that of picketing, the motion will be granted to the extent of forbidding any picketing in front of plaintiff's premises.

Ordered accordingly.

LABOR ORGANIZATIONS — PICKETING — INJUNCTION — EFFECT OF CLAYTON ACT—*Kinlock Telephone Co. et al.* v. *Local Union No. 2 et al., United States District Court, Eastern District of Missouri (May 6, 1920), 265 Federal Reporter, page 312.*—The Kinlock Telephone Co. and others brought an action in equity against Local Union No. 2 of the International Brotherhood of Electrical Workers, its members, and officials to obtain an injunction to restrain an unlawful strike and to prevent picketing. The telephone company had made a contract with its employees, some of whom belonged to the union and some of

whom did not, whereby the company was to be permitted to maintain an "open shop." The union voted to call a strike of the company's employees for the purpose of compelling the company to maintain a "closed shop" and to make it see that union members in its employ regularly paid their dues. The strike was called, and many of the company's employees were induced to quit their employment in violation of their contracts. The usual picketing and persuasion was indulged in by the union, with the result that irreparable damage was inflicted upon the company's business. A temporary restraining order was allowed. The company's business is interstate in character, and upon the hearing of the motion for injunction the union set up as a bar the Clayton Act (38 Stat. 738, see Bul. No. 166, p. 235), which restricts the courts of equity from issuing injunctions in certain cases. District Judge Faris held that the facts of the case brought it within the provisions of the Clayton Act and refused to grant the injunction prayed for. The decision is in part as follows:

I am of opinion that the most that the proof may be said to show is that the defendants, as members, officers, and agents of the International Brotherhood of Electrical Workers and as individuals, are causing, maintaining, and supporting the strike in question upon wholly feigned and insufficient grievances, with the aim and intent as already stated, to compel plaintiffs to unionize their business; that the result of such action upon the part of the defendants has been to cause the contract existing between plaintiffs and its employees to be breached by such employees without sufficient reason or excuse, in law or in fact, and, further, that defendants threaten to cause other of plaintiffs' employees to breach their contract with the plaintiffs, and that defendants are seeking to attain the results above stated by advice, persuasion, and inducements bottomed upon labor unionization and union obligations.

Construing the contract offered in evidence, I am of opinion that this contract requires arbitration as therein provided for, even though one party to the same may contend that there is no grievance in fact upon which to bottom the complaints made. Neither upon a construction of this contract, nor in common fairness or reason, is there any obligation on the part of plaintiffs to pay the union dues of plaintiffs' employees, or to see that such dues are paid, or to discharge men who do not pay such dues, although it is clear from the evidence that this is one of the chief ostensible reasons for calling the strike now existing.

In the light of the provisions of the Clayton Act, have the defendants, by the several acts found, become in equity liable to be enjoined? I am constrained, by the view I am compelled to take of the fairly plain provisions of the act, to hold that they have not. The Clayton Act was passed on the 15th day of October, 1914, and provides generally in substance, that no injunction shall be granted in any case between employers and employees, unless such injunction is necessary to prevent irreparable injury to property or property rights, for which injury the law furnishes no adequate remedy.

The court then quoted that portion of the act which forbids injunctions against picketing, peaceable persuasion, the payment of strike benefits, etc., and continued:

Upon the record there is no manner of doubt that irreparable injury has been done to the property of the plaintiffs, and that further irreparable injury is threatened, and that the law applicable to the facts in this case provides no adequate remedy. But the definite particularization set out in that part of the Clayton Act which I have quoted specifically defines what acts shall nevertheless be deemed lawful (of course, so far only as concerns the power to enjoin such acts), even though the doing of such acts shall result in irreparable injury, without an adequate remedy at law for the redress of such injury.

Being constrained to follow the fairly plain provisions of the Clayton Act, I am of opinion that this case is ruled by it, and, however strongly I have heretofore entertained the view that, when there is committed an irreparable injury to property and when similar injury is clearly threatened and no adequate remedy at law exists, equity may grant relief by injunction, even as against employment, I am yet bound by this statute, which I deem it my plain duty to follow, even to the exclusion of these views.

It follows that the motion of plaintiffs for a temporary injunction should be denied, and the temporary restraining order heretofore issued dissolved. Let an order be entered accordingly.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—RIGHT OF MOVING-PICTURE PROPRIETOR TO RUN HIS OWN MACHINE—*Hughes et al.* v. *Kansas City Motion-Picture Machine Operators, Local No. 170, et al., Supreme Court of Missouri (Apr. 30, 1920), 221 Southwestern Reporter, page 95.*—J. E. Hughes had been a motion-picture machine operator and was a member of the defendant union. It was alleged by the union but denied by Hughes that he had revealed certain secrets of the union. In accordance with the rules of the union he was fined $100, or in event of failure to pay to suspension for one year. Hughes refused to pay and he was both fined and suspended. He thereupon purchased an interest in a moving-picture theater and operated the projecting machine. It being contrary to the rules of the union for a person having an interest in a show to conduct it himself, Hughes was again fined $100. Later Hughes became a partner with one Briner, the other plaintiff in this case, in the Eastern Theater. At that time Briner had in his employ a union machine operator, but as Hughes was capable of operating the machine the union operator was dismissed. The executive board of the union, together with a machine operator and two pickets, called on Hughes on April 16, 1916, and told him he must choose either the

operator or the pickets. Hughes asked time to consider, but this was refused and the place was picketed that night and every night thereafter at 7.45 p. m., which was the busiest hour of the day. The picketing continued regularly and occasioned some friction and involved some intimidation of passers-by. It also caused a falling off of $15 in the show's weekly earnings. Hughes and his partner sued for an injunction and a temporary injunction was allowed but later dissolved, and they appealed. In reversing the decision of the lower court and issuing a permanent injunction, the court rendered a decision in part as follows:

The court below in its judgment found that each and all of the defendants had been engaged in picketing plaintiff's place of business and persistently requested the public not to patronize it, on the theory plaintiffs did not employ a union operator and therefore was unfair to union labor; that the picketing resulted in substantial damage to the business of plaintiffs, but was conducted in a peaceable manner and therefore was not unlawful; that if the defendants were enjoined from continuing their conduct they would be deprived of the rights of free speech and personal liberty guaranteed by sections 4 and 30, article 2 ,of the State constitution, and amendments 1 and 14 to the National Constitution.

Beyond question the demand of the union that plaintiffs should desist from conducting business in that way, and should employ an outside operator, was arbitrary and unlawful. The right asserted by plaintiffs to keep down the expense of their business by having Hughes manipulate the projector is the simple and primitive right of a man to earn a livelihood with his own hands, as much so as that of a blacksmith to blow his forge. (Truax *v.* Raich, 239 U. S. 33, 36 Sup. Ct. 7 [Bul. No. 189, p. 53].) This right the rule of the union denied to Hughes, even if he became a member.

Defendants contend the picketing was peaceable and therefore lawful, and to prevent it by the writ of injunction will deprive them of their privilege of free speech and the use of the public streets. Without denying that there can be peaceable picketing, as some courts have held, we dissent from the proposition that picketing is lawful, as a matter of course, simply because it is not accompanied by assaults, threats, or other methods of intimidation. In some instances we consider peaceable picketing is lawful. For example, where in the prosecution of a strike pickets are posted to observe and report what takes place on the employer's premises, and in the course of their task use neither violence nor threats toward other employees. (W. & A. Fletcher Co. *v.* Assn. of Machinists (N. J. Ch.), 55 Atl. 1077; Karges Furniture Co. *v.* Woodworkers' Union, 165 Ind. 421, 75 N. E. 877.) It has been held, but not by all courts, to be lawful in such instances, when nothing more is done by the pickets than to endeavor by argument and persuasion to prevent other workmen from taking service under the employer against whom the strike is directed. (St. Louis *v.* Gloner, 210 Mo. 502, 109 S. W. 30; Standard Tube etc. Co. *v.* International Union, 9 Ohio Dec. 692; Ricard etc. Co. *v.* Benner, 14 Ohio Dec. (N. P.) 357; Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45.) It is unlawful, according to the

authorities, when a strike is in progress for members of a labor union to endeavor to persuade employees to break their contracts, and doubtless picketing for that purpose is unlawful.

The point of difficulty is not whether the picketing as prosecuted was wrong, but whether the writ of injunction can be used to prevent it. Decisions of this and other courts are cited as holding it may not. The courts of review of this State have declared peaceable picketing is lawful and can not be enjoined; but the instances were where the legality of the act was determined with reference to the effect of the absence of intimidation by violence and threats, and not with reference to the harassment of the complainants and the damage to their business by the manner in which the picketing was done. Intimidation happened in the present case, as we have stated, and in consequence of it and of the propaganda conducted by the pickets in defaming the behavior of plaintiffs to organized labor, much damage was inflicted on them, considering the small scale of their business. They and their employees were compelled for months, during the busiest hours of the evening, to do their work under the constant annoyance of the picketing a few feet from the entrance of the theater. To break the effect of the misrepresentations of the pickets, Mrs. Hughes walked the sidewalk informing passers-by that plaintiffs were not unfair to organized labor; and it may be fairly concluded that plaintiffs were forced into this unpleasant activity to preserve in some measure their patronage. To our minds such a condition of affairs constituted a private nuisance and an intolerable one. No organization should be permitted to thus vex and harass men; at any rate, when the act objected to by the organization affects so remotely the welfare of the members, as in the present instance.

We hold that the picketing by defendants of the premises of these plaintiffs was, as carried on, a nuisance that worked irreparable injury and is subject to be enjoined. Authority for this view is not wanting.

Referring to the constitutional guaranties invoked by defendants, we remark that the first amendment to the National Constitution is a restraint on congressional action only, and has no bearing on the rights of defendants in this case.

The clause of the fourteenth amendment providing against a State's depriving a person of liberty without due process of law, the kindred provisions in sections 4 and 30 of article 2 of the constitution of the State, and the guaranty of freedom of speech in section 14 of said article 2, are not, it is hardly necessary to say, absolute rights to be exercised by a person without limit or reference to the correlative rights of others. To follow a lawful business or vocation is part of the liberty protected by the constitutional limitations; but when the business is carried on at a place or in a manner to make it a nuisance and injurious to others it is no longer within that protection, but is an illegal act.

The judgment is reversed and the cause remanded, with directions to the court to set aside the judgment dissolving the temporary injunction heretofore granted, and to issue a permament injunction against defendants. restraining them from picketing in front of plaintiffs' theater.

LABOR ORGANIZATION — PICKETING — INJUNCTION — VIOLATION — VALIDITY—CONTEMPT OF COURT—*Lyon & Healy* v. *Piano, Organ & Musical Instrument Workers' International Union et al., Supreme Court of Illinois (June 18, 1919), 124 Northeastern Reporter, page 443.*—The plaintiff, Lyon & Healy, is a corporation engaged in manufacturing and dealing in musical instruments. On October 4, 1917, some of its employees, who it seems were members of the defendant union, went on a strike. The strikers picketed plaintiff's establishment and resorted to violence and intimidation in an effort to induce plaintiff's remaining employees to quit their employment. The employer procured on November 5, 1917, a temporary injunction against the union, its president, and its members, restraining them from engaging in picketing. In spite of the injunction the picketing and other unlawful acts were continued. Various employees of plaintiff were assaulted and injured and some of their homes were bombed. Plaintiff's store and garage were also bombed. Thereupon plaintiff filed a petition against six individual defendants, including Charles Dold, president of the defendant union, asking for a rule to show cause why they should not be punished for contempt for the violation of the injunction. They answered the petition and denied that they violated the injunction and further declared that the court had no jurisdiction to issue the injunction. The court found them all guilty and fined them and they appealed. In affirming the decision the court said in part:

The only question to be considered is whether the circuit court had jurisdiction to grant the injunction. Counsel for appellants do not contend that they did not picket the appellee's plant, or did not violate the injunction, but only that there is no evidence that they were guilty of any threats, intimidations, or acts of violence, or have attempted to create or enforce a boycott, and therefore it is argued that they have not violated any prohibition of the injunction which the court had power to grant.

The injunction prohibited the picketing or the maintaining of any picket or pickets at or near the appellee's premises, and the appellants' contention is that picketing is the exercise of a legal right, which can only be enjoined when something else besides the act of picketing itself is done.

No one denies that the courts have the power to interfere by injunction in controversies between employer and employee in proper cases, at the suit of either party. So the appellants' counsel state that the court had the undoubted right to prohibit violence, assault, and breach of the peace upon the workingmen employed in complainant's shop during the strike, but did not have the right to prohibit the peaceful assembly of workingmen who are on a strike; that this part of the injunction, therefore, was illegal, and should not have been included in the writ. Granting this to be true, it does not follow that the court had no jurisdiction to grant the injunction. Jurisdiction is the power to hear and determine the matter in controversy

between parties, and if the law gives the court power to render a judgment or decree, then the court has jurisdiction. Jurisdiction does not depend upon the correctness of the decision, and is not lost by an erroneous decision. Where a court has before it a party complainant asking that an injunction issue on a bill stating a case belonging to a class within the general equity jurisdiction of the court, and also the party against whom the injunction is asked, the court has jurisdiction to decide whether an injunction ought to issue, and the character of the injunction, and, should the court err in ordering an injunction to issue when one ought not to issue or in ordering an injunction broader in its terms than is justified by the bill, its decree will be reversed, but the error will be no defense to an attachment for contempt for violating the injunction. The error does not deprive the court of its jurisdiction, and the decree is binding upon the defendant until vacated or set aside. (Franklin Union *v.* People, 220 Ill. 355, 77 N. E. 176.)

A party may refuse to obey an order where the court had no jurisdiction to make it, but not on the ground that it was erroneously made. An order made in the exercise of jurisdiction, though erroneous, must be obeyed until modified or set aside by the court making it, or reversed by an appellate court. (Court Rose Foresters of America *v.* Corna, 279 Ill. 605, 117 N. E. 144; Christian Hospital *v.* People, 223 Ill. 244, 79 N. E. 72.) There can be no doubt that the circuit court of Cook County had jurisdiction of the subject-matter and the parties. It had jurisdiction to determine whether the bill was sufficient to justify the issue of an injunction and the character of the injunction which should issue. Whether the bill stated a cause of action for which an injunction should be granted, or whether the affidavits sufficiently establish the facts upon which an injunction should be granted, are questions of no importance upon the hearing of a charge of contempt for violating the injunction which the court ordered. If the bill was insufficient, it should have been tested by a demurrer, and not by disobedience of the writ. (Court Rose Foresters of America *v.* Corna, supra.) If its averments were not true, a motion should have been made to dissolve the injunction, but until it was dissolved the appellants were bound to obey it. The sufficiency of the bill is not before us for determination. Neither is the question whether the scope of the injunction is broader than the allegations of the bill. Those questions can arise only on a direct proceeding for the review of the order granting the injunction.

The appellants having violated the injunction were properly adjudged guilty of contempt of court, and the judgment against them is affirmed.

Judgment affirmed.

LABOR ORGANIZATIONS — PICKETING — INTERFERENCE WITH CONTRACT—INJUNCTION—*Dail-Overland Co.* v. *Willys-Overland (Inc.) et al., United States District Court, Northern District of Ohio (Dec. 27, 1919, and January, 1920), 263 Federal Reporter, page 171.*—The Willys-Overland Co. manufactured automobiles in Ohio and sold them through the Willys-Overland (Inc.). The court called the former the "Overland" and the latter the "Willys-Overland." The plaintiff is a

North Carolina corporation to whom was given a certain territory in which it might sell the Willys-Overland automobiles. By contract the Dail Co. was to get a certain number of cars for sale each year. The required deliveries were made for the first four months in 1919, but in May, by reason of a labor dispute at the plant of the Overland at Toledo, Ohio, the deliveries stopped. This action was brought by the Dail Co. against the Willys-Overland, the Overland, and the labor organizations causing the dispute which stopped work for conspiracy in restraining interstate commerce. An injunction was also prayed for to restrain any interference with the contract to deliver the automobiles and to restrain the strike, picketing, and an alleged lockout, which was in reality a closing of the plant at the request of the city authorities to avoid violence and bloodshed on the part of the strikers and their supporters. In granting the injunction, Judge Killits, speaking for the court, referred to Loewe *v.* Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (Bul. No. 75, p. 622), and Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492 (Bul. No. 95, p. 323), and continued:

The acts charged against the alleged coconspirators in this case to have been in contemplation as agencies to effect the conspiracy, and also committed to further that conspiracy, were morally much more responsible than those charged against the alleged conspirators in the cases cited; also in the present case the labor defendants are charged with conspiring to induce the employees of the Overland to break their contracts with the latter. Consequently the case is within the scope of Hitchman Coal Co. *v.* Mitchell, and Eagle Glass & Mfg. Co. *v.* Rowe, reported in 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145], and 245 U. S. 273, 38 Sup. Ct. 80 [Bul. No. 246, p. 152], respectively.

Does the Clayton Act change the law in any way so as to affect the application here of the cases above cited? We are unable to see that it does, for we see nothing in this case that brings into pertinency the statement with which section 6 of that act (Comp. St. 8835f) begins, "that the labor of a human being is not a commodity or article of commerce;" nor are the other provisions of section 6 applicable here. We are not asked here "to restrain individual members of such organization [labor organizations and others named] from lawfully carrying out the legitimate objects thereof," nor are we asked to declare the labor organizations named as defendants in this case "to be illegal combinations or conspiracies in restraint of trade." The things which the labor defendants are alleged to have in mind to accomplish the purposes of their alleged conspiracy, and the things which are alleged to have been done in furtherance of that conspiracy by way of overt acts, can not, by the wildest stretch of imagination, be considered to be "lawfully carrying out the legitimate objects" of such organizations. Intimidation, violence, bloodshed, can not be said to be lawful means to the effecting of legitimate objects of a labor organization, nor can it be said that the acts alleged to have been in contemplation and to have been

put in practice as agencies of the alleged conspiracy were remotely within the privileges of peacefully persuading and lawfully assembling accorded to persons engaged in a labor controversy by section 20 of the Clayton Act (Comp. St. 1243d).

Our order made part of its conditions the terms of the Clayton Act, and we allowed picketing at the plant under such sanctions, respecting both parties, as would tend to identify authors of disorder if any occurred.

This court has repeatedly in this case disclaimed a judgment that picketing per se was lawful. It was ordered and allowed in this case as a convenient means of stabilizing a very uncertain situation, providing a concrete expression, at the Overland factory, of rights declared by section 20 of the Clayton Act, and to fix responsibility, if those rights were exceeded or infringed. The immediate reason for fixing the terms of picketing, and thus apparently approving of it, having disappeared, there is no reason in allowing it to continue as a court provision.

There was a motion before the court to dismiss the case for want of jurisdiction, but this was overruled and a permanent injunction allowed, with a warning that if picketing continued in the present form the final order, at the time of its issue, " will definitely abrogate the apparent privilege of picketing."

A supplemental opinion was afterwards filed, in which it was stated that the foregoing " intimation that organized picketing at the Overland plant should cease " had been ignored, and the practice continued " with a rather flamboyant air, as if enjoying an unrestrainable right to do, in that behalf, just as they please." Some account of the methods prescribed, and of their consequences, was then given, after which the opinion continued:

We have recently discussed the fact that the defendant, the Willys-Overland Co., has made steady and rapid headway against the opposition of the labor defendants, until more than a month ago both its working force and its daily production exceeded the maximums when the dispute arose. This increase of both force and production has been maintained since our last memorandum. The blunt truth is that the revolt against their employer of certain Overland employees, which arose seven months ago, has failed of its purpose to influence the company's policy respecting terms and conditions of employment. It is the plainest fact—appreciated everywhere, whether acknowledged or not—whether the truth is unpalatable to anyone or not—that the " strike " or " lockout " has long since ceased to be anything else than an ineffective protest against the Willys-Overland Co. by persons which that company may or may not heed, as it pleases.

It follows that it can not be fairly said that there is now existing a real controversy, or one which any court is bound to honor, over questions which caused the trouble early in May of 1919. As we have suggested in an earlier opinion, it can not be tolerated that a few men, either from pride of office in their respective organization or otherwise, or from sheer willfulness, may indefinitely parade the ghost of a dead contest and claim the special consideration which might pos-

sibly have been given them and those they claimed to represent when the dispute had vitality. Our notion is that the court is called upon to—in fact, common sense dictates that it should—treat the situation much more stringently and differently under circumstances which now attend this cause, than it should do under those which confronted the court when the temporary injunction was issued. If, last June, there were to be equitably granted the labor defendants a privilege of picketing, it was allowable because of conditions which existed then but which, since, have wholly vanished. The foundation for the privilege of picketing of the character the court has permitted having collapsed, no matter what a few men who assume to be leaders of the labor defendants think about it, there is nothing to support it.

We are therefore enjoining the continuance of picketing at the Overland plant.

LABOR ORGANIZATIONS—PICKETING—NUISANCE—CONSPIRACY—ATTEMPT TO UNIONIZE RESTAURANT—*Moore* v. *Cooks'*, *Waiters'* & *Waitresses' Union No. 402 et al., District Court of Appeals, California (Jan. 30, 1919), 179 Pacific Reporter, page 417.*—The defendants wished to unionize the restaurant of the plaintiffs and for that purpose placed pickets before it, each wearing a band or sash of white bearing the word "picket." These pickets regularly walked up and down in front of plaintiffs' restaurant during the busy hours of the day. Plaintiffs secured in the superior court an injunction against the defendant union restraining them from picketing his place and the defendants appealed. In affirming the judgment of the superior court, the court spoke in part as follows:

The fact that the purpose for which the defendants maintained pickets, as was done here, viz, to induce plaintiffs to unionize said restaurant by compelling the women employees to pay their dues to said union, and to discharge the nonunion cook and employ a union cook in his place, does not justify maintaining a patrol in front of plaintiffs' premises as a means of carrying out their scheme, which is nothing short of a conspiracy—as the court found the fact in the case at bar to be. The admitted facts in the case, we think, disclose "a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him," and "is outside of allowable competition, and is unlawful" (Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077), and against such "the law will protect the victim and punish the movers of any such combination." (Crump *v.* Commonwealth, 84 Va. 927, 6 S. E. 620.)

Peaceful picketing! There is no such thing, if the term is intended to apply to the facts as they are shown to be by the record in the case at bar. We are in full accord with the doctrine enunciated in the case of Atchison *v.* McGee (C. C.), 139 Fed. 582, where it was held that "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."

From what has been said here, it follows that, as appellants contend, "the only question involved in the present appeal is the right of organized labor to maintain a 'peaceful picketing' in front of plaintiffs' place of business, so that all members and friends of labor unions may know that plaintiffs are operating their business in a manner that organized labor believe to be 'unfair.'" The entire contention of the defendants here is that they have a right so to do. We are convinced, from an examination of the record presented to us, that under the law they have no such right, and that the court acted within its jurisdiction in granting the injunction herein.

LABOR ORGANIZATIONS — PICKETING — PURPOSES — CONSTITUTIONALITY OF STATUTE PERMITTING PEACEFUL PICKETING—*Truax* v. *Corrigan, Supreme Court of Arizona (Dec. 14, 1918), 176 Pacific Reporter, page 570.*—William Truax and his partner owned and conducted a restaurant. A dispute arose between them and their employees over wages and hours of employment, and the parties could not come to an agreement. The employees proceeded to strike and picket the restaurant of the petitioner, Truax. This they did by carrying banners back and forth in front of the restaurant and passing out handbills and by loud talking advertising the strike and the reasons therefor. All the acts alleged to have been done by the strikers were peaceful and lawful. The employer seeks an injunction against this peaceful picketing, declaring that the statute, paragraph 1464, Civil Code 1913, which permits injunctions against picketing only when necessary to prevent injury to property rights and to prevent unlawful acts, is unconstitutional by reason of the fact that it violates the fourteenth amendment to the United States Constitution, in that it deprived the employer of his property without due process of law and denied to him the equal protection of the law. Chief Justice Cunningham, in upholding the constitutionality of the statute and refusing the injunction, rendered a decision, which is in part as follows:

The good will of the public toward the plaintiffs was successfully attacked by the defendants and temporarily limited to those of the public who were not persuaded by the recommendations, advice, and appeals made by the defendants. Without any doubt, good will in any business is a valuable factor to business success, but no man carrying on any business has a vested property right in the esteem of the public.

The plaintiffs had the unquestioned right to adopt any terms and conditions of employment of servants in their business as they may choose. No one has a right to interfere with the private management of a man's business. If he refuses to employ union members, or refuses to pay union wages, and refuses to recognize union conditions of employment, that is his affair altogether, and his rights can not be interfered with. If any person conducting a business elects to disregard the demands of his employees, and such employees strike for that reason, no right of the employer is violated if the striking

employees advertise the cause of the strike. If the publicity given the facts cause a loss, such loss is attributable to the employer and his business methods as the proximate cause of the loss to him.

The purpose of the statute in question is to recognize the right of workmen on strike to use peaceable means to accomplish the lawful ends for which the strike is called. The statute adopts the view of a number of courts which have held "picketing," if peaceably carried on for a lawful purpose, to be no violation of any legal right of the party whose place of business is "picketed," and whether as a fact the picketing is carried on by peaceful means, as against the other view, taken by the Federal courts and many of the State courts, that picketing is per se unlawful. The last view is that contended for by the appellant. The contention is that the statute, having attempted to legalize picketing when peaceably carried on for any purpose, deprives plaintiffs of their property without due process of law, and denies to plaintiffs the equal protection of the law. Conceding that prior to the enactment of paragraph 1464, supra, the state of the law in this jurisdiction was as contended—that is, that picketing carried on in any manner, in a concededly peaceable manner, was an unlawful act, as held by a great number of courts; in other words, that picketing naturally induces breaches of the peace, and is therefore unlawful—yet plaintiffs have no vested right to have the law continue in that state. A change in the law, so that when it is made to appear that peaceable picketing is in fact carried on, and all picketing is no longer conclusively presumed to be unlawful, as recognized by said statute, that change in the law places the burden upon the plaintiff to show as a fact that the defendant violates the law, while the other view presumed that the law was violated, if any manner of picketing was carried on. The statute simply deals with a rule of evidence requiring the courts to substitute evidence of the nature of the act for a presumption of the nature of the act, based upon an inference from the bare act. Hence it is quite clear that the statute recognizes the right of the striking employees to carry on a campaign of picketing in furtherance of a strike for a lawful purpose, provided the means used and the manner in which such means are used are peaceable and otherwise violate no legal rights of the party whose premises are subjected to the picketing, and are not in violation of any duty owing by the striking employees to such party or to the public. In no sense can the statute be considered as one either depriving the plaintiffs of property without due process of law, or denying plaintiffs the equal protection of the law.

The plaintiff's property rights are not invaded by the picketing, unless the picketing interferes with the free conduct of the business by the plaintiffs; and the plaintiffs do not claim that the defendants have, by using violent means with picketing, invaded their rights in this respect by causing a loss in business.

LABOR ORGANIZATIONS—PICKETING—STRIKES—BOYCOTTS—INJUNCTION—*Rosenberg* v. *Retail Clerks' Assn., Local 428, District Court of Appeals, First District, California (Dec. 4, 1918), 177 Pacific Reporter, page 864.*—The defendant union called a strike of Rosenberg's

employees and proceeded to picket his store. The pickets wore badges and walked in front of plaintiff's store, accosting and calling out to possible patrons passing by: "This is an unfair house; it is unfair to organized labor. Don't patronize it." Plaintiff sued for an injunction on the ground that these actions of the pickets intimidated his patrons. An injunction was granted, but not to the extent desired by the plaintiff, and he brings this appeal for the purpose of securing an injunction against the acts above set out and complained of. In granting his plea the court said, in part:

The question presented involves the subject of peaceful picketing. The right of united labor to enforce a boycott by means of peaceable, oral persuasion, and to induce those sympathetic with such a cause to refrain or withhold their patronage from an employer is one that has received extended consideration from the courts, and the decisions on the subject are widely divergent. This principle, however, is not one of first impression in this State. The manner and extent to which organized labor may strike, the means that may be employed in furtherance thereof, and the respective rights of the employer and employee are subjects which have received elaborate consideration by our supreme court. [Cases cited.]

It is unnecessary to discuss the principles reviewed and established in these [cited] cases, it being sufficient for the purposes of this case to say that while coercion, intimidation, or menace can not be resorted to for the purpose of enforcing a boycott, strikers have an unquestionable right, where no contractual obligation interferes, to present their cause by peaceful persuasion and argument. The question whether picketing is a peaceful and lawful means is one that has also received frequent judicial consideration. The cases in different jurisdictions are not harmonious on the question. Some of the courts have recognized, or at least do not deny, that picketing may not be unlawful. The weight of authority, however, and the growing tendency is to accept the contrary view, and to regard picketing as inherently illegal, for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly, it has been held that there is no such thing as peaceful picketing any more than there can be peaceful mobbing.

This being so, it follows that as the trial court found that the defendants committed the acts complained of, judgment should have been rendered in accordance with the prayer of the complaint, declaring that such acts constituted a threat or menace against plaintiff's customers, and defendants should have been enjoined from a continuance thereof. This was the issue raised by the pleadings, and, the finding having been in the plaintiff's favor, he was entitled to a judgment declaring that his patrons were intimidated by the admitted acts, and on account of such intimidation were restrained from patronizing him. Under the judgment as rendered, defendants being merely prohibited from interfering with or obstructing plaintiff in the conduct of his business by means of threats, menace, or intimidation, plaintiff would be compelled, in order to enforce his judgment, to institute proceedings upon a charge of violating the injunction on the assumption that the acts complained of came within its terms.

This was the only issue in the present case, and it should have been finally disposed of by the judgment.

LABOR ORGANIZATIONS—RESTRAINT OF TRADE—BOYCOTT—SYMPATHETIC STRIKES—INJUNCTION—REFUSAL TO HANDLE GOODS HANDLED BY NONUNION MEN—*P. Reardon (Inc.)* v. *Caton et al. and Reardon* v. *International Mercantile Marine Co. et al., Supreme Court, Special Term, Kings County (June, 1919), 177 New York Supplement, page 803.*—This was an action for an injunction by the plaintiff, a trucking company, against Caton as president of the Steamship Clerks' Union, Brooklyn and Staten Island, Local 975. The plaintiff conducts a large trucking business devoted principally to hauling freight, under contracts, between railroad terminals and steamship terminals and employs a large number of teamsters. The employees of plaintiff are composed of both union and nonunion labor. About 85 per cent are nonunion men who have no desire to become union members. Plaintiff's employees are working for the same wages as are earned by union teamsters wherever employed. The union employees of plaintiff and the teamsters union have not struck, nor have they made any demands or manifested any discontent. The checkers, weighers, and clerks employed on the docks and by the steamship companies are well organized. For the purpose of forcing plaintiff to unionize his business these checkers, weighers, and clerks refused to handle in any way, freight that had been hauled by plaintiff's nonunion employees. Injunctions pendente lite were granted and defendants appealed. The court continued the temporary injunctions until the case could come to trial. The opinion is in part as follows:

The defendants say that their members are merely refusing to work with nonunion men, i. e., plaintiff's drivers, but it is plain that they are not employed and do not work with plaintiff's men. They are employees of the various steamship companies, who admit that they would accept all of the freight brought by plaintiff's trucks, if the checkers, weighers, etc., would perform their work upon it, but that, if they ordered them to do so, they would all quit, and, as all of such dock workers appear to be organized into some union or other, the companies say they would be worse off than the plaintiff.

The defendants admit that 15 per cent of plaintiff's present force are now members of the defendant Teamsters' Union. They strenuously contend that their acts, of which plaintiff complains, are merely directed to prevent union men (checkers, weighers, scalesmen, etc.) from working with plaintiff's nonunion men; yet it is a most remarkable circumstance that these union truckmen (comprising 15 per cent of plaintiff's force) have not left plaintiff's employ or in any way attempted to refrain from working with plaintiff's other or nonunion men. Thus it appears that the only union work-

men who are actually working with nonunion men voluntarily consent to continue to so work, and with defendants' consent.

In the last analysis, therefore, the defendants' acts have but one purpose; that is, the unionization of plaintiff's workmen against their will under penalty of discharge, and instead of persuading the individuals concerned, or a substantial majority of them, by showing the various alleged benefits to be derived from joining this union they command the plaintiff to boycott its own workmen, at the peril of disorganizing its entire force, by voluntary withdrawals upon their refusal to join the organization.

It is stated repeatedly that the defendants' members shall handle "plaintiff's goods" if it is trucked by union drivers. The merchandise in question is not plaintiff's; it never was, and never will be. It belongs to persons against whom defendants have no grievance and who, in turn, have no control over the situation. It is contended that the defendants are merely exercising their right to refuse to handle material upon which nonunion labor has been employed. The labor of one of plaintiff's nonunion drivers is not employed upon this freight any more than the labor employed in making the cars, say, of the Union Pacific Railroad in which these goods were carried before arriving at the terminal in New York was so employed, and yet the defendants do not contend that they are enforcing the same right against such workmen, or the truck drivers who transferred this freight at Buffalo, Chicago, or San Francisco. The plaintiff is the only one of all the carriers involved in each shipment who is singled out for discipline.

"The right of one man to refuse to work for another on any ground that he may regard as sufficient" is a frequent quotation, and yet the refusal of any one of plaintiff's employees, union or nonunion, to work for plaintiff is not in any way involved. The only union men who can rightfully be said to be working with nonunion men do not seem to desire to exercise that right.

It is claimed that the acts of defendants, if successful, will broaden the field of employment for union teamsters. Plaintiff, however, is not charged with refusing to employ union teamsters. In fact, the defendants admit that 15 per cent of plaintiff's workmen are members of other teamsters' unions. Plaintiff does not discriminate in any way between a union or nonunion man. If any individual is competent and capable, and the plaintiff desires his labor, it employs him, irrespective of whether he belongs to the defendants' union or any other labor organization. The plaintiff's field of employment, therefore, is as open to union drivers as it possibly can be.

It is charged that the court's preliminary order is unlawful because it compels the defendants' members to work with nonunion men. It does nothing of the kind. Its members, one or all, can refuse to work at any time they see fit, without in any way coming within the purview of this order. The order merely restrains the defendants' members from singling some distant shipper's merchandise out of the mass presented and refusing to check or weigh it simply because it or part of it happened to be brought from the freight station to the dock in one of plaintiff's trucks. The fact is that defendants seek to get this court to rubber stamp their demand

that nonunion men be ordered to work with union men, although it is just as much a nonunion man's right to refuse to work with a union man as vice versa.

This court is satisfied that the facts as thus far outlined by the papers submitted show sufficient facts to warrant the continuance of the injunction until a trial of the merits has been had. In the meantime no harm can come to the defendants unless, of course, they violate the order; whereas the plaintiff will be protected to a certain extent, as it has a right to be.

Motion granted.

Two separate appeals were taken from this decision; the defendant unions and members appealed and the International Mercantile Marine Co. appealed. These appeals were decided on November 21, 1919, and are reported in 178 New York Supplement, pages 713 and 722. The appellate division of the supreme court, second department, reversed the above decision and in each case denied the motion for preliminary injunction before trial. Judge Kelly, expressing the majority opinion of a divided court, said in part concerning the case in the appeal of the unions:

We are concerned on this appeal solely with the question of the legality and propriety of the preliminary injunction issued in this action, originally without notice and continued after argument.

If disputes of this kind are to be reviewed in courts of equity, the plaintiff must present a case in conformity with equitable principles, and upon the papers before the court on this appeal I think it fails to present such a case. The plaintiff does not make the employers, or common carriers, or shippers of freight, parties to this action. We are dealing here with the facts presented by the record, and with conditions prevailing in the months of January, February, and March, 1919. We have here no dispute between employer and employee. No common carrier or employer, or shipper or receiver of freight is before the court complaining of the defendants. On the proof here one trucking concern, the plaintiff, is before the court, complaining that it can not transact its business, although 75 per cent of the truck owners in the port of New York have no difficulty with the defendants. There is but one other trucking concern mentioned in the affidavits as involved in the same controversy, and that concern is not before the court as a plaintiff. Despite the agreement of its fellow truck owners, the plaintiff will not agree with the defendants; and, so far as the record discloses, the immediate cause of the break between plaintiff's concern and the defendants is its refusal to accede to the demand for an 8-hour day and $1 an hour for overtime for its drivers. These are the so-called "union rates." They are the rates paid by 75 per cent of the truck owners. The plaintiff pays its men the same regular wages as other truck owners, but it insists upon a 10-hour day and pays but 50 cents on hour for overtime. Of course, this gives plaintiff a great advantage over its competitors; its profits are greater; but is the assertion of such a right sufficient to justify a court of equity in issuing a mandatory injunction without notice, since continued after argument, compelling

the defendants, comprising the entire body of dock laborers in the port of New York, to work with the plaintiff's nonunion employees? Because this is the effect of the injunction.

There is no proof of any violence or intimidation in this record. The plaintiff's affidavits will be searched in vain for any evidence of unlawful overt acts by the defendants. There is no evidence of any appeal to the shippers or receivers of freight to refuse employment to plaintiff. There is no evidence of malice or animosity toward the plaintiff in particular, because the defendants have never refused to handle the merchandise brought to and from the docks by its union drivers. The sole object of the refusal to deal with plaintiff's nonunion employees is to bring about the same hours and the same pay for its drivers as prevail in 75 per cent of the trucking concerns in New York. This does not appear to be unlawful or unreasonable.

But it is said that this injunction, granted originally without notice, directed to this army of more than 100,000 laboring men, is not mandatory; that there is no obligation on the men to continue working if they do not wish to work with plaintiff's nonunion drivers. This argument, it seems to me, is no answer in a court of equity. We know that longshoremen and dock laborers who are not regularly employed, and who are paid by the hour, can not quit their work because of their necessities. A so-called "strike," even if it be lawful, is a serious matter, entailing loss and hardship on employer and employee; a last resort, to be avoided if it be possible by united effort. It appears that in this case the defendants have continued to work because of these considerations and in obedience to the preliminary injunction of the court, which gives to the plaintiff the full relief to which it might be entitled after trial.

There are diverse contentions concerning strikes and boycotts which affect public service, but I think these are for the legislative branch of government, and no legislature, State or National, has so far enacted that they are illegal.

I therefore vote to reverse the order and to deny the motion for preliminary injunction before trial.

The second appeal, by the International Mercantile Marine Co. is from a temporary injunction restraining it from refusing to accept for shipment freight hauled by the plaintiff companies. Judge Kelly, in giving the opinion of the court on this appeal, said in part:

It seems to me that the preliminary injunction, granted in this case originally without notice, and continued after argument, is contrary to law for several reasons:

The action is based entirely upon the allegation that the defendant common carriers knowingly and wrongfully permit the workmen to refuse dealing with the nonunion drivers of the league members. But each of the common carriers makes positive affidavit that the action of the dock laborers is without their assent and without their approval. No conspiracy between the common carriers and the dock laborers is pleaded or suggested. The affidavits for the carriers state that they are powerless in the matter, because, if they discharge their men, they can procure no one else to do the work, which is of so great importance to the entire community.

As already suggested, the plaintiff has not joined the labor organizations as parties defendant in the action. The preliminary injunction is unnecessary and uncalled for. If the injunction in the action against the labor unions is sustained, there is no reason or necessity for enjoining the steamship companies. If, on the other hand, it is dissolved, in my opinion it would be the height of folly to issue a mandatory injunction such as this against the defendants; because it appears that practically the entire force of dock laborers, checkers, weighers, etc., to the number of some 125,000 men, is unionized, and if they are left free to pursue their work and better their condition by lawful methods, any attempt by the steamship companies to force them to work with nonunion drivers would only result in a general strike and tie-up of the freight of the port. Upon the papers it is uncontradicted that it is impossible from a practical standpoint to obtain nonunion labor to perform the work.

Under elementary principles I think the injunction should have been denied. The dispute must be settled in the other case. From every point of view I think it was an abuse of discretion to issue such a mandatory injunction in advance of trial. Taking the case by itself, as the plaintiff sees fit to present it to the court, a preliminary injunction may benefit the two trucking concerns mentioned, enabling them to continue their exaction of the 10-hour day and payment of 50 cents for overtime; but it might ruin the 75 per cent of the truck owners in the port who are in accord with the labor organizations, and result in an embargo on the shipping in and out of New York, and would be unenforceable because it would bring about the very results which it purports to prevent. I think the order should be reversed and the motion denied.

LABOR ORGANIZATIONS—RESTRAINT OF TRADE—INTERFERENCE WITH INTERSTATE COMMERCE—CONSPIRACY—INJUNCTION—*Burgess Bros. Co. (Inc.)* v. *Stewart et al., Supreme Court of New York, Special Term, Kings County (June, 1920), 184 New York Supplement, page 199.*—The plaintiff is a foreign corporation, engaged in business as a dealer in lumber. Its principal business is in the exportation of lumber to foreign markets and for this reason is required to use extensively the various steamship lines docking in New York. The defendants are steamship lines and common carriers. Other defendants are the Truck Drivers and Chauffeurs' Local Union No. 807, Greater New York Lumber Handlers' Union Local No. 17122, Steamship Clerks' Union of Brooklyn and Staten Island, Local No. 975, I. L. A., and the Transportation Trade Council of the Port of New York and Vicinity. The teamsters, chauffeurs, and lumber handlers of the Burgess company went on a strike in January, 1920, to compel the company to maintain a closed shop. This the company refused to do, reorganized its business, and continued to transact its business on the open-shop plan. Thereupon the defendant unions in order to coerce the Burgess company and other companies to maintain a closed shop served notice upon the steamship companies that if they

received or accepted for transportation any of the Burgess company's or other blacklisted companys' goods said unions would call a strike of the employees of said steamship companies. The steamship companies in the face of this threat refused to accept the plaintiff's goods for shipment, and the plaintiff brought this action for injunction to prevent the defendants from conspiring together to prevent it from engaging in interstate and foreign commerce and to prevent the unions from calling, participating in, or threatening to call strikes with the purpose in view of preventing plaintiff's goods being handled in such commerce. In granting the injunction the court rendered a decision from which the following is quoted:

The moving papers herein show that all of the parties are engaged in a combination having for its object the exclusion of plaintiff's merchandise from transportation by defendant carriers, both where plaintiff is the shipper and where its customers are the shippers. The continuance of this condition makes it impossible for plaintiff to carry on export trade in any form. If combinations of this character are lawful, then it is impossible for any trucking to be done in New York City and vicinity except on terms that the Truckmen's Union permits, and it becomes entirely practicable for the Truckmen's Union to decide what merchandise it will haul and what merchandise it will not haul.

The affidavits of the union defendants generally admit the specific acts charged, and assert their legality.

This seems to me to be a combination to gain control over transportation, and to blockade the channels of trade against all but union merchandise, and against all concerns who do not make union contracts. Such a combination to exclude open-shop merchandise from the channels of trade and commerce and from the markets of the Nation is a conspiracy against public welfare, and deprives the public of their sovereign right of choice to purchase such goods as they want, because by artificial methods it keeps such goods out of the market. They will not permit anyone but themselves to handle shipments.

It appears the carriers knew of the rule laid down by the employees, and, so far as the papers go, have acquiesced in them without any protest. Common carriers owe an affirmative duty to perform impartial service, and it is unlawful to subject plaintiff to undue prejudice. Their duties call upon them as common carriers to serve the plaintiff and not discriminate against it. If the carriers and their terminal agencies, instead of joining with the unions in this combination, by submitting to this discrimination for fear of a strike, had stood squarely for the performance of their public duties it is doubtful if the plaintiff would now be in court. The carriers appeared to have aided, abetted, and encouraged the unions by seeking to evade their duties to handle the plaintiff's goods without discrimination.

The facts herein seem to present a conspiracy within this definition:

"A conspiracy is sufficiently described as a combination of two or more persons by concerted action to accomplish a criminal or

unlawful purpose or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

They show a combination to violate the positive provisions of the shipping act and the provisions of section 5440 of the Revised Statutes (U. S. Comp. St. 10201).

Under the provisions of these statutes it seems clear that a refusal on the part of the carriers to transport the plaintiff's merchandise constitutes a violation of law and a crime, and that the defendant unions and officers are engaged in an unlawful conspiracy when they induce, aid, and abet the carriers in committing this misdemeanor, and threaten them with a strike unless they commit the misdemeanor.

The combination presented in this case is in violation of both the shipping act and Revised Statutes, and the plaintiff, being irreparably injured in its property rights by acts done in furtherance of such conspiracy, is entitled to an injunction.

While it is indisputable that a man may enter any vocation that he chooses, yet if he sees fit to select a field indissolubly linked with the rights of the public, such as that of a common carrier, he must subserve his own rights to that of the public welfare, and must at all times stand ready and willing to assume all of the exacting duties which he knows are owed the public. When he enters the public service he impliedly acquiesces in assuming all of these obligations. He must either get out of the transportation business or serve all persons alike.

Employees of steamships and those employed in and about the docks and all others associated in or connected with and necessary to the conduct of business of common carriers should perform their usual services regardless of whether the merchandise is worked upon, or handled, received or delivered by union or nonunion men, and such service should be impartial and uninterrupted. The plaintiff is not asking anything unjust or unfair in insisting upon the free use of the transportation lines. It does not lie with union leaders to lay down the proposition that the last word in deciding what merchandise shall or shall not be transported should vest exclusively in them.

The court distinguished this case from the Reardon cases above, decided by the appellate division, in that the common carriers and shippers were not made party to the action therein, while here their complicity, or at least assent to the conditions complained of was an essential factor in the proceedings.

The opinion concluded:

The papers sufficiently establish, for the purpose of the present application, and until the rights of the parties and the issues herein can be determined on a trial, the existence of an unlawful conspiracy on the part of the defendants, and therefore the preliminary injunction as prayed for herein is granted.

LABOR ORGANIZATIONS—RESTRAINT OF TRADE—INTERFERENCE WITH INTERSTATE COMMERCE—SECONDARY BOYCOTTS—INJUNCTION—*Buyer* v. *Guillan*, *United States Circuit Court of Appeals* (*Feb. 2, 1921*),

271 Federal Reporter, page 65.—Samuel Buyer & Co. were "engaged in the business of manufacturing and selling elastic garters and notion specialties." The principal office and salesrooms were in New York City and the factories were in Norwich, Conn., and Norfolk, Va. The defendants are the Old Dominion Transportation Co., its general agent Guillan, and a large number of labor unions connected with the shipping of goods by water, the most important of which are the District Council, No. 16, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers, and the International Longshoremen's Association. The Citizens' Trucking Co. (Inc.) employed both union and nonunion men. Buyer delivered a shipment of raw materials for his Norfolk factory to this trucking company for transportation to the docks of the Old Dominion Transportation Co., the only steamship line plying between New York and Norfolk. When the goods arrived at the dock, the Old Dominion Co.'s employees, who were highly organized, refused to unload, check, or weigh the shipment because the trucking company refused to maintain a closed shop and employ none but union labor. The Old Dominion Co. thereupon refused to accept the shipment. This incident occurred on July 8, 1920, and was repeated on July 12. The same thing took place in connection with a shipment by the International Cork Co. of Brooklyn.

Buyer thereupon brought this action for an injunction against the defendants, alleging that the Old Dominion Co. had violated its duty as a common carrier and that it had entered into a combination with the labor unions in violation of acts of Congress, among others the Sherman law, to prevent the handling or transportation of the plaintiff's merchandise or of any merchandise handled or operated on by nonunion men or which is offered for transportation by any transfer company or individual teamster not employing union men exclusively. The court sustained the plea for a preliminary injunction on the ground that the agreement of the unions not to handle goods which have been handled by nonunion labor was in restraint of interstate commerce and a violation of Federal laws. The opinion in part is as follows:

While it is true that the injunction asked for is of a mandatory nature, rarely granted on affidavits, the question is really one of law and we believe that it will be to the interest of the public and with the approval of the parties with the exception of the Old Dominion Transportation Co. to dispose of the question now.

It will be seen that the representatives of the unions admit the existence of an agreement that their members will not handle the plaintiff's interstate shipment unless he sends them to the Old Dominion Transportation Co. by some transfer agency operated entirely by union men and the Old Dominion Transportation Co. admits that it will not transport his shipments until its employees consent to

handle them. For this reason it may be regarded as a party to the combination. It is also plain that the plaintiff has sustained and is sustaining and will sustain in the future special and irreparable damage as the result of this combination for which he has no adequate remedy at law because of the difficulty of ascertaining the damage in case of each shipment refused and of the necessity of bringing a multiplicity of suits.

The whole case of the defendants and the conclusions of the learned judge of the court below are based upon the law of the State of New York as laid down in Bossert *v.* Dhuy, 225 N. Y. 342, 117 N. E. 582 [Bul. No. 246, p. 129], to the effect that a combination of individuals whose primary intent is the protection of their own interests, as, for instance, to establish complete unionization of the longshore work of the water front of the port of New York, not accompanied by violence or intimidation and not to gratify malice, is lawful, even if it does injure others.

In Duplex Printing Press Co. *v.* Deering, 252 Fed. Rep. 722 [Bul. No. 258, p. 109], we followed this view and also held that such combinations did not violate the Sherman law. We construed section 20 of the Clayton Act as legalizing a secondary boycott so far as it consists in refusing to deal with anyone who deals with an employer whose employees are on strike. But this decision has lately been reversed by the Supreme Court holding that if the combination was in violation of an act of Congress it is of minor consequence whether either kind of boycott (primary or secondary) is lawful or unlawful at common law or under the statutes of particular States; that section 6 of the Clayton Act providing that labor organizations shall not be held illegal combinations in restraint of trade under the antitrust laws contemplates only such organizations as lawfully carry out their legitimate objects; that section 20 prohibiting United States courts and judges from issuing injunctions applies only to disputes between employers and employees. [41 Sup. Ct. 172.]

The combination in this case being in restraint of interstate commerce and no controversy between employer and employees being involved the order is reversed and the court below directed to issue a preliminary injunction in accordance with the opinion.

LABOR ORGANIZATIONS—RULES—EXPULSION OF MEMBER—LOSS OF INSURANCE—JURISDICTION OF COURTS—*Simpson* v. *Grand International Brotherhood of Locomotive Engineers et al.* (*two cases*) *and Smith* v. *Same* (*two cases*), *Supreme Court of Appeals of West Virginia* (*Feb. 11, 1919*), *98 Southeastern Reporter, page 580.*—The brotherhood named had had much trouble in regard to certain matters connected with the disposal of work by the Norfolk & Western Railway, which had finally been settled by an agreement known as the Elk Horn pool. This pool permitted steam engineers and electric engineers and firemen who worked in the capacity of engineers to work interchangeably with either steam or electric locomotives. The pool was broken up and certain engineers were permanently assigned to electric engines. Smith and Simpson each were thus

assigned. They were both then accused and tried by the brotherhood to which they belonged of having violated a rule of that organization which prohibited any member from interfering with or causing the breaking or changing of any agreement of the brotherhood with any employer. The divisions to which they belonged twice acquitted them of any wrong doing, whereupon one Stone, the grand chief engineer of the organization, in the exercise of his appellate jurisdiction and power of suspension, caused another trial to be had, and Smith and Simpson were declared guilty. Stone then suspended Smith and Simpson and permitted them to appeal to the convention or Grand International Division, which met triennially. This they refused to do. The effect of their expulsion resulted in the loss of insurance in the Locomotive Engineers' Mutual Life & Accident Association, as a condition both precedent and subsequent to retaining insurance therein was membership in the union or brotherhood. Suit was brought by each of the expelled members for the loss of their insurance and for wrongful expulsion. Both the brotherhood and the accident association were sued as corporations, and the members of the organizations were also sued as individuals. In affirming the judgment of the lower court in favor of the individual defendants and in reversing, for want of jurisdiction, the judgment against the brotherhood the court said in part:

A preliminary of vital importance in some aspects of the case is whether the Grand International Brotherhood of Locomotive Engineers has been brought within the jurisdiction of the court by sufficient process and pleadings. Upon the assumption that it was a corporation qualified under the laws of the State to do business here, the summons in each case as to it was served upon the auditor of the State, and it was impleaded as a corporation. It filed special pleas at rules denying that it was a corporation, to which plaintiffs replied generally, and the issues thus raised were determined in favor of the defendant, and the actions accordingly dismissed as to it. But in the same order in which the dismissal was formally adjudged the plaintiffs were permitted to amend both the summons and the declaration in each case by striking out the words " a corporation " and inserting in lieu thereof the words " a fraternal beneficiary association." The course pursued by the plaintiffs was adopted upon two theories: (1) Identity of the Grand International Brotherhood of Locomotive Engineers with the Locomotive Engineers' Mutual Life & Accident Association and the Locomotive Engineers' Building Association; and (2) liability of the association to be sued by its associate name under the provisions of chapter 55A of Barnes's Code, 1918.

There is no proof that the contracts of membership made between the plaintiffs and the association were understood or deemed by them to have been made in a corporate name. On the contrary, both admit in their testimony that the association is not incorporated. Not having been misled nor deceived as to the capacity in which

the association made its contracts with them, they are not in any position to invoke the doctrine of estoppel.

The Grand International Brotherhood of Locomotive Engineers and Locomotive Engineers' Mutual Life & Accident Association, the two corporations to which reference has been made, are not identical. The Grand International Brotherhood covers vastly more ground than the insurance association. Its purpose is the promotion of the general interests of railway locomotive engineers. The insurance merely provides life and accident indemnities for such members of the brotherhood as become certificate or policy holders therein, and the building association is a corporation owning and managing a brotherhood building in the city of Cleveland, Ohio. Relationship of the institutions is not determinative of the question of identity. Almost anything conceivable bears some sort of relation to everything else.

Lack of jurisdiction of the Grand International Brotherhood of Locomotive Engineers makes reversal of the judgment against it inevitable, and also renders it unnecessary as well as improper to pass upon any of the numerous rulings made in the course of the trials, in so far as they might, if it were a party to the cases, affect its interests. Without having brought the association within its jurisdiction, the trial court could not properly decide anything against it nor can this court do so. But since the court acquired jurisdiction of the individual defendants, it is necessary to determine whether it properly directed verdicts in their favor.

Although the plaintiffs claim to have been injured by wrongful and illegal acts of the defendants, the injuries of which they complain were deprivation of contractual rights. Both their right of membership in the division and in the brotherhood and the powers, privileges, and rights of the defendants within the same organizations are measured and defined by the organic or fundamental laws thereof, called the constitution and statutes and its rules and regulations. This contract governs not only the rights of individual members and local divisions but the higher tribunals and their officers as well.

But the construction of the organic agreement, by-laws, rules, and regulations of a benefit society or other unincorporated voluntary association belongs not to the court but to the board, council, or other tribunal provided for the purpose in the organization, if any. So long as the body upon which this power of interpretation has been conferred does not substitute legislation for interpretation, nor transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land in their conclusions and decisions, the courts can not interfere with them.

Stone's exercise of his power of suspension and appellate jurisdiction conjointly and simultaneously, so as to compel the expulsion of the accused members or loss of the charter and thus restrain the liberty of members in respect of their action in the trials, is harsh and drastic on its face and decidedly variant from the course of ordinary judicial procedure. But it must be remembered that the association was not formed in absolute accord with the scheme or plan of the State government. The mere reversal of a finding of

not guilty by a division would not affect an expulsion of a guilty member.

The propositions on which these observations stand are obvious corollaries of others to which the courts have yielded practically unanimous assent. The expulsion of a member of a voluntary association, whether incorporated or not, after notice, an opportunity to be heard, and a trial fairly conducted agreeably to the laws of the association, is conclusive upon the civil courts.

As nothing can be decided against the association without jurisdiction, and the judgment in favor of the other defendants is free from error and completely discharges them, there is no occasion to deal with the numerous assignments of error, based upon the other rulings of the court during the course of the trial. As to the Grand International Brotherhood, the cases will be remanded, with leave to the plaintiffs to acquire jurisdiction of its members by proper process and proceed with a new trial, if they shall see fit so to do.

LABOR ORGANIZATIONS—RULES—EXPULSION OF MEMBER—POWERS OF CENTRAL ORGANIZATION—*Love* v. *Grand International Division of the Brotherhood of Locomotive Engineers, Supreme Court of Arkansas (July 7, 1919), 215 Southwestern Reporter, page 602.*—J. C. Love and F. C. Stelter were members of the Brotherhood of Locomotive Engineers, their membership being in Local Division 554. The Grand International Division, commonly known as the G. I. D., was an incorporated organization, located at Cleveland, Ohio, with power to do business in Arkansas. Stelter had received an injury while operating an engine on the Rock Island Railroad and had sued the company for damages. The suit was settled by compromise, but the company refused to reemploy him, contrary, as he claims, to his contract with the brotherhood. However, the organization refused to secure redress in spite of the presentation of his claims to the various authorities of the order, in presenting which he was assisted by the appellant Love. While attending the convention of the G. I. D. for the purpose of securing a consideration of these claims, it was charged that the appellants, Love and Stelter, had violated an obligation of the order by publishing an attacking pamphlet which contained a complete statement of Stelter's case and his fruitless attempts to obtain redress from the local division, the brotherhood officials, and a prior convention of the G. I. D. Deceit, falsehood, and tyrannical influence were said to have been used to prevent a proper redress of grievances.

A committee was appointed to consider the charge of insubordination, and after hearing this committee recommended expulsion. This recommendation was acted upon by the G. I. D. after refusing to allow the appellants to appear before the board. A motion was then adopted giving to the grand chief engineer and the advisory board

power to hear and reinstate the suspended members on a proper showing. The nature of the committee's hearing was vigorously disputed, the appellants claiming that they did not know that it was anything more than an informal discussion of the situation and had no idea that they were being tried on the charges preferred against them. The committee, on the other hand, asserted that the appellants understood the procedure and that they admitted the authorship and responsibility for the circulation of the pamphlet.

The vote of expulsion was followed by a petition to the chancery court of Pulaski County seeking legal action to protect the interests of Love and Stelter, claimed to have been illegally violated by the order. This petition was ordered dismissed, whereupon the petitioners appealed.

The first insistence was to the effect that the G. I. D. had only appellate and not original jurisdiction to expel members of the subordinate divisions. The court cited apt provisions of the constitution of the organization, which were construed to confer original authority on the G. I. D. On this point Judge Humphreys, who delivered the opinion of the court, said in part:

It is hard to conceive what broader or more specific language could be invoked in an attempt to confer all power upon a body than was utilized in this section. The first clause confers jurisdiction on the G. I. D. over all subjects pertaining to the brotherhood, the next makes the enactments and decisions the supreme law of the brotherhood, and the next exacts complete obedience of every member of the order to the laws enacted, or decisions made by the G. I. D., touching any subject concerning the brotherhood. If this is not an investment of all power in a body by plain, unambiguous language, we are unable to detect the restriction or limitation. Touching upon the unlimited power vested in the G. I. D. by the first paragraph of this section of the constitution of the order, it was said by the court in the case of Simpson and Smith *v.* Grand International Brotherhood of Locomotive Engineers (W. Va.), 98 S. E. 580 [above], that:

"The powers thus vested in it expressly exclude any presumption of intent to adopt the limitations and rules of the civil laws, respecting either procedure or substantive rights in the order."

As to the nature of the offense committed, Judge Humphreys said:

Again, it is insisted by appellants that there was no by-law establishing the offense charged and fixing expulsion as the penalty. Section 92 of the constitution of the order provides that:

"All divisions, or members of divisions, are prohibited from issuing circulars or signing any form of petition relative to brotherhood business among members of the brotherhood or others. If issued by a division its charter shall be suspended, and the length of such suspension shall be at the discretion of the grand chief engineer. If issued or signed by a member, he shall be suspended or expelled: *Provided*, That the foregoing shall not prevent or hinder in any manner any official or division of the brotherhood in properly conducting

the business of the organization as to sending out notices, reports, etc., for the purpose of securing or giving information."

The third claim was that the procedure was contrary to the by-laws of the order. It appeared that there were detailed regulations for procedure in case of trial of members by subordinate subdivisions, but no regulations were prescribed covering the G. I. D.

Under these circumstances it was within the power of the G. I. D. to adopt a fair method of procedure, even though it did not conform to the method governing trials of the members before subordinate divisions.

The delegation of authority to the committee was also attacked, but the court held that this was the only practicable method and that it had been approved in other cases; while as to the conflict of evidence regarding the fairness of the trial, it was said that the chancellor's finding was in favor of the brotherhood, " which finding seems to be supported by the evidence."

The decree appealed from was therefore affirmed.

LABOR ORGANIZATIONS—RULES—POWER OF UNION TO MODIFY—*Burger et al.* v. *McCarthy et al.*, *Supreme Court of Appeals of West Virginia* (*Oct. 7, 1919*), *100 Southeastern Reporter, page 492.*—This was an action by three railway conductors, members of the Brotherhood of Railway Trainmen, against the 14 members of the grievance committee of said brotherhood for an injunction to prevent them from entering into a certain agreement with their employer, the Chesapeake & Ohio Railway Co. The grievance committee was the legislative body of the brotherhood and was intrusted with the promulgation of rules for the government of the members and with the drawing up of working agreements with the railway. The particular brotherhood here involved is composed only of employees of the Chesapeake & Ohio Railway.

Many years previous to this action the grievance committee of the brotherhood made a rule and entered into an agreement with the railway establishing this rule as a regulation of the employees. This rule provided that the runs on the railroad be apportioned among the employees of the railroad according to seniority of service. In 1918 the grievance committee made another rule changing the previous rule with regard to the apportionment of runs, and were about to enter into an agreement with the railway to establish this rule when the present action was brought. A temporary injunction was granted against the grievance committee, but on final hearing it was dissolved and plaintiffs' bill was dismissed. Plaintiffs appealed, but the judgment was affirmed. The opinion was in part as follows:

The bill avers that plaintiffs have been in the railroad service from 15 to 18 years, having commenced as brakemen and worked up to the position of conductors, and have been members of the Brotherhood of Railroad Trainmen for 13 years or more, and have thereby acquired property rights under the old rule or regulation, a right growing out of contract between themselves and their employer, and therefore a sacred property right, which the new rule, if put into operation, would destroy. It is seriously contended in brief of counsel that this right of seniority is a thing of value; that it is one of the cherished rights of railroad men, gained only by long and arduous years of service.

It is established by the evidence that the new regulation was adopted in the manner and by the body of representatives provided for by the constitution and by-laws of the Brotherhood of Railroad Trainmen.

Presumably the action of the general grievance committee was for the general good of the brotherhood; nothing appears to the contrary. We are furthermore of the opinion that the old rule, giving preference in making runs of trains according to seniority, did not create a property right in plaintiffs such as to justify the interference by a court of equity to prevent the operation of the rule.

We affirm the decree of the circuit court.

LABOR ORGANIZATIONS—SOLICITING MEMBERS FOR UNION—RIGHT TO ERECT HOUSES FOR DISCHARGED UNION MEN—*Diamond Block Coal Co.* v. *United Mine Workers of America et al., Court of Appeals of Kentucky (June 18, 1920), 222 Southwestern Reporter, page 1079.*—The defendant labor union, its officials, and its members were engaged in a campaign to organize the coal miners of the Hazard field and vicinity and make them members of their union. The plaintiff and other operators of mines in the vicinity refused to recognize or employ union labor and opposed the movement to organize the laborers. The Diamond Block Coal Co.'s mine was some 3 miles from the town of Hazard. The company maintained 78 houses for its employees. When the movement was started to organize the miners of Hazard field a few of plaintiff's employees joined the union and were for this reason discharged by plaintiff and ejected from the company's dwelling houses. The ejected miners and their families had no other employment in the vicinity nor had they any place to go to secure shelter. To meet this condition the union, after much difficulty, found a number of small available parcels of land which it leased and upon which it proceeded to erect shanties or shacks for the purpose of affording shelter to ejected miners and their families. The officials and members of the union also made some efforts peaceably to persuade other employees of the plaintiff to join the union. No violence was indulged in and none was threatened by the union or any of the other defendants, although

some threats were made by some persons supposed to be members of the union.

The company sued for an injunction against the union and certain other persons to restrain them from constructing the shacks or shanties for the housing of discharged miners near its property and further to restrain them from soliciting members for the union from among its employees. A temporary restraining order against the union was issued by the circuit court. On motion made by the union and other defendants to the court of appeals the order was dissolved. The decision of the court is in part as follows:

As there is no evidence to support the allegations of the petition that defendants have used threats, intimidation, coercion, and fraud to accomplish their purposes, and as these allegations are specifically denied by defendants, thus putting the burden of proof upon the plaintiff, and as it is admitted by plaintiff and its officers that its mines continue uninterruptedly to run, and no employee has been induced by defendants, or either of them, to leave its employment, and that its employees have the right to quit its employment at any time, it follows that the plaintiff has wholly failed to make out its case, unless it be that the peaceable solicitation of miners to become members of the organization in that district was a violation of the rights of the plaintiff, or that the leasing of the ground by defendants from Davis and others and the erection or attempted erection of the shacks or tenant houses was an invasion of the rights of plaintiff. In its last analysis, plaintiff's only complaint supported by evidence is that defendants have leased the ground and are proposing to erect shacks thereon, and are soliciting other employees to become members of the union.

While the United Mine Workers of America is a voluntary association, and not a corporation, it is recognized both by Federal statutes and the statutes of Kentucky. The association, through its officers, had a right to enter into a lease contract with Davis and to erect the houses for the shelter of their membership. Of this there can be no doubt. That it was going to house and care for laboring men who had been discharged and evicted by employers in that vicinity because the men joined the unions does not militate against the manifest right of the association to otherwise make a lease and erect houses. So long as the union keeps within its legal rights it may lease as much ground and erect as many houses as may satisfy its purpose, and it violates no right of the plaintiff, because the rights of two persons never conflict.

It may be urged that there is evidence in this record sufficient to warrant the conclusion that certain of the persons named in the affidavits as making threats or proposing injury to the plaintiff's employees or plant were at the time members of the United Mine Workers of America, and therefore acting for and on behalf of the union. Even if it be granted that these men or any one or more of them were members of the union, and that they made the statements with which they are charged, no injunction would lie against the organization on account of such threats.

In this jurisdiction the rule is thoroughly established that a labor organization, through its officers and agents, may organize new branches and solicit membership among employees of concerns that are opposed to union labor so long as they use only peaceable means, such as persuasion and argument, and are not guilty of threats against the person or property, intimidation, coercion, or fraud. No sufficient facts were shown on which the extraordinary remedy of injunction should have been granted to complainant in this case, as injunctive relief can be had in no case except where it is made to appear that complainant has no adequate remedy at law and that great and irreparable injury will result.

LABOR ORGANIZATIONS—STRIKE FOR RECOGNITION OF UNION—PICKETING—CONSPIRACY—INJUNCTION—ACTION FOR DAMAGES—*Heitkemper et al.* v. *Central Labor Council of Portland and vicinity et al., Supreme Court of Oregon (Oct. 11, 1920), 192 Pacific Reporter, page 765.*—The manufacturing and merchant jewelers of Portland, Oreg., are the plaintiffs. They employed a number of engravers, watchmakers and repairers, stonecutters and stone setters, members of the defendant union. The employees were being employed on an eight-hour basis and their wages ran as high as $45 per week. According to their own statements they were satisfied both with the hours of labor and the wages paid; they also openly admitted that they were satisfied with the conditions of labor and were pleased with their employers. The Central Labor Union, backing up Local Union No. 41 of the International Jewelry Workers, to which the employees belonged, called a strike of all the plaintiffs' employees for the purpose of making the employers recognize the union, deal with it in collective bargaining, and sign an agreement promising to maintain a closed shop. The employers had each individually refused to sign the agreement presented by the union. The strikers picketed the employing jewelers' shops and indulged in the usual tactics in such cases, such as carrying banners and wearing sashes inscribed with "Unfair to organized labor" and similar statements, parading back and forth before the employers' shops, speaking to and exhorting prospective customers not to deal with the plaintiffs, and similar acts. The picketing was intended to injure the plaintiff's business and it was successful. The plaintiffs were damaged, and because the defendants were insolvent and therefore no adequate relief could be had by suing them for damages the plaintiffs brought this action for an injunction to enjoin the picketing which was conceded to be peaceful. The strike commenced in July, 1919. The State legislature had that year passed a law (ch. 346) in which labor organizations were declared to be lawful organizations, and restricted the

power of courts to issue injunctions against them or to prevent them from engaging in peaceful picketing. The circuit court awarded judgment in favor of the plaintiffs and the defendants appealed. In affirming this decision the court held that as there was no dispute in this case as to hours, wages, or conditions of labor the above mentioned law did not apply and could not be regarded as permitting picketing for the purpose of forcing recognition of the union. The opinion in part is as follows:

There is no real dispute between the plaintiffs and the defendants as to wages, hours of labor, treatment, or conditions of employment.

We hold that under the facts in this case, chapter 346, Laws 1919, does not embrace or legalize picketing a man's place of business and destroying his patronage where the only question involved is the recognition of the union.

The complaint is founded upon conspiracy, and on that point the alleged and admitted facts bring the case within the purview of Alaska S. S. Co. *v.* International Longshoremen's Assn. of Puget Sound et al. (D. C., 236 Fed. 964 [Bul. No. 246, p. 160].

Regardless of any statute bearing on the subject, every fair-minded man must concede that labor has a right to organize and to use any and all lawful means to further and protect its own interests, and that in the absence of contract any individual, with or without cause, has a right to terminate his employment at any time and without notice. Organized labor is organized brain and muscle. It has all the legal rights of any other association and in this State they are specifically recognized by section 1 of chapter 346, Laws 1919. But under the existing facts the question is squarely presented whether or not, in the absence of a statute conferring such power, any organization has the right, even peacefully, to picket a man's store, drive away his patrons, materially injure his business, and continue to do so, for the sole purpose of compelling him to recognize the union.

When the evidence is analyzed, it clearly appears that the primary purpose of the picketing was to compel recognition of the union, and that it was the defendants' intent to make it continuous.

Even where the relation of employer and employee is shown to exist, and there is a dispute as to wages or hours of labor, there is a sharp conflict in the authorities as to whether there is such a thing as peaceful picketing.

But distinguished counsel have not cited, and after diligent search we have not found any authority which would justify or sustain picketing, even though it be peaceable, where the controversy is not between employer and employee, and there is no dispute growing out of employment but the purpose of the picketing is to induce the employer to recognize the union. As we analyze the authorities, the legal right peacefully to picket is largely dependent upon the purpose and intent, and the method and manner in which the picketing is done.

Assuming that the plaintiffs sustained material injury, the defendants vigorously contend that it was the result of picketing which was both peaceful and lawful, and that the damages were only incidental, for which the plaintiffs would not have any right of action; in other words, that it would be damnum absque injuria. Under

another state of facts that legal principle would be sound and sustained by the authorities; but in applying the rule both the facts and the motive are important.

Under the facts shown to exist in the instant case, we hold that chapter 346, Laws 1919, does not apply; that the relation of employer and employee did not exist; that there was no real or vital dispute about the scale of wages, hours of labor, or pay for overtime; and that the primary purpose of calling the strike, placing the plaintiffs on the unfair list, and picketing their places of business was to obtain the recognition of the defendant local union No. 41. Under such a state of facts, the damages are not incidental to the legal right of the defendants. It appears from the record that the defendants are insolvent, and that the plaintiffs have sustained material injury to their business, which will be continuous if the defendants are permitted to picket, and for which the plaintiffs would not have a complete and adequate remedy at law even in a multiplicity of actions. The decree of the circuit court is affirmed on the merits, but, for the reason that this is in the nature of a test case, it is modified as to costs, which neither party shall recover in either court.

Two judges out of seven sitting on this case dissented, and each rendered dissenting opinions in which they attacked the majority's interpretation of the proper application of the law and declared that the anti-injunction statute should be enforced in any and all cases, and that the picketing if peaceful should not be enjoined.

LABOR ORGANIZATIONS—STRIKE TO COMPEL CONTRACT—PICKETING—EFFECT OF STATUTE—BOYCOTT—RIGHT TO LABOR MARKET—*Folsom Engraving Co.* v. *McNeil et al. and Wright Company* v. *McNeil et al., Supreme Judicial Court of Massachusetts, Suffolk (March 20, 1920), 126 Northeastern Reporter, page 479.*—This was an action for tort by two photo-engraving companies against the members of a local union of workmen who were employees of companies doing such work as that engaged in by plaintiffs. The members of the employees' union drew up a contract by which the absolute right of "collective bargaining" was conferred upon the union. It also provided for preferential employment of union men at a minimum wage and forbade the "laying off" of permanent employees even if there was not sufficient work on hand to keep them employed. Various other provisions were contained in the contract, among which was one providing that no contracts, individual or otherwise, would be entered into conflicting with this contract. The union then presented the contract to the employers, many of whom had individual contracts with their employees, with the demand that it be unconditionally accepted as an entirety. This demand was refused, and the union declared a strike. In furtherance of their efforts to bring the employers to terms, the union resorted to picketing and intimidation

of faithful employees, who continued to work, by the use of scurrilous language and abusive epithets. Individual boycotting was resorted to and strenuous attempts were made to compel nonstriking employees working under contracts to breach their contracts and leave the city. Printed and written communications were published branding the employers as unfair to and prejudiced against union labor, and calling on others to refrain from dealing with the companies. The court granted an injunction against the defendants, saying in part:

The question for decision is not whether an individual employee who has contracted to perform labor can abandon his contract, leaving his employer to whatever remedy in damages he may have. It is whether by concerted action using the strike as a mass weapon the defendants could lawfully compel the plaintiffs to yield to their demands. The proposed agreement was presented as an entire contract to be unconditionally accepted.

If the plaintiffs declined to enter into the agreement the underlying purpose manifestly was to enforce acquiescence through the coercive power of a strike, which even where there is both a legal and illegal purpose is of itself illegal. (Bausch Machine Tool Co. *v.* Hill, 231 Mass. 30, 36, 120 N. E. 188 [Bul. No. 258, p. 127].)

The provision that the employer must retain and pay more employees than were actually or reasonably required for carrying on his business, and that disputes not covered by the agreement must be submitted to arbitration even if proper subjects for negotiation where the parties are willing to negotiate, were, until accepted, mere proposals, the refusal of which was wholly insufficient to justify the measures adopted by the defendants. The plaintiffs could not be compelled to make an involuntary contract, or to substitute compulsory arbitration for due process of law. (Haverhill Strand Theater *v.* Gillen, 229 Mass. 443, 118 N. E. 671 [Bul. No. 258, p. 108]; Reynolds *v.* Davis, 198 Mass. 294, 84 N. E. 457 [Bul. No. 77, p. 393].) But these provisions, while material and important, comprise a part only of the general plan to compel the plaintiffs, who were employing nonunion as well as union labor, "to unionize" their shops. The record states that prior to the vote to strike which followed the declination of the agreement no disagreement or controversy had arisen between the plaintiffs and their workmen. It is true, the agreement reads, that the plaintiffs in the employment of journeymen and apprentices will give preference to union men by notifying the union officials when additional journeymen and apprentices are needed, and if the union can not furnish and supply competent help, the employer may secure such help from other sources, and no express requirement is found for the discharge of nonunion men already under employment. No prolonged discussion, however, is needed to make plain that this was merely an indirect method which must culminate in a closed shop. The position of nonunion employees under the practical working of the agreement would gradually become so unbearable and intolerable that as they retired and were gradually eliminated by the process of selection the plaintiffs necessarily must resort solely to union workmen to recruit their in-

dustrial force. It is unnecessary to consider what the status of the parties would have been if the agreement had been mutually accepted and executed. (See Minasian *v.* Osborne, 210 Mass. 250, 96 N. E. 1036 [Bul. No. 99, p. 727].)

The right of the plaintiffs at all times to hire in the labor market, and to retain in their employment, such workmen as they might choose unhampered by the interference of the union acting as a body through the instrumentality of a strike, or of a boycott, or of a black list, is a primary right which has never been abrogated but remains unimpaired by our decisions. (W. A. Snow Iron Works *v.* Chadwick, 227 Mass. 382, 389, 116 N. E. 801 [Bul. No. 246, p. 171]; Folsom *v.* Lewis, 208 Mass. 336, 94 N. E. 316, 787 [Bul. No. 95, p. 341].)

Statutes 1913, chapter 690, an act to define the extent to which peaceful persuasion is permitted, is invoked as a shield for what has been done. But the statute is applicable only to a lawful strike lawfully conducted. It is unavailing as a defense on the present record. The prayer for the assessment of damages has been waived, and the defendants having deliberately, intentionally, and unlawfully entered upon a course of procedure materially interfering with the right of the plaintiffs unmolested to carry on business in their own way, they are respectively entitled to a decree with costs awarding injunctive relief, the terms to be settled by a single justice. (Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603 [Bul. No. 60, p. 702]; Cornellier *v.* Haverhill Mfg. Assn., 212 Mass. 554, 109 N. E. 643 [Bul. No. 189, p. 318]; Shinsky *v.* Tracey, 226 Mass. 121, 114 N. E. 957 [Bul. No. 246, p. 142].)

Labor Organizations—Strike to Unionize Electric Railway—Injunction—Interference with War Work and Mail—*Montgomery et al.* v. *Pacific Electric Ry. Co., United States Circuit Court of Appeals, Ninth Circuit (May 26, 1919), 258 Federal Reporter, page 382.*—The Pacific Electric Railway operated a line in Southern California which accommodated various military and naval posts or bases and also supplied various shipbuilding corporations and an oil refinery which was engaged in supplying the federally controlled railroads with oil. The company made it a condition precedent to procuring employment that each employee refrain from becoming a member of any labor organization. The railway was not under Federal control and therefore in no way obligated to grant its employees the increases in wages which were ordered by the Director General of Railroads; however, it voluntarily granted its employees the same increases in wages as called for in these orders, and they were satisfied as to their wages, hours of labor, and conditions of employment. The defendants, the Brotherhood of Railway Trainmen and the Brotherhood of Locomotive Engineers, unincorporated associations of Cleveland, Ohio, represented by Montgomery and Forquharson, attempted to unionize the railway company's employees, inducing them to violate their contracts of employment and

associate themselves with the defendants. They succeeded by various methods in inducing about 1,200 of the railway's employees to join their unions and thereupon issued an ultimatum to the railway company stating that unless it would recognize the union by July 2, 1918, at 7 o'clock they would call a strike of its employees and tie up the company's lines. The company secured a temporary restraining order against the brotherhoods to prevent them from interfering with its employees, and later it secured a temporary injunction, from which the defendants appealed. Circuit Judge Ross, expressing the opinion of the court which affirmed the order issuing the injunction, said in part:

The contention of the appellants' counsel that because the act of Congress of October 15, 1914 (38 Stat. 730, ch. 323), commonly called the Clayton Act, was not expressly mentioned in either the majority or dissenting opinions of the Supreme Court in the case of Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, we should hold that the court decided that case "upon the condition existing at the time of its commencement, and not upon the condition existing at the time of the decision," is wholly unsound. The exact reverse is manifestly true. That the order here appealed from accords with the decision in the case cited is expressly conceded in the brief for the appellants, where it is declared that—

"the injunction approved by the Supreme Court in the Hitchman case does the same violence to the provisions of the Clayton Act as does the order at bar."

And again:

"Certain it is that the provisions of the Clayton Act and the decision in the Hitchman case can not be reconciled."

Nor is it true that the Supreme Court made in the case cited no reference to the Clayton Act; for, notwithstanding the fact that that act was pressed upon its consideration, the court, in the course of its elaborate opinion, expressly declared it "needless to say there is no act of legislation to which defendants may resort for justification."

While it is perfectly true, as is expressly declared in section 6 of that act (Comp. St. p. 8835f), "that the labor of a human being is not a commodity or article of commerce," it is equally true that laborers in this country, in whatever field of operation, and whether of head or hand, are governed and protected by the same Constitution and laws that govern and protect the owners of property here. One of the things thus permitted and secured is the right of contract. The latter, freely and fairly made upon sufficient consideration, is inviolable. In the present case the complainant company made nonmembership in a union a condition of employment, and to that condition the employees in question agreed. Such was the contract of the parties.

With the contract between the complainant company and its employees the appellants, Montgomery and Farquharson, in their respective capacity, and others acting with them, undertook to interfere, not by "recommending, or advising, or persuading" such employees to break their contract and stop the work in which they were

engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States submarine base at San Pedro to give public warning to all persons concerned against any interference, or attempt to interfere, or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the outer harbor there, and to actually put naval guards on each car to enforce his command. Surely nothing more need be said to show the absurdity of the pretension that the appellants' interference with the existing contract between the complainant company and its employees was not that peaceful, lawful recommending, advising, or persuading the latter to cease work and terminate their employment, permitted by the provisions of the * * * [Clayton Act].

The order appealed from is affirmed.

LABOR ORGANIZATIONS—STRIKES—BOYCOTT—PICKETING—INJUNCTION—*Thomson Mach. Co.* v. *Brown et al., Court of Chancery of New Jersey (Aug. 14, 1918), 108 Atlantic Reporter, page 116.*—A number of the employees of the plaintiff company who are members of the Grand Lodge, International Association of Machinists, went on a strike. They posted pickets, attempted a boycott, and did other things which were calculated to aid the cause of the strike. They also maintained a building in close proximity to the plaintiff's factory, on which were posted many placards bearing statements of an unpleasant nature. This case was heard on a petition for a preliminary injunction in 1918 (104 Atl. 129, Bul. 258, p. 115) in which the injunction was granted. The present case is a supplemental opinion confirming the opinion in the previous case and is in part as follows:

I am still of the opinion that the act of the respondents maintaining in close proximity to the plant of the complainant a building upon which they maintained placards, upon which were printed statements of the following nature: "Don't scab. Honest jobs are plenty. Strike at Thomson Mch. Co.," etc.—distributing generally and handing employees and prospective employees of complainant cards drawing attention to the fact that there was a strike on, and that those who labored for complainant were scabs, and that complainant was unfair, communicating with users of machinery manufactured by complainant and with labor employed on such machines in the use or repair thereof with the purpose of establishing a boycott, were illegal and should be enjoined. (Jonas Glass Co. *v.* Glass Bottle Blowers' Association, 77 N. J. Eq. 219, 79 Atl. 262.)

The strike was unaccompanied by violence. The only illegal acts of which there was any evidence was the posting of placards, the maintenance of a black list, the distribution of the cards, and the attempted boycott. How far the court will go, where a strike has been accompanied by so many illegal acts as that it is apparent that the strikers have no intention of complying with the law, in enjoining the performance of illegal acts not proven to have been per-

formed, but so closely related with those already performed as to make it apparent that there is danger that they will be indulged in, I do not find it necessary to determine on this preliminary application. The complainant can be protected by enjoining the continuance of the illegal acts which have been proven to have been performed, with leave to at any time apply if any further illegal acts occur.

The injunction will restrain defendants:

First. From knowingly and intentionally causing or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by inducement or persuasion any employee of the complainant under contract to render service to it to break such contract by quitting such service.

Second. From attempting to cause any person employed by complainant to leave such employment by intimidating or annoying such employees by annoying language, acts, or conduct.

Third. From causing persons willing to be employed by complainant to refrain from so doing by annoying language, acts or conduct.

Fourth. From inducing, persuading or causing to attempt to induce, persuade, or cause the employees of complainant to break their contracts of service with complainant or quit their employment.

Fifth. From threatening to injure the business of complainant or of any corporation, customer, or person dealing or transacting business or willing to deal and transact business with complainant, by making threats in writing or by words for the purpose of coercing such corporation, customer or person, against his or its will so as not to deal with or transact business with the complainant.

Sixth. From displaying or circulating cards, placards, pictures, or other devices, either printed, painted, or written, in any place, reflecting upon the ability of the Thomson Machine Co. to make and fulfill contracts, or in any way casting reflection upon the reputation, ability, or conduct of the present employees of the Thomson Machine Co., or any of them, or any persons willing to become such employees.

Seventh. From communicating with the users of the machinery manufactured by complainant or with labor unions whose members work with said machines or on the repair thereof in such manner as to induce or persuade such users to discontinue the use of such machinery and prospective customers to refrain from purchasing such machinery and labor to refuse to work with such machines or on the repair thereof.

LABOR ORGANIZATIONS—STRIKES—COMBINATIONS OF EMPLOYERS AND EMPLOYEES—"OPEN SHOP"—RIGHT TO INJUNCTION—*State* v. *Employers of Labor et al., Supreme Court of Nebraska (Nov. 30, 1918), 169 Northwestern Reporter, page 717.*—In May, 1917, certain industrial disturbances took place in Omaha, finally culminating in interference with the comfort and welfare of large classes of the community, and in lockouts, strikes, disorderly assemblages, assaults, and damage to property. Prior to that year it had been the custom in that city for certain trades to make collective agreements through labor unions with associations of employers in such trades, but the

practice was stopped by the employers and it was sought by some of them to have their workers sign an agreement recognizing the "open shop" principle. A business men's association was formed which was influential in preventing agreements being made with the unions which did not recognize the "open-shop" principle. The unions attempted to establish a "closed shop." A strike of the teamsters in one of the building material and coal yards led to a general teamsters' strike where nonunion men were employed. Violence resulted and the employers established a lockout and refused to sell fuel and building material to the public generally, and, this preventing building construction, many building craftsmen were rendered idle. Conditions were becoming chaotic when this action was brought by the attorney general of the State against all employers of labor, both those belonging to associations and those who did not, and against a large number of labor unions and their officers in the city to secure an injunction. Injunction was allowed against the owners of the coal yards enjoining them from closing the yards and against the teamsters enjoining them from attacking nonunion teamsters. The attorney general appeals from that part of the judgment refusing an injunction against the other employers and unions and the Teamsters' Union appeals from the injunction against it. In the language of the court, as expressed by Judge Letton, the prayer for injunction by the attorney general was in substance as follows: "That the Omaha Business Men's Association, and all employers of labor in the city, be enjoined from committing any acts in restraint of trade, transportation, or commerce or conspiring so to do, and from punishing any of its members for failure to continue to cooperate with it; that the owners of coal and building material yards in the city be enjoined from refusing to sell their goods to anyone who is willing to pay the price for the same; that the labor unions and their officers be enjoined from agreeing to refuse to transport any commodity in the usual course of trade, from carrying on any unlawful business, from picketing, from threatening, intimidating, or interfering with any individual in performing lawful work, or from seeking to require any individual to join a union, and—'that the question of union or nonunion shops, whether advocated or contended for or against, by any of the defendants herein, be held in abeyance until the close of the present war.'" The opinion of the court is, in part, as follows:

Both employers of labor and workingmen may form organizations for their own personal benefit. Their right to form and organize associations is the same. That which is lawful for the employers is lawful for the employees. If there is no contract for any fixed term of employment, the employer may discharge, or the employee may stop work, at his own pleasure.

In such a case there is no law which prevents workingmen from combining for the purpose of improving working conditions, raising their general standard of living, procuring shorter hours of labor and higher wages, or for any other lawful and useful purpose. They have a right to refuse to work, if they believe this will aid them in accomplishing their object. They have a right, also, for that purpose to persuade other workmen to cease work, in a legal and proper manner, and to employ any other lawful means which will aid them in attaining their end.

On the other hand, employers may legally agree with each other that they will not adopt the "closed-shop" principle, but will require any man employed to work upon the "open-shop" principle, or may counsel and advise with each other for that purpose. They have as much legal right to refuse to employ members of labor unions as such members have to refuse to work in an "open shop," and the same legal right to adopt a course of conduct in concert.

Of the moral aspect of the respective legal right to combine, we can not take note in such a proceeding.

It may be that, in the great mass of testimony, some instance has escaped us where a contract relation existed, or malice was shown; but, if so, that fact, while perhaps affording an action for damages to the person whose rights were affected, would not warrant granting such an injunction as is asked for in this suit. While relief by injunction will be granted in proper cases by the courts, it is not their function to attempt to regulate by such process the relations between capital and labor. It is only when property or personal rights are assailed that the courts interfere. Viewed in the light of these legal principles, we conclude that evidence as to the Omaha Business Men's Association, and as to employers of labor generally, does not warrant the granting of an injunction against them.

The same considerations apply with respect to the injunction sought against the labor unions and their respective officers, with the exception of the Teamsters' Union. In the main, the acts in evidence with respect to the action of these defendants show simply a refusal by members of these unions to work upon the same job with nonunion men, and peaceable efforts by union members to induce other workers to join the union in their respective crafts. Taken as a whole, there is not sufficient evidence to sustain the sweeping and blanket injunctions sought by the attorney general in behalf of the State. These considerations dispose of the appeal of the State.

We are convinced that the evidence sustains the finding that the Teamsters' Union and its members conspired together to prevent the transportation of goods and merchandise within the city by assaults, threats, and other disorderly conduct. The evidence as to this is in sharp conflict, but the circumstantial evidence and the general situation which the record discloses with respect to the obstruction of commerce and interference with the attempted delivery of goods by nonunion teamsters is such as to convince an unprejudiced mind that the illegal acts occurred by reason of a concert of action instigated by the men directly connected with and in control of the organization.

On the whole case, we find no reason for interfering with the judgment of the district court; and it is therefore affirmed.

LABOR ORGANIZATIONS—STRIKES—EFFECT ON EMPLOYERS' CONTRACTUAL OBLIGATIONS—*The Richland Queen, United States Circuit Court of Appeals, Second Circuit (November 13, 1918), 254 Federal Reporter, page 668.*—*The Richland Queen*, a steamship belonging to the Richland Steamship Co., was in need of repairs and was sent to the Buffalo Dry Dock Co. on September 5, 1916. In October a dispute arose between the workmen and the dry dock company, the workmen demanding an eight-hour day, which the company refused to grant. A strike was declared and it was impossible to do very much work so that *The Richland Queen* was not repaired until December 2. Since no time had been fixed for the completion of the repairs it was understood that they should be completed within a reasonable time, and, taking this stand, the Richland Steamship Co. has sued the dry dock company for the loss of the use of its vessel. Decisions were rendered in favor of the dry dock company by Judge Hazel on the ground that the work was done within a reasonable time in view of the circumstances obtaining during the course of the repair work. The plaintiff points out the fact that the strike was a peaceful strike and thereupon cites a number of New York decisions where it was held that a peaceable strike is no defense to a claim for delay. In affirming the lower court's decision, Circuit Judge Ward said in part:

We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable strike and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike. The question, however, in each case is the same, whether the conduct of the employer was reasonable. A peaceable strike on frivolous grounds, which the employer did all he could to prevent, should be a defense against a claim for delay. On the other hand, a violent strike on justifiable grounds, which the employer either fomented or unreasonably resisted, ought to be no defense. Of course the employer in either case could end the strike by surrendering. We are not disposed to differ with Judge Hazel's finding that the dry dock company's performance was reasonable in view of the strike.

Circuit Judge Manton rendered a rather lengthy dissenting opinion in which he declared that the dry dock company should have averted the strike until the work in hand had been completed.

LABOR ORGANIZATIONS — STRIKES — INJUNCTION — UNLAWFUL ARRESTS OF STRIKE BREAKERS—*American Steel & Wire Company* v. *Davis, Mayor, et al., United States District Court, Northern District of Ohio (Dec. 17, 1919), 261 Federal Reporter, page 800.*—Certain organizations of workers in the steel industry

throughout the United States went on a strike. The plaintiff company operated one plant in Cleveland, Ohio, and seven plants in Cuyahoga County for the manufacture of steel and steel products, in which over 11,000 men were employed. A considerable number of the company's employees joined in the strike, and in order to continue operations the company employed other persons in other cities and States. These other employees were engaged under contracts which provided that transportation to Cleveland would be paid by the company, and in event the new employees were dissatisfied with conditions the company would provide them with transportation back to their homes. All these new employees of the company were proved by the company's affidavits to be American citizens of good character and habits. With reference to these affidavits the court said:

In my opinion, however, the citizenship of the persons thus engaged is not a material circumstance. The law would be the same if they were any persons entitled to the privileges and immunities accorded to citizens of the United States, including aliens lawfully admitted, pursuant to treaty and the immigration laws.

Shortly after the strike was declared the mayor of Cleveland, Davis, publicly announced that the police of the city would arrest all persons brought into the city for the purpose of becoming employed in the company's plants. In pursuance of this policy uniformed policemen boarded trains entering the city and arrested all persons who were on their way to plaintiff's plants and took them to police stations, where they were locked up. This was all done without warrants of arrest, without information or suspicion of the commission of a felony, and without the persons arrested having committed misdemeanors in the presence of the policemen. The sole reason for the arrests was that the persons arrested were "suspicious persons." In this manner the police arrested over 100 prospective workmen of the plaintiff's and caused at least 4 of them to return to their homes.

The plaintiff company sued for an injunction to restrain the mayor and police of the city of Cleveland from illegally and unlawfully arresting its employees. Judge Westenhaver in granting the injunction said in part:

It was not seriously contended before me that this procedure is legal. The law to the contrary is well settled.

In cases of felony arrest may be made without a warrant only when the arresting officer has information or knowledge of facts reasonably calculated to induce a belief that a felony has been committed and that the person thus arrested without warrant is guilty of having committed it. In cases of misdemeanors a warrant is always required, except when committed in view of the peace officer making the arrest.

The so-called "suspicious person" ordinance of the city of Cleveland confers no authority in conflict with those settled rules of law.

It follows then that the procedure pursued by defendant is illegal and that if a violation of plaintiff's rights results therefrom then an injunction should issue.

The history of defendants' interference with persons employed by plaintiff, or seeking to enter of their own initiative plaintiff's employment, is not fully covered by the affidavits on file; but, as already stated, this procedure has been pursued since a few days after the declaration of the strike. On one day, October 16, 1919, some 200 persons came to Cleveland for the purpose of entering the employ, either of the plaintiff or of some other manufacturer of steel and iron products. All of these were arrested, detained, investigated, and escorted by the police out of the city.

Peaceful, law-abiding citizens stand in awe of being arrested, and have a proper respect for public authority. The mere proclamation by the mayor and chief of police of a city that all persons seeking to enter the employment of the plaintiff, to take the place of other persons who have left that employment, will be arrested, detained, and investigated, would inevitably tend to prevent the plaintiff from obtaining employees and other persons to enter into its employment. The prejudicial effects to the plaintiff are sufficiently proved.

That plaintiff is entitled to relief by injunction in this situation is obvious from a consideration of well-settled legal principles. It is engaged in a lawful business and has a right to conduct that business without unlawful interference, either by its striking employees or by any other persons. It may solicit and procure persons to work in its plant, no matter where they reside, or whether citizens of the United States or not. No one may lawfully interfere with this right of plaintiff, and if deprived thereof its property is destroyed.

This is also equally true of all persons desiring to enter into the employment of plaintiff. To deny any such person that right because he does not live in Cleveland would be to abridge or deny to such person privileges and immunities belonging to every citizen of the United States and protected by its Constitution from a denial or abridgement by any State. The protection accorded by the constitution of Ohio is equally sweeping. The power to preserve the public peace and to arrest and prosecute persons for crime can not be made to support action depriving persons of these constitutional rights and privileges.

The courts have uniformly protected and enforced these rights by injunction. The legal principles which support equitable jurisdiction are too well known to require the citation of authority. The question has often arisen in suits to enjoin unlawful interference by striking employees and their pickets. Employees have ordinarily the right to leave an employment at will unless restrained by contract or law, either singly or in combination.

They have a right peaceably to persuade others to do likewise and to refrain from taking the places thus vacated. They have no right, however, by violence, intimidation, coercion, or threats to prevent the former employer from conducting his business at will, or from obtaining other persons to take their places or to prevent such persons from seeking and entering the places thus vacated. The rights are at least equal. In all cases in which picketing has been allowed, the courts have not hesitated to restrain or regulate picketing in such a way as is necessary to prevent violence, coercion, or intimidation

being used against the persons employed or seeking to be employed to take the vacant places.

What striking employees may not themselves do to prevent an employer from conducting his business may not be done by police officers under the guise of preserving the peace or preventing crime. Such conduct is outside any power or authority conferred by the law on police officers. Injunction will lie against police and other officers when thus acting beyond lawful power.

LABOR ORGANIZATIONS—STRIKES—INTERFERENCE WITH EMPLOYMENT—INJUNCTION—*Smith* v. *Bowen et al. Supreme Judicial Court of Massachusetts (Feb. 4, 1919), 121 Northeastern Reporter, page 814.*—Rice & Hutchins, employers, had a price-list agreement with the members of the Shoe Workers' Protective Union, who are the defendants in this action. This agreement made no provision that the employer was to employ only union men in his shop. However, the superintendent had been in the habit of employing only union men because he preferred them. In January, 1918, one Stafford, a member of the union, "voluntarily gave up his job" as a channeler, whereupon Smith was brought from Lynn to fill the vacant job. Smith was a nonunion man, and the superintendent told him to join the union before he was employed, which Smith accordingly attempted to do by putting in his application. The application was refused, but Smith was employed notwithstanding his not belonging to the union. Later the members of the union went on a strike to have Smith removed. At the employer's request Smith left their employ. He now brings an action for a permanent injunction to prevent the union from combining to prevent him from being employed by Rice & Hutchins. In granting the motion for a permanent injunction and thereby reversing the decision of the lower court, the court said, in part:

An agreement by an employer with a union to give all his work to members of the union is legal and a valid agreement. A strike by members of the union to enforce their rights under such an agreement is a legal strike. But the peculiarity of this case is that there was no stipulation to that effect in the price-list agreement between Rice & Hutchins and the defendant union. The price-list agreement here in question fixed the prices to be paid and the conditions (or some of them) under which the work should be done; in addition it gave to the union a right to have an agent "visit the factory during working hours," and "to have a shop committee." But this price-list agreement went no further. It did not stipulate that Rice & Hutchins should give all their work to members of the union. It is found, indeed, by the judge that the purpose of "the superintendent of the factory" of Rice & Hutchins was "to secure" union men and their shop "was to run as a union ship" in all departments with which the defendant union had to do. But a price-list agreement with a

union in which it is agreed that the union shall have a shop committee and an agent who shall be allowed to visit the factory during working hours is not in and of itself an agreement on the part of the employer to give all its work to members of the union. In case of such a price-list agreement the employer has a right to change his mind and decide not to employ union men because he has not made an agreement that he will give all his work to the members of the union in question. Inasmuch as the union before the strike here in question had not secured from Rice & Hutchins an agreement to give all their work to members of the union, a strike to compel Rice & Hutchins to employ none but union men was an illegal strike. (W. A. Snow Iron Works *v.* Chadwick, 227 Mass. 382, 116 N. E. 801 [Bul. No. 246, p. 171].)

It follows that the plaintiff is entitled to an injunction permanently enjoining the members of the defendant union from interfering and from combining, conspiring, or attempting to interfere directly or indirectly by striking or otherwise with the employment of the plaintiff by Rice & Hutchins.

LABOR ORGANIZATIONS—STRIKES—JUSTIFIABLE CAUSE—VIOLATION OF INJUNCTION—CONSTITUTIONALITY OF STATUTE REGULATING PUNISHMENT—*Walton Lunch Co.* v. *Kearney et al., Supreme Judicial Court of Massachusetts (Oct. 18, 1920), 128 Northeastern Reporter, page 429.*—The employees of the Walton Lunch Co. belonged to a union known as the Hotel & Restaurant Employees' International Alliance, Local No. 34. They desired a contract with the lunch company, which, among other things, called for a closed shop. The defendants, who are officers and members of the union, met the representative of the lunch company in his office and discussed the contract for two hours. No decision was arrived at, and it was agreed at the request of the company's representative to meet again the following day at the same place. On the following day, when the union representatives put in appearance, the company's representative could not be found. It was later learned that, although he was in his office at the time, he had concealed that fact from those in charge of the office and from the union men. The union used this as a cause for striking and proceeded to patrol or picket the company's lunch rooms. The manner of this picketing led to an injunction prohibiting it, but it was nevertheless persisted in. This action was brought to punish for contempt those who had violated the injunction. Two questions are involved, "Was the cause for the strike justifiable, and could punishment be meted out for contempt in a case like this without a jury trial, contrary to chapter 339, Statutes 1911?" In answering these questions the court handed down the following opinion:

The ruling that a strike for this cause was justifiable was right. This is not a case of a mere refusal to meet employees for discussion

of demands for change of wages or working conditions. It is not a declination to confer with strangers about the subject. It is a plain case of breach of good faith and of square dealing between man and man by intentionally failing without apparent excuse and without notice to keep an engagement deliberately made for further consultation touching their contractual relations with each other. It does not appear that the strike was in violation of the terms of any contract between the plaintiff and its employees.

The essential words of the final decree are that the defendants "are perpetually enjoined and restrained from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass, and intimidate the plaintiff's customers or intending customers, or his (its) present employees or those desirous of entering his (its) employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract."

There is no error of law in this decree. Although not minute as to details, it unmistakably enjoins in every particular all the acts and conduct of the defendants set forth in the findings of fact as means by which the strike was carried on. The scope of the decree is coextensive with findings as to methods used to enforce the strike. Forms of interference with the plaintiff's rights which are not found to have been practiced or threatened are not rightly included within the terms of an injunction.

The matter came on to be heard before another justice, who has reserved for our consideration in that connection the question whether Statutes 1911, chapter 339, is constitutional. The pertinent part of the statute is in section 1, which is in these words:

"The defendant in proceedings for violation of an injunction, where it appears from the petition filed in court alleging the violation that the violation is an act which also would be a crime, shall have the right to trial by jury on the issue of fact only as to whether he committed the acts alleged to constitute the said violation, and the said trial by jury shall take place forthwith, and if there is no sitting of a jury in the county where the contempt proceedings are to be heard, a venire shall issue to impanel a jury forthwith."

It is provided by section 2 that the act shall not apply to the proceedings in the probate court.

It is an essential element of a court that it possesses power to enforce its orders and to protect itself from having its authority flouted. It was said by Chief Justice Gray in Cartwright's case (114 Mass. 230, 238):

"The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery or other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of the Magna Charta and of the twelfth article of our Declaration of Rights."

This statement is complete, unequivocal, and binding upon us. To undertake to amplify or make it more clear by further discussion would be vain. Similar statements are to be found in the decisions of numerous other courts where the question has arisen.

Trial by jury of the question whether a contempt of court had been committed would be a serious limitation of the power of courts. It has been so held whenever the point has arisen. (Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 450, 31 Sup. Ct. 492 [Bul. No. 95, p. 323].)

A number of other cases were cited, the court finding therefrom that "the conclusion is inevitable that this statute is unconstitutional as applied to the case at bar."

LABOR ORGANIZATIONS—STRIKES—PICKETING—CLOSED SHOP—DAMAGES—*Michaels et al.* v. *Hillman et al., Supreme Court of New York, Trial Term, Monroe County (June 25, 1920), 183 New York Supplement, page 195.*—This was an action for an injunction and damages by Michaels and others against the Amalgamated Clothing Workers of America, certain of its members, and Hillman, its president. The plaintiffs are engaged in the clothing business and employ a large number of workers. Previous to 1915 the plaintiffs had had a contract arrangement with the United Garment Workers, an organization affiliated with the American Federation of Labor. Upon the breaking down of this union in 1915 the plaintiffs refused to have any more dealings with any unions whatever, but set up and maintained an inside shop organization of its workers and declared it to be their policy not to have in their employ any employees who were members of an outside organization or union. The Amalgamated Clothing Workers of America had organized most of the city of Rochester, where plaintiffs are located, and in 1919 entered into a contract with all the clothing manufacturers of that city except the plaintiffs. The aloofness of the plaintiffs aroused the hostility of the union, and it set about unionizing their plant. The plaintiffs always immediately discharged any of their employees who joined a union. The union knowing this, secretly induced about 200 of plaintiffs' employees to join the union, and then when plaintiffs still adhered to their policy of refusing to recognize it, it declared a strike and proceeded to picket the plant. Later, the greater part of plaintiffs' employees joined the United Garment Workers' Union with the sanction of plaintiffs, but this did not satisfy the officials and members of the Amalgamated Clothing Workers' Union, and the strike and picketing were continued. Violence and intimidation were resorted to by the strikers, which brought them a certain measure of success, causing plaintiffs damage. The court in granting plaintiffs' plea and awarding a permanent injunction against the unlawful acts of the union and its members said in part:

The case turns upon the question as to whether or not force, or what is equivalent to force, was employed by the defendants to secure

this recognition. If no threats, intimidation, force, violence, or other coercive measures were employed, the defendants are not liable, for they were within their rights in seeking to compel recognition by calling a strike. Whatever number of pickets was necessary to secure the reasonable and lawful purpose of the union is sanctioned by law, but where the number is swelled to 500 or 600, and at times to 1,000, made up in part of workers from other factories, the unnecessary and unlawful purpose to awe and intimidate by numbers is apparent. Intimidation may consist in numbers alone without any actual notice. Many of the workers in plaintiffs' factories were girls, and in such a case a large crowd of pickets, composed in part of women of foreign birth, with the calling of opprobrious names, and expressions and gesticulations of violence, would be sufficient alone to intimidate, without a single blow being struck.

Actual violence supplemented opprobrious epithets. There was no physical violence every day, but that was hardly necessary. An overt act of this kind now and then would be a sufficient warning, and a blow or disturbance now and then would be rumored about, and be quite adequate as an object lesson. It is enough if violence was employed with sufficient frequency to warrant the conclusion that it was a part of the program for conducting the strike. There were actual assaults upon employees, and interferences with and even attacks on the police. Twenty-nine arrests were made, which represent, however, only a small fraction of the number of misdemeanors actually committed. The number of police deemed necessary on the ground, and the necessity for reserves at the police station for emergencies, indicate the temper of the so-called picketers and the condition that existed. If the leaders admonished the strikers not to indulge in violence, there is no evidence that they followed the advice, or that anything was done by the union to punish the offenders. They created a situation from which violence might be expected, by congregating unnecessary crowds at the factories, and must take the full responsibility for the results, and can not be heard to exculpate themselves by the claim of advice given that was not heeded. The speeches made at the general meeting at Convention Hall show that the temper of the leaders was no more moderate than that of the rank and file of the workers, and these speeches were well calculated to lead them to believe that their conduct was not disapproved.

The defendants sought to interfere, also, with the contract of the United Garment Workers. While the strike was in progress, the plaintiffs' employees in large numbers joined the United Garment Workers affiliated with the American Federation of Labor, but the strike and its methods continued just the same. Salvation, it seems, could be secured only through the upbuilding of an organization represented by the defendants. The United Garment Workers had as much right on the ground as did the Amalgamated Clothing Workers. The latter has no patent right on unionism.

This intolerant attitude of the Amalgamated Clothing Workers toward the United Garment Workers savors of a species of domination which does not inspire confidence in their ultimate purposes.

But not only were the Amalgamated Clothing Workers opposed to the unionization of the plaintiffs' factories by the United Garment

Workers, but they were unwilling that independent contractors and home workers who were making garments for the plaintiffs should have the privilege of working for the plaintiffs. House workers were persuaded by promises of strike benefits, or by still more effective measures, to quit working for the plaintiffs.

Thus by means that were in part lawful, but in most part illegal, the defendants have sought economically to strangle the plaintiffs' business, in order to compel them to recognize an organization against their wishes. "Employees, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business." (Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45, 51.) The law should favor the lawful purposes of unionization, but "rights that are lawful, and purposes that are useful and just, can not, however, be effectuated and accomplished by unlawful means." (Auburn Draying Co. *v.* Wardell, 227 N. Y. 1, 124 N. E. 97 [see p. 172].)

All the defendants who acted in concert with respect to the illegal means conceived and employed are liable for the damages occasioned thereby. The national organization must bear its share of the responsibility. It had two national organizers on the ground before the strike was called, and it is a fair conclusion that they were directing the action of the joint board and the conduct of the strike in the interest of the national body.

A concert of action by a labor organization and its members to compel recognition of a union, or to redress grievances, by means of threats, intimidations, force, violence, or similar coercive measures constitutes a conspiracy, whether such intention was present at the inception of the strike or afterward, and a national unincorporated labor union is liable for damages, if its officers and agents, acting within the scope of their authority as such, called and carried on the strike, with the intention of using such unlawful means, and used such means; but the liability does not extend to the individual members who are not specially connected with such acts.

The plaintiffs are entitled to a permanent injunction, restraining the defendants substantially in the terms of the temporary injunction heretofore granted (181 N. Y. Supp. 165), and to damages to be hereafter determined.

LABOR ORGANIZATIONS—STRIKES—PICKETING—CLOSED SHOP—MONOPOLIES—JOINDER OF PLAINTIFFS—*Baldwin Lumber Co. et al. v. Local 560, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, et al., Court of Chancery of New Jersey (Feb. 25, 1920), 109 Atlantic Reporter, page 147.*—The complainants are 15 in number, and are operators of lumber yards and dealers in building and masons' materials who have associated themselves solely for the purpose of prosecuting this action for an injunction to restrain the defendant unions from engaging in picketing their yards. The defendants are three local unions, the International Brotherhood of Teamsters, etc., the Hudson County Building Trades Council, the Coal Drivers' Union, and various individuals said to represent other unions. These unions had each year

made agreements with the various complainants fixing wages, hours of labor, establishing closed shops, etc., and as January 1, 1920, approached the unions prepared new demands which they desired incorporated in the agreement for 1920. These demands called for a weekly wage increase of $10 and the reduction of the working hours per day from 10 to 9. The complainants would not agree to any larger increase in wages than $3, whereupon the unions declared a strike. In furtherance of the strike various members engaged in "peaceful picketing" of the complainants' yards. Strangers were also hired to engage in picketing the yards. The tactics of the latter although persuasive were not in all cases exactly peaceful. The complainants by reason of these activities were compelled to shut down their respective businesses. They then associated themselves together and brought this action for an injunction to restrain the picketing. In rendering the decision granting the injunction the court first disposed of questions of jurisdiction, dismissing the bill as to the Coal Drivers' Union, which did not appear to be properly before the court, but retaining jurisdiction as to the teamsters, who were shown to have been active, and properly represented at the proceedings. Continuing, the court said:

The next objection denies the right of complainants to unite in the prosecution of this action, and the facts pertinent to its consideration are: That the former contracts between the employers and their employees were joint contracts executed by complainants and the defendant organizations; that the contract in question is of the same joint character; that the vote to order the strike was taken at a joint meeting of the unions; that the strike against all the complainants was called and went into effect at the same time, and has been directed and managed in the same way and by the same parties, and the result has been common to all the yards—a complete cessation of business. The rules of the court are to be liberally construed, and rules Nos. 5, 23, and 24 (100 Atl. vii, viii) seem clearly to sanction the joinder of complainants in prosecuting this action, in which there is a common question of law and facts arising out of the same transactions with the defendants, and in which they seek to prevent defendants by their joint conduct doing them severally an injury for their joint refusal to comply with defendants' demand for the execution by them of this joint contract. Their grievances and injuries arise out of the same joint transactions, and are the results of the same joint action and conduct of defendants; and no satisfactory reason has been shown why they should not be permitted to jointly ask for relief.

Objection is particularly urged against the injunctive relief sought on that branch of the case relating to the execution of the contract containing the provisions for making the yards of complainants closed shops to all nonunion men, the insistment being that, if such contracts are illegal, complainants need not perform them; and, further, because complainants during the past four years have executed, without objection, contracts containing similar provisions.

Contracts of this character, containing provisions designed to unionize an entire industry in a territory as large as Hudson County, do not appear to have come directly before our courts for consideration, except as hereinafter mentioned. In other jurisdictions where they have been involved they have uniformly been held to be illegal as against public policy. (Connors *v.* Connolly (Connecticut Court of Appeals), 86 Conn. 641, 86 Atl. 604.)

The illegality of such contracts is pronounced upon the fundamental principles of our theory of government, to which monopolies of any kind affecting in any way the utmost freedom of the individual to pursue his lawful trade or business are abhorrent.

The remaining question to be considered relates to the restraint on peaceable picketing. It is insisted that the restraint imposed under the rule, and which is asked to be continued by preliminary injunction, enjoins peaceful picketing and persuasion, and that in this respect it is beyond the scope of the restraint imposed by Vice Chancellor Bergen in Jonas *v.* Glass Assn., 72 N. J. Eq. 653, 66 Atl. 953, and approved by the Court of Errors and Appeals in 77 N. J. Eq. 219, 79 Atl. 262, in affirming the decree in the case.

A careful consideration of the vice chancellor's opinion, and of the opinion of Chancellor Pitney in the court above, and the dissenting opinions therein, do not support this insistment. Vice Chancellor Bergen quoted with approval from the opinion of Judge McPherson in A. T. & S. F. Ry. Co. *v.* Gee (C. C.), 139 Fed. 582, that, "There is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching," and later in his opinion the vice chancellor held that such picketing "in its mildest form is a nuisance, and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted * * * committee, whose very presence upon the highway for such purpose is deterrent, is just as destructive of his property, and is a boycott which prevents the sale of his product." This language was neither criticized nor modified in any of the opinions in the court above. Chancellor Pitney in delivering the prevailing opinion summarized the 10 features of the strike to which the restraint advised by Vice Chancellor Bergen applied, and his comment on No. 3 was:

"With respect to other persons not as yet employed, but willing to take employment under the complainant, the defendants are restrained from interfering to prevent this by coercion or personal molestation and annoyance, but are not restrained from using mere persuasion in such a case."

The present hearing was on a return to a rule to show cause why the injunction should not issue, the rule having laid down certain restraints in the meantime. These restraints were embodied in a temporary injunction not affecting certain of the plaintiffs whose plants were not shown to have been affected, other restraints also being added, binding upon the unions and "their representatives and those associated with them in the promotion and management of the strike."

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—CONSTITUTIONALITY OF ANTI-INJUNCTION LAW OF OREGON—*Greenfield v. Central Labor Council of Portland and vicinity et al., Supreme Court of Oregon (Oct. 1, 1920), 192 Pacific Reporter, page 783.*—George L. Greenfield was a shoe merchant in the city of Portland, Oreg., where he maintained two stores in which he employed a considerable number of clerks. His clerks belonged to the Retail Clerks' International Protective Association, Local Union No. 1257, which is a part of and is represented by the Central Labor Council. On March 1, 1919, Greenfield entered into an agreement with the clerks' union, good for a 12 months' period, in which stipulations were made as to hours of labor, holidays, times for meals, and payment for overtime. He also agreed to maintain a closed shop. About November 15, 1919, Greenfield required certain of his employees to work four hours a week overtime without additional compensation; he also failed to maintain a strictly closed shop, and on January 13, 1920, he wholly repudiated his contract. The union called a strike on January 19, and at once proceeded to picket plaintiff's shops. The pickets bore banners and wore scarfs on which it was declared that plaintiff was unfair to organized labor, and they accosted prospective customers and endeavored to persuade them not to deal with the plaintiff.

The State of Oregon passed a law, chapter 346, Laws of 1919, declaring labor unions to be lawful organizations; restricting the powers of any court of the State in the granting of injunctions; declaring the labor of a human being not a commodity or article of commerce; and prohibiting the indictment, prosecution, or trial of any person or combinations of persons for any act in furtherance of the bettering of his or their conditions, unless such act should be forbidden by law if done by an individual.

Greenfield brought action on January 23, 1920, for an injunction against the union to stop the picketing, alleging that the pickets were ruining his business, and as the defendants were insolvent he had no adequate remedy at law. The circuit court granted his petition, and an injunction was issued and the defendants appealed, declaring that under the law they could not be enjoined from picketing. The court upheld the constitutionality of the law and modified the judgment granting the injunction. The opinion is in part as follows:

The vital question presented is the application, construction, and constitutionality of chapter 346, Laws 1919.

Although we agree with the trial court in its findings as to what the pickets said, yet, as we construe the record, they spoke in an ordinary tone of voice and not in a loud or unusual manner. Policemen were present and there is no evidence of any complaint or arrests, or that there was any violence or disturbance of the peace. In fact, the pickets were placed in front of each store for the sole

purpose of advising people entering or departing therefrom that "this place is unfair to organized labor. Please do not patronize it. Friends of union labor and all workingmen will not patronize this place. All others should not." That was the sum and substance of their offering. The words were uttered in the usual and ordinary tone of voice used by people speaking to others on a public street.

It is also shown by the affidavits of three of his employees that the plaintiff had violated his contract with them in respect to the payment for overtime, although this was denied by his manager. In other words, there was a dispute between an employer and employees growing out of an employment, within the terms and provisions of chapter 346, Laws 1919.

Because a strike was declared and the union employees walked out, plaintiff claims that the relation of employer and employee ceased to exist.

The contract between plaintiff and the defendant union, as stated, did not expire until March 1, 1920. The strike was called on January 19, 1920. At that time, according to the finding of the trial court, all of the employees of the plaintiff at both of his stores, except four, were members of the defendant union. The complaint in this suit was filed on January 23, 1920. Based upon such facts, we hold that the relation of the employer and the employee and the terms and conditions of employment continued to exist after the strike was called, bringing the case under sections 2 and 3 of chapter 346.

Assuming that to be true, plaintiff contends that such sections are unconstitutional. Section 2 of chapter 346 is identical with paragraph 1464, Arizona Civil Code of 1913, and with section 20 of the Clayton Act. If it is unconstitutional, so are the two latter laws. The Clayton Act was passed in 1914. In so far as we are advised its constitutionality has never been attacked and no Federal court has ever declared it unconstitutional.

Again, section 2 of chapter 346 is identical with paragraph 1464 of the Arizona Civil Code of 1913, the constitutionality of which was sustained in the opinion of the Supreme Court of that State on December 14, 1918. Chapter 346 was enacted by the Oregon legislative assembly of 1919, and in the absence of the referendum, became the law of this State 90 days after its passage. In other words, at the time of its adoption section 2 of chapter 346, which is a copy of paragraph 1464 of the Arizona Civil Code of 1913, had been construed and its constitutionality was sustained by a decision of the Supreme Court of Arizona.

The question was raised in the case of Truax *v.* Corrigan, 20 Ariz. 7, 176 Pac., 570 [p. 222].

By the terms of the contract, the defendant union had notified all members of labor unions that the plaintiff had signed an agreement with it and in effect that he was "fair to organized labor." After plaintiff broke the contract the strike became and was legally justified, and the defendants then had at least the legal right to notify members of the union that he was "unfair to organized labor." It was a justifiable strike for a lawful purpose, and, as we construe the record, it was done in a peaceful and lawful manner. It was called because the plaintiff breached his contract and to further and protect the interests of the union and its members. Any damage to

plaintiff therefrom was incidental to the strike and was damnum absque injuria.

The decree of the circuit court will be modified, and one will be entered here permitting the defendants during business hours to place and maintain one picket only, on the outer edge of the sidewalk, at each public entrance to plaintiff's stores, with authority to each picket to wear a banner or scarf inscribed with the words, "Unfair to organized labor, Local Union No. 1257," and in the usual ordinary tone of voice used by one individual in addressing another on the public street to say to any prospective customer: "This place is unfair to organized labor. Please do not patronize it. Friends of union labor and all workingmen will not patronize this place"—but not in any manner to impede or interfere with the right of any one to enter or depart from the said stores or any passer-by. Any picket so placed is hereby enjoined from the doing of any other act or thing which is intended to or would divert or turn away any patron or prospective customer from plaintiff's places of business. Otherwise the defendants and each of them, their agents, servants and employees, are hereby enjoined and prohibited from interfering with, intimidating, or harassing the plaintiff or any of his employees at his said place of business or from the use of any violence, threat, or intimidation to induce any customer or patron to withhold or withdraw patronage from the plaintiff.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—EFFECT OF CLAYTON ACT—*Langenberg Hat Co. et al.* v. *United Cloth Hat and Cap Makers of North America et al., United States District Court, Eastern District of Missouri (June 11, 1920), 266 Federal Reporter, page 127.*—The defendants are a labor union, and its members brought about a strike throughout the entire trade for the purpose of unionizing it. During the strike unlawful picketing was indulged in and acts of violence were committed. The employers sued for an injunction, and a temporary restraining order was granted. In making the injunction permanent the court referred extensively to the Kinlock Telephone case, p. 212, saying in part:

I think upon the merits that no necessity exists for any lengthy dissertation upon the law which applies to the facts adduced in evidence. Lately this court, in the case of Kinloch Telephone Co. et al. *v.* Local Union No. 2 of International Brotherhood of Electrical Workers, 265 Fed., 312, took occasion to discuss some of the things which can not lawfully be done by striking employees as well as many of the things which those employees may lawfully do. In that case I took occasion to lay down a test of what is lawful and what is peaceful by stating that to my mind the plain and simple language of the Clayton Act (38 Stat., 730) itself disclosed what is lawful and what is peaceful; conversely, "he who runs may read" what is unlawful and what is unpeaceful.

The test which I stated in that case, and which I now repeat (and that is almost in the language of the Clayton Act itself), could be put in the form of a question: Would any ordinary citizen be per-

mitted to do the acts complained of in this case if no strike or labor dispute existed? If he could do those things, absent a strike, then of course he could do them, present a strike; in other words, if any ordinary citizen, when no strike exists, can do a given act against the rights, person, peace, or property of another, and not commit thereby a breach of the peace, or an act of lawlessness, then the striking employee can do the same act when there is a strike existing.

This case, by the great weight of the evidence, shows an outrageous condition of mass picketing under a situation and condition which no stretch of the imagination can denominate as either peaceful or lawful. There were numerous instances of threats, abuse, and abusive language, of domiciliary visits and physical assaults upon and directed at employees and potential employees; that is, those who desired to become such. These I need not detail; suffice it to say that the record in the case simply reeks with things of this sort. I can hardly conceive of a more outrageous situation in this behalf than that which has been presented by the evidence adduced in this case.

The cases which I have cited, and many others with which the books are fairly filled, hold that the Clayton Act does not justify the doing of the things which the record in this case shows were done. Not alone were these unlawful and unpeaceful acts committed by defendants, or some of them, and those acting in concert and combination with them, before the issuance of the injunction in this case, but afterwards, while it was in force, in utter contempt of its prohibitions.

Without further comment, I am of the opinion that the temporary injunction in this case should be made perpetual. Let a decree be drawn accordingly.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—VIOLATION—*Ash-Madden-Rae Co.* v. *International Ladies' Garment Workers' Union et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 258.*—The plaintiffs are various manufacturing concerns of Chicago engaged in the manufacture of women's garments. The defendants are the International Ladies' Garment Workers' Union, which has a number of local unions in Chicago whose members are a part of the plaintiffs' employees, Sol Seidman, the vice-president of the union, and various other individuals. Seidman came to Chicago from New York and assumed charge of the affairs of the union in Chicago and later assumed charge of and conducted the strike. The union sent a letter to the various plaintiffs presenting certain demands and stating that in event the letter was not answered a strike of their employees would be declared. The letters were not answered and the strike was called. The strikers proceeded to picket the plaintiffs' establishments and to resort to various violent methods of persuasion in an attempt to prevent plaintiffs' employees from working. The plaintiffs sued for and obtained injunctions restraining the strikers from doing the unlawful acts and from picketing, which in Illinois is unlawful.

After the issuance of the injunctions, of which he had full notice, Sol. Seidman advised the strikers and the picketing committee which he had organized to disregard the injunctions and to continue to picket the establishments. Upon consultation with his lawyers he was advised that picketing although lawful in New York was not lawful in Illinois. He thereupon ceased to advise the violation of the injunction. Action was brought against him for contempt of court for the violation of the injunction and he was found guilty and sentenced to 75 days in jail. He and the other defendants appealed to the appellate court, declaring that although they had violated the injunction they could not be punished because the injunction was erroneous and invalid. The appellate court reversed the decision and the plaintiffs appealed. The supreme court reversed the appellate court and remanded the case. The opinion of the supreme court as handed down by Judge Farmer is in part as follows:

It is so universally settled law as to require no citation of authorities that the orders and judgments of a court having jurisdiction must be obeyed until reversed or set aside in a direct proceeding for that purpose, and in a proceeding for contempt for violating an injunction it can not be urged that granting the injunction was erroneous. Unless absolutely void, it is binding on the parties and must be obeyed. The appellate court did not reverse the judgment of the circuit court because it found defendant in error had not violated the injunctions. In its opinion that court says, "It is evident appellant (defendant in error here) was guilty of a technical violation of the injunctions," but because he honestly thought the injunctions were unlawful, and refrained from further violations when he was advised to the contrary, the court was of opinion punishment by imprisonment should not have been imposed, and that court reversed and set aside the judgment of the circuit court, without remanding the case, which was a discharge of defendant in error. In any view we can take of the case, the judgment of the appellate court can not be sustained. The judgment of the circuit court was not reversed as a result of the appellate court finding the facts different from the circuit court, for there is no substantial dispute as to facts, and the appellate court made no finding of facts, as is required by statute when it reverses a judgment without remanding the case, as a result of finding the facts different from the trial court. The reason for the reversal of the judgment of the lower court, as stated in the opinion, is that punishment by imprisonment should not have been imposed. Reversing for that supposed error would require the modification of the penalty imposed or remandment to the circuit court.

The court granting the injunction is clothed with a large discretion in enforcing obedience to it, and in a proceeding for its violation the extent of the punishment to be inflicted rests in the sound legal discretion of the court, and courts of appellate jurisdiction will not interfere with the exercise of such discretion except for its abuse. [Cases cited.]

The judgment of the appellate court is reversed, and the case remanded to that court, with directions to render such judgment, not

inconsistent with the views expressed in this opinion, as it may deem lawful and proper.

Reversed and remanded, with directions.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—VIOLATION—*Kayser* v. *Fitzgerald et al., Supreme Court of New York, Special Term (Oct. 4, 1919), 178 New York Supplement, page 130.*—The plaintiff is a glove manufacturing corporation of New York with factories at Sidney and Amsterdam. The defendants are three labor unions, the Dyers and Finishers' Union, the Glove Makers' Union, and the Warpers and Warp Hands' Federated Union of America, and the officers and members of said unions. The defendant R. F. Stump was president of the warpers' union and was the leader and superior officer of the striking unions. The defendants H. T. Wilpers and Hannah Chrisman were presidents of the unions, and the defendant Otto Boelke was a member of one of the unions in Amsterdam.

In May, 1919, a large percentage of plaintiff's employees in the Sidney and Amsterdam factories went on a strike. The plaintiff sued for and obtained a preliminary injunction, which later was made permanent. This proceeding was a petition for a rule to show cause why Stump, Wilpers, Chrisman, and Boelke should not be punished for contempt of court for the violation of the injunction.

It seems that after the injunction was issued it was widely published, and copies of it were sent to each of the strikers and the defendants. After being notified of the injunction the defendants at various times advised their subordinate strikers that the injunction "did not amount to anything." They organized a paid picket of 35 members at Sidney and proceeded to march up and down the streets and shout opprobrious epithets at plaintiff's loyal employees. They also resorted to other means of annoying plaintiff's employees, even going so far in some instances as to commit assault and battery. In rendering an order that the defendants be fined and imprisoned for violating the injunction the court said in part:

It is true, of course, that men have a right to strike, and that they have a right to cooperate together, and the organization and cooperation which men form is not against public policy, but is to be commended when their purposes are legitimate and lawful; but while they have that absolute right, other men who are willing to work have an equal right to pursue their labors unmolested, and the plaintiff has just that same right to employ whomsoever it pleases, provided it can get men to enter such employment, and this right can not be interfered with by threats, intimidation, or coercion by the defendants, whether they act singly or as a result of an organization or conspiracy.

In this case the evidence points unmistakably to the fact that the purpose of the defendants was not by peaceful persuasion to endeavor to prevent men from entering the employment of the plaintiff and working; but, on the other hand, it seems as though the defendants took the course they did, and by means complained of, to compel the plaintiff to accede to their demands, or else destroy its business, and in doing that they exceeded their rights under the decisions of this State.

In order to constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the defendants is intimidating, and this may be shown by all of the circumstances of the case. (New York Central Iron Co. *v.* Brennan, 105 N. Y. Supp. 869.)

What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked: "Would this be lawful if no strike existed?" Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others; for one to call another a "rat," a "scab," a "yellow dog," a "yellow rat," or a "Hun," or by any other name commonly accepted as offensive or degrading, or calculated to provoke the other to break the peace in resentment, or to so intimidate them that he or she would refuse to work?

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

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful.

I find, therefore, that the three men and women named deliberately disobeyed the order of the court. This makes it a case of criminal contempt. The only question left is as to the proper punishment to be inflicted upon them for what they have done. The facts being as they are in this case, every consideration of law and order requires such a sentence as will prevent these acts in the future.

An injunction is not sacred as coming from any man, but to disobey it is a serious thing, because it is disobeying the law, which, in this country, workmen themselves helped to make and should help to uphold.

An order may therefore be made:

(1) Directing that Robert F. Stump be imprisoned for the period of 30 days, and that he be fined the sum of $250.

(2) That Otto Boelke be imprisoned for the period of 30 days, and that he be fined the sum of $250.

(3) That Harry T. Wilpers be imprisoned for the period of 20 days, and be fined the sum of $250.

(4) That Hannah Chrisman be fined the sum of $250.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—VIOLATION—WHAT MAY BE ENJOINED—*Ex parte Tucker, Supreme Court of Texas (Mar. 31, 1920), 220 Southwestern Reporter, page 75.*—Tucker was an officer and member of the International Brotherhood of Electrical Workers' Department, Local No. 388, of Palestine. A dispute arose between this union and the Palestine Telephone Co. As a result of the activities of the union the telephone company succeeded in procuring an injunction against said union, enjoining it from, among other things, "vilifying, abusing, or using opprobrious epithets to or concerning any party or parties in the employ of the plaintiff" and "from any and all conduct" toward such employees, or concerning them, "which might be calculated to provoke or inspire a breach of the peace." Tucker was later heard in a conversation to apply slanderous epithets to female operators in the company's employ. He was prosecuted for contempt for the violation of the injunction and placed in confinement, whereupon he brought this action for a writ of habeas corpus to secure his discharge. He was also indicted for slander. The court in allowing the writ of habeas corpus and ordering Tucker's discharge said in part:

The existence of any power in a court of equity to supervise one person's opinion of another, or to dictate what one person may say of another, is plainly and emphatically refuted by the eighth section of the Bill of Rights.

That section, in part, reads:

"Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

The purpose of this provision is to preserve what we call "liberty of speech" and "the freedom of the press," and at the same time hold all persons accountable to the law for the misuse of that liberty of freedom.

It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say, or that his sentiments on any subject or concerning any person should be supervised before he could utter them. Nothing could be more odious, more violative or destructive of freedom than a system of only licensed speech or licensed printing. The experience of the English nation and some of the American colonies under the tyranny of such systems is the reason this provision in the Bill of Rights is one common to the constitutions of the American States, and for its incorporation, in like words, in the first amendment to the Federal Constitution. Hallam characterized the liberty of the press as finally gained in England as but exemption from a licenser.

There can be no justification for the utterance of a slander. It can not be too strongly condemned. The law makes it a crime. But there is no power in courts to make one person speak only well of another. The Constitution leaves him free to speak well or ill, and if he wrongs another by abusing this privilege he is responsible in damages or punishable by the criminal law.

Equity will protect the exercise of natural and contractual rights from interference by attempts at intimidation or coercion. Verbal or written threats may assume that character. When they do they amount to conduct or threatened conduct and for that reason may properly be restrained. Cases of that sort, or of analogous nature, are not to be confounded with this one.

That part of the injunction which attempted to control the relator in his speech was beyond the power of the court to issue and therefore void.

The relator is discharged.

LABOR ORGANIZATIONS — STRIKES — PICKETING — INTIMIDATION — RIGHT TO CONDUCT BUSINESS A "PROPERTY RIGHT"—CLAYTON ACT—*King et al.* v *Weiss & Lesh Mfg. Co., United States Circuit Court of Appeals, Sixth Circuit (June 11, 1920), 266 Federal Reporter, page 257.*—The Weiss & Lesh Mfg. Co., of Tennessee, employed some 150 employees, of whom 20 were white men and about 130 were colored. A strike of the company's employees was declared, and the plant was picketed by most of the white men. The next day because most of the colored men did not go through the picket lines the plant was shut down. In order to keep the colored men from going through the picket line the white men resorted to threats and intimidation. The company at once got a temporary restraining order to prevent further picketing of the plant. As soon as this was done the colored men went back to work. Later the restraining order was, after a hearing, changed to a temporary injunction. King and the other defendants appealed, claiming, first, that no intimidation was resorted to by the pickets; and, second, that there was no ground for the issuance of an injunction because no property right had been injured or threatened. The court resolved both these points against the defendants and affirmed the injunction. The opinion on these points is as follows:

The substantial complaint now made is that the weight of evidence was against the existence of any violence, or intimidation, or unlawful threats, but, on the contrary, showed that the strikers kept within their legal rights, whether measured by the Clayton Act (sec. 20, act Oct. 15, 1914, Comp. St. 1243 d) or by the general principles independently applicable. More specifically, the complaint is that the district judge gave undue weight to the fact that the strikers and the pickets were white men and the intimidated employees were colored; that he considered, as constituting unlawful intimidation, words and acts to which there would have been no rightful objection, if addressed to or used against white men; and thereby held that, in such cases, the defendants' rule of conduct must be varied according to the color of the nonstrikers. We do not so interpret the action of the district judge. Whether or not we can take judicial notice ourselves of the supposed fact, certainly we can not disregard the finding of the trial judge that it is a fact that, in that community and at the

time in question, speech and action by white men would intimidate and terrify the typical colored laboring man, when the same things would not have serious effect upon the typical white laborer. The question is not one of color; it is one of individual or class intimidation.

Not only must we apply the familiar rule that we will not overturn the fact findings of the trial judge, save in a very clear case, but we must recognize that a judge who has lived a lifetime in a community, and knows its atmosphere and feelings and prejudices, is more competent than we are to draw a correct inference as to what is and what is not intimidation as against one class in that community.

We understand defendants' counsel also to take the position that since section 20 of the Clayton Act prohibits an injunction, excepting in case of injury to property or property rights, the issue of the injunction was in conflict with this act, because the right of the plaintiff to continue its business, free from unlawful obstruction, was neither "property" nor a "property right." There is no sufficient basis for this contention. The Clayton Act did not undertake to make new definitions of "property" and "property right." It used these terms in their then accepted and well-understood definitions. It was dealing with the facts that between the recognized property right of the employer to conduct his business and the other recognized right of the employees to strike, more or less conflict would arise; and it was prescribing the kind and degree of injury to this employer's right which should be deemed rightly appurtenant to the employees' conflicting right, and which should therefore not be deemed unlawful. No court has held, since the passage of the Clayton Act, so far as we find, that it was intended to forbid an injunction in aid of an employer's right to keep his business running, in any case where the injury to that right, which the defendants were inflicting, is beyond the limits which the act purports to authorize. That the right to prosecute a lawful business without unlawful obstruction is either property or a property right has always been recognized, and is at the foundation of equity jurisdiction in this entire class of cases. It is sufficient to cite Hitchman *v.* Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145], as an example of the unquestioned acceptance of this basis of jurisdiction.

LABOR ORGANIZATIONS—STRIKES—PICKETING—STATUS OF EMPLOYEES ON STRIKE—CONSPIRACY—INJUNCTION—*Vonnegut Machinery Co.* v. *Toledo Machine & Tool Co. et al., United States District Court, Northern District of Ohio (Feb. 7, 1920), 263 Federal Reporter, page 192.*—The Vonnegut Machinery Co., an Indiana corporation, sued the Toledo Machine & Tool Co., an Ohio corporation, and 10 individuals and the Central Labor Union, of Toledo, for an injunction to restrain the breach of a contract. The complainant had a contract with the Toledo company whereby the latter was to deliver certain machinery in a specified time. The Toledo company, owing to a labor dispute with the other defendants and the unions which resulted in a strike and picketing accompanied by violence, was unable to make the

agreed deliveries; whereupon this action was brought for conspiracy to restrain interstate commerce, and for an injunction to restrain the strike, the picketing, and the interference with the contract. In allowing a temporary injunction Judge Killits, speaking for the court, said in part:

The testimony first before the court suggested that the character of the picketing sought to be restrained was wholly objectionable, unlawful, and utterly beyond the sanctities of even an extravagant construction of the privileges of the act of October 15, 1914, commonly known as the Clayton Act (Comp. St. 1243d, 8835f). It showed that the pickets used language which was minatory, insulting, abusive, and in some instances downrightly obscene; that their conduct was that which would call upon a court, without hesitation, to order and to enforce immediate restraint. It was of a character which could not be sustained by any valid legislation.

It is because the passions of an acute labor controversy tend to mount beyond control, releasing conventional restraints upon social intercourse, that practical people question the possibility of peaceful persuasion through the practice of picketing.

That defendants were working in concert, in behalf of themselves and associates in the defendant machinists' union, to accomplish just what actually was effected, a crippling, by intimidating means, the lawful business of the defendant company, there is no room for doubt.

Without accepting as established the extreme characterization of the conduct of pickets found in the testimony, we find that proof enough of its objectionable character is in the record to indicate clearly the wisdom of a temporary injunctional order. There is no evidence, however, that it should run against defendants Quinlivan and the Central Labor Union.

The interesting and unique question in this case, however, is whether we have a situation here contemplated by and within the provisions of the first paragraph of section 20 of the so-called Clayton Act (act Oct. 15, 1914, Comp. St. 1243d), and consequently one in which the court's injunctional powers are limited in view of any construction of the force of that measure. Concretely the query is whether at the foundation of this case is a controversy between employer and employees respecting terms and conditions of employment.

What is the scope of the language "terms and conditions of employment," for these words, from section 20 of the act in question, need interpretation here? The court should not attempt an inelastic definition. One should be given which would keep step with the advance in sentiment, as conditions change, to make good the very proper demand that the laboring man should receive consideration from his employer which will maintain his health and self-respect and secure to him the full measure of the fruits of his toil, while preserving to him all those opportunities for social intercourse and self-improvement which should be his to enjoy that he may realize his aspirations. But even a most liberal definition in this direction has its limitations. The mind, in considering the words "terms and conditions of employment," unconsciously, but directly, goes to a contemplation of such things as hours of labor, wages, classification of

employees, sanitary and physical conditions controllable by the employer, opportunities for reasonable redress of grievances, and for bargaining respecting the conditions of employment, whether collectively, as enlightened public sentiment as well as convenience approves, or individually. This view is well supported in this case by the character of the new contract which the labor organization tendered in writing to the defendant company, and which had been under consideration before the strike. Its fifteen paragraphs deal exclusively with subjects, as "terms and conditions of employment," which come within the above limitations. At the time of the strike the factory was what is known as an open shop and the proposed new agreement with the defendant labor organization recognizes, as a condition tendered by the latter itself, that the factory should remain open.

The court then discussed the reasons for the strike, which involved no matter of wages, hours, physical or sanitary conditions, or any question of rights of bargaining, "but simply and solely because they did not like a customer with whom the employer was doing business."

The opinion continued:

Considering, as we must, the insufficiency of the reason given for leaving their employer's service to bring defendant company's striking workmen within the provisions of the Clayton Act, it follows necessarily that they must be regarded, from the day of their abandonment of that service, to be strangers to their late employer's business. If, indeed, the law just considered at length favors striking employees for a time after the crisis by continuing to them the status of employees, notwithstanding they were not at work and idle because they preferred to strike, these particular men were not to be so considered, respecting defendant company, after August 13.

The picketing in question, therefore, presents a not unusual, but, in the judgment of this court, the always unlawful, situation of persons who stand in no special relationship to an employer—persons who have no privileges not common to all men—attempting to interfere with the business of such employer by propagandic activities directed against his working force, or his product, or both. Having left their employment for no reason which the law specially favors, the labor defendants here, and their associates, had only the rights and were under the disabilities of the general public respecting the conduct of the business of the Toledo Machine & Tool Co. The defendant, Toledo Lodge No. 105, International Association of Machinists, had no more liberty in law or public policy, in the circumstances of this case, to "picket" the defendant company's factory to change conditions of labor therein than any other association of men enjoyed to bend the defendant company to its will.

It is clear in the judgment of the court that the evidence before the court on the motion tends to show that (*a*) employees of the defendant company, in whose behalf the labor defendants here are acting, struck, August 13, for a reason which was not under the favor of any law; (*b*) that thereby all employment relations between them and defendant company terminated absolutely; (*c*) that the labor

defendants and those represented engaged forthwith in a conspiracy to unlawfully obstruct the business of defendant company; (*d*) that the picketing shown in this case is a continuing overt act in the consummation of the purpose of such conspiracy; (*e*) that the conduct of the several defendant pickets is, independent of its purpose, unlawful, in that it is intimidating and coercive in character, intended to bring about, and is accomplishing, the annoyance and incensing of employees of defendant company and of those seeking employment with said company. A temporary injunction shall issue.

LABOR ORGANIZATIONS—SUSPENSION—INTERNAL CONTROL—RIGHTS OF MEMBERS—*Gardner et al.* v. *Newbert et al., Appellate Court of Indiana, Division No. 2 (Nov. 17, 1920), 128 Northeastern Reporter, page 704.*—Newbert and his companions were the plaintiffs in the lower court. They are all members of a local union called Lakeside Lodge, No. 39, International Brotherhood of Boiler Makers and Iron Ship Builders and Helpers of America. The international brotherhood was organized in Chicago on October 1, 1880, and consisted at that time of nine lodges or locals. On August 13, 1890, it granted a charter to Lakeside Lodge, No. 39, and gave it exclusive jurisdiction over a great part of Cook County, Ill., and Lake County, Ind. Later in 1917 its jurisdiction was restricted to Lake County, Ind., by the supreme international lodge in convention and its location was transferred to Whiting, Ind. The local's membership comprised some 243 members and the lodge was one of 600 then belonging to the international. The charter of lodge No. 39 was reissued in 1909 and is now in full force. The government of the union is vested in the supreme international lodge which has full jurisdiction over the subordinate lodges or locals. The rules of the lodge provide for the payment of death and accident benefits in certain amounts to members in good standing. The constitution of the supreme lodge forbids the suspension or expulsion of any member without a hearing and without notice. On April 18, 1918, Weyand, the acting president, without previous notice or hearing sent a telegram to Lakeside Lodge, No. 39, informing it that its charter was revoked and that it had been expelled from the international. At about the same time another lodge No. 39 was chartered and sought to operate in the territory of the Lakeside Lodge, No. 39. Newbert and other members of the Lakeside lodge brought action for an injunction against the officials of the international lodge to prevent them from interfering with their rights as members of the Lakeside Lodge, No. 39, and of the international lodge. The defendants demurred to the complaint and when the demurrer was overruled they refused to amend or plead further. Therefore judgment was entered for the plaintiffs representing the local union, and defendants appealed. In affirming the decision the court said in part:

The complaint states a cause of action, and the demurrer thereto was properly overruled.

It has been repeatedly held that courts have jurisdiction to protect a member from unlawful or arbitrary suspension or expulsion, or of proceedings to compel reinstatement to membership, with all the rights and privileges thereunto belonging, to a member who has been unlawfully suspended or expelled, providing property rights are involved. (Martin's Modern Law of Labor Unions, sec. 313; Froelich *v.* Musicians' Mutual Benefit Assn., 93 Mo. App. 383; Otto *v.* Journeymen Tailors' Protective etc. Assn., 75 Cal. 308, 17 Pac. 117, 7 Am. St. Rep. 156.)

This doctrine applies with equal force to unincorporated unions and to those which are incorporated.

It is averred in the complaint that Lakeside Lodge No. 39, is possessed of property of the value of about $4,000, which it holds in trust for appellees, and of which appellants seek to deprive appellees, and that there is a provision in the constitution and by-laws of the brotherhood that entitles members in good standing to death benefits and disability benefits. These are property rights which must be lost to the member in event of suspension or expulsion from the order, and they are such vested rights as can not be disturbed without charges and due trial. Such a rule or law must certainly prevail, when it is contended, as in this case by appellees, that each and all of the members were in good standing, and have at all times complied with the rules, regulations, constitution, and by-laws of the brotherhood, and of their subordinate lodge, and that the officers of such subordinate lodge have in all respects complied with the rules, regulations, constitution, and by-laws of the brotherhood.

It is averred in the complaint that the appellees had no notice whatever of the intended suspension of their lodge and of its members until the receipt of the telegram above sent out from the acting international president. It has been repeatedly held that the expulsion of a member from a fraternal benefit association, without notice or opportunity to be heard, is void. The suspension being void, appellees' legal status was not changed, and they were not required to prosecute an appeal within the order, before resorting to the courts for relief.

In the case at bar the attempted suspension was of a local lodge, but such suspension, if effective, of necessity deprived appellees of their standing and benefits and property rights in the order.

The motion to modify the judgment was properly overruled. Judgment is affirmed.

LABOR ORGANIZATIONS—SUSPENSION—INTERNAL CONTROL—RIGHTS OF MEMBERS—POWER OF COURTS—*Bricklayers, Plasterers, and Stonemasons' Union* v. *Bowen et al., Supreme Court of New York, Equity Term, Monroe County (Aug. 2, 1920), 183 New York Supplement, page 855.*—The plaintiff organization was incorporated in 1881, and shortly after became a local union of the National Union of Bricklayers of the United States of America. It was granted a charter and became known as Local No. 39. These unions were thus associated

together for nearly 40 years. In the spring of 1919 some differences arose between the president and executive officers of the national union, which had by then become the Bricklayers, Masons, and Plasterers' International Union of America, and the president and certain members of the Local No. 39, with the result that the international's officers removed Mr. Clyde, the local's president, from office, and suspended a number of the local's members. Later, the Local No. 39 itself was suspended. All this was done without notice or hearing. The international then, without consulting Local No. 39, started another local in the same locality, No. 53, and required all members of Local No. 39 to join Local No. 53 or be suspended. This action was brought to restrain the officers of the international from removing the local's officers, suspending its members, or interfering with its affairs. In granting the relief sought the court rendered its decision in part as follows:

In connection with these matters the defendants, or some of them, undertook to obtain plaintiff's charter, seal, books, records, money, and property generally, and in some instances succeeded. By these transactions Local No. 39 has become largely disrupted, its activities halted, and its usefulness interfered with, while large numbers of its members are not only in danger of losing certain pecuniary benefits, but are debarred from working at their trade, and deprived of their accustomed means of livelihood. The law governing disputes arising in voluntary associations is simple and well settled. It proceeds upon the theory that the members are, in a sense, one family, and entitled to settle their family jars without outside interference, and in their own way. Thus it is held that, where proceedings for the expulsion of a member of such an association have been conducted in accordance with its laws, the courts will in the first instance assume that the acts charged constituted cause for removal within the meaning of those laws.

Such associations are not, however, above the law of the land, nor altogether a law unto themselves.

Therefore the law is vigilant to prevent a violation of the constitution and by-laws of the association involved, and to see to it that suspension or expulsion is only had after fair notice to the offending member and full opportunity to be heard in his own behalf. In other words, the law insures to every member of such an association a fair trial, not only in accordance with the constitution and by-laws of the association, but also with the demands of fair play, which in the final analysis is the spirit of the law of the land.

The constitution and rules governing the relations of these parties provide an elaborate and well-conceived scheme, called the code of procedure, for the trial of charges against members by members, against local unions by members, and against local unions by sister locals. These provisions do not, however, either in terms or by reasonable intendment, furnish a procedure for the investigation of charges by the international union or its officers against a local, its officers, or members. By the constitution, all the executive and judicial powers of the union, when not in session, are delegated to

the president, first vice president, and secretary, who together constitute separate boards, denominated the executive board and the judiciary board. It appears that the duties of the latter board are at times transferred to State judiciary boards, which within their own State assume exclusive control of such matters. Briefly, however, the judiciary board is largely an appellate tribunal, although it seems to have been given original jurisdiction for the trial of charges referred to it in the first instance against unions or members. Both the code of procedure referred to and the provisions relating to the judiciary board specifically require the filing of charges, and an opportunity for the defendant therein to be heard in his defense, as a prerequisite to any valid determination against him.

The fact that no such restriction upon the power of the executive board is in terms contained within the book does not relieve it from like obligation of fair play. Not only does the entire scheme of these articles indicate, but both good conscience and law demand, that no member shall be deprived of his rights and privileges until he has had notice of the charges against him and been given opportunity to meet them.

Coming to the establishment of Local 53 and the suspension of those members of Local 39 who neglected to affiliate themselves therewith, the defendants seems to have either overlooked or else to have deliberately ignored an express limitation placed upon them by their constitution.

"Under no circumstances will a charter be granted to any body of men in any city, town, or village where one or more unions already exist without the consent of a majority of the other unions being first obtained."

No. 39 was the only local in the city of Rochester, and by this section was protected from a competing union being established without its consent by the executive board in that city. Apparently the executive board acted upon the assumption that it had ceased to exist. Manifestely this was error. It had not been dissolved nor expelled, nor had its charter been revoked. It was only suspended from the exercise of its privileges until the international, in convention assembled, could investigate and act upon the complaints against it. That convention might, after investigation and trial, restore its right of active operation, either with or without conditions, or might revoke its charter and disband it entirely; but until it had been finally dissolved its territory could not be lawfully invaded nor it ruined by such indirectness.

The establishment of Local 53 (so called) was under the circumstances wholly unauthorized; it acquired no status as a local union, and the suspension of those members of Local 39, who refused to transfer their membership to it, was wholly void and inoperative.

There remains only the question as to the right of plaintiff to appeal to this court for redress. It is well settled that the courts will not interfere in the affairs of such associations, where there is a remedy provided by their own rules, regulations, and by-laws, until that remedy has been availed of and exhausted. (O'Connor *v.* Morrin, 109 Misc. Rep. 379, 179 N. Y. Supp. 599; Lafond *v.* Deems, 81 N. Y. 507, 514.) The constitution of the international makes no provision whatsoever for an appeal by locals or individuals from the

decrees and mandates of the executive board, and indeed there could not well be such an appeal, except to the general convention at its biyearly meeting. In the interim there is no authority superior to that of the executive board, and to provide for an appeal to that board from its own actions would be but an idle form.

Mr. Clyde has been removed from his office, and in addition he, with certain of his associates, has been suspended for 15 months or thereabouts from all benefits of the union, including an opportunity to work at his trade. From such suspension and its consequent damage there is absolutely no redress within the union. Those other members who believed the executive officers of the international union to be in the wrong, and therefore remained loyal to Local 39, are in the same situation and are equally without redress, except they consent to join another local, the illegal and clandestine character of whose origin and operations can not be doubted.

The prayer of the plaintiffs for a judgment restraining the suspension of the members and the dissolution of the union was therefore granted.

LABOR ORGANIZATIONS—SYMPATHETIC STRIKES—CLOSED SHOP—CONSPIRACY—BREACH OF CONTRACT—*Lehigh Structural Steel Co. et al.* v. *Atlantic Smelting & Refining Works et al., Court of Chancery of New Jersay (Aug. 26, 1920), 111 Atlantic Reporter, page 376.*—The Lehigh Structural Steel Co. entered into a contract to fabricate and erect a steel building for the Atlantic company. The steel had been fabricated, delivered and paid for, and the contract to erect the building had been sublet to the Donnell-Zane Co. The Lehigh Steel Co. belonged to an association known as the Iron League. This association had a contract with the International Brotherhood of Bridge and Iron Workers of America which it is claimed required the exclusive use of union labor in construction work done by the members of the Iron League. The Donnell-Zane Co. was not a party to this contract and did not acquiesce in or adhere to it. On another construction job it had used nonunion labor; therefore, in retaliation, after work had gotten under way on the Atlantic company's building, Timothy Tierney, business agent of Local No. 11 of the above union, called a strike. There was no reason for the strike except, perhaps, punishment and to bring about a closed shop. The employees on this job were all union men, working union hours for union pay. In short, all union requirements were met and complied with so far as the erection of the Atlantic company's building was concerned. The strike was therefore purely sympathetic. The Donnell-Zane Co. thereupon proceeded with the erection of the building with nonunion labor. The union labor in the employ of the Atlantic company then threatened a general strike if union labor was not exclusively employed to erect the building. The Atlantic company through one Lehman, its sole representative, demanded of Donnell-

Zane to comply with the union's demands in order to keep the union labor in the former's employ from striking. This Donnell-Zane refused to do. The Atlantic company sued for an injunction to prevent Donnell-Zane from using nonunion labor, alleging that the contract for the construction of the building made this provision, but it was unable to support its case and the petition was dismissed. Later the Lehigh company received a notice from the Atlantic company ordering the former to cease work on the building and to notify its subcontractor, Donnell-Zane Co., to this effect.

The Lehigh company and Donnell-Zane Co. thereupon brought this action to secure an injunction to prevent the Atlantic company from breaching its contract and also to prevent the union from interfering with its contract by maintaining a strike. In granting the injunction, Chancellor Backes, who rendered the decision, spoke in part as follows:

The principle of the closed shop, i. e., the monopolization of the labor market, has found no judicial sponsor. In whatever form organized labor has asserted it, whether to the injury of the employer, or to labor, or to labor unions outside of the fold, the judiciary of the country has responded, uniformly, that it is inimical to the freedom of individual pursuit guaranteed by the fundamental law of the land, and contravenes public policy. On the other hand, public policy favors free competition, and the courts have been keen to recognize the right of organized labor to compete for work and wage and economic and social betterment, and to use its weapon, the strike, to realize its lawful aspirations, but none has gone to the length of sanctioning a strike for a closed shop, which has for its object the exclusion from work of workmen who are not members of the organization. There is a wealth of literature and authority upon the subject in England and in this country. (Walker *v.* Cronin, 107 Mass. 555; Reynolds *v.* Davis, 198 Mass. 294, 84 N. E. 457.)

The conclusion upon the case as presented is that the New York contract violates public policy, and that the sympathetic strike is without just cause or excuse, and is unlawful.

Lehman and the Atlantic company say they were not parties to the sympathetic strike, and consequently not parties to the conspiracy of the unions. That they were, it seems to me, admits of no doubt. They were and are fixed in mind not to allow the work to be done by nonunionists, and to this end brought suit to restrain the complainants, and, when they failed, ordered the complainants off the job for no other reason than that they were going to complete it with the labor of the unanointed. Their excuse is that they feared the wrath of organized labor, and were acting in self-defense. In other words, they breached their contract to avert a general strike of the trades-unions on the work. That that is not a legal excuse for breaching the contract needs no argument, and that it furnishes a legal excuse for joining the oppressors of the complainants is even less defensible. Their protection lies in the law, not in the graces of those who transgress the law. Their further contention that they were moved to their course by causes wholly independent of the

motives of the unions, that they were prompted solely by a desire to escape a labor squabble, and to have their building completed expeditiously, is irreconcilable with their activities and the means they used to accomplish the unlawful aim of the unions, in common with the unions, to make the sympathetic strike effective, viz, by preventing the complainants from employing nonunion men. Their motives may not have been coextensive with that of the unions; they may have been wholly indifferent as to the success of the ultimate object of the sympathetic strike, but a common ground upon which they met the unions, a common motive that actuated them, and made them coconspirators, was the enforcement of the closed shop at Brills.

Lehman and the Atlantic company ask upon what theory they can be deemed coconspirators, inasmuch as the proofs show the strike was called by the unions without their knowledge and without consultation or intimation? The answer is: They joined the conspiracy later on, after the strike, when, out of fear of a general strike, they broke their contract to help it along. This was decided in Aberthaw Const. Co. *v.* Cameron, 194 Mass. 208, 80 N. E. 478 [Bul. No. 71, p. 391], a case strikingly similar to the one at hand.

The Atlantic company next takes the stand that the remedy of the complainant Lehigh company is at law for damages, citing McGann *v.* La Brecque Co., 109 Atl. 501. The general rule is that compensation in damages is the relief for breach of a contract, and that the remedy is at law, and that the measure of damages is the immediate loss, the incidental losses, which are often the heavier, being regarded as too remote to bring into the calculation. Where, however, as here, the complainants are not suing for a breach, but to prevent a breach of a contract by unlawful means, and to serve unlawful ends, to the injury of the complainants' business, the remedy at law is inadequate. The damages for such an injury are incapable of ascertainment at law, and justice demands that the injury be prevented by injunction. The many instances in which equity has intervened by injunction to restrain injury by strikes testify to the jurisdiction. As to the irreparableness of the injury to the complainants' business by breach of the contract due to the strike, the findings of the master in the Aberthaw case may be profitably quoted:

"Any failure of a contractor to fully perform a contract, regardless of the reason or party in fault, impairs his reputation for efficiency, and consequently is a damage to his good will." * * *

There will be an injunction restraining the strike and the breach of the contract. The form of the injunction will be settled on notice.

MANUFACTURERS' ORGANIZATIONS—DISCIPLINING OF MEMBERS—LOCKOUTS—REFUSAL TO OBEY ORDER—*American Men's and Boys' Clothing Mfrs.' Assn. (Inc.)* v. *Proser et al., Supreme Court of New York, Appellate Division, First Department (Dec. 19, 1919), 179 New York Supplement, page 207.*—The plaintiff is an incorporated association composed of clothing manufacturers whose purpose was to improve trade conditions, foster the welfare of the men's and boys' clothing industry, and to settle trade disputes. The associa-

tion had a certificate of incorporation and by-laws. The by-laws provided the methods of control of the association and for the government of the members. Provisions were made for determining wages, hours, and working conditions and for the arbitration of disputes as well as for the punishment and disciplining of the members of the organization.

The cutters (who belonged to a trade-union of certain of the members of the organization) went on a strike and refused to submit to arbitration. The association thereupon held a meeting and duly passed a resolution requiring all the other members of the organization whose employees belonged to the union but had not gone on a strike to "lay off" such employees until the cutters' union submitted to arbitration. The reason for this was that the union employees who had not struck were encouraging and financially assisting those who had struck. A copy of the resolution was sent to the defendants who are a copartnership and were members of the association and who were therefore bound by the action of the organization. The defendants chose, however, to disregard the resolution and refused to "lay off" its union employees. Thereupon, following the prescribed procedure as set forth in the certificate of incorporation and by-laws of the organization, the association accused the defendants of disobedience and bad faith, held a hearing, and fined the defendants the sum of $2,000, to which extent the association alleged that its influence and prestige had been impaired. This suit was brought for the collection of the $2,000 fine. The defendants demurred to the complaint on the ground that it failed to set forth a cause of action and the demurrer was overruled and the defendants appealed. In reversing the order overruling the demurrer and sustaining the defendants' demurrer the court said in part:

We think the plaintiff was without authority in law to fix the arbitrary assessment by way of a fine, and the plaintiff is not entitled to recover it. (10 Cyc. 363.)

It is quite competent for such an association as the plaintiff to fix penalties by way of fines for derelictions of its members; but the penalties must be determined according to some method, to which the member has agreed, at least impliedly by joining the association, not only as to the imposition of the fine, but also as to the maximum amount thereof; otherwise, the association would be allowed to assess its own damages, which would be clearly unjust and improper. And a by-law imposing an excessive fine would be set aside as unreasonable. (Hagerman *v.* Ohio Building & Savings Assn., 25 Ohio St. 186; Lynn *v.* Freemansburg B. & L. Assn., 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639.)

To hold that an association of this character might assess such amount as it saw fit for any infraction of its rules or by-laws, important or unimportant, would make possible a course that would work serious loss to members and invite an abuse of authority. A fixed,

reasonable fine, in the nature of liquidated damages for injury sustained because of dereliction, would be sustained. It follows that the complaint fails to set forth a cause of action. The demurrer is therefore well taken, and the order overruling it should be reversed.

MINE REGULATIONS—USE OF DYNAMITE—CONSTITUTIONALITY OF STATUTE—*Richards* v. *Fleming Coal Co., Supreme Court of Kansas (Mar. 8, 1919), 179 Pacific Reporter, page 380.*—The laws of Kansas provided that the use of dynamite or other detonating explosives in coal mines was prohibited unless such explosives were used according to rules and regulations agreed to between employer and employees and approved by the State mine inspector. (Laws 1909, ch. 175, sec. 1; Gen. Stat. 1915, sec. 6326.) The defendant company and Richards and other employees had an agreement, but it did not make any mention of dynamite nor was it approved by the State mine inspector; therefore the use of dynamite in the defendant's mine was prohibited. Richards was about to make a blast with some dynamite with some dry cell batteries, which he was compelled to use as the plunger battery was out of order, when the wires he had attached to the dynamite accidentally touched the batteries causing the charge to explode in his hand. For the injuries thus sustained he brings action for damages, and the defendant contends that, as he was violating the statute when he was injured, he can not recover. This view was adopted by the trial court, and the case was dismissed without prejudice, whereupon Richards appealed, contending that the statute is unconstitutional. On this point the court said in part:

The plaintiff contends that the act is unconstitutional because it delegates to mine operators and miners the power to make rules and regulations for the use of dynamite in coal mines, which rules and regulations may be different in different localities.

Powers similar to the one given by the statute under consideration have been granted to agencies of the State by other statutes, and those statutes have been expressly or impliedly held valid. Among these are the statutes giving to the board of railroad commissioners, and subsequently to the public utilities commission, power to fix freight and passenger rates, to compel railroads to give sufficient service, etc. In most of the States statutes giving similar powers have likewise been held constitutional. These cases will be found collated in 12 C. J. 847–853. The act now questioned giving to mine operators and miners the power to make rules and regulations concerning the use of dynamite in coal mines, subject, however, to the approval of the State mine inspector, is not unconstitutional.

The judgment of the court below was therefore affirmed.

MUNICIPALITY ENGAGING IN BUSINESS—ICE PLANT—PUBLIC PURPOSE—*State ex rel. Kansas City* v. *Orear, City Comptroller, Supreme Court of Missouri (Mar. 15, 1919), 210 Southwestern Re-*

porter, page 392.—At a general election held in Kansas City, November 5, 1918, a bond issue of $400,000 was favorably voted upon for the purpose of enabling the city to raise funds for the construction and operation of an ice plant to supply ice to the Government offices and to the inhabitants of the city. The comptroller refused to issue such bonds or offer them for sale, whereupon the State brought this action for the city to secure a writ of mandamus to compel him to act. Though this is not strictly a "labor case," it is noted here on account of the very general interest, industrial and economic, in the subject of public ownership.

Orear gave two reasons for not issuing the bonds; first, that there was no authority in the city charter permitting the city to engage in the business of manufacturing ice; and second, that the engaging in the making and selling of ice is a private and not a public business and therefore a business wherein the money of the public raised by taxation can not be used. The court after considering these reasons came to the conclusion that they were sound and that the bonds could not be issued. The opinion is in part as follows:

That there must be authority in the charter of Kansas City, either express or clearly implied, permitting that municipality to engage in making and selling ice before it can legally do so is settled by the repeated adjudications in this State. (State ex rel. *v.* Kansas City Terminal Railway Co., 260 Mo. 495, 168 S. W. 1144.)

While, by reason of the novelty and far-reaching importance of the question presented, we have mentioned as requisite an apt and sufficient charter provision, nevertheless in the view we are constrained to take of this case, it makes no difference whether the issuance of the bonds in question is warranted by a specific provision of the general welfare clause of the Kansas City charter or not. The question before us cuts deeper than that. If such bonds can not be issued lawfully, the charter permitting, we must needs refuse to compel respondent to issue, sign, or sell the same; for, even if such issuance is warranted by either an express or implied provision of the charter, the further question arises whether such a charter provision, when thus construed, is not itself bad, for that it contravenes the constitutional and statutory requirement that the charter of Kansas City shall be in harmony with and subject to the constitution and laws of the State. (Sec. 16, art. 9, Const.) Since the last question, if found against the contention of the relator, is decisive of the point whether the ice factory bonds are valid we need not trouble ourselves or take up time in further discussing the other one.

May a town or city in this State, its charter permitting, lawfully engage in the business of making and selling ice to the inhabitants of such city?

Our constitution explicitly says, "Taxes may be levied and collected for public purposes only." (Sec. 3, art. 10, Const.) We have held that this was the law before the provision was ever put into the constitution. (State ex rel. *v.* St. Louis, 216 Mo. 47, 115 S. W. 534.)

It is obvious, therefore, that in the final analysis the question becomes, Is the making and sale of ice to all inhabitants of a city who desire to buy a public or a private business? It is public, of course, in the sense that the police power of the city extends to regulating the cleanliness and sanitary methods of making, handling, and vending ice. It is not public in the sense that it is such a utility as comes under the supervision of the public service commission. That it is not the latter is persuasive, but, we concede, not conclusive, in the view against its public nature.

The court then discussed a number of cases involving similar or apposite propositions, and concluded:

We are of the opinion that the business of making and selling ice by Kansas City to the inhabitants of that city is not, under the situation shown by the conceded facts, so far a public purpose as to warrant the expenditure therein of public money obtained as the proceeds of municipal bonds, the payment of which, with the interest thereon, must be met by the levy and collection of public taxes.

Judge Woodson submitted a dissenting opinion, holding that in view of modern conditions of life in cities, involving the transportation and preservation by refrigeration of large and essential parts of the food supply, such action as was contemplated was for the general welfare of the city and within the police power of the municipal government. He said, in part:

I have always understood, and in my opinion it is no longer a debatable question in this State and country, that all laws enacted for the preservation of the public health and well-being of a city or State are derived from the police power of the State, and that it is an inherent attribute of sovereignty, and is unabridged by any constitutional provision that can be found in the State or Federal Constitution.

PENSIONS—PUBLIC EMPLOYEES—CONSTITUTIONALITY OF STATUTE—DEDUCTIONS FROM SALARIES—*Higgins et al.* v. *Sweitzer, county clerk, et al., Supreme Court of Illinois (Feb. 18, 1920), 126 Northeastern Reporter, page 207.*—Higgins and several other persons were employees of Cook County and were employed in various public hospitals. A law was passed providing for the creation of a pension fund for the retirement of public employees (Laws 1915, ch. 342). Pursuant to this law certain deductions were made from the salaries of the employees of the county. This is an action by Higgins and others for an injunction to restrain the county clerk and others from making the deductions. It is urged that the act is unconstitutional as contravening the constitution, article 10, section 10 of which authorizes the county board to fix the compensation of county officers. The court upheld the constitutionality of the law, saying in part:

It is contended by appellants that the act is unconstitutional and void and does not apply to appellants, as they are employees of constitutional offices and officers. These positions are not offices created by the constitution and are nowhere mentioned in the constitution. The Cook County Hospital is provided for by section 62 of chapter 34 of our statutes (Hurd's Stat. 1917, p. 798), as is the Oak Forest Hospital. Section 61 of the same act (sec. 62, Hurd's Rev. St. 1917) provides that the compensation paid such employees as appellants shall be fixed by the board of county commissioners " when not otherwise provided by law."

It is also contended that the act is unconstitutional, in that it takes the property of appellants without due process of law. It has been frequently held in this State that the right to prospective salary of an office or position is not a property right. The pension fund act in this case has the effect of reducing, by the act of the legislature, the compensation paid to the appellants here, and it was held in Helliwell *v.* Sweitzer, 278 Ill. 248, 115 N. E. 810 [Bul. No. 246, p. 183], that in so doing it in no sense invaded any property rights of the persons affected.

PENSIONS—RETIREMENT FUND—CONSTITUTIONALITY OF RETROACTIVE AMENDMENT TO POLICE PENSION FUND—VESTED RIGHTS—*Beutel v. Foreman et al., Supreme Court of Illinois (Apr. 15, 1919), 123 Northeastern Reporter, page 270.*—Beutel and other policemen had been in the service of the Chicago police force for 20 years and were therefore qualified to receive a pension of one-half of their salary. Beutel put in his application for pension in March, and before it was acted upon an amendment was passed to the pension law requiring that pensioners be of the age of 50 years before they become entitled to a pension. The trustees of the pension fund refused to grant Beutel a pension, as not having attained the required age, and he brought action for mandamus to compel the payment, which was granted by the lower court. The defendant trustees appealed and the decision was reversed, the court saying in part:

While it is true that a statute is not generally deemed to be retroactive, but prospective only, in its force, a statute will be given a retroactive effect when it was clearly the intention of the legislature that it should so operate. In the construction of statutes it is the duty of the court to take the words found in the statute, and to give each its ordinary, usual meaning. We agree that, fairly construed, the amendment to section 3 of the police fund act (Hurd's Rev. St. 1917, ch. 24, secs. 391–419k), read in connection with the other sections of the act, was intended to be retroactive and to apply to all persons who were entitled to pensions under said act, and that therefore it included the defendant in error within its provisions.

Counsel for defendant in error earnestly insist that the pension act in force previous to July 1, 1917, gave him a contract and property right in his pension at the time he filed his application for the

same, and therefore the amendment in question must be held to be unconstitutional, because of violating a property right vested in him. The legislature can not pass a retrospective or an ex post facto law impairing the obligation of a contract, nor can it deprive a citizen of any vested right by a mere legislative act. This is a principle of general jurisprudence.

Counsel for plaintiffs in error contend that no person entitled to a pension has a vested legal right in said pension; that pensions, considered in connection with vested rights must be held to be bounties of the government, which that government has the right to give, withhold, or recall at its discretion, while counsel for defendant in error argue that this court in Hughes *v.* Traeger, 264 Ill. 612, 106 N. E. 431, and People *v.* Abbott, 274 Ill. 380, 113 N. E. 696, has held that the pensions to employees of municipalities "are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services," and that therefore those decisions which hold that a pension is not a vested right, under such circumstances as exist here in the claim of defendant in error, can not be upheld. Counsel are in error in their argument that the decisions of this court last referred to intended to hold that the right of pension was a vested right under the circumstances found in this record.

We can reach no other conclusion in this case than that, by the great weight of authority in this and other jurisdictions, as between the State and members of the police department of one of the municipalities of this State, the State may take the right of pension away, under such circumstances as shown by this record, without affecting the contract right of the pensioners or violating the constitution.

RELIEF ASSOCIATIONS—DEDUCTIONS FROM WAGES—CONSTITUTIONALITY OF STATUTE—SUIT FOR PENALTY—*Baltimore & O. S. W. R. Co.* v. *Bailey*, *Supreme Court of Ohio* (*Mar. 25, 1919*), *124 Northeastern Reporter, page 195*.—This is an action by one Bailey, a switchman and a former employee of the railway company, to recover certain penalties imposed by an Ohio statute (secs. 9012–14 of the General Code), upon any corporation which maintained a relief association for its employees and required them by deductions from their wages involuntarily to contribute to said relief fund. The defendant admitted that it maintained a relief association and that by the contract of membership in it it sought to limit its liability for injuries sustained by its employees, but contended that in this case Bailey voluntarily joined the association and agreed to the deductions from his wages. Upon submission to a jury it was determined that the payments to the association by deductions from Bailey's salary were involuntary and without his consent. It was contended by the defendant railway that the Ohio statute above referred to was unconstitutional under the fourteenth amendment to the United States Constitution,

and that in enacting the Federal employers' liability act the United States Congress had legislated on the subject and therefore the Ohio statute could not apply. In answering these arguments and affirming a judgment in favor of the plaintiff the court said in part:

It is also contended that these statutes violate the fourteenth amendment to the Constitution of the United States. It is sufficient as to this to say that a similar contract was under investigation by the Supreme Court of the United States in C., B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328. The Federal Supreme Court held in the McGuire case that a State has power to prohibit contracts limiting liability for injuries, made in advance of the injuries received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract, and that such a statute does not impair the liberty of contract guaranteed by the fourteenth amendment.

The Federal statute declares void any contract or device whatsoever to exempt a carrier from any liability created by the Federal employers' liability act, but provides that in any action brought against such common carrier under the act it may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee.

The Ohio statute likewise prohibits the making of any contract to exempt the company from liability to the employee, and prevents the company from compelling employees to join any association or from withholding any part of the employee's wages for the payment of dues in any society or association.

There is nothing whatever in that act [Federal employers' liability act], or any other to which our attention has been called, by which Congress in any wise regulates relief departments, whether voluntary or involuntary. That is a subject wholly aside from that of giving rights of action for injuries while engaged in interstate commerce. The Ohio statute here in question does not abridge or affect in any way the rights of action secured by the Federal act or the procedure under it. The provisions of sections 9012 and 9014, General Code, on which this suit is predicated, simply prevent a company from compelling an employee to join any association, or from withholding any part of his wages for payment of dues, and prescribe the penalty for violation thereof. They do not in any way conflict with the provisions of the Federal act.

It must be kept in mind that in this case the plaintiff is not suing to recover damages for injuries. He sues for a penalty fixed against the company for withholding part of his wages from him against his consent for the payment of dues in the association.

Congress has denounced all contracts of every kind to exempt a company from liability for injury, but allows a set-off of any amount contributed to insurance that has been paid to the injured employee.

We do not think that we would be justified in holding that Congress has thereby impliedly permitted involuntary associations which employees are required to join, and to which they are compelled to pay dues, and has prevented the State by implication from prohibiting such compulsion and such withholding by an exercise of its police

power for the protection of its citizens. Such an implication would not only be strained, but would be contrary to the obvious spirit of the Federal statute in which the provisions are found.

Judgment affirmed.

RELIEF DEPARTMENT—REFUND OF DUES—*Philadelphia, B. & W. Ry. Co. et. al.* v. *Campbell, Court of Appeals of the District of Columbia (Feb. 3, 1919), 47 Washington Law Reporter, page 114.*—Campbell was employed by the company named and other roads embraced in the Pennsylvania system from 1897 until 1913, when he was discharged. In 1900 he was admitted to the Pennsylvania Railroad Voluntary Relief Department and regularly paid his dues until he was discharged. During this time he paid as dues $439.90 and received as accident and sick benefits the sum of $83.60. He now claims that the difference between the total amount paid in and the benefits received, $356.30, together with interest and costs, is due him, inasmuch as he is no longer in the employment of the company. Judgment was in his favor in the trial court, from which the company appealed.

The decision necessarily turned on a construction of the provisions found in the regulations governing the relief department, and these had been construed by the court of appeals to warrant a return in such a case (Vermillion *v.* P., W. & B. R. Co., 42 App. D. C. 579, 42 Wash. Law Rep. 790, 43 Wash. Law Rep. 66). The trial court had followed this decision, but on this appeal the court of appeals reversed itself, reading the regulations in a different light.

The opinion concludes:

> The interpretation placed upon the regulations in the Vermillion case would in time work to the ruin of the relief department. The department is formed and maintained as a mutual benefit association, and the dues are based upon the probable obligations it will have to meet in the payment of its members for death, accident and sick benefits. The monthly contributions paid by a member into the relief fund, like dues paid to an insurance company, constitute the price which the member pays for the protection afforded him by the relief department. They make up the joint fund from which the benefits are paid, not only to himself, but to his fellow members. In many cases, the payment of benefits to a member will be in excess of the contributions of such member to the relief fund; and in others, as in the present case, they will fall short of the contributions. But the plan is so arranged that the total contributions of the members will meet approximately the total liabilities. This could not be accomplished equitably if a member in severing his connection with the company, for any reason whatever, could recover as decreed in the present case.
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> The decision on the Vermillion case, supra, is overruled, and the decree in the present case is reversed with costs, and the cause re-

manded for further proceedings not inconsistent with this opinion. Reversed and remanded.

TIPS—ANTITIPPING LAW—CONSTITUTIONALITY—*Dunahoo* v. *Huber*, *Supreme Court of Iowa* (*Mar. 17, 1919*), *171 Northwestern Reporter*, *page 123*.—Dunahoo was arrested for receiving a tip while engaged as an employee in a barber shop. The prosecution was for the violation of section 5028u of the Supplemental Supplement of 1915, which prohibits "every employee of any hotel, restaurant, barber shop, or other public place" from accepting or soliciting any gratuities or tips or other things of value. Dunahoo applied for a writ of habeas corpus which was granted and the defendant constable appealed. The constitutionality of the statute was attacked on several grounds, the most important being that it did not afford "any person within its jurisdiction the equal protection of the laws," as required by section 1 of the fourteenth amendment to the Constitution of the United States. In declaring the statute unconstitutional the court said in part:

Under this act the proprietor of a hotel, restaurant, or barber shop, even though engaged in the same employment, would be perfectly free to accept tips or gratuities or anything of value, while the employee working at his side and engaged in the same occupation might be prosecuted for having committed a crime should he do the same thing. That the proprietor would not likely be made the recipient of such a so-called courtesy does not answer the criticism. The present case illustrates the vice of this statute. There were two chairs in the barber shop. The employer, one Murphy, worked at one of these, and defendant at the other. Murphy undertook to pay defendant $15 per week and 60 per cent of what he received for his work above said sum, and defendant was to have, according to the custom of the trade, such tips and gratuities as might be handed him. A customer gave him 25 cents in excess of the charges, and he was prosecuted. Had the same amount been handed to Murphy, his employer, no offense could have been charged. Manifestly there is no reason for such discrimination. For the purpose of efficient and beneficial legislation, it is often necessary to divide the subjects upon which it operates into classes. Indeed the greater part of all legislation is of this character, but the authorities agree that the distinction in dividing must not be arbitrary, and must be based on differences which are apparent and reasonable. The classification should be based upon some apparent natural reason, some reason suggested by necessity, such as difference in situation and circumstances of the subjects, placed in the one class or the other as suggest the necessity or propriety of discrimination with respect to them.

Tipping may be an evil, but this does not justify discrimination between classes in order to put it down. In so far as the public is concerned, the evil of tipping the employer is quite as obnoxious to good morals as though it were done to the employee. Surely here there is no ground for discrimination.

WAGES—ASSIGNMENT—EFFECT OF NEW EMPLOYMENT.—*Raulines* v. *Levi, Supreme Judicial Court of Massachusetts (Jan. 7, 1919), 121 Northeastern Reporter, page 500.*—Edward J. Raulines had assigned his wages to one Levi to secure the payment of a debt. The statute in the case provided that assignments of wages in a sum in excess of $300 were to be void after two years from the making thereof. Levi had paid out on Raulines's account the sum of $171.40, which added to a previous indebtedness of Raulines to him made $405.40. The assignment was made on August 14, 1916, and under the statute became void on August 14, 1918. Raulines filed a bill in equity on December 21, 1917, to enjoin Levi from enforcing the assignment and asking that the assignment be delivered up and canceled. At that time Raulines was working for a different employer from the one when the assignment was made. In granting the injunction the court said:

It is manifest the assignment ceased to have legal force as security for a debt with the termination of the contract of service existing between the plaintiff (Raulines) and his employer at the time the assignment was made; and it is equally plain that thereby it was not merely suspended in its operation to revive and attach to every new contract of service as often as made during its statutory life. The action of the defendant in serving notice of the assignment upon the new employer of the plaintiff was oppressive, and was calculated and intended to embarrass and hinder him in the lawful exercise of his trade.

At the time the bill was filed the assignment had become void by the plaintiff's change of service, and since the bill was filed it has determined by limitation of time. On either ground the plaintiff is entitled to an injunction and to a surrender and cancellation of the instrument as prayed for with costs, and it is

So ordered.

WAGES—MECHANICS' LIENS—RELEASE OF LIEN FOR LABOR—CONTRACT.—*Manson & MacPhee* v. *Flanagan, Supreme Judicial Court of Massachusetts, Middlesex (June 18, 1919), 123 Northeastern Reporter, page 614.*—One Fisher agreed to build a four-family house for defendant. The plaintiffs, Manson & MacPhee, agreed to do all the stair work on the house and provide the materials therefor for the total sum of $120. When the work was completed plaintiffs demanded their money but Fisher failed to pay. Plaintiffs upon the completion of the house went to defendant and declared that they would enforce their lien unless the sum due them was paid. The defendant thereupon agreed to pay the amount for the release of the lien. Defendant, Flanagan, then refused to pay the money, stating that the amount included both labor and materials, whereas only a

lien for labor could be enforced. In affirming judgment in favor of the plaintiff the court first quoted the law as follows:

If such agreement is for labor performed or furnished and for materials furnished under an entire contract and for an entire price a lien for the labor alone may be enforced, if the value of such labor can be distinctly shown, but it shall not be enforced for an amount greater than the entire contract price.

It then said:

Under this section a subcontractor may maintain a lien for labor if its value can be distinctly shown, even if the contract was entire and there was an entire price for both labor and materials, and although no notice of an intention to claim a lien for material was given. [Cases cited.]

There was evidence that the value of the labor could be distinctly shown, and that at the time when the defendant agreed to pay the plaintiffs they could have filed a valid lien for the labor performed or furnished under their contract in the erection of the building. The defendant's promise to pay the plaintiffs was based upon a legal consideration, and although the lien could be enforced for the labor only, and the value of the labor formed but a small part of the entire claim, the mere inadequacy of the consideration in the absence of fraud is no defense to the plaintiffs' right to recover.

WAGES—MINIMUM WAGE LAWS—POWERS OF COMMISSION—INJUNCTION—*G. O. Miller Telephone Co. et al.* v. *Minimum Wage Commission, Supreme Court of Minnesota (Mar. 19, 1920), 177 Northwestern Reporter, page 341.*—The Minimum Wage Commission of Minnesota pursuant to its authority vested in it by law held certain hearings and rendered a report thereon as a result of which it issued two orders, Nos. 10 and 11, in which it declared the minimum living wages at which women and minors should be employed. The orders were alike except that No. 11 applied only to learners and apprentices. In order No. 10 the weekly wage was $11 on the basis of an eight-hour day or 48 hour week and applied to telephone company employees as well as others. The Miller company sued in equity for an injunction to prevent the commission from enforcing the orders which it had issued. Two other telephone companies appeared as interveners. A temporary injunction was granted and the commission appealed. In reversing the decision and dismissing the injunction the court spoke in part as follows:

The minimum wage act is Laws 1913, ch. 547 (Gen. St. 1913, 3904–3923). It was before the court in Williams *v.* Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504 [Bul. No. 246, p. 193], and its constitutional validity sustained. An examination of its provisions leads to the conclusion that the legal minimum wage which it au-

thorizes the commission to fix is not a blanket minimum wage throughout the State for women or for minors, without reference to wage conditions in the different occupations, but is a minimum wage based on the different occupations and fixed after an investigation and determination of wage conditions therein.

An examination of the minimum wage statutes of other States indicates that occupation is a common basis of classification.

Order No. 10 recites that after investigation the commission is "of the opinion that the wages paid to one-sixth or more of the women and minors employed in this State are less than living wages." The recited fact gives the commission no authority to fix a minimum wage. The test is prescribed by section 5 of the statute which provides that the commission may establish legal minimum rates of wages "if after investigation of any occupation [it] is of opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than living wages." It reaches a single occupation in which one-sixth of the workers are paid less than a living wage.

It did not intend that the commission should be without jurisdiction over an occupation in which one-sixth were receiving less than a living wage because of the fact that five-sixths of the total number of employees in all occupations in the State were receiving more than a living wage. It intended to reach each occupation in which wage conditions were harsh. The orders of October 23, 1914, involved in Williams *v.* Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, seem to have been upon this interpretation of the statute.

The statute does not require a formal finding or a recital of the opinion of the commission after investigation. To make the order it is necessary that the commission have an investigation and reach the opinion which the statute requires, but the statute does not require a formal recital or finding. The one made might have been omitted.

Objection is made to the order because it gives women and children the same minimum wage. The statute intends a separate investigation and determination for women and minors. There may be a different minimum for each. The minimum may be the same for each. The facts alleged, as we must take them, do not show that the order is invalid because the commission made one minimum applicable to both classes. Again, the plaintiff can not complain if the minimum for neither class which it employs is too high.

Complaint is made of the order because it fixes a minimum of $11 for 48 hours per week, which is to be increased by 23 cents an hour for each hour of work in excess of 48 hours; and the claim is that it amounts to a fixing of the hours of labor and of pay for overtime.

The commission has no authority to fix legal hours of labor. The statute fixes 10 hours as a standard day's work for hire, unless a shorter time is agreed upon. (G. S. 1913, 3831.) It is the contract labor day. It fixes a shorter daily and weekly limit for women in certain employments. (G. S. 1913, 3851.) The order does not fix the hours of labor. It takes 48 hours a week as the basic period of labor upon which to compute a minimum wage. An 8-hour day is a quite customary work day in industries. It is the period fixed by statute

for State labor. (Laws 1919, ch. 40; Laws 1917, ch. 422 (Gen. St. Supp. 1917, 9321–1).

Reference was then made to a contention that the order worked hardship in cases in which exchanges were in dwellings, stores, etc., and the service occupied only a portion of the operator's time.

As to this, the court said:

The order, alone or in connection with note 2 bearing on telephone companies, is not construed as fixing a minimum wage for services of the kind mentioned. It is, as we have said before, the purpose of the minimum wage act to reach occupations which furnished the substantial livelihood to workers therein and consume their ordinary work period and not to include workers who do some slight or intermittent daily or weekly service.

The commission in fixing minimum wages makes a distinction between cities of 5,000 or more inhabitants and cities of less than 5,000. For cities of 5,000 or more the minimum is $11 per week of 48 hours with 23 cents per hour for additional time, and for cities of less than 5,000 the minimum is $10.25 with an added 21½ cents for additional time. We can not say that this is an arbitrary classification. Section 6 of the statute contemplates that because of differences in the cost of living the minimum may not be uniform throughout the State. And again, the plaintiff has no cause of complaint unless the minimum which it is required to pay is too high.

Order No. 11 fixes the minimum wages for learners and apprentices. The statute does not define learner and apprentice except in so far as section 20 provides that a learner or apprentice may mean either a woman or a minor. The definition is left to the law. The order provides for a minimum for apprentices under 18 years of age and fixes a different minimum for the first three months and for the second three months and for the third three months. From what appears in the pleadings we can not hold that this is an invalid classification or that it is an invalid administrative regulation.

The minimum wage commission is an administrative body. It does not determine hours of labor or prescribe conditions of employment or work out the rights of the employer and employee except in so far as its fixing of a minimum wage under conditions prescribed by the statute has such effect. Legislative power is not delegated to it nor judicial power conferred upon it. It has the administrative authority which is conferred by the statute. In performing the duties with which it is charged it must be permitted to proceed in a practical way so as to accomplish the lawful results intended. It must be permitted to exercise judgment and discretion in working out the details of administration and establish some sort of administrative regulations. This does not mean that it has either delegated legislative or judicial power. The legislature determines the policy of the statute. The review by a court of the orders of the commission is limited to such as are made without jurisdiction, or under a mistaken interpretation of the law, or are so arbitrary and unreasonable that they deprive a party of guaranteed property rights. The scope of review is such as has been announced from time to time, in cases involving various situations, and often recently, as in administering statutes enacted under the police power, duties are increasingly cast upon boards and commissions.

WAGES—NONPAYMENT—PENALTY—CONSTITUTIONALITY OF STATUTE—*Manford* v. *Memil Singh, District Court of Appeal, Third District of California (Apr. 17, 1919), 181 Pacific Reporter, page 844.*—L. V. Manford proceeded against Memil Singh, his employer, to recover wages and penalty as provided in chapter 663, Acts of 1911, amended by chapter 143, Acts of 1915 (repealed and superseded by ch. 202, Acts of 1919). Judgment had been in Manford's favor in the court below and Singh appealed, claiming that the statute was unconstitutional.

The question of constitutionality had been decided in favor of the law in Moore *v.* Indian Spring Channel Gold Mining Co., 174 Pac. 378 (see Bul. No. 258, p. 147). However, the defendant claimed a distinction between the power of the legislature to enact such a law to govern corporations and its power to control the acts of individuals. He conceded that the act is valid "if it can be reasonably held that the prompt payment of employee's wages is a matter that affects the public generally."

In upholding the law as accomplishing this end, the court said, in part:

> Its design is to protect the employee and to promote the welfare of the community. Without defeating that purpose, it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts. But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employee is guilty of culpable conduct. The statute is not subject to such reproach. It contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim. Indeed, the fullest right to contract as to payment is but slightly restricted, and an employer can easily provide in advance for the contingencies that may arise under the statute. If he refuses to pay what is due as therein provided, it is not unjust that he should be subjected to a penalty.

WAGES—PREFERENCE—PRECEDENCE OVER PRIOR LIENS—*Florida Construction & Realty Co.* v. *Pournell, Supreme Court of Florida (Oct. 31, 1918), 80 Southern Reporter, page 54.*—The above mentioned company and the Florida Railway sued the Florida Railway Co. and recovered judgments against it in June, 1913, for the total sum of $287,687.07. They also succeeded in having the Florida Railway Co. thrown into the hands of receivers. Pournell and four others were employed by the Florida Railway Co. as conductors, engineer, and foreman. Part of their pay was earned before the appointment of the receiver, but the greater part of it was earned under the receiver. They brought suit against the Florida Railway Co. and its receiver

for the amounts due them for services rendered and recovered judgment. The receiver sold some of the railway's property, receiving for it the sum of $35,000. Pournell and his coworkers, referred to in the opinion as the interveners, demanded that their judgment for wages be paid before the lien of the prior judgments is discharged. Their demand was granted and this court on appeal affirmed the judgment, rendering in part the following decision:

The main contention here is that claims of interveners (Pournell et al.) for services rendered in operating the insolvent railroad should not have preference over the prior judgment creditors in the proceeds from the sale of the property after the payment of taxes.

It appears that the services rendered by the interveners were necessary to the business of the insolvent railway company, and that such services were rendered during the receivership, or perhaps a small part thereof within a short time prior thereto, when the insolvent condition of the defendant company existed, as shown in the proceedings taken by the judgment creditors, and that the receiver was asked for and appointed to operate the railroad for the protection and benefit of the prior judgment creditors and at their instance. Under these circumstances an equitable preference existed in favor of the interveners.

WAGES—REFUSAL TO PAY—RECOVERY—*State ex rel. Stephens* v. *State Corporation. Commission, Supreme Court of New Mexico (Nov. 21, 1918), 176 Pacific Reporter, page 866.*—Stephens had been employed by the State corporation commission as an assistant rate clerk when he was discharged. The commission then refused to pay the salary due him for the month of October, 1917. The fiscal year closed on November 30, 1917. The State, in the interest of Stephens, applied for a peremptory writ of mandamus, which was granted on November 27, 1917. The commissioners, finding a balance of $170 on the fifth fiscal year contingent expense fund, proceeded to buy postage stamps with it and then answered the writ by saying that there were no longer any funds with which to pay Stephens' salary of $150. The commission later made out a voucher against the fifth fiscal year contingent expense fund but after the close of the books for the fifth fiscal year and as a result the voucher was dishonored. The court then directed that the voucher be made to draw upon the sixth fiscal year contingent expense fund. The commission appealed. In allowing the writ the court rendered in part the following decision:

The first point arising for consideration is as to whether or not mandamus was the appropriate remedy to compel the issuance to relator (Stephens) by the corporation commission of the salary voucher in payment for such services for the month of October, 1917.

Here there was no question that the appellee (Stephens) had been employed by the commission as assistant rate clerk at a salary of $150 per month; that he had performed the services required under such employment, and that he was entitled to a voucher therefor clearly. Mandamus was the appropriate remedy to compel the issuance of such voucher; in fact, mandamus was the only adequate remedy open to him.

The appellee showed beyond a question of doubt, however, that, in order to exhaust the contingent expense account, it was necessary, on the last day of the fifth fiscal year, to purchase postage stamps in excess of the amount of his claim, which stamps were for use, and could only be used, during the sixth fiscal year, and were consequently a legitimate charge against the appropriation for that year. In legal contemplation it is as though the appellee had traced just so much money, instead of postage stamps, into the contingent expense account for the sixth fiscal year.

In directing the voucher to be designated as payable from the contingent expense account for the sixth fiscal year, the court, sitting on the equity side, brushed aside all subterfuge and form, and looked at the naked facts as they really were. Its action, in effect, restored to the contingent expense account of the fifth fiscal year for the payment of this voucher, a fund which passed into the contingent expense account for the sixth fiscal year, and which in equity and good conscience should be restored.

WAGES—RETROACTIVE PAY—DISCHARGE—VOLUNTARY SEPARATION FROM SERVICE—*Kowalski* v. *McAdoo, Director General of Railroads, Supreme Court of New Jersey (July 11, 1919), 107 Atlantic Reporter, page 477.*—Kowalski was employed by the Pennsylvania Railroad Co. as a gang leader. He had been in the service of the company for some seven years. On May 15, 1918, he was arrested and locked up for the theft of a pair of shoes from a railroad car. He was convicted and paid a fine of $25. His pay prior to his arrest had been 32 cents per hour. By an order, No. 27, May 25, 1918, and Supplement No. 4, July 25, 1918, the Director General of Railroads increased the wages of the railroad employees and provided that said increases were to be retroactive from January 1, 1918. The provision of Supplement No. 4 is as follows:

> The increase in wages and the rates established shall be effective as of January 1, 1918, and are to be paid according to the time served to all who were in the railroad service, or who have come into such service, and remained therein. A proper ratable amount shall also be paid to those who for any reason since January 1, 1918, have been dismissed from the service, but shall not be paid to those who left it voluntarily.

Kowalski brought action for the back pay to which he claims he is entitled. He received judgment and the defendant appealed. In affirming the judgment the court said, in part:

The only point made and contended for by counsel of appellant in the court below and now here was, and is, that the plaintiff has disentitled himself to any of the increase of wages from January 1, 1918, to May 15, 1918, because the plaintiff on May 15, 1918, was arrested and locked up for an alleged theft of the goods of his employer, and that this in effect was a voluntary leaving by the plaintiff of his employment.

There is no pretense that the plaintiff did not render loyal and efficient service to his employer from January 1, 1918, to May 15, 1918, before he committed the alleged theft. The fact that he was arrested and locked up on a criminal charge was wholly without any significance, unless it was shown that the plaintiff created the situation for the purpose of abandoning the employment of the railroad company. And this does not appear from the evidence. But, on the contrary, it appears that the plaintiff's arrest was caused by the railroad company, his employer, and it is, therefore, inconceivable upon what plausible ground it can be even argued that the plaintiff left his employment voluntarily.

It was further pointed out that a discharge for theft or for inefficiency would not bar a claim to the increase, and the judgment was affirmed.

WAGES—SEAMEN—CONSTITUTIONALITY OF STATUTE—CONSTRUCTION—*Strathearn S. S. Co., Limited*, v. *Dillon, United States Supreme Court (Mar. 29, 1920), 40 Supreme Court Reporter, page 350.*—Dillon was a British subject who shipped on a British vessel in Liverpool under shipping articles providing for a voyage of not over three years ending at Liverpool, England. Under the agreement he was to receive no wages until the end of the voyage. When the vessel arrived at the port of Pensacola, Fla., he demanded of the master of the vessel one-half of the wages he had thus far earned. This was done in accordance with the provisions of section 4530 of the United States Revised Statutes. The master refused to grant the request, and Dillon brought suit to recover $125, the full amount earned up to that time. This action was brought in the United States district court and under a United States statute. Here the decision was against Dillon, but the court of appeals reversed the court below, whereupon the company appealed. In rendering the decision of the Supreme Court in favor of Dillon, Mr. Justice Day, delivering the opinion of the court, stated the decision in part as follows:

The district court found against Dillon upon the ground that his demand was premature. The circuit court of appeals reversed this decision, and held that Dillon was entitled to recover. (256 Fed. 631, 168 C. C. A. 25.) A writ of certiorari brings before us for review the decree of the circuit court of appeals.

Section 4 of the seamen's act is an amendment of section 4530 of the Revised Statutes: it was intended to supplant that section, as amended by the act of December 21, 1898.

The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one-half of the wages those cases in which the contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the Federal courts to foreign seamen. No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the provisions of the act to American seamen, this feature would have been wholly superfluous.

Apart from the text, which we think plain, it is by no means clear that if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subserved, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute. In the case of Sandberg *v.* McDonald, 248 U. S. 185, 39 Sup. Ct. 84 [Bul. No. 258, p. 141], we found no purpose manifested by Congress in section 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in section 4. Under section 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforceable in the courts.

We come then to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this court. The matter was fully considered in Patterson *v.* Bark *Eudora*, 190 U. S.

169, 23 Sup. Ct. 821 [Bul. No. 50, p. 195], in which the previous decisions of this court were reviewed, and the conclusion reached that the jurisdiction of this Government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this Government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

But, it is insisted, that Dillon's action was premature, as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the district court, but it was ruled otherwise in the court of appeals. Turning to the language of the act, it enacts in substance that the demand shall not be made before the expiration of five days, nor oftener than once in five days. Subject to such limitation, such demand may be made in the port where the vessel stops to load or deliver cargo. It is true that the act is made to apply to seamen on foreign vessels while in United States ports, but this is far from requiring that the wages shall be earned in such ports, or that the vessels shall be in such ports five days before demand for one-half the wages earned is made. It is the wages of the voyage for which provision is made, with the limitation of the right to demand one-half of the amount earned not oftener than once in five days. The section permits no demand until five days after the voyage has begun, and then provides that it may be made at every port where the vessel stops to load or deliver cargo, subject to the five-day limitation. If the vessel must be five days in port before demand can be made, it would defeat the purpose of the law as to vessels not remaining that long in port, and would run counter to the manifest purpose of Congress to prevent a seaman from being without means while in a port of the United States.

We agree with the circuit court of appeals of the fifth circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the circuit court of appeals for the second circuit held in the case of *The Italier*, 257 Fed. 712, 168 C. C. A. 662, that demand, made before the vessel had been in port for five days, was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But, the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States.

We find no error in the decree of the circuit court of appeals, and the same is affirmed.

WAGES—SERVICES RENDERED BY REQUEST—PRESUMPTIONS—QUESTION FOR JURY—*Williams* v. *Jones*, *Supreme Court of Kansas* (*July 5, 1919*), *182 Pacific Reporter, page 391.*—Jones owned a farm and desiring to absent himself from the State for a period requested Williams to look after his stock, alfalfa, and corn. This Williams did according to his agreement with Jones. The agreement of the parties made no mention of what Williams was to receive for his services or how much. Jones claims Williams was to receive nothing for his services, while Williams claims it was agreed that he was to be paid for his labor. Judgment was rendered in favor of Williams and on appeal the decision was affirmed. The court said in part:

Their actual intention was a matter to be determined by the jury from all that took place between them and the accompanying circumstances. The findings in question were not that the defendant had said in so many words that he would pay for the plaintiff's services, but that in the situation the jury found to exist an agreement to that effect was reasonably to be implied.

A mere request or direction to the plaintiff to do the work would be enough to warrant an inference that it was to be paid for, in the absence of evidence that it was to be gratuitous, or that the plaintiff was to be compensated in some other manner. (13 C. J. 241–243, 787; 6 R. C. L. 587, 588.)

WAGES—TIME OF PAYMENT—AMOUNT OF WAGES—ACTIONS FOR NONPAYMENT—CONSTITUTIONALITY OF LAW PROVIDING PENALTY—*Davidow* v. *Wadsworth Mfg. Co.*, *Supreme Court of Michigan* (*July 20, 1920*), *178 Northwestern Reporter, page 776.*—Like a number of other States, Michigan has a law providing for and regulating the payment of wages of employees in certain employments and fixing a penalty for the violation of such law.

The statute here involved is act 59, Public Acts of 1913, entitled: "An act regulating the time of payment of wages to employees * * * and providing a penalty for a violation thereof."

The third section of the act follows:

SEC. 3. Any employer, mentioned in section 1 of this act, who, unless prevented by act of God, proceedings in bankruptcy or orders of process of any court of competent jurisdiction, or circumstances over which such employer has no control, shall fail to make payment of the wages due to any such employee, as provided in section 1 of this act, shall, as liquidated damages for such failure, pay to such employee for each day that the amount due him remains unpaid, ten per cent of the amount due him in addition thereto, and said damages may be recovered in any court having jurisdiction of the suit to recover the amount due to such employee.

Davidow had worked for the defendant company as a stenographer from April 20, 1917, to August 11, 1917, at which time he was discharged. When this occurred there was due him the sum of $12.32, the wages for four days. The defendant failed to pay this amount and to date of the trial it still remained unpaid. Judgment was rendered for plaintiff in the sum of $12.32 plus 10 per cent per day, amounting in all to a sum in excess of $500. The company appealed, claiming the law was unconstitutional. The court accepted this contention and modified the decision, limiting the plaintiff's recovery to $12.32 and interest. The opinion is in part as follows:

It will be observed that by the title of the act the purpose of the legislation is to regulate the time of payment of wages to employees of manufacturing, mercantile, etc., companies or corporations. The title contains no hint even that failure to comply with the terms of the statute will render the employer liable to pay more than the amount of wages due the employee by way of liquidated damages. The subject of liquidated damages is not mentioned in the title. It is stated in the title that the act provides a penalty for a violation thereof. But there is a marked difference between a penalty and liquidated damages. Section 21 of article 5 of the constitution of this State provides that "no law shall embrace more than one object, which shall be expressed in its title." Should the subject of liquidated damages have been named or expressed in the title? While it was not designed to require the body of the act to be a mere repetition of the title, yet it might be urged that so vital a matter as the addition of 10 per cent of the amount due for each day that the amount remains unpaid should have been indicated in the title.

The question whether the burden imposed by this statute upon the defaulting employer is in any sense liquidated damages may well be considered. Were we dealing with a contract between private parties where similar language was used, we would not hesitate to hold that the sum here imposed was a penalty and not liquidated damages. (Jaquith *v.* Hudson, 5 Mich. 123.)

Here there is no penalty provided for in the act. A penalty must be expressly created and imposed by statute, and can not be raised or extended by implication. (13 Am. & Eng. Ency. of Law (2d ed.) 55, and cases cited.) It has been held that where liquidated damages are claimed for the nonpayment of a sum of money, and such damages exceed the lawful rate of interest, they are necessarily in violation of the law of usury, and will not be allowed. See 13 Cyc. 101, note 56. Here by the terms of this anomalous statute there is no attempt to impose a penalty, but the term "liquidated damages for such failure" is used.

We are of the opinion that the statute under consideration constitutes class legislation of the most objectionable kind. The classification is arbitrary and oppressive and without any valid reason for its basis. It seeks, under the guise of liquidated damages, to impose a penalty for the benefit of the employee, not provided for in the act, which is confiscatory and unreasonable.

The judgment of the court below will be reversed, and, as the case is here upon case made, judgment may be entered in this court for

the plaintiff for the sum of $12.32, with interest thereon from August 13, 1917, with costs to appellant.

WAGES—VACATIONS—RIGHT OF EMPLOYEE TO PAY DURING VACATION—*Vaile* v. *Walker Const. Co., District Court of Appeals, Second District, California (Dec. 1, 1919), 186 Pacific Reporter, page 602.*—This action is upon a contract of employment wherein Vaile seeks to recover a certain sum of money which he claims is due him as wages. In defense of this action the defendant employer claims that Vaile is not entitled to be paid for time spent by him on vacation, and that he should not be permitted to calculate such wages as a part of the sum he claims is due him. On this point the court ruled as follows:

Appellant's contention that plaintiff was not entitled to compensation for periods of time in each year covered by his service during which he was on vacation is without merit. The evidence shows that the vacations taken by him were not only in accordance with the prevailing custom in the employment in which plaintiff was engaged, but that defendant, as such employer, in each case assented thereto, and, except as to the last year, paid his full salary, thus recognizing his right to take a vacation without any deduction from his salary.

WORKMAN'S COMPENSATION—ADMIRALTY—CONSTITUTIONALITY OF AMENDMENT TO JUDICIAL CODE—*Knickerbocker Ice Co.* v. *Stewart, United States Supreme Court (May 17, 1920), 40 Supreme Court Reporter, page 438.*—William Stewart, while employed by the Knickerbocker Ice Co. as a bargeman, and while he was doing work of a maritime nature fell into the Hudson River and was drowned. His widow elected to take compensation under the State workmen's compensation act and was allowed an award. The employer appealed from this award, first to the appellate division of the New York Supreme Court and thence to the court of appeals, but in each case the award of the industrial commission allowing compensation was affirmed. Thereupon the employer took the case to the United States Supreme Court on a writ of error. The Supreme Court reversed the decision of the New York Court of Appeals and remanded the case for further proceedings. A dissenting opinion was rendered by Mr. Justice Holmes, in which Justices Pitney, Brandeis, and Clarke concurred. These same justices dissented in the opinion handed down in the case of Southern Pacific Co. *v.* Jensen, 244 U. S. 205, 37 Sup. Ct. 524 (see Bul. No. 246, p. 203).

When New York first passed a workmen's compensation law its constitutionality was assailed in the United States Supreme Court

in the Jensen case, in which the State courts had affirmed an award for maritime injuries, and the law was declared unconstitutional because it compulsorily included employers engaged in maritime work as well as those engaged in industrial enterprises. This inclusion of maritime cases was held to be an invasion of the exclusive jurisdiction vested in the Federal courts under section 2, Article III, of the Federal Judicial Code. Subsequent to the decision rendered in the Jensen case Congress amended clause 3 of section 256 of the Judicial Code, which contains a saving clause allowing suitors to choose whether to sue in admiralty or at common law by adding thereto the following: "And to claimants the rights and remedies under the workmen's compensation laws of any State," so that the third clause reads as follows:

The district courts shall have original jurisdiction as follows:

* * * * * * *

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation laws of any State.

The ice company in this case contended that the New York workmen's compensation law did not in any way apply to it notwithstanding the amendment to the Judicial Code above quoted. It based its case almost entirely upon the decision in the Jensen case, and maintained that Congress had no authority to make the workmen's compensation laws of any State applicable to admiralty or maritime cases. In this contention the company was upheld by the Supreme Court, which declared the aforementioned amendment to the Judicial Code unconstitutional and void. Mr. Justice McReynolds, who rendered the majority opinion, said in part:

The act [amendment to clause 3, sec. 256, Judicial Code] only undertook to add certain specified rights and remedies to a saving clause within a code section conferring jurisdiction. We have held that before the amendment and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount Federal law—within that field they had no existence. Were the words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record. The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee probably indicates the general legislative purpose. And, with this and the accompanying circumstances, the words must be read.

Having regard to all these things, we conclude that Congress undertook to permit application of workmen's compensation laws of the several States to injuries within admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out in Southern Pacific Co. *v.* Jensen. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

The dissenting opinion, as presented by Mr. Justice Holmes, after reciting the reference to the amended sections of the Judicial Code, continues in part as follows:

Those sections in similar terms declared the jurisdiction of the district court and the exclusive jurisdiction of the courts of the United States, "of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the workmen's compensation laws of any State." I thought that claimants had those rights before. I think that they do now, both for the old reasons and for the new ones.

I do not suppose that anyone would say that the words, "The judicial power shall extend to all cases of admiralty and maritime jurisdiction," Constitution, Article III, section 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the obligation can change it, and I suppose Congress can do as much as the judges who introduced the rules, for we know that they were introduced and can not have been elicited by logic alone from the mediæval sea laws.

But if Congress can legislate it has done so. It has adopted statutes that were in force when the act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the several States—not an unfamiliar form of law. [Cases cited.] An act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore if it were necessary, the words "rights and remedies under the workmen's compensation laws

of any State" should be taken to refer solely to laws existing at the time, as it certainly does at least include them.

The only question before us is whether the words in the Constitution, "The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction" prohibit Congress from passing a law in the form of the New York workmen's compensation act, if not in its present form, at least in the form in which it stood on October 6, 1917. I am of the opinion that the New York law at the time of the trial should be applied and the judgment should be affirmed.

It is interesting to note in connection with the foregoing decision that of the Supreme Court of California, in the case Sudden & Christenson *v.* Ind. Com., 188 Pac. 803, rendered March 13, 1920, some weeks prior to the action of the Supreme Court of the United States, involving the same points. The California court reached the same conclusion of unconstitutionality, using the same reasoning, and arguing against the findings of the Court of Appeals of New York from which the ice company had appealed.

WORKMEN'S COMPENSATION—AGRICULTURAL LABOR—FISH FARMING—*Krobitzsch* v. *Industrial Accident Commission et al., Supreme Court of California (Nov. 19, 1919), 185 Pacific Reporter, page 396.*—Krobitzsch conducted a trout farm on which he raised trout for domestic use, and to take charge of which he employed one Starkey. While Starkey was engaged in removing some brush and fernbrakes from the vicinity of a flume he fell from the wagon with which he was hauling away the brush and was injured by a pitchfork falling upon him. Later he died from his injuries, and upon making claim therefor his widow was granted an award of compensation and for funeral expenses under the workmen's compensation act of 1917. The employer applied for certiorari to review the award, declaring that it should not have been granted as the work Starkey was doing when injured was "fish farming," an occupation claimed to be excluded from the benefits of the compensation act by virtue of section 8, subdivision "*a*," part of which reads as follows:

* * * Excluding any employee engaged in household domestic service, farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising. * * *

The court refused to accept this construction of the statute and affirmed the award, saying in part:

We are of the opinion that the petitioner is not entitled to exemption under the provisions of this act. It seems clear beyond question that the legislature did not intend to use in a general sense the terms employed in describing the excluded classes. If that had been the

intention of the legislature, it would not have used the terms "farm, dairy, agricultural, viticultural, or horticultural labor," for "farm labor" would, in the broad sense, include labor engaged in dairying, agriculture, horticulture, stock raising, and poultry raising and anything which can be defined as cultivation of the soil. (19 Cyc. 456; 2 C. J. 988.) The very wording of the clause of the act upon which petitioner relies shows that the legislature was giving a restricted meaning to the term employed and was segregating into certain definite and exclusive classes all kinds of "labor" which, in the broad and unrestricted sense, would come under the head of farming. "Farm labor" must, we think, be taken in its ordinarily accepted meaning as labor engaged in the production of hay, grain, vegetables, and the like by the tillage of the soil.

WORKMEN'S COMPENSATION—AGRICULTURAL LABOR—ICE HARVESTING—EMPLOYMENT FOR PECUNIARY GAIN—*Mullen* v. *Little, Supreme Court of New York, Appellate Division, Third Department (Jan. 8, 1919), 173 New York Supplement, page 578.*—Mullen was employed by Little as a farm laborer and was engaged at the time of the injury in unloading ice from a sleigh into an ice house by means of a skid. The skid was a makeshift affair and was too long, so that when ice slid over it the end which rested on the sleigh flew up into the air as the ice left the end inside the ice house. A piece of ice became wedged in the doorway and Mullen attempted to release it with his foot. When the piece became disengaged the skid flew up into the air and threw Mullen into the ice house injuring him. He was awarded judgment in the lower court, and on appeal the decision was reversed because Mullen was deemed guilty of negligence. In reply to Mullen's plea that the compensation law applied and therefore proof of negligence was no bar to recovery, the court said:

The plaintiff urges that the question of contributory negligence is eliminated, for the reason that the case falls within the workmen's compensation law (Consol. Laws, c. 67), and, if so, section 11 makes that question unimportant. Ice harvesting is a hazardous employment under that act, but such employment was not in this instance "carried on by the employer for pecuniary gain," within the meaning of the statute (sec. 3, subd. 5). The plaintiff was in reality a farm laborer (sec. 3, subd. 4), and the ice was being stored for use on the farm, and only as incidental to farm purposes. Hence the case is not within the act.

WORKMEN'S COMPENSATION — AGRICULTURAL LABOR — THRESHING MACHINES—*Jones et al.* v. *Industrial Commission of Utah et al., Supreme Court of Utah (Jan. 30, 1920), 187 Pacific Reporter, page 833.*—The appellant Jones and a number of other farmers together purchased a threshing machine and employed Rowley to assist in

operating it. The machine was purchased primarily for the purpose of threshing the crops of the owners. While the machine was being used to thresh the crop of a son and renter of one of the owners, Rowley was so injured that he died.

The owners of the threshing machine had not elected to come under the compensation law at the time of the accident. Afterwards, acting upon legal advice, they procured insurance under the industrial act and engaged in custom work during the remainder of the season. The industrial commission held that inasmuch as the work being done at the time of the injury was for a nonowner the machine was being used for commercial threshing and that Rowley was not an agricultural laborer such as to exclude his dependents from compensation under the workmen's compensation act. An award for compensation was accordingly made. The owners appealed and the award was annulled. The decision is in part as follows:

The statute expressly excludes from its operation "agricultural laborers and domestic servants." (Compensation Laws, section 3111, as amended in Session Laws 1919, page 156.)

The number of adjudicated cases respecting questions analogous to the one here presented is exceedingly limited. This should not be a matter of wonder when we consider that workmen's compensation laws are, in most cases, of comparatively recent origin. We have found no case substantially identical in its facts with the present case. The nearest analogy we have been able to find are cases in which threshing machines or other farm machinery have been devoted entirely to custom work for the community, instead of being used principally on the crops of those who own the machine. Even as to those cases there is a marked conflict among the authorities. Some of the cases hold that when a farm machine, such as a hay baler, corn shredder, or threshing machine, is used even for custom work, the business is farm work, and the employees employed thereon are farm laborers. Other cases take the contrary view. We find no case whatever which holds that the work is not farming, and the employees not farm laborers, where the machine is used primarily by the owners for use on their own farms.

In the instant case we need not go to the full extent to which the Supreme Courts of Minnesota and Iowa and the Industrial Accident Commission of California have gone, for, as manifestly appears, the employers in all of those cases were engaged in custom work for the farmers of the community, or, as our own industrial board calls it, "commercial business." There is no pretense that owners of the machine in the cases referred to purchased the same primarily for their own use as farmers, or that they were owners of farms upon which the machines could be used. Notwithstanding this the courts and commissions referred to held that they were engaged in farming business and their employees farm laborers.

We hold, however, that in the case at bar, the commission itself having found that the owners of the machine purchased the same primarily for the purpose of threshing their own grain and used it principally for that purpose, such primary purpose becomes con-

trolling in determining the nature and character of their business within the meaning of the industrial act.

For the reasons stated the findings, conclusions, and award made by the defendant commission are set aside and annulled.

WORKMEN'S COMPENSATION—ATTORNEY'S FEES—EFFECT OF CONTRACT—*Rawlings* v. *Workmen's Compensation Board, Court of Appeals of Kentucky (Mar. 2, 1920), 218 Southwestern Reporter, page 985.*—Rawlings, an attorney at law, was employed without solicitation of the business on his part, by Maxwell and four others to represent them before the workmen's compensation board in proceedings for compensation. He made a written contract with each of the five employees for a fee within the statutory limits as allowed under section 4942 of the Kentucky statutes, which is as follows:

All fees of attorneys and physicians and charges of hospitals under this act shall be subject to the approval of the board. No attorney's fees shall be allowed or approved against any party or parties not represented by such attorney nor exceeding an amount equal to 15 per cent of the amount of the first $1,000 or fraction thereof recovered, or 10 per cent of the excess of such recovery, if any, over $1,000. The board may deny or reduce the attorney's fee upon proof of solicitation of employment.

In granting the employees their awards the board refused to grant Rawlings the fee fixed by the contracts, but awarded him a materially reduced sum. He sued for a writ of mandamus against the board to compel the payment of the contract fee. Judgment was rendered for the board, and he appealed. In affirming the decision the court of appeals said in part:

Our construction of this section is that the board in the exercise of a sound discretion and after a careful consideration and understanding of the facts and circumstances may reduce the contract compensation agreed to be paid an attorney, although it does not exceed the statutory amount or there be any evidence that the employment was solicited and, of course, if no contract was entered into between the attorney and the client, would likewise have the power to fix the fee at a reasonable sum.

We think the legislature intended in this section: (1) To limit the fees that attorneys might have; (2) to give to the board the power to reduce the fee below the statutory limit, even when it was agreed to by contract, and (3) to deny altogether the fee if it should appear the employment was solicited. The whole purpose and intention of the act was to lodge large power and discretion in the board, except in cases where the powers were specifically described by the statute.

We are also of the opinion that the remedy of an attorney who feels himself aggrieved by the action of the board in allowing a smaller fee than he considers himself entitled to have is by appeal from the action of the board to the circuit court. Where a party has

an adequate remedy by appeal it is well settled that mandamus will not lie.

WORKMEN'S COMPENSATION—ATTORNEY'S FEES—RECOVERY OF COMPENSATION—*Johanson* v. *Lundin Bros. et al., Supreme Court of Minnesota (Dec. 19, 1919), 175 Northwestern Reporter, page 302.*—Johanson was injured while in the employ of Lundin Bros. In settlement of compensation the employer agreed to pay Johanson $11 per week until his disability should cease. This agreement was approved by the district court. Payments were discontinued on March 6, 1917, because as the employer stated Johanson had recovered from his disability. Johanson's attorney secured an order to show cause and a hearing was had thereon, wherein a receipt for $22, dated April 20, 1917, and signed by Johanson, releasing the company from all further liability for the payment of compensation was produced. The attorney then asked leave to file his application for attorney's fees, which was granted. Thereafter proceedings were had on the application, and it was disallowed upon the ground that he was not entitled to recover attorney's fees under the workmen's compensation act. The court declared that attorney's fees are not allowed in ordinary civil actions and can be allowed only when authorized by statute.

WORKMEN'S COMPENSATION—AWARD—BASIS—AVERAGE WEEKLY WAGES—*Remo* v. *Skenandoa Cotton Co. et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 12, 1919), 179 New York Supplement, page 46.*—Remo was injured by an accident arising out of and in the course of his employment with the cotton company, and upon bringing the proper proceedings he was awarded compensation under the workmen's compensation act. The award was based on an average weekly wage computed according to subdivisions 1 and 2 of section 14 of the workmen's compensation act (Consol. Laws, ch. 67), which provide that the average weekly wages of an employee who works at the same occupation for a year shall be arrived at by multiplying the daily wage by 300 and dividing by 52. Remo worked at night, 12 hours per day or 60 hours per week, but he only worked five nights a week. The employer and its insurance carrier appealed from the award, declaring that the average weekly wages were incorrectly computed. They state that as Remo had worked only five days a week his average weekly wages should have been computed according to subdivisions 3 and 4 of section 14 of the act. The employer submitted a statement showing Remo's actual earnings plus a 12 per cent bonus which the company allowed its employees to have amounted to $826 for the year preced-

ing the injury. This statement was undisputed. The court adopted the employer's view of the matter and ordered the award modified, saying in part:

According to the statement, the correctness of which is undisputed, the claimant earned, during the year prior to the accident, with bonus figured in, the sum of $826, which, divided by 52, made an average weekly wage of $15.89. As the claimant regularly worked no more than 5 days a week, the methods of calculation given in subdivisions 1 and 2 of section 14 of the workmen's compensation law could "not reasonably and fairly be applied." Therefore the provisions of subdivisions 3 and 4 of that section, which require that the sum which "shall reasonably represent the annual earning capacity" be taken as a basis, and divided by 52, to determine the average weekly wages, became applicable. As said in Matter of Littler *v.* Fuller Co., 223 N. Y. 369, 119 N. E. 554:

"If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation. (Section 14, subd. 3.) The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness?"

Since the actual annual earning capacity of the injured employee was $826, and his weekly wages were $15.88, the amount which should have been allowed to the claimant was two-thirds thereof, or the sum of $10.59 per week for 244 weeks.

The award should be modified accordingly. All concur.

WORKMEN'S COMPENSATION—AWARD—BASIS—BOARD—*Picanardi* v. *Emerson Hotel Co., Court of Appeals of Maryland (Nov. 13, 1919), 108 Atlantic Reporter, page 483.*—The appellant, Picanardi, was employed by the defendant as a baker at a wage of $50 per month and board. While engaged at his work he got his hand caught in a bread mixer and injured, resulting in a permanent partial disability. The State industrial accident commission awarded him compensation without, however, taking into consideration in the computation of the weekly amount to be paid, the value of the board which he received in part payment for his services. He appealed to the Baltimore city court and from that court to the court of appeals, but in each case the award was affirmed on the ground that the money value of the board not having been fixed at the time of the hiring the board could not be regarded as part of the wages. The opinion was rendered by Judge Burke, who quoted with approval from the opinion in the court below in part as follows:

I can only repeat that I think we are not permitted to suppose that the legislature meant to have the funds provided to pay losses calculated upon a smaller basis than that allowed for the calculation

of the losses themselves. That is equivalent to saying that "average weekly wages," under section 35, in which the scale of benefits is fixed, means wages in money or other things which have been given a fixed money value at the outset, just as it does in the earlier sections concerning the making up of the State accident fund and the provision of adequate insurance. This is confirmed by the letter of the statute. In section 17 "percentage of pay roll" and "percentage of wages" are used as synonymous terms. And we seem to have a similar identity of measure in section 35 itself, for there it is provided that the allowance of "50 per cent of the average weekly wages" for permanent total disability shall not be less than a minimum of $5 per week, "unless the employee's established weekly wages are less than five dollars per week." It would be straining these last words to interpret them as including board of undetermined value if such an element entered into the employee's agreement.

Continuing, Judge Burke said:

The compensation to which the appellant was entitled as provided by section 35 of the act was 50 per cent of his average weekly wages. It is clear the legislature did not intend, as to insurance in the State accident fund, that board was to be included as wages, unless its money value was fixed by the parties at the time of the hiring. And for the reason stated by Judge Bond in his opinion, it would be unreasonable to hold that it was intended that the premiums and rates of insurance from which the fund to pay losses were derived were to be calculated upon a narrower basis than that adopted for the allowance of compensation. The appellant has referred us to certain cases decided upon the compensation laws of Great Britain and California. By those acts the compensation is based not upon wages but upon the earnings of the employee. Wages and earnings are not synonymous terms. The latter is a much more comprehensive term, and the cases cited have not been found helpful in the construction of the Maryland act.

Being of opinion that the construction placed by the court below upon the act is in accordance with the intention of the legislature the judgment will be affirmed.

WORKMEN'S COMPENSATION—AWARDS—BASIS—CONCURRENT CONTRACTS—*In re Howard, Appellate Court of Indiana (Dec. 12, 1919), 125 Northeastern Reporter, page 215.*—Howard was a janitor working for three employers under separate contracts of service. Employer A conducted an insurance agency and paid Howard $1.25 per week to clean his office; employers B and C each had flat buildings for which they hired Howard as janitor, the former paying him $12.50 per week and the latter $4.25 per week. Howard's aggregate earnings as janitor from the three employers was $18. While washing the windows of A's office, Howard lost his hold and fell to the sidewalk, dying from the injuries thus received. His widow sued for compensation under the workmen's compensation act and was

granted an award, but the question of the amount of the award was certified to the appellate court for decision. The compensation act (Acts 1915, p. 392) provides compensation at the rate of 55 per cent of the "average weekly wages" in the "employment in which he was working at the time of the injury" with a minimum weekly compensation of $5.50. The question is: Should Howard's widow be given compensation on the basis of his earnings from employer A, $1.25 per week, for whom he was working when killed, which would allow her the minimum of $5.50 per week, or should she be awarded compensation on the basis of the aggregate earnings, $18 per week, from all three employers, which would allow her $9.90 per week? The court held that the aggregate earnings from all three employers should be used as a basis for computing the compensation, citing Western Metal Supply Co. *v.* Pillsbury, 172 Cal. 407, 156 Pac. 491 (see Bul. No. 224, p. 237), and Gillen *v.* Ocean Accident & G. Corp., 215 Mass. 96, 102 N. E. 346 (Bul. No. 152, p. 200).

After stating the facts and announcing that "the question presented is one of first impression in this State," the court said in part:

If Howard had been in the joint service of the three employers, then, under section 49 of the workmen's compensation act, all of the employers would have contributed to the payment of the compensation in proportion to their respective wage liability. He was not in the "joint service" of his employers but in the employment of all, under concurrent contracts of service. There is no provision in the act for the joint liability of employers who hold independent, concurrent contracts with the same employee. If the legislature had intended to make concurrent employers all liable for compensation in a case like the one at bar, it would in all probability have made special provision as it did with reference to joint employers. Therefore, if the widow of Howard is to be compensated on the basis of the total average weekly earnings of Howard, it must be by employer A, whom he was serving at the time of his injury and death. The amount she should receive must depend upon the construction of clause (c) of section 76, supra. The term "average weekly wages" used in section 40 of said act is defined in said clause (c) of section 76 to be "earnings of the injured employee in the employment in which he was working at the time of the injury." Does this definition mean that the average weekly wages of Howard is the amount he was receiving from the one employer for whom he was washing windows at the time, or does it mean the amount he was receiving in his employment as janitor? What is meant by the words "in the employment"? Webster defines "employment" as "occupation, business, which engages head or hands." Worcester says, "employment" means "business, occupation, object of industry, engagement, vocation, calling, or profession." If we apply these definitions to the word "employment" as used in clause (c) of section 76, as we must, then, under the facts of this case, Howard's employment was that of janitor, and he was engaged in that employment for three employers and was injured while so employed.

It follows that the compensation to be paid to the widow should be based upon the total earnings received by Howard from his three employers.

WORKMEN'S COMPENSATION—AWARD—BASIS—DEDUCTIONS FROM WAGES—UNION DUES—MINE SUPPLIES, ETC.—*Springfield Coal Mining Co.* v. *Industrial Commission, Supreme Court of Illinois (Feb. 28, 1920), 126 Northeastern Reporter, page 133.*—William Wiley was killed by an accident arising out of and in the course of his employment as a coal miner for the Springfield Coal Mining Co., and his administratrix brought proceedings for compensation. The facts are all agreed to, the only dispute being the basis for the computation of the average weekly earnings to determine the compensation. The terms of the deceased's employment required him to pay for all the powder, tools, carbide, etc., which he purchased from the mining company and used in the mining of coal. These materials were not paid for when purchased, but were deducted from the wages on pay days. At the same time union dues, fines, and assessments were also deducted from the wages and paid over to the miners' organization. Deceased's average annual gross earnings were $933.21 and the average weekly gross earnings $17.96; the average annual net earnings after the deduction of $181.01 for supplies, union dues, etc., were $752.20 and the average weekly net earnings $14.46. The company contends that the compensation should be computed on the basis of the average net earnings. An award was entered based on the average gross earnings and the company appealed. In affirming the award the court held in part:

The measure of the responsibility which the employer assumes is the compensation provided by the various sections of the compensation act as declared by section 11 of the act. The question in this case is to be determined by the provisions of paragraps (*a*) and (*g*) of section 10 of the act and the first two lines of that section, providing as follows:

"SEC. 10. The basis for computing the compensation provided for in sections 7 and 8 of the act shall be as follows:

"(*a*) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages, or earnings if in the employment of the same employer continuously during the year next preceding the injury.

* * * * * * *

"(*g*) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment."

After carefully examining the various provisions of section 10 we are satisfied that the lower court properly construed the statute under the evidence in this record. It is clear that the gross earnings of the deceased are the proper basis for fixing the compensation, unless the provisions of paragraph (*g*) require a different construction. We are of the opinion that that paragraph requires no reduction of the compensation allowed by the commission in this case on account of the various items deducted from his wages on pay days by plaintiff in error. The dues, fines, etc., are not customarily or otherwise paid by the employer to the employee "to cover any special expense entailed on him by the nature of his employment." They are not paid to the employee at all by the employer or to the organization, within the meaning of that paragraph. The employee, through his employer, pays them himself to his organization from his wages, and his employer simply deducts them from his wages and turns them over to the organization as agent for the employee; hence there is no payment of such a sum by the employer to the employee "to cover any special expense entailed on him by the nature of his employment." The nature or character of his employment does not impose upon him any special expense for such dues, fines, etc. It is his obligation to his organization that imposes or entails such expense.

The miners are required, in order to pursue their occupation or trade of mining coal, to equip themselves with drilling machines, shovels, lamps, carbide, powder, fuse, squibs, picks, wedges, and sledges, and a box in which to keep such tools and supplies. This is the custom where coal mining is conducted by the use of powder or other explosives. Their expenses were not in this way lessened any more than they would have been had such articles been bought from outsiders. They receive so much a ton for mining coal. Their wages are not increased nor decreased or in any way affected by the fact that they buy the various articles aforesaid from the plaintiff in error instead of buying them from an outsider. We can not understand how the making of a contract by the operator to sell or furnish any one or more of said articles, to be paid for out of the miners' wages, can have the effect to reduce their compensation under said paragraph, when the same would not be the case if the miners bought the same articles from an outsider. The correct rule to be applied in this case will be readily understood by noting that such payments as were made by plaintiff in error in this case to the miners' organization were really payments of the deceased himself to his organization through plaintiff in error as his agent, and the amounts deducted by plaintiff in error for the articles sold or furnished to the deceased were really payments by the miner to the plaintiff in error, and none of them were sums "which the employer had been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment."

WORKMEN'S COMPENSATION—AWARD—BASIS—METHOD OF COMPUTATION—*King's Case, Supreme Judicial Court of Massachusetts (Nov. 28, 1919), 125 Northeastern Reporter, page 153.*—Arthur N. King, an employee of the Globe Newspaper Co., was fatally in-

jured in the course of his employment. His widow brought proceedings for compensation and recovered an award and the employer and its insurer appealed. The award was $10 for 400 weeks. King was employed each week from Monday to Saturday noon by the Atlantic Printing Co. and received a weekly wage of $28. On Saturday nights he worked for the Globe Newspaper Co., receiving $9.20 for each night's work. The industrial accident board in making the above award did so on a basis of a weekly wage of $31.52, that being the average weekly amount earned by a person in the same grade, employed at the same work by the same employer (St. 1911, ch. 751, pt. 5, sec. 2). The compensation law allows compensation at the rate of 66⅔ per cent of the average weekly wages, with a maximum weekly compensation of $10. The employer claimed that the weekly compensation should have been $6.13, which is 66⅔ per cent of an average weekly wage of $9.20, the only amount which King actually ever earned while in its employ in any one week. The court affirmed the decision granting the award, but ordered that the weekly compensation be reduced from $10 to $6.13. The opinion, in part, is as follows:

In computing wages under the workmen's compensation act regard may be had to the average weekly amount earned by one in "the same grade, employed at the same work, and by the same employer, when, by reason of the shortness of time of the employment, or by reason of its nature or terms, it becomes impracticable to compute the employee's average weekly wages earned during the 12 months preceding his injury by dividing this amount by 52." King had been employed each Saturday night during the year by the newspaper company and the shortness of time during which he had been in its employ did not make it impracticable to ascertain his weekly earnings received from the newspaper company during the preceding year. Nor were the nature and terms of his employment of such a character as to render the computation of the compensation impracticable. He was regularly employed by the newspaper company, his wages were established, and for each Saturday night's work he received a fixed sum. The amount earned by an employee in a particular employment should govern in all cases in computing the compensation to be paid under the workmen's compensation act unless the computation becomes impracticable; and the wages which determine the compensation, with the exceptions referred to, are the wages earned in the employment where the injury happens. The cost of the insurance to the employer is determined by the wages of the employee received in this employment and it is to be presumed that this is shown by the pay roll. (Gagnon's case, 228 Mass. 334, 338, 117 N. E. 321.)

It may be proper to add that the provision of the British workmen's compensation act, providing for compensation based on concurrent contracts of service with two or more employers, is not found in our act. It follows that the compensation should be computed on the employee's earnings for the preceding year received from the newspaper company.

The decree is to be modified by striking out the words "ten dollars" and inserting in place thereof $6.13; and, so modified, it is affirmed.

WORKMEN'S COMPENSATION — AWARD — BASIS — TIME LOST BY STRIKES—*Rakie* v. *Jefferson & Clearfield Coal & Iron Co., Supreme Court of Pennsylvania (Oct. 23, 1918), 105 Atlantic Reporter, page 638.*—Charles Rakie was killed on September 29, 1916, while working as an employee in the defendants' mine. The workmen's compensation law of the State of Pennsylvania requires that in the computation of an injured man's average weekly wages the wages earned during the six months next preceding the accident must be used as a basis. In addition to this stipulation the compensation board has adopted a set of rules governing the computation of wages by which it is the practice to deduct all Sundays, holidays, and half holidays and days when the workman has been absent from work due to no fault of his own. In upholding the reasonableness of this rule the court rendered in part the following decision:

In the six months preceding his death there were 184 calendar days during 88 of which the mine was closed [on account of a labor dispute] and deceased did not work. The record contains a finding of the referee, adopted by the compensation board, that "the deceased's idleness during this period was not due to any fault of his own." To arrive at a divisor, for the purpose of determining the average daily earnings of deceased, in order to calculate his weekly wage so as to ascertain the compensation payable to claimant, the before-mentioned 88 days, together with Sundays and holidays occurring during the six months in question, were deducted in accord with the relevant standing rule of the board.

The first question raised involves the propriety of the rule above referred to. We have recently sustained its validity (see Jensen *v.* Atlantic Refining Co., 105 Atl. 545, not yet officially reported), and on the findings of the referee there can be no question of the rule's applicability to the present case. The learned court below erred in deciding otherwise.

The next "question involved" is correctly stated by appellant thus:

"In case of the instantaneous death of an employee by accident, does the period of compensation begin with the day of his death or is it deferred to begin 14 days thereafter?"

There is room for argument as to the proper construction to be placed upon the act of June 2, 1915 (P. L. 736), in this regard, but taking into consideration all the pertinent provisions of the statute, particularly sections 306 (clauses "*d*" and "*f*"), 307, and 311 of article 3 and sections 410 and 422 of article 4, we are not convinced the court below erred in determining that the 14 days must elapse and compensation in this case be counted from October 14, 1916.

The widow was therefore awarded benefits for 300 weeks, in the absence of prior death or marriage, after which awards to her three minor children were to become effective.

WORKMEN'S COMPENSATION — AWARD — BASIS — TIPS — *Bryant* v. *Pullman Co., Supreme Court of New York, Appellate Division, Third Department (June 30, 1919), 177 New York Supplement, page 488.*—The claimant, Bryant, was injured while in the employ of the Pullman Co. and brought proceedings for compensation under the workmen's compensation act. His salary exclusive of tips was $1 per day. The company contends that in determining the amount of compensation to be paid the tips should not be computed. From an award in favor of Bryant the employer and its insurer appealed. In affirming the judgment the court said in part:

It is urged, however, that the award rested upon a wrong basis as to tips received by the porter, which were treated as a part of his wages, and an ingenious, but unsuccessful, attempt is made to distinguish this case from Sloat *v.* Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. It is improbable that the company could employ a porter for $1 a day if other compensation was not in contemplation. The company puts its patrons in the hands of underpaid porters expecting that the patrons will not suffer the porter to remain underpaid but will help the company pay for the services rendered by them. Such is the common understanding.

Award unanimously affirmed.

WORKMEN'S COMPENSATION—AWARD—LUMP-SUM SETTLEMENT—NECESSITY FOR EMPLOYER'S CONSENT—*McMullen* v. *Gavette Const. Co., Supreme Court of Michigan (Dec. 22, 1919), 175 Northwestern Reporter, page 120.*—McMullen was injured by an accident arising out of and in the course of his employment with the Gavette Construction Co. He had been employed as a carpenter, and the result of his injuries was such as to render him incapable of ever again following that occupation. He was allowed compensation under the workmen's compensation act at the rate of $10 per week on April 9, 1917. On January 20, 1919, by reason of the very large sum necessarily expended for medical services and by reason of his physical condition McMullen petitioned for a commutation of the compensation into a lump sum. This petition was refused, but the industrial accident board ordered an advance payment of $1,750. From this advance-payment lump-sum award the defendant and its insurer appealed, declaring (1) that the board could not grant a lump-sum award without the consent of the employer, and (2) that to grant a lump-sum award would in effect nullify the provisions of the act allowing compensation to an employee's depend-

ents in event of his death. The court sustained the order of the board, saying in part:

There appears to be very little necessity for construing this statute. In plain, unmistakable terms it provides for a lump-sum agreement by the parties with the approval of the industrial accident board, and it also provides that the board may, at any time, in any case, provide for a commutation of deferred payments, if its discretion is moved by special circumstances attending the case. While the first provision makes it plain that the consent of the employer is to be given, there is no language in the second provision from which any such conclusion could be drawn.

The argument is made under the first and third sections that if, after a lump-sum advancement is made, the injured party should die, leaving no dependents, the employer would be deprived of the right to retain the future payments, and under the second section that the dependents would be deprived of them. In view of this we are asked to nullify this section of the statute as being inconsistent with the body of the act. It was evidently the intention of the legislature in passing this act to provide for the misfortunes of the employees by accident, and in doing so it was evidently in the mind of the legislature that in most cases the employee's misfortune would be better served by making periodical payments rather than lump-sum payments, and that policy was adopted and carried out in the act. But to that rule the legislature created an exception, namely, that lump-sum advancements might be made where special circumstances exist, which, in the discretion of the board, made it probable that the interest of the employee would be better served by so doing. We see no inconsistency between these provisions. The exceptions may in many cases be very beneficial to the injured man and his dependents, and it is therefore in furtherance of the central idea which underlies the legislation.

But it is insisted that there have been no circumstances shown here which justify action under this statute. It was shown, on the hearing, by medical testimony, that plaintiff is permanently incapacitated for work in his trade as a carpenter. It was further shown that he might be able to do some kinds of work where he could sit, such as clerical work or telegraphing. It is further shown that his medical and hospital expenses were over $900, and that in order to obtain the same his father mortgaged his farm.

We think the showing was ample to authorize the board to invoke the aid of this statute, and their order must be sustained, with costs to the plaintiff.

WORKMEN'S COMPENSATION—AWARD—POWERS OF COMMISSION—LUMP SUMS—*Reteuna* v. *Industrial Commission, Supreme Court of Utah (Nov. 14, 1919), 185 Pacific Reporter, page 535.*—Domineck Borda sustained injuries arising out of and in the course of his employment with the Independent Coal & Coke Co., which caused him to become insane. Reteuna was his guardian and as such entered into agreement with the coke company whereby he was to

receive the lump sum of $2,500 in full settlement and discharge of all liability of the employer under the workmen's compensation act. This agreement was not approved by the industrial commission, which awarded compensation at the rate of $12 per week until such time as the commission would order otherwise. Reteuna, as Borda's guardian, petitioned to the district court for permission to make the lump-sum settlement of $2,500 with the employer. This permission was granted and Reteuna petitioned the industrial commission to give its approval to the agreement. This the commission refused to do, and Reteuna brought an action to review the decision of the commission. In denying the writ of review and affirming the award the court held in part as follows:

The commission is charged with the duty of fixing the compensation to be received by an injured employee. Also, after having made such award, the commission has continuing power and authority to modify or change such order of award as in its opinion may be justified. By the provisions of section 3145, under special circumstances, when deemed advisable, it may commute the periodical payments to one or more lump-sum payments. Considering the objects sought to be accomplished by the enactment, that it is not damages as ordinarily understood to be paid by the negligent employer for an injury to an employee, but that it is compensation to protect the injured party and those dependent upon him regardless of the question of negligence, and that the State is an interested party, then it must necessarily follow that the authority and discretion of the commission, as the authorized agent of the State, in determining whether the interests of the parties concerned in any particular case would be best subserved by a commutation or payment in a lump sum, must be absolute, and not subject to review by the courts. In other words, the question for determination is one of discretion under all the peculiar circumstances of the particular case, and must be so considered, and each case determined upon the particular facts surrounding it. It is not a question, as pointed out by the attorney general, of evidence or the weight of evidence. It must be assumed that the commission, in making the original award, familiarized itself with the facts surrounding the applicant, his particular needs, and, based upon such facts, made its decision that the payments should be made periodically as authorized by the act.

Considering the entire record, there is ample testimony to support the conclusion of the commission to refuse to approve the settlement, considered purely as a question of fact; and, there being such testimony, this court will not review the commission's findings.

If it be contended that the conclusions herein reached of necessity abridge the freedom of contract, it is sufficient answer that the authority of the legislature to enact a workmen's compensation law is no longer open to question; that the provisions of such law, if constitutional, enter into and become a binding part of all contracts made between employers and employees.

It follows that the writ should be denied and the petition dismissed. Such is the order.

WORKMEN'S COMPENSATION — AWARD — REVIEW — AGREEMENTS — POWERS OF COMMISSION—*Industrial Commission of Colorado* v. *London Guarantee & Accident Co. (Ltd.) et al., Supreme Court of Colorado (Nov. 3, 1919), 185 Pacific Reporter, page 344.*—Ray Brown was awarded compensation for an injury by the industrial commission. The accident company took the case to the district court, and while there pending Brown entered into a stipulation with the company to receive in settlement of his claim a sum less than that allowed in the award of the commission. This stipulation was filed in the district court, which rendered judgment thereupon. The industrial commission objected to this decision and brought the case to the supreme court for review. The supreme court reversed the judgment of the district court, saying in part:

The commission was made a party to the proceeding in the district court, as was required by the statute, and, being a party there, it had the right to bring the case here for determination of the questions raised by it. Inasmuch as the statute provides that the commission be made a party to the proceedings in the district court, it can not be supposed that the cause there may be conducted solely by the other parties. The commission has a function to perform in the district court, and that manifestly is to defend its award in the interest both of the claimant and of the State. The workmen's compensation act is an acknowledgment by the State of a duty to aid the injured employees in securing compensation for their injuries and to prevent the delays and miscarriage of justice which sometimes occurred in personal-injury actions in the courts. As has been frequently pointed out, the State has an interest in the recovery of just compensation by injured employees to the end that they do not, because of their injuries, become public charges. It is that fact which induced the lawmakers to give to such commissions the power to approve settlements as a condition of their becoming binding on the parties to them.

It is further urged by the commission, and with force, that the district court's powers on an appeal are limited to those named in the statute. We have several times held that the findings of the commission are binding unless set aside for one or more of the reasons named in the statute. The policy of the law, clearly disclosed in its provisions, is to give the district court power to set aside the commission's orders only when made without jurisdiction, by the usurpation of power, or when procured by fraud, or when the findings of fact are not supported by the evidence.

It may well be that the employee's rights would be fully protected by the district courts, but the lawmakers have seen fit to commit to the industrial commission that important duty. We have merely to apply the law as we find it.

We are therefore of the opinion that the award by the district court, on the stipulation, violated not only the spirit but the express provision of the law.

WORKMEN'S COMPENSATION—AWARD—RIGHT TO COMPEL PAYMENT—MANDAMUS TO SCHOOL BOARD—*Woodcock* v. *Board of Education of Salt Lake City et al., Supreme Court of Utah (Jan. 13, 1920), 187 Pacific Reporter, page 181.*—Rae E. Woodcock was injured in the course of her employment as a school-teacher by an accident arising out of and in the course of employment. She applied to the industrial commission for compensation and was allowed an award against the defendant school board, but a demand for payment of the award was refused. The time for taking an appeal having expired, she brought proceedings for a writ of mandamus to compel the defendant to pay the award. Defendant demurred on the ground that Miss Woodcock could not as an individual sue for a writ of mandamus against it. The court overruled this demurrer, saying:

Counsel for the board insist that in view that in the original act (Comp. Laws Utah, 1917, 3130), creating the commission and providing for the payment of compensation to injured employees, it is provided that, in the event that any employer shall fail to pay the compensation awarded to an injured employee within the time specified in section 3130, the compensation awarded "may be recovered in an action in the name of the State for the benefit of the person * * * entitled to the same," therefore the plaintiff should at least have joined the State with her as a party plaintiff. After considering all the provisions of the act in connection with other statutory provisions, we are of the opinion that it was not the intent or purpose of the legislature to prevent the injured employee from prosecuting an action or proceeding in his own name if he felt so disposed. The language quoted from the section is directory rather than mandatory. There is nothing in the act which indicates that the action referred to in section 3130 was intended to be exclusive. From the language employed we are constrained to hold that the action or remedy in that section referred to was intended to be cumulative and not exclusive. This view is strengthened by the fact that under our statute, unless there is some express provision to the contrary, it is not only proper for the real party in interest, if he be competent and sui juris, to bring all actions in his own name, but the statute requires him to do so. Then again, under our statute mandamus is a special proceeding which the party beneficially interested may always institute and maintain in his own name and behalf. We are of the opinion, therefore, that while under section 3130, supra, the commission could have commenced the action in the name of the State for the benefit of plaintiff, she nevertheless had the right to bring the action or proceeding and to prosecute the same to full determination in her own name.

WORKMEN'S COMPENSATION—BENEFITS AS A PREFERRED CLAIM—EXTENT OF PREFERENCE—*Steel & Iron Mongers (Inc.)* v. *Bonnite Insulator Co., Court of Chancery of New Jersey (Mar. 5, 1919), 106*

Atlantic Reporter, paye 380.—The plaintiff company brought proceedings against the defendant, an insolvent company, and a claimant, a former employee of the latter company who had been injured and awarded compensation, interposes his claim for compensation, alleging that it is under the law a preferred claim. The claimant rested his right to preference upon the provisions of section 22 of the workmen's compensation act (C. S. of N. J., 1st Supplement, p. 1650), which reads as follows:

The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor.

The receiver of the insolvent company allowed preference for the compensation only to the extent of two months, on the ground that the preference allowed to unpaid wages under section 83 of the act concerning corporations (revision of 1896, 2 C. S. N. J., p. 1650) was similarly limited. The claimant contends that the entire compensation should be regarded as preferred, and appealed. The court sustained the receiver's position, saying in part:

It is difficult to understand precisely what the legislature meant by the language used in section 22 of the workmen's compensation act. If it had been intended to give a general preference to the amounts awarded as compensation, clear language expressing such purpose might have been used. The term "right of compensation" used in section 22 must, of course, refer to the amounts awarded as compensation. The same preference then is given to the claimant for such amounts as is allowed by law for a claim for unpaid wages for labor. The claim for unpaid wages for labor allowed in the case of insolvent corporations is prescribed by section 83 of the corporation act, and is for claims for labor for a period not exceeding two months prior to the institution of proceedings in insolvency. Labor is therefore given but a limited preference. A holding that the entire amount of the award for compensation under the workmen's compensation act is entitled to preference would require a disregard of the limited preference given to labor, and of the fact that if such had been intended apt and clear language was available to express such an intent. While the award may not in all respects be considered as wages accruing, the award being in reality for injuries sustained, yet in order to make effective, in any way, the provisions of section 22, I think that, for the purpose of that section, the award must be considered as in the nature of wages, and the preference is confined to the amount accrued and unpaid, computed at the weekly rate for the two months preceding the institution of proceedings in insolvency.

The action of the receiver upon the claim, therefore, will be sustained.

WORKMEN'S COMPENSATION—CASUAL EMPLOYEES—LOANED EMPLOYEE—DEATH BY ASPHYXIATION—*Tarr* v. *Hecla Coal & Coke Co.* (*Employers' Liability Assurance Corporation, Intervener*), *Supreme*

Court of Pennsylvania (Jan. 5, 1920), 109 Atlantic Reporter, page 224.—Tarr was employed as a miner by the H. C. Frick Coke Co. A fire broke out in the mine of the Hecla company and on its application it was loaned the services of Tarr, who was experienced in fighting fires. While thus engaged for the Hecla company Tarr lost his life by asphyxiation. His widow was awarded compensation under the workmen's compensation act, payable by the Hecla company, and it appealed. The appeal was dismissed and the intervener appealed. In affirming the award the court said in part:

The referee concluded, as a matter of law, that claimant's deceased husband came to his death by reason of injuries sustained in an accident while in the course of his employment with the defendant company and award compensation, which was affirmed by the compensation board and court below.

The facts found by the referee justify the award. A master may loan his servant, with the latter's consent, to another under such circumstances as to create for the time a new relation of master and servant; the regular servant of one may thus for the time being become the special servant of another, and that was done here.

The deceased when injured was working in the interest of the defendant on its premises and under its control, and clearly, for the time being, its servant. That his wages had not been fixed is unimportant; the law will imply a reasonable compensation. The finding of a temporary employment by defendant is not inconsistent with the finding of a general employment by the Frick Coke Co., and being one of fact we are concluded thereby.

"Persons whose employment is casual in character and not in the regular course of the business of the employer" are excluded from the workmen's compensation act (art. 1, 104 P. L. 1915, p. 736); but we can not adopt the suggestion that this case comes within the exception. Putting out mine fires is as much in the regular course of the business as clearing passageways or pumping water. There are two necessary elements to constitute the exception: (1) The employment must be casual in character, and (2) it must be outside of the regular course of the business of the employer. As we find this within such course, it is not necessary to determine whether the employment was casual in character or otherwise. This statute must be liberally construed (Pater *v.* Superior Steel Co., 263 Pa. 244, 106 Atl. 202), which it would not be by holding that the extinguishment of fire in a coal mine was a work outside of the regular course of the mining business. Being overcome by noxious gases while working in a mine is an "accident" within the workmen's compensation law. (Gurski *v.* Susquehanna Coal Co., 262 Pa. 1, 104 Atl. 801.)

The award was therefore affirmed.

WORKMEN'S COMPENSATION — CASUAL EMPLOYMENT — "ODD JOB" WORKER—*Bedard* v. *Sweinhart, Supreme Court of Iowa (July 2, 1919), 172 Northwestern Reporter, page 937.*—This was an action for damages under the workmen's compensation act. Judgment was ren-

dered in favor of the defendant employer on a directed verdict and the plaintiff appeals. Bedard was employed by the defendant, a real estate agent, to do various odd jobs about the houses which he rented. The defendant had engaged Bedard to place shingles on a house. Bedard completed this job and went to work on another for another man. Later he reported to defendant and told him that the chimney on the building which he had been shingling needed some cement and that he would put it on for nothing if defendant would get the cement. Bedard was injured while coming down from fixing the chimney. Judgment was rendered in favor of the defendant on the ground that Bedard was only a "casual employee." In upholding this decision the court rendered in part the following opinion:

It is conceded that the provisions of this act do not apply to a "casual employee"; that is, to one whose employment is of a casual nature. It appears that he had discovered that a little cement was needed at the base of the chimney on the roof which he had been shingling, which fact he reported to his employer. He proposed that his employer get the cement for him and he would put it on for nothing. He was at that time already at work upon another job for another man. When he received the cement from the defendant he left the other job temporarily and made the repair upon the defendant's chimney. In coming down from this work he received his injury. He testified also that in the course of his conversation with the defendant it was agreed that he would work for the defendant at other jobs as they might arise for 40 cents an hour. It is not claimed that there was any particular reference to any particular job.

The trial court held that the plaintiff was a "casual employee" within the exception to the workmen's compensation act. We think the holding was clearly right. If this was not a "casual employment," it would be hard to apply the term to any employment. The word "casual" is defined in the dictionaries as "coming without regularity; occasional; incidental;" "coming at uncertain times or without regularity in distinction from stated or regular;" "a laborer or an artisan employed only irregularly." (See Webster and Century Dictionaries.) We do not find the authorities cited by the appellant as being applicable to the facts disclosed by this record. The following authority supports the holding of the trial court: Blood *v.* State Industrial Commission, 30 Cal. App. 274, 157 Pac. 1140.

WORKMEN'S COMPENSATION — CASUAL EMPLOYMENT — SEASONAL WORK—*State Accident Fund* v. *Jacobs*, *Court of Appeals of Maryland* (*Mar. 5, 1919*), *106 Atlantic Reporter*, *page 255*.—Julia Jacobs brought proceedings for compensation for the death of her son, and an award was ordered, from which order the State Accident Fund appealed, contending that the deceased was not entitled to compensation because he had been only a casual employee. Plaintiff's son was fatally injured by being thrown against a post as he was driving

a wagon loaded with canned tomatoes out of the packing factory of his employer. The injured man, who was a farmer and teamster, had been employed to do hauling for the factory whenever he was needed for that service. He had become engaged early in the season to do any necessary hauling required of him at a certain rate per day, the work being a necessary part of the employer's business. The court in declaring that this work was not casual rendered a decision, in part as follows:

There can be no dispute as to the fact that the appellee's son was an employee, within the definition of the act, at the time he was injured; but it is contended that his employment was so irregular that it should be characterized as only "casual," within the meaning of the act, and therefore expressly excluded from its operation.

The question whether an employment is casual must be determined with principal reference to the scope and purpose of the hiring, rather than with sole regard to the duration and regularity of the service. One who enters into a contract of employment for an entire season is not a casual employee merely because he may be required to work for only short and irregular periods. When there is a continuing engagement to serve the employer in his business at such times as the particular and essential service may be needed, the employment is not "casual" according to any of the judicial definitions of that term. In this case the service required and rendered was occasional, but it was rendered in pursuance of an engagement covering the whole of the working season at the employer's plant.

WORKMEN'S COMPENSATION — CLAIM — PROCEDURE — EFFECT OF CLAIM FOR MEDICAL SERVICE.—*Central Locomotive & Car Works* v. *Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 369.*—One Lindstrom sustained an injury to his eye while in the employ of the car works. He received the injury on October 12, 1913, on which date he went to the paymaster and asked for a permit to call on the doctor. The permit was granted and the medical treatment was provided, after which Lindstrom returned to his work. The injured eye steadily became worse until he was told in April, 1916, that the injured eye would have to be removed in order to save the remaining eye. In May or June, 1916, Lindstrom went to Bruce, the general manager of the employer company, and inquired whether he was to receive any compensation for his injury. Prior to this Lindstrom had made no claim for compensation other than the demand for medical treatment on the day of the accident. The industrial commission awarded compensation and the circuit court affirmed the award, but on appeal the supreme court reversed the lower court's decision. The opinion of the supreme court is in part as follows:

Section 24 of the workmen's compensation act (Laws 1913, p. 351) provides that—

"No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made within six months after such payments have ceased."

It is argued by defendant in error that claim for compensation was made on October 13, 1913, when he asked for a permit to visit the company doctor; that the claim to the doctor's services was a claim for compensation. Section 8 of the act provides:

"The amount of compensation which shall be paid to the employee for an injury not resulting in death shall be: (*a*) The employer shall provide necessary first aid medical, surgical, and hospital services; also medical, surgical, and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of $200. The employee may elect to secure his own physician, surgeon, or hospital services at his own expense."

The legislature in using the word "compensation" made no distinction between medical services and money payments. When the defendant in error made claim for medical services, he made claim for compensation, and when medical services were rendered at the employer's expense payments were made under the provisions of the act. The defendant in error's claim was acceded to when the services of the doctor were rendered, and no claim for any other compensation was made within six months after the accident or within six months after the services of the doctor ceased, as required by section 24, where payments have been made under the provisions of the act.

The defendant in error contends that it was impossible for him to make any more specific and definite claim for the loss of the sight of his eye than he did make before he knew or had reason to believe that the sight would be lost; that the law does not require an impossible thing to be done; that in a case where the injury at first appears slight but afterwards develops graver symptoms, the injury results when the diseased condition culminates; and that a claim made as soon as the loss of the eye was definitely ascertained was within the provisions of the act. Cases have been cited from Massachusetts and Nebraska holding that the time within which notice must be given or claim made runs from the culmination of the injury, and not from the physical accident which caused it. (Brown's case, 228 Mass. 31, 116 N. E. 897; Johansen *v.* Union Stockyards Co., 99 Neb. 328, 156 N. W. 511 [Bul. No. 224, p. 340].) The statutes construed in those cases referred to the injury for determining the time of giving notice or making claim. On the other hand, the Supreme Court of Michigan, whose statute also provides for notice within a certain time after the happening of the injury, holds the time to run from date of the accident. (Cooke *v.* Holland Furnace Co., 200 Mich. 192, 166 N. W. 1013 [Bul. No. 258, p. 219].)

The legislature has seen fit to fix the time for making claim for compensation at six months after the accident. By another section of the statute, provision is made for reviewing the award and for reestablishing, increasing, diminishing, or ending the compensation if the disability of the employee shall have recurred, increased,

diminished, or ended. These provisions are within the domain of legislative power, and the court is without authority to modify them. If they operate unjustly, the remedy is in the amendment of the law.

WORKMEN'S COMPENSATION — COMPULSORY SYSTEM — EXCLUSIVE STATE FUND—ELECTION—PAYMENT OF PREMIUMS—*Camunas et al.* v. *New York & P. R. S. S. Co., United States Circuit Court of Appeals, First Circuit (June 3, 1919), 260 Federal Reporter, page 40.*— The workmen's relief commission, which administers the workmen's compensation law of Porto Rico, in compliance with the provisions of said law, fixed the New York and Porto Rico Steamship Co.'s quota of the annual premium tax to be contributed to the State fund at $7,639.68. The steamship company protested, and in order to avoid criminal proceedings paid the first installment of the sum under protest. The company, appellee in the present proceedings, then sued for an injunction against the members of the workmen's relief commission to restrain them from requiring it to file certain statements or reports and to prevent them from assessing any premium or quota to be paid by the company into the workmen's relief fund. The United States district court granted the injunction, and the members of the workmen's relief commission appealed. The company, which owns a dock at San Juan and employs about 75 workmen, claimed that under the act it could elect whether or not it would be bound by the act and that having elected not to accept the act its provisions could not be enforced against it. In reversing the decision of the district court and dismissing the injunctions the court declared that the Porto Rico act was compulsory and that the company could be required to pay the legally assessed premiums. The opinion is, in part, as follows:

The gist of the district court's decision was that the Porto Rican Legislature had enacted an elective, and not a compulsory, workmen's compensation act, so far as employers are concerned, and that therefore the Porto Rican officials should be enjoined from enforcing the act as against a rejecting employer.

In considering the problems thus presented it is desirable to have in mind the legislative and constitutional status of compulsory workmen's compensation acts when this act was passed. It is a matter of general knowledge that for many years courts, lawyers, and legislators were divided in their opinion as to the constitutionality of compulsory workmen's compensation acts.

This question finally reached the Supreme Court of the United States in the two cases of New York Central R. R. Co. *v.* White, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232], and Mountain Timber Co. *v.* Washington, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. No. 224, p. 252]. The decision was in favor of the constitutionality of compulsory workmen's compensation acts.

Under section 1 of the act of 1916, which is left unchanged by the amendment of 1917, a trust fund is created, starting with an appropriation of $25,000 from the treasury of Porto Rico, and thereafter based upon insurance premiums levied upon employers who do not elect to reject the benefits of the act by filing with the workmen's relief commission a written statement expressing such election.

But the next Porto Rican Legislature that convened after the Supreme Court of the United States had in the above-cited cases held compulsory compensation acts constitutional passed the act in question of February 25, 1918. This is a new act. By section 32 all laws and parts of laws in conflict therewith are repealed. It does not purport to be an amendment of the old acts.

Section 7 requires "every employer subject to the provisions of this act * * * to report to the workmen's relief commission as soon as possible, within a period of five days from the date of the accident, all injuries suffered by his employees in the course of their employment." The words "subject to the provisions of this act" are given full effect, if applied only to employers employing not less than three laborers. There is nothing in these words indicating an election open generally to all employers. Refusal or neglect of an employer to make such report is punishable by a fine of from $25 to $50.

It is apparent that the act of 1918 is, as to all employees, excepting only the classes specifically excluded under section 2 and the victims of accidents caused by illegal acts or gross negligence given an option under section 21, compulsory. All rights of action against employers existing under the old law are, as to the great mass of victims of industrial accidents, taken away. Whatever the right of employers to elect, employees are limited to such remedies as the new act affords for compensation under the plan provided; and this compensation is to be paid from the treasury of Porto Rico. The great mass of victims of ordinary industrial accidents in Porto Rico are thus cut off by this act from their former rights against their employers, and are given in lieu thereof a right to claim compensation from the public treasury.

The commission also contended that the injunction should not issue, because the company had an adequate remedy at law and was not subjected to irreparable injury by the collection of the tax. This the court agreed to, saying that the Government of Porto Rico had taken over the liabilities of the company for accidents to its employees; further, if there were only reasonable doubt, a Federal court ought not to interfere with the operation of the law whose function it was to secure to the treasury of Porto Rico funds essential to the performance of the public duties of the government, and that the statute affords full relief for any unlawful assessment that might be made under it.

The decree of the district court was therefore reversed, and the bill ordered dismissed, with costs to the appellants.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ABROGATION OF COMMON-LAW RIGHTS OF ACTION AND DEFENSE—COMMISSION AS A JUDICIAL BODY—*Shea* v. *North-Butte Mining Co., Supreme Court of Montana (Mar. 8, 1919), 179 Pacific Reporter, page 499.*—Murty Shea was in the employ of the defendant and was injured while at his work. He brought suit in an action for damages, and the defendant demurred to the complaint on the ground that the case was covered by the workmen's compensation act and that a common law suit for damages would not lie. The demurrer was sustained by the lower court and the plaintiff Shea took a default and appealed on the ground that the workmen's compensation act is unconstitutional. In considering this argument Chief Justice Brantly rendered an opinion upholding the act, extracts from which are as follows:

Our own statute is elective. While it has been criticized that the schedule of rates of compensation provided for by it is not sufficiently liberal, and also on the ground that it makes an unwise and unjust discrimination against the dependents of aliens, yet that it operates more justly and satisfactorily than the old system is demonstrated by the fact that as soon as it became operative, on July 1, 1915, the great body of employers as well as employees in the various industries in the State accepted its provisions, and have since been subject to them, as administered by the industrial accident board created by the act for that purpose.

Under these circumstances, the rule that an act of the legislature will not be declared invalid because it is repugnant to some provisions of the constitution, unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force.

It is said that the act is repugnant to section 6 of article 3 of the constitution, which declares that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay."

It is true that the legislature can not destroy vested rights. Where an injury has already occurred for which the injured person has a right of action the legislature can not deny him a remedy. But at this late day it can not be controverted that the remedies recognized by the common law in this class of cases, together with all rights of action to arise in the future, may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident, so long as there is no impairment of the rights already accrued. This necessarily follows from the proposition, well established by the courts everywhere, that no one has a vested right in any rule of the common law. The technical defenses recognized by it in this class of cases, viz., contributory negligence, assumption of risk, etc., may be abolished or modified without transcending any constitutional guaranty. [Cases cited.]

This being so, there is no reason why technical rights of action arising out of the negligence of the employer may not be abolished by the legislature in the same way. And so it is held by the courts

of those States which have enacted compensation laws made compulsory, as in New York and Washington. If this is so, for a much stronger reason may it be asserted that there can be no objection to a compensation law which becomes binding upon the employer and employee at their election, but not otherwise. By way of inducement to the employer to accept the act, it is provided that if he refrains the technical common law defenses shall not be available to him. As an inducement to the employee, his guaranty of compensation for any injury arising out of his employment becomes absolute, whereas, if he refuses to do so, he still has his action at law subject to all the common law defenses. The employer can not object because he has by his affirmative act elected to waive all objections to the extent of his liability and his obligation to make compensation. The employee cannot thereafter object if he fails to give the required notice of his refusal to accept the conditions imposed.

The difference in the modes by which they may indicate their election is not objectionable on the constitutional ground that it discriminates against either employee or employer.

The former is not in this case making any complaint; the latter can not complain because it was competent for him to waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver did not violate public policy.

It is argued that the act is invalid in that it constitutes the industrial accident board a court, whereas the whole judicial power of the State is vested in the courts enumerated in section 1 of article 8 of the constitution. Several of its provisions are cited as evidencing the fact that the functions of this body are judicial. The fallacy of this contention is fully demonstrated by the case of Cunningham *v.* Northwestern Imp. Co. (44 Mont. 196, 119 Pac. 554). That case is decisive of counsel's contention. It is true that many of the functions of the board are judicial in character; but that it is not vested with judicial power in the sense in which that expression is used in the constitution becomes clear upon a moment's consideration. As used in the constitution, the expression "judicial power" means "the power of a court to decide and pronounce judgment and carry it into effect between persons and parties who bring a case before it for decision." (Miller on the Constitution, 314.) This power the board does not possess. It was created as a purely administrative body. It may hear evidence to enable it to make an award in a particular case, and to that end may call witnesses; but it is without power to render an enforceable judgment, and its determinations and awards are not enforceable by execution or other process until a judgment has been entered therein on appeal to a regularly constituted court. [Cases cited.]

The other contentions made by counsel are that the act denies a jury trial, and that it violates the clause of the fourteenth amendment to the Constitution of the United States guaranteeing to the citizen the equal protection of the laws. What we have said above in discussing the other questions heretofore determined disposes of these contentions.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ALTERNATIVE REMEDIES—TAKING PROPERTY WITHOUT "DUE PROCESS OF LAW"—*Arizona Copper Co. (Ltd.)*, v. *Hammer, United States Su-*

preme Court (June 9, 1919), 39 Supreme Court Reporter, page 553.—Five cases were brought up and heard by the Supreme Court together, each of them contesting the constitutionality of the Arizona workmen's compensation law (ch. 14, Laws of 1912, 1st special session). In each case the injured employee was engaged in a hazardous employment at the time of the injury, and in each case he was successful in recovering compensation. The respective defendants brought these writs of error to the Supreme Court. The chief ground for attacking the constitutionality of the statute is that it violates the fourteenth amendment to the United States Constitution in that it is alleged to deprive the defendants of their property without "due process of law." In upholding the statute Mr. Justice Pitney, speaking for the court, used, in part, the following language:

We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

The principal contention is that the Arizona employers' liability law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employee killed or injured. In determining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the fourteenth amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications.

We are unable to say that the employers' liability law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the

occupation, is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. [Cases cited.] In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. The statute requires that compensation shall be paid to the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid by the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the "equal protection of the laws."

Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject matter, and of the public interest involved, we can not assent to the proposition that the rights of life, liberty, and property guaranteed by the fourteenth amendment prevent the States from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed, but perhaps was unrecognized, by requiring that its cost be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among

several remedies. In Consolidated Arizona S. Co. *v.* Ujack, 15 Ariz. 382, 384, 139 Pac. 465, 466 [Bul. No. 169, p. 109], the supreme court of the State said:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. (Const. 4, 5, art 18.) (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. (Const. 7, art. 18.) (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. (Const. 8, art. 18.)"

It is said by counsel that the compensation act, because it limits the recovery, never is resorted to in practice unless the employee has been negligent, and hence is debarred of a remedy under the liability act. But it is thoroughly settled by our previous decisions that a State may abolish contributory negligence as a defense, and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course. Judgments affirmed.

Mr. Justice McKenna prepared a dissenting opinion, in which Chief Justice White, Mr. Justice Van Devanter, and Mr. Justice McReynolds concurred; Mr. Justice McReynolds also dissented specially, the Chief Justice, Mr. Justice McKenna, and Mr. Justice Van Devanter concurring therein. Mr. Justice Holmes concurred in the majority opinion in a separate opinion, giving additional reasons for upholding the law, and in this Mr. Justice Brandeis and Mr. Justice Clarke concurred. The dissents were based on the unrestricted liability to which the employer was exposed at the employee's option.

Mr. Justice McKenna began by recognizing the established doctrines of compensation for injuries as stated by the court in cases when other laws were before it. Accepting their validity, he continued:

The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the compensation laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can be done only by bringing its instances and theirs under the same generalization; that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation. In other words, there is a clear discrimination, a class distinction with its legal circumstances

and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification.

But I pass this discrimination and return to the law as a violation of the employer's rights considered absolutely and abstractly. It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. Consider what the employer does: He invests his money in productive enterprise—mining, smelting, manufacturing, railroading—he engages employees at their request and pays them the wages they demand; he takes all the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable.

Mr. Justice McReynolds pointed out at length the differences between the Arizona statute and a compensation law proper, as he regarded it.

The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common-law rules have been set aside without a reasonably just substitute. The prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—CLASS LEGISLATION—RIGHT TO JURY TRIAL—DUE PROCESS OF LAW—MINORS—FEES FOR JUDGES—*Scott* v. *Nashville Bridge Co., Supreme Court of Tennessee (June 22, 1920), 223 Southwestern Reporter, page 844.*—The plaintiff, Scott, was injured while in the employ of the bridge company. The injury occurred in October, 1919, the workmen's compensation act having gone into effect on July 1. Scott, however, ignored this law and brought a common-law suit for damages in the circuit court of Davidson County to obtain redress for his injuries. The bridge company made a special plea setting up the compensation act as a bar to the suit; Scott demurred to this plea and the demurrer was overruled. The facts were then agreed upon and the court rendered judgment in favor of the defendant employer. Scott appealed, contending that the Tennessee workmen's compensation act was unconstitutional. The court, however, upheld the constitutionality of all but the thirty-second section of the act. The opinion is in part as follows:

The sole question involved in this case is the constitutionality of chapter 123 of the Public Acts of the General Assembly of 1919, commonly known as the "workmen's compensation act."

As to appellant's contention that the act is coercive because it deprives the employer of his common-law defenses if he elects not to accept the act, we do not think that the power of the legislature to abolish these common-law defenses can be seriously questioned. These defenses are creatures of judicial opinion, and are not guaranteed or protected by the constitution. This being true, the legislature may modify or abolish them, as it sees fit. Their complete abolition does not render the act in question compulsory as to employers.

The court next disposed of contentions based on the alleged discrepancy between the body of the act and its title, contrary to the constitution, rejecting these contentions. Continuing, it said:

It is next insisted that the act violates section 8 of article 11 of the State constitution because: (1) Coal mine operators and their employees are exempted from the operation of the act while all other mine operators and their employees are included; and (2) the act exempts domestic and agricultural servants, casual employees, and all other industries having less than 10 regular employees. The contention is that this classification is arbitrary, unreasonable, and discriminatory.

It has been held by this court that when the classification made and stated in a statute is challenged, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. It is also the rule that one who assails the classification contained in a statute has the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. [Motlow *v.* State, 125 Tenn. 547, 145 S. W. 177, and other cases cited.]

It is the general rule that statutes public in their character, and otherwise unobjectionable, may extend to all citizens or be confined to particular classes [citing laws regulating motor vehicles, coal mines and boiler inspection, which have been upheld].

Other acts could be cited, but this is sufficient to show that the legislature, for obvious reasons, has classified coal mining in a class by itself because it is attended with risks and dangers which distinguish it from all other mining industries.

It is next insisted that the act is violative of section 6 of article 1 of the State constitution, because it denies trial by jury. The section of the constitution referred to provides:

"That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Section 32 of the act in question provides:

"The cause [claim for compensation] shall be heard by the circuit judge without a jury and as other nonjury civil cases are heard in the circuit court. Neither party shall have the right to demand a jury."

The constitutional provision above referred to only protects the right of trial by jury as it existed at common law. The act in question confers rights and remedies that were unknown to the common law. The act is elective. If the employee accepts the provision of the

act it thereby becomes a part of his contract of employment, and he waives his right to trial by jury and accepts the compensation and remedies provided by the act. A jury may be waived by parties falling within the provisions of the workmen's compensation act by their voluntary acceptance of the terms of said act. It has been invariably held that, under the voluntary or elective workmen's compensation acts, parties, by accepting the act, waive the right to a jury trial; hence there is no deprivation of that right. [Hawkins *v.* Beakley (D. C.) 220 Fed. 378 (sustaining the Iowa act), and other cases cited.]

It is next insisted that the act violates section 17 of article 1 of our State constitution, which reads as follows:

"That all courts shall be open, and every man, for any injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law and right and justice administered without sale, denial, or delay."

It is insisted by plaintiff that the act closes the courts to him that were open prior to its passage, and denies him a remedy by due course of law. We do not think such is the effect of the act. The provision of section 17 of article 1 of our State constitution is a mandate to the judiciary and was not intended as a limitation of the legislative branch of the Government.

It is next insisted that the act violates the fourteenth amendment of the Federal Constitution, because it deprives the plaintiff of his property without due process of law.

This question was settled adversely to the contention of the plaintiff in New York Central Railroad Co. *v.* White (243 U. S. 188, 37 Sup. Ct. 188 | Bul. No. 224, p. 232], and the case of Arizona Copper Co. *v.* Hammer, 250 U. S. 400, 39 Sup. Ct. 553 [p. 330].

It is next said that the act is unconstitutional, in that it undertakes to make an election for and a binding contract upon a minor employee, when, by reason of such minority, he is unable to make such election or contract.

However, we think there is no question as to the power of the legislature to endow minors with the right to make contracts otherwise lawful, and after he has been so endowed he becomes, for the purpose of the act, an adult, or at least on the same plane. It was expressly so ruled in the case of Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209.

It is next said that the act is unconstitutional because it violates section 7 of article 6 of our State constitution. This section of the constitution is as follows:

"The judges of the supreme or inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any office of trust or profit under this State or the United States."

Section 32 of the act provides as follows:

"For acting in each of such cases which is contested or litigated the county judge or chairman of the county court shall receive a fee of $5, which shall be taxed as a part of the costs of the case against the unsuccessful party. For entering all orders, settlements, or com-

promises of claims which are not controverted or litigated the county judge or chairman of the county court shall receive as compensation a fee of two ($2) dollars, which shall be taxed equally against both parties."

The county judge is a judge of an inferior court, within the meaning of the above-quoted section of the constitution, and his salary as judge can neither be increased nor diminished during the term for which he is elected.

We are of the opinion, therefore, that this provision of the act is unconstitutional and void, but we are further of the opinion that this infirmity in the act does not affect the validity of the entire act. We think the provision allowing a fee to the county judge or chairman for acting in certain cases may be elided. It is a well-settled rule of law that where the provisions of a statute are severable and distinct the unconstitutionality of one or more provisions will not vitiate those that are valid and constitutional.

The concluding contention of the plaintiff was that the provision of section 25 of the act which suspends benefits during the refusal of the claimant to submit to medical examination or accept medical treatment is unconstitutional. As to this the court said:

The plaintiff does not undertake to point out what provision of the constitution is violated by the provisions of section 25. We do not think it violates any section of the constitution.

The act was therefore upheld, with the exception of section 32, relating to the fees provided for the county judge or chairman of the county court.

WORKMEN'S COMPENSATION — CONSTITUTIONALITY OF STATUTE — CLASSIFICATION—HAZARDOUS EMPLOYMENTS—*State ex rel. Amerland* v. *Hagan et al., Supreme Court of North Dakota (Oct. 25, 1919), 175 Northwestern Reporter, page 372.*—Amerland, the relator, is a private citizen engaged in the real estate and loan business at Fargo and employs two clerks whose sole duties are to keep books, write letters, and similar general office work. Invoking the original jurisdiction of the Supreme Court of North Dakota, Amerland brought suit to restrain Hagan, the commissioner of agriculture and labor, who is intrusted with the administration of the workmen's compensation law (Laws 1919, ch. 162), from enforcing the act in so far as he is concerned for the reasons that the act is unconstitutional and that the relator does not come within the provisions of the act. The title of the act states that it applies to hazardous employments. Amerland, the relator, declares he does not properly come within the provisions of the act, as his work is only clerical and his employees do only office work and that work, not being hazardous, can not be included under the law. He also states that the law is an unreasonable

exercise of the police powers of the State and that it is an unreasonable exercise of the legislative power to include an occupation among hazardous occupations which in fact is nonhazardous. He further alleged that the act was unconstitutional because it deprived him of his property without due process of law and because it interfered with his right of freedom to contract.

The attorney general appeared in behalf of the compensation bureau and filed a motion to dismiss. One of the members of the bureau who is an attorney also appeared for the bureau and filed a return in the nature of a demurrer. After fully discussing the petition of the relator the supreme court dismissed the action. Judge Bronson, rendering the opinion of the court, said in part:

It is clear from the terms of the act that the term "employer" includes a person engaged in a hazardous employment; that the term "employee" includes a person engaged in a hazardous employment under a contract of hire in the trade, business, profession, or occupation of his employer; that a "hazardous employment" is an employment of such employee by such employer in the business of such employer. In terms, therefore, the act covers the employment and the business of the relator as a hazardous employment. Under the act in question the employment of the relator is termed hazardous. The relator alleges that his employment is nonhazardous; this is denied by the respondents. The relator makes no record to prove that in fact the employment in question is nonhazardous. This court accordingly will not accept as conclusive, or even as a presumption, that the mere alleged declaration of the relator that his employment is nonhazardous overrides the legislative declaration, or proves thereby the arbitrary character of said legislative declaration. It is fairly well settled that the court will only hear objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.

Within recent years—in fact, within the last decade—the police powers of the State, as well as Federal legislation, have been applied to the problem of adequately enacting legislative rules and regulations for the protection of workmen. Now in a large number of States compensation acts of various kinds have been enacted, proceeding in the beginning more upon the elective or even private insurance plan to the later and now increasing compulsory State insurance plans.

No longer is it regarded without the police powers of the State to provide for compulsory insurance to protect workmen and their families from the hazard of modern industry. No longer is it considered that mere novelty in legislation is a constitutional objection.

But, again, it is argued that a proper exercise of the police powers does not warrant a legislative declaration that an employment is hazardous which in fact is nonhazardous. The question of whether compensation insurance may properly cover nonhazardous employments, if they may be so termed, is not before this court. The act involved concerns hazardous employments. The act by definition defines the classes that fall within the term "hazardous employment." The employment of the relator falls within the definition given.

Strenuously the relator contends that his business is nonhazardous and his employees are without risk.

Common observation, as well as ordinary reasoning, readily discloses that even the clerk or stenographer in the modern office, engaged in the course of his occupation, incurs risks vastly different from those applicable to similar situations in the comparatively similar business conditions that existed when the common-law principles concerning the law of negligence arose and were made applicable. His employment subjects him to possible risks on every side. It is possible to conceive that the employees of the relator are subject to risk, not only from dangers within the modern office building while at work, from apparatus and instrumentalities used by the employee, but also from injuries that may occur proceeding from without, such as through faulty construction of the building, such as in injury that occurred in Chicago through a ship of the air crashing through the roof. His employee may be injured while on duty wending his way through the crowds on the street, or while ascending to his work on the elevator.

It is no answer to state that this might likewise occur to one who is not so engaged or employed. It may likewise occur to one who is not engaged in an extrahazardous employment. It therefore is not within the province of this court to state as a matter of law that the employment of the relator is nonhazardous, which the legislature has declared to be hazardous. As a matter of law this court is not in the position to declare that it is not within the legislative province to classify the business of the relator as possessing elements of hazard.

WORKMEN'S COMPENSATION — CONSTITUTIONALITY OF STATUTE — EQUAL PROTECTION OF THE LAWS—ELECTION—*Middleton* v. *Texas Power & Light Company, Supreme Court of the United States (Mar. 3, 1919), 39 Supreme Court Reporter, page 227.*—While in the employ of the light company, Middleton received serious personal injuries through the bursting of a steam pipe due to the negligence of his employer and its agents. Middleton sued for damages and the defendant interposed as a defense the Texas workmen's compensation act, to which the plaintiff Middleton excepted. His exception was overruled and the action was dismissed. On appeal to the court of civil appeals the decision was reversed, but on rehearing constitutional questions were certified to the Supreme Court of the State, which declared in favor of the dismissal of the action, and the court of civil appeals accordingly changed its decision. Writ of error was then taken to the United States Supreme Court on the constitutionality of the statute. Mr. Justice Pitney delivered the opinion of the court in favor of the constitutionality of the statute.

The law of Texas excludes certain classes of workers from its coverage, and the contention was made that this rendered the law discriminatory and invalid. The nature of these exclusions, and the

opinion that they were not unconstitutional, are set forth in the following quotations:

Of course plaintiff in error, not being an employee in any of the excepted classes, would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act. But plaintiff in error sets up a grievance as a member of a class to which the act is made to apply.

However, we are clear that the classification can not be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Tex. 110–111): "Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers[1] are excluded from the operation of the act, but this was doubtless for reasons that the legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employees, known experience as to hazards and extent of accidental injuries to farm hands, gin hands, and domestic servants, were all matters no doubt considered by the legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. But in this case adequate grounds are easily discerned. As to the exclusion of railroad employees, the existence of the Federal employers' liability act of April 22, 1908 (ch. 149, 35 Stat. 65; ch. 143, 36 Stat. 291), applying exclusively as to employees of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases within its reach (New York Central R. R. Co. *v.* Winfield, 244 U. S. 147, 37 Sup. Ct. 546 [Bul. No. 246, p. 260]; Erie R. R. Co. *v.* Winfield, 244 U. S. 170, 37 Sup. Ct. 556 [Bul. No. 246, p. 265]), and the difficulty that so often arises in determining in particular instances whether the employee was employed in interstate commerce at the time of the injury (see Pedersen *v.* Del., Lack. & West. R. R., 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85]; North Carolina R. R. Co. *v.* Zachary, 232 U. S. 248, 34 Sup. Ct. 305; Illinois Central R. R. *v.* Behrens, 233 U. S. 473, 34 Sup. Ct. 646, etc.), reasonably may have led the legislature to the view that it would be unwise to attempt to apply the new system to railroad employees, in whatever kind of commerce employed, and that they might better be left to common-law actions with statutory modi-

[1] The law as amended in 1917 includes gin laborers; also employers of three or more employees.

fications already in force (Vernon's Sayles' Texas Civ. Stat. 1914, Arts. 6640–6652), and such others as experience might show to be called for.

The exclusion of farm laborers and domestic servants from the compulsory scheme of the New York workmen's compensation act was sustained in New York Central R. R. Co. *v.* White, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232], upon the ground that the legislature reasonably might consider that the risks inherent in those occupations were exceptionally patent, simple, and familiar. The same result has been reached by the State courts generally. Similar reasoning may be applied to cotton gin laborers in Texas; indeed, it was applied to them by the supreme court of that State, as we have seen. And the exclusion of domestic servants, farm laborers, casual employees, and railroad employees engaged in interstate commerce was sustained in Mathison *v.* Minneapolis Street Ry. Co., 126 Minn. 286, 148 N. W. 71 [Bul. No. 169, p. 318].

The exclusion of employees where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in Jeffrey Mfg. Co. *v.* Blagg, 235 U. S. 571, 35 Sup. Ct. 167 [Bul. No. 169, p. 203], and has been sustained repeatedly by the State courts.

The discrimination that results from the operation of the act as between the employees of different employers engaged in the same kind of work, where one employer becomes a subscriber and another does not, furnishes no ground of constitutional attack upon the theory that there is a denial of the equal protection of the laws. That the acceptance of such a system may be made optional is too plain for question; and it necessarily follows that differences arising from the fact that all of those to whom the option is open do not accept it must be regarded as the natural and inevitable result of a free choice, and not as a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employees of their right to agree upon the terms of employment.

Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees taking them out of the operation of the act; but probably such an agreement might be held by the courts of the State to be inconsistent with the general policy of the act; the supreme court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee and enabling

them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the legislature deemed it proper, if not essential, that the payment of compensation to the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further, there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the State in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the State to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees of the equal protection of the laws within the meaning of the fourteenth amendment.

This disposes of all contentions made under the equal protection clause.

It is argued further that there is a deprivation of liberty and property without due process of law in requiring employees, willingly or unwillingly, to accept the new system where their employer has adopted it. Of course there is no suggestion of a deprivation of vested property in the present case, since the law was passed in April and took effect in September, while the plaintiff's injuries were received in the following December, after he had been notified of his employer's acceptance of the act. What plaintiff has lost, therefore, is only a part of his liberty to make such contract as he pleased with a particular employer and to pursue his employment under the rules of law that previously had obtained fixing responsibility upon the employer for any personal injuries the plaintiff might sustain through the negligence of the employer or his agents. But, as has been held so often, the liberty of the

citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of *respondeat superior*, the imposition of liability without fault, and the exemption from liability in spite of fault—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers. (N. Y. Central R. R. Co. *v.* White, 243 U. S. 188; Mountain Timber Co. *v.* Washington, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. 224, p. 252].

All objections to the act on constitutional grounds being found untenable, the judgment under review is affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—EXTRATERRITORIALITY—PROCEDURE—FAILURE TO REJECT—*Carl Hagenbeck & Great Wallace Show Co.* v. *Randall, Appellate Court of Indiana, Division No. 1 (Mar. 12, 1920), 126 Northeastern Reporter, page 501.*—Randall was employed by the show company in Indiana under an oral contract of hire to take charge of a "privilege car," in which he sold food and soft drinks and conducted games of chance. This contract of hire was reduced to writing in Ohio by an agreement expressly stating that the forum of the contract was to be in the District of Columbia and that no workmen's compensation law of any State through which the show passed or in which it performed was to govern or affect the parties. The show company was an Indiana corporation with its principal place of business at Indianapolis. While the show train was moving over the Michigan Central Railroad from Michigan City, Ind., to Hammond, Ind., the train was wrecked in the State of Indiana, and Randall sustained injuries from which he died. His dependent mother brought proceedings for compensation and was granted an award by the industrial board under the workmen's compensation act. From this award the employer appealed. The court affirmed the award and rendered the following decision:

By the workmen's compensation act of 1915, the State of Indiana made sweeping changes in its laws relative to the rights and duties of the parties under an employment contract. A new public policy for the State was established; and it is a settled principle of the law that the public policy of a State is supreme, and, when once established, will not, as a rule, be relaxed even on the ground of comity

to enforce contracts which, though valid where made, contravene such policy. (Lake Shore etc. R. Co. *v.* Teeters, 166 Ind. 335, 77 N. E. 599.)

The workmen's compensation act of this State (secs. 2–4, 15, Acts 1910) specifically provides that every employer in the State is presumed to have accepted the provisions of the act, and to have agreed to be bound thereby, unless such employer, 30 days before the accident resulting in injury or death, shall have given notice of exemption, and that no contract can operate to relieve any employer of any obligation created by the act. It is not contended that appellant gave the required notice, or any notice whatever. Appellant's show and show train were brought into Indiana, and appellant's business was being conducted in Indiana, just as had been contemplated by the parties at the time the employment contract in question was executed, and Randall, at the time of his death, was in the line of his employment as provided by such contract. Under such circumstances the public policy of Indiana as established by her compensation law did not give way because the contract of employment had been made in Ohio. Appellant's obligation under the Indiana act was superimposed upon the Ohio contract as a condition of its performance in this State. Appellant could not relieve itself of the statutory obligation by a foreign contract. The one way of exemption was by notice as provided by the act.

We therefore hold that the cause is governed by the Indiana workmen's compensation act. (Davidheiser *v.* Hay Foundry & Iron Works, 87 N. J. Law 688, 94 Atl. 309; Johnson *v.* Nelson, 128 Minn. 158, 150 N. W. 620.)

Appellant does not attack the constitutionality of the workmen's compensation act, but in its brief asserts that the award by the industrial board in this cause amounts to an impairment of appellant's said contract of employment with Randall, in violation of section 10, article 1, of the Constitution of the United States, and that it deprives appellant of property, and denies it the equal protection of the laws, in violation of the fourteenth amendment of said Constitution. It is sufficient to say, in response to this complaint, that the constitutional prohibitions referred to do not extend to subjects affecting the general welfare of the public, and that the rights guaranteed by such constitutional provisions are subservient to the public welfare. (Grand Trunk etc. R. Co. *v.* City of South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809.)

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—POWERS OF COMMISSION—PAYMENT TO STATE IN CASE OF DEATH OF EMPLOYEE WITHOUT DEPENDENTS—*Bryant, Commissioner of Labor,* v. *Lindsay et al., Supreme Court of New Jersey (June 5, 1920), 110 Atlantic Reporter, page 823.*—On April 4, 1911, the State of New Jersey enacted a workmen's compensation law, the administration of which rested with the courts. In 1918 (ch. 149) a workmen's compensation bureau was established for the administration of this act. In the same year another act (ch. 203) was enacted providing

that in cases where an employee was killed while working for his employer but left no dependents the employer would be required to pay the sum of $400, in addition to medical and burial expenses to the commissioner of labor to be used in the administration of the act under chapter 149, Acts of 1918, provided, had the employee left dependents they would have been entitled to compensation. The act also authorized the commissioner of labor to bring suit against a defaulting employer for the payment of the $400 in proper cases. This act is neither specifically declared to be an amendment of nor a supplement to the workmen's compensation act, but it does specifically provide that it shall not apply to any employer who has not accepted the workmen's compensation act. This action was brought by the commissioner of labor under chapter 203, Acts of 1918, for the recovery of $400 alleged to be due from the defendant employer. The court declared the act unconstitutional and rendered judgment in favor of the defendant. The opinion of the court is in part as follows:

It will therefore be seen that the legislation in question amounts to this: That whereas, under the workmen's compensation act, the liability of an employer in the case of an employee leaving no dependents was limited to "expenses of last sickness and burial, the cost of burial, however, not to exceed $100" (see P. L. 1913, p. 306), the amended act now under consideration requires the employer to pay in addition to this the sum of $400, not for any expense connected with the injury, the sickness, or the burial of the deceased employee, but to the State commissioner of labor as a functionary designated to receive the money and to apply it as part of a fund to pay the expenses of conducting the State labor bureau, another State agency. It is true that the State labor bureau is an agency expressly devoted to the investigation and settlement of questions arising under the workmen's compensation act, but, for that matter, so is the court of common pleas, at least in part, and the infirmity of this legislation, which is strongly urged upon us by the defendants' counsel, will appear somewhat more plainly if we consider that the act might as well have prescribed that the $400 should in each case be turned into the State or county treasury, to be used in helping to defray the salaries of the various judges of the courts of common pleas. It seems quite obvious that this is nothing more or less than a tax imposed for the purpose of supporting the expense of a State agency. The act, as we have said, does not pretend to be either a supplement or an amendment of the workmen's compensation act; it is separate and distinct. Consequently it can not be supported upon the theory of a contract between employer and employee, conclusively presumed because of the absence of dissent, pursuant to the statutory procedure outlined in the compensation act.

The real question is whether the State can, in view of the fourteenth amendment to the Federal Constitution, constitutionally tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accidents. Such a tax has manifestly no relation to the police power; it is

plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within section 2 of the compensation act, we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. (Southern Railway Co. *v.* Green, 216 U. S. 400, 30 Sup. Ct. 287.)

From another standpoint the act seems to be simply a taking of the property of this class of employers without any compensation therefor. They are in effect penalized for employing men or women who are without dependents qualified to claim compensation. If we were permitted to comment upon the question of legislative policy which tends to dissuade an employer conducting a hazardous occupation from receiving into his service a workman who, if killed in that service, would not leave a widow and infant children destitute of support, it would be apposite to remark that this is the precise opposite of the policy of the United States in the selective-service draft. But, looking at the matter in its purely legal aspect, we are clear that it is an attempted exercise of the power of taxation which runs counter to our constitutional system, both National and State, and that it can not be supported on that theory or on any other that has been suggested.

The result is that there must be a judgment for the defendant.

WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY OF STATUTE—PROCEDURE—CHOICE OF REMEDIES—*Utah Copper Co.* v. *Industrial Commission of Utah et al., Supreme Court of Utah (Oct. 22, 1920), 193 Pacific Reporter, page 24.*—Louis Rushton was killed while employed by the Utah Copper Co. He left as dependents a widow, nine minor children, and one unborn child. Under the State constitution of Utah the right of action for death can not be taken away or limited. The widow therefore had her choice of remedies; she could sue at common law for damages, or she could elect to take compensation under the workmen's compensation act (Comp. Laws 1917, secs. 3061–3165). She elected to accept compensation under the workmen's compensation law and was accordingly granted an award by the industrial commission for compensation for herself and her minor children. She was legally and regularly made the guardian of her children and was given permission by the court to elect as to which remedy she would pursue. The employer appealed to the district court, which affirmed the award. The employer again appealed to the supreme court alleging that under the State constitution the widow could not elect the method of recovery she would pursue, and any election by her could not be binding upon her minor children, especially the unborn child. The court affirmed the award saying in part:

It is further claimed by the appellant that the minor heirs, and particularly the unborn child of the deceased, are not bound by the

proceedings before the commission, and that as a result the award made must fail, for the reason that if permitted to stand it might expose the appellant company to a double liability, and would result in taking property without due process of law, and deny to appellant the equal protection of the law, in violation of both the Federal and the State constitutions.

Section 5 of article 16 of our State constitution reads as follows:

"The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

By the provisions of Comp. Laws, Utah, 1917, sec. 3127, it is provided that for injuries resulting in death the dependents of the deceased are given the right, within such time as by rule the commission shall prescribe, to elect between bringing suit at law against such employer to recover damages for such death or accept the benefits allowed dependents of deceased employees under the act. It is also provided that if the dependents elect to take under the act they will not be entitled to sue the employer at law to recover damages. It is not questioned by appellant that the right of an election of remedies given to the dependents of anyone whose injury results in death, and for whose death the right of action is guaranteed by the constitution, contravenes or is in conflict with any constitutional right. The constitutionality of such provision, however, is set at rest by the Supreme Court of the United States in the Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553 [p. —].

It is, however, contended that the guardian attempting to make the election in this case was not authorized or empowered to make a binding election on behalf of the minors, and that the court authorizing the election was without authority to make such order.

Not only, in our judgment, is the district court given authority by the Probate Code to direct and authorize an election of remedies, as it did in this case, but if no such power existed by the provisions of the code, and the district court having jurisdiction of the persons and estates of the minors is convinced that it is for the best interests of such minors that an election be made to take the award provided for by the workmen's compensation act, the court has the authority to make such order.

The right of an heir to recover damages for the wrongful death of an adult is, after all, but a property right. It may, in a certain limited sense, be considered as a personal right, but, nevertheless, the result to be obtained by such an action is property equivalent to the loss sustained. The right of the unborn child to maintain an action for the death of the father in this case after its birth, or the right to take under the workmen's compensation act, has for its object one and only one purpose. That purpose is compensation for the death of the individual caused by industry.

We conclude, therefore, that the court was in the exercise of its rightful authority under the circumstances appearing in this record, when it named a guardian for the unborn child, and that such guardian, when authorized by an order of court, was empowered to elect to take the award that could be made for it under the workmen's compensation act.

The judgment of the district court upholding the award is affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—PROCEDURE—NOTICE—ALTERNATIVE ACTION—*Colorado* v. *Johnson Iron Works (Ltd.), Supreme Court of Louisiana (Nov. 3, 1919), 83 Southern Reporter, page 381.*—George Creath was killed by an explosion while he was in the employ of the defendant company. The injury arose out of and in the course of his employment and was within the scope of the employers' liability act (act 20, p. 44, Acts of 1914), by which title the Louisiana workmen's compensation law is known. Creath's widow, Mrs. Camilia Colorado, chose to ignore the compensation act and brought an action under article 2315 of the Civil Code for damages for the death of her husband. The defendant interposed the compensation law as a defense to the widow's suit and the action was dismissed, with right to proceed under said act. The widow appealed, alleging that the compensation law did not affect actions for damages for death under article 2315 of the Civil Code and that the said compensation act was unconstitutional in so far as it applied to cases such as hers. The court upheld the constitutionality of the act, rendering the following decision:

Said act, by its plain and express terms, does make the remedy which it provides exclusive in a case like the present; it therefore does apply to this case, and does supersede article 2315 of the code. And for so doing the title is broad enough, since it reads:

"An act prescribing the liability of an employer to make compensation for injuries received by an employee in performing services," etc.

The act does no more in its body than "prescribe the liability of an employer for injuries received by an employee in performing services," etc.

As to this law being "special," within the intendment of article 48 of the constitution, forbidding the enactment of special or local laws, it is not such, since it applies to employers and employees in general. As to its depriving plaintiff of property without due process of law, it does nothing of the kind, for two reasons: First, because formerly the right to sue for the death of a human being, which is the right plaintiff is seeking to exercise, did not exist in this State, but was given by statute, and, of course, the legislature may repeal a statute enacted by itself, or supersede it by another statute; second, because the regulation of what recourse one person may have against another for personal injury is a matter entirely within legislative discretion.

Plaintiff also contends that the said act is inapplicable to this case, for the further reason that the notice required by section 12 of the act to be posted was not posted. But by the very terms of said section the sole effect of failure to post said notice is to extend for six months the delay within which notice of the injury must be given to the employer.

All the questions raised by plaintiff in this case in connection with said act have been considered and decided (and let us hope settled) in the following cases: Boyer *v.* Crescent Box Co., 43 La. 368, 78 South. 596 [Bul. No. 258, p. 93]; Whittington *v.* La. Sawmill Co.,

142 La. 322, 76 South. 754; Philips *v.* Guy Drilling Co., 143 La. 951, 79 South. 549; Veasey *v.* Peters, 142 La. 1012, 77 South. 948.

With the policy or justice of the employers' liability act this court has nothing to do. That is a matter for the legislature.

In her original petition plaintiff prayed that should the court hold that the case is governed by said act then that—

"an adequate and equitable relief and an equitable lump sum be adjudicated, according to said acts, adding to it an adequate and equitable sum for sufferings, mental agony, loss of consortium, and pecuniary loss."

Except as in this prayer, nothing was alleged to be due or claimed under said employers' liability act in the petition; but, on the contrary, said act was repudiated throughout as invalid and inapplicable to the case. The learned trial judge thought the petition insufficient to justify any judgment under the act.

This ruling was correct. Plaintiff has made no specific demand upon defendant under the act, either in or out of court. Section 18 of the act would seem to contemplate that suit may be brought under the act only after the parties have failed to agree out of court upon the amount of compensation due. At any rate the defendant company is entitled to know what specific amount the plaintiff is claiming before it can be required to answer.

"WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—RECOVERY OF COMPENSATION—ACTION FOR DAMAGES—DEATH—*Grannison's Admr.* v. *Bates & Rogers Const. Co., Court of Appeals of Kentucky (Mar. 23, 1920), 219 Southwestern Reporter, page 806.*—The decedent, Grannison, was employed by the Bates & Rogers Construction Co. and was killed in the course of his employment by reason of his employer's negligence. Both he and the employer had elected to accept the provisions of the workmen's compensation act and accordingly his dependent sister was granted compensation. One Humphrey was appointed Grannison's administrator, and as such brought an action for damages against the defendant employer alleging negligence on its part. The action was dismissed as being barred by the workmen's compensation act, and the administrator appealed, claiming the right to bring the action under section 241 of the Kentucky constitution, which provides that "whenever the death of a person shall result from an injury inflicted by negligence" damages may be recovered for such death. The court held that this provision had no effect where the employee has elected to accept the workmen's compensation act, and affirmed the decision dismissing the action. The opinion is in part as follows:

It will, of course, be readily admitted that, if the personal representative has a vested property right in the cause of action created by section 241 of the constitution, this property right can not be taken from him by a legislative enactment or a court decision, as

such enactment or decision, although it might be held not to violate section 241 of our constitution, would be prohibited by the Federal Constitution. It would further follow from this premise, if it was sound, that the employee himself could not by his contract take from the personal representative his vested property right.

But we find ourselves wholly unable to agree with counsel that the personal representative of an employee who comes to his death by the negligence or wrongful act of his employer has a vested property right in the cause of action created by section 241 of the constitution. The right of action given to the personal representative by the constitution depends entirely on the employee in whose power it is to determine for himself whether a cause of action shall survive to his personal representative. The employee has the right of election, and, when he elects that the loss sustained by his death shall be compensated in the manner provided in the act, his personal representative has no control over it. The right of action contemplated by the constitution never reaches him.

It was not intended by section 241 of the constitution to take from the employee his right to voluntarily contract that in the event of his death from whatever cause a stipulated sum should be paid to the persons entitled thereto. The constitutional provision only becomes operative when a right of action survives to the personal representative. It was never intended that the personal representative should have a vested property right in the cause of action that he could not be deprived of by statute supplemented by contract.

That this right of election is in the employee we determined in Kentucky State Journal Co. *v.* Workmen's Compensation Board, 162 Ky. 387, 172 S. W. 674.

It has been fully settled in the interpretation of these acts that no vested rights control the liberty of action of the contracting parties or prevent either from exercising the privilege to forego causes of action and likewise of defense that existed before these acts. In fact, many courts have gone so far as to uphold compulsory compensation acts.

It is also, as we have said, insisted that the act should be confined to accidental injury and death as distinguished from death caused by negligence or wrongful act; in other words, the argument is that the act was not intended to embrace cases in which the employee came to his death by negligence or wrongful act. There is, however, no room for such a distinction found in the act. It applies when its provisions are accepted in every case of injury or death that occurs within the scope of the act, whether it be brought about by accident or negligence. To hold that the act does not cover injuries caused by negligence that resulted in death would be taking from the act a very material part of it and would work the destruction of its harmonious purpose.

WORKMEN'S COMPENSATION—DEATH—BENEFITS FOR PRIOR DISABILITY—SEPARATE AWARDS—*Jackson* v. *Berlin Const. Co., Supreme Court of Errors of Connecticut (Dec. 17, 1918), 105 Atlantic Reporter, page 326.*—Jackson, an employee of the defendant company, received an injury on March 26, 1914, consisting of a fracture of

his right leg, which arose out of and in the course of his employment. A wound was produced by this injury; it did not heal and it became necessary to amputate the leg. As a result of these injuries he died on March 18, 1916. Jackson had made an agreement with the company, which was duly approved by the compensation commissioner, under which he received weekly payments, together with the medical, surgical, and hospital services, in all amounting to $1,010. The dependent widow after bringing action was awarded by the commissioner a sum which when paid would equal $3,220 and which included funeral expenses. The company, on appeal to the court, succeeded in having the $1,010 paid to the deceased credited against this award. The widow appealed from this judgment. In reversing the judgment, Judge Wheeler spoke, in part, as follows:

The legality of such a credit depends upon whether under our act the compensation paid to this employee was an indivisible part of the compensation awarded after death to the dependent. If so, the statute must be so construed as to give this credit. But if the compensation is separable and that paid to the employee is independent of that paid to the dependent, a construction compelling this credit could not be made unless the language of the statute were imperative. The General Statutes, sections 5351, 5352, provide that compensation for either partial or total incapacity "shall be paid to the injured employee." It is to be paid to him because the statute intends to provide support for him during his period of incapacity. Whatever is paid him belongs to him. Whatever of compensation accrues in his lifetime and is unpaid becomes upon his decease an asset of his estate.

The voluntary agreement was made under General Statute, section 5361, between the employer and employee. The dependent had no privity with this contract, and no right to its payment in the lifetime of the employee or to any which remained unpaid at his decease.

The compensation to the employee is distinct from that to the dependent. The allowance of payments made to the employee can not be made against the compensation to the dependent, and vice versa.

The trial court assumes in its reasoning that the payments to the employee were payments to the dependent. This is quite contrary to the fact and law. The payments to the employee belonged to him. The court failed to note that the act provides two distinct forms of compensation, the one for incapacity, the other for death; the one payable to and belonging to the employee, the other payable to and belonging to the dependent.

There is error, the judgment is set aside, and the cause remanded, with direction to the superior court to enter judgment dismissing the appeal from the commissioner.

WORKMEN'S COMPENSATION — DEATH WITHOUT DEPENDENTS — PAYMENT TO STATE—*Stempfler* v. *J. Rheinfrank & Co. et al., Supreme Court of New York, Appellate Division, Third Department*

(*Dec. 29, 1919*), *179 New York Supplement, page 659.*—Stempfler, while in the employ of the J. Rheinfrank Co., was injured by an accident, for which he received compensation under the workmen's compensation act up to the time of his death. He left no dependents. The industrial commission awarded the State treasurer $100 in accordance with the provisions of the law. The company and its insurer appealed, claiming that because they paid compensation to the employee before his death the case is not one coming within the provisions allowing the State treasurer an award. The court affirmed the award, rendering the following decision:

It is provided in subdivision 7 of section 15 of the workmen's compensation law (Consol. Laws, c. 67):

"The insurance carrier shall pay to the State treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of $100."

The deceased, for whose death an award under this provision was made, left him surviving no widow, child, or dependent relative, and therefore no person entitled to compensation. The fact that the deceased himself received compensation for a brief period for disabilities resulting from his injuries has no significance. An award is payable to the State treasurer in a "case of injury causing death," and although the person dying temporarily receives compensation for disabilities during life he is nevertheless not, within the meaning of the provision, a "person entitled to compensation" in a "case of injury causing death," for the very obvious reason that when the payment is or can be made there has arisen no such case.

The award should be affirmed. All concur.

WORKMEN'S COMPENSATION—DEFENDANTS—"CHILD"—*Hasselman et al.* v. *Travelers Ins. Co. et al., Supreme Court of Colorado* (*Nov. 3, 1919*), *185 Pacific Reporter, page 343.*—Richard P. Hasselman was killed by an accident arising out of and in the course of his employment with the H. Koppers Co. His sole dependent was a minor sister, 17½ years of age, to whom the industrial commission allowed an award of $2,500, payable $34.72 per month, beginning March 31, 1917. This method of paying the compensation would make it extend over a period of about six years. The sister reached the age of 18 on September 10, 1917. The law provides that benefits payable to a child shall cease at 18. The employer's insurer admitted liability for compensation only for the period the dependent sister remained a minor, but the commission held that it was liable for the full award. The insurance company brought action in the district court to have the award cease as of September 10, 1917, and was granted judgment. The sister and the commission both appealed, and the supreme court reversed the district court and affirmed the award of the commission. It was the contention of the insurance

company that the compensation was payable only to a child or children under 18 years of age and that it could not be construed to mean a "minor dependent." After reviewing the various provisions of the workmen's compensation law relating in any way to children the court proceeded as follows:

When the above provisions are taken and considered together, it is obvious that the word "child" in each instance refers to and specifies the relationship of parent and child, or lineal descendant, and can not upon any theory refer to a person who, although a minor, stands in some other dependent relationship to a deceased employee.

The act contains nothing which either directly or by necessary, or even reasonable, implication, indicates an intent upon the part of the legislature to limit compensation in general to minor dependents only. To hold that the dependent in the case at bar is not entitled to the compensation which was awarded her would in effect thus limit the application of the act whenever it involved a minor dependent. The term "child" as used in the act can not be construed to mean "minor dependent." Such a construction would deprive widows, and in fact all designated dependents, if minors, of compensation after they came of age. There is no dispute but that if the claimant had been of full age at the time of the accident she would have been entitled to the full amount awarded, payable as directed by the commission.

WORKMEN'S COMPENSATION—DEPENDENTS—DUAL COMPENSATION—*Decker* v. *Mohawk Mining Co., Supreme Court of Pennsylvania (Jan. 5, 1920), 109 Atlantic Reporter, page 275.*—Mary Decker's father was killed in an industrial accident, and the compensation board allowed her compensation under the act. Her mother remarried, and subsequently her stepfather was killed while in the employ of the Mohawk Mining Co. and she was again awarded compensation. The employer appealed, declaring that the legislature had no power under the constitution to permit double compensation under the compensation act. The court affirmed the decision, dismissing the employer's appeal, saying in part:

In section 307 of the workmen's compensation act (Acts 1915, p. 736):

"The terms 'child' and 'children' shall include stepchildren and adopted children, and children to whom (the employee) stood in loco parentis, if members of the decedent's household at the time of his death."

The referee finds that decedent not only stood in loco parentis to these children, who were members of his household at the time of his death, but that they were also dependent upon him. This conclusion would seem to fix their right to compensation through the stepfather. We find nothing in the act that prohibits this dual compensation. Moreover, it would seem to be expressly permitted. Section 204 reads:

That "the receipt of benefits from any association, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void."

If it is inequitable for children who are receiving compensation as a result of the death of their natural father to receive additional compensation on the death of their stepfather, but we do not so decide, an appeal should be made to the legislature, not the courts. Conditions may have so changed as to cause the prior compensation to be wholly inadequate, or the second husband's wages might raise the amount of their compensation, and, if inequality among dependents exists, yet the first paying company surely should not bear the entire burden. The appellant can not complain, as it is merely complying with its undertaking, directed by the act of assembly.

WORKMEN'S COMPENSATION—DEPENDENTS—ILLEGITIMATE CHILDREN—*Murrel* v. *Industrial Commission et al., Supreme Court of Illinois (Feb. 18, 1920), 126 Northeastern Reporter, page 189.*—John Hering was killed as the result of an accident. The industrial commission made an award of compensation to Alice Hering as his widow and five children under 18 years of age as his children. It was later discovered that John and Alice Hering had never been married and that the four older children were not John Hering's children, while the youngest, John, jr., was his child by Alice Hering. The circuit court set aside the award and the administrator of Hering's estate appealed. In affirming the decision setting aside the award the court held that the workmen's compensation law only applied to legitimate children. The decision is in part as follows:

Other questions are presented, but our decision is based upon the proposition that illegitimate children of a man are not included within the protection of the workmen's compensation act. The act as amended in 1915 (Laws 1915, p. 400) provided (sec. 7) for the payment of compensation for an injury resulting in death:

"(*a*) If the employee leaves any widow, child, or children whom he was under legal obligation to support * * * (*b*) If no amount is payable under paragraph (*a*) of this section and the employee leaves any widow, child, parent, grandparent, or other lineal heir, to whose support he had contributed within four years," etc.

The words of a statute will be construed in their ordinary sense and with the meaning commonly attributed to them under such construction unless such construction will defeat the manifest intention of the legislature. When the words have a well-settled meaning through judicial interpretation they must be understood, when used in a statute, to have that meaning unless a different meaning is unmistakably indicated. It is a rule of construction that prima facie the word "child" or "children," when used in a statute, will, or deed, means legitimate child or children, and will not be extended by implication to embrace illegitimate children unless such construction

is necessary to carry into effect the manifest purpose of the legislature, the testator, or the grantor. (Blacklaws *v.* Milne, 82 Ill. 505.)

The workmen's compensation act mentions only children, by which is ordinarily meant legitimate children, and there is no word in the act which indicates that the legislature used the word in any other than its ordinary sense. Indeed in paragraph (*b*) the words "or other lineal heir," used in connection with the words "any widow, child, parent, grandparent, "seem to imply that the child, parent, grandparent mentioned must be a lineal heir—that is, that the relation must be legitimate.

Some cases in other jurisdictions have been referred to in which illegitimate children have been held entitled to the benefit of workmen's compensation acts, but the decisions have been made upon a construction of the particular statute involved and have usually been based up a question of dependency or of support as a member of the family. The right to compensation under the statute of 1915 does not rest upon dependency or support as a member of the family, but upon the existence of the relation specified in the statute and the legal obligation to support or actual contribution. The right is statutory and depends upon conformity with the terms fixed by the legislature. The policy of the State toward children born outside of the marriage relation has been very considerably modified from that of the common law by statute. The extent to which such modification should go is a question for the determination of the legislative department of the State and not of the courts.

The judgment is affirmed.

WORKMEN'S COMPENSATION — DEPENDENTS — ILLEGITIMATE CHILDREN—*Piccinim* v. *Connecticut Light & Power Co., Supreme Court of Errors of Connecticut (Apr. 16, 1919), 106 Atlantic Reporter, page 330.*—One Piedmonte was killed while in the employ of the defendant company. In 1909 Piedmonte agreed to marry Clotilde Piccinim but never fulfilled the agreement. He did, however, live with her from this time until his death. During this period three children were born to them, and now she and the three children are asking for compensation for his death. Award was granted to the children but not to the mother. Deceased had up to the time of his death cared for and supported the plaintiff and her three children as if they had been lawfully married. The court affirming the award in favor of the children rendered a decision from which the following is quoted:

Our act as enacted in 1913 defines dependents as meaning and including "members of the injured employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee at the time of the injury."

The word "family" is one of elastic meaning, and is used in a great variety of significations.

But whatever be the accepted meaning of the word as used in the statutory definition under review, the three children claimants will

not be excluded from the family group to which the deceased belonged and over which he presided, unless that meaning is one which either directly or indirectly raises a bar of exclusion for them out of their illegitimacy. The question before us, therefore, comes down to this: Does their illegitimacy ipso facto forbid that they be regarded as members of the deceased's family for the purpose of receiving compensation?

It is, of course, true that one may not successfully assert a claim to membership in a family group and thereby secure benefits provided by the law whose presence in that group is a violation of the law. That is the position in which the mother of these children found herself, and the commissioner has for that reason properly refused to recognize her as belonging to the deceased's family and denied her claim to share in an award of compensation.

The children's position in that household was a very different one. They were not only innocent of their parents' wrongdoing, but their father, in caring for them, was acting in obedience to the mandate of the law. It was alike his legal and moral duty to maintain them, and it was quite within his legal right to do so in the most natural and convenient way by taking them into his household. That he kept his unlawful consort there also is a matter for which they were not responsible. They certainly should not be punished for his unlawful act in so doing or hers in remaining.

WORKMEN'S COMPENSATION—DEPENDENTS—PARTIAL DEPENDENCY—*Freeman's case, Supreme Judicial Court of Massachusetts (June 25, 1919), 123 Northeastern Reporter, page 845.*—Clarence E. Freeman, a boy of 16 years of age, went to Boston and entered the employ of the Automatic Time Stamp Co. While working for this company and before his first pay day he received injuries arising out of and in the course of his employment which resulted in his death. When he left his home he had promised his mother, who was partially dependent upon him, to send her all his wages that remained after he paid his board and bought necessary clothing. The boy's father was living, but was unable to support his family of a wife and five children. The industrial accident board allowed the mother an award, and the employer and its insurer appealed. In affirming the award the court said in part:

The question of dependency upon the earnings of a deceased employee under the workmen's compensation act is to be "determined in accordance with the fact, as the fact may be at the time of the injury. (Part 2, pp. 6 and 7; part 5, p. 2; Bott's case, 230 Mass. 152, 119 N. E. 755.) The fact was that at the time of his injury the deceased was at work for wages, which it was his declared purpose as well as his filial duty to send home. The circumstance that the mother did not know that the son was working and that his intent was to send her the proceeds of that particular employment as fast as earned is not by itself decisive. A simple expression of purpose to contribute to support, unaccompanied by any actual contribution

after reasonable opportunity, would not constitute dependency. The case at bar, however, in substance and effect discloses injury to the employee before his first pay-day and before any opportunity had arisen to make contribution to the support of the dependent out of the wages of the particular service, and substantial contributions from the earnings of earlier work. Partial dependency may be found even though the dependent might have subsisted without the aid. (McMahon's case, 229 Mass. 48, 118 N. E. 189.) The deceased was a minor; hence a duty rested upon him to turn his wages over to the parent entitled thereto, and a correlative right to receive such wages vested in the parent. (Tornroos *v.* Autocar Co., 220 Mass. 336, 107 N. E. 1015.) The finding of partial dependency by the mother can not be pronounced erroneous in law. (Kenney's case, 222 Mass. 401, 111 N. E. 47.)

WORKMEN'S COMPENSATION — DEPENDENTS — REMARRIAGE OF WIDOW—VESTED RIGHT—*Newton* v. *Rhode Island Co., Supreme Court of Rhode Island (Jan. 10, 1919), 105 Atlantic Reporter, page 363.*—James E. Newton was killed while in the employ of the Rhode Island Co. as a result of an accident arising out of and in the course of his employment, and in accordance with the workmen's compensation act of the State of Rhode Island his widow was awarded compensation in the amount of $7.64 per week for 300 weeks from May 22, 1915. On the 22d of August, 1916, Mrs. Newton was legally married to Nathaniel Major, jr. The Rhode Island Co. now seeks to have the award to the widow set aside on the ground that she is no longer dependent on the compensation awarded her for the loss of her right of support by her former husband and that her present husband being legally bound to provide for her support, she could no longer be called a dependent. The case was certified by the lower court to the supreme court for decision, the first and principal question being: "First, did the obligation of the respondent, the Rhode Island Co., to pay compensation to the petitioner cease by reason of the petitioner's second marriage?" In answer to this the court said:

The rights of the parties in the premsies are wholly dependent upon the provisions of the workmen's compensation act, chapter 831, Public Laws, approved April 29, 1912, and the amendments and additions thereto. Unless said act expressly or by necessary implication authorizes the superior court to modify its decree upon the second marriage of the petitioner and because of such second marriage, the question must be answered adversely to respondents. The provisions of the act justify the respondent's contention that in passing upon the petitioner's claim for compensation her dependency was the point of supreme importance. By "dependency," however, the statute clearly intends a reliance for support upon the earnings of the workman at the time of the injury which results in his death, and not at any time thereafterwards. Manifestly no one can be regarded as a person dependent upon the earnings of a deceased workman after his death. It is therefore to the time of the injury alone

that the superior court was to look in determining who, if any, of the members of James E. Newton's family or next of kin, should be regarded as his dependent or dependents according to the terms of the statute. The superior court found and decreed that the petitioner was at the time of the injury wholly dependent upon the earnings of said Newton for her support. No appeal was taken from this decree; and the standing of the petitioner became fixed as the dependent of James E. Newton, and the person entitled to compensation from the respondent in the amount and for the period fixed by statute. It seems clear that during the lifetime of the petitioner, within the period named in the decree, her status in that regard, depending upon a finally adjudicated fact, can not be changed by extraneous happenings.

The court permitted the award to stand as originally decreed.

WORKMEN'S COMPENSATION — DEPENDENTS — REMARRIAGE OF WIDOW—VESTED RIGHT—*Wangler Boiler & Sheet Metal Works Co.* v. *Industrial Commission, Supreme Court of Illinois (Feb. 20, 1919), 122 Northeastern Reporter, page 366.*—One Frank Lewis, who had been in the employ of the metal works company, was killed as the result of an accidental injury, and upon bringing proper proceedings his widow recovered compensation. The widow later married again, and the metal works company refused to continue to pay the compensation on the ground that as respects the widow and minor children of a deceased employee under the workmen's compensation act, the compensation is based on the theory of support for dependents and on that theory alone, and when the widow no longer is dependent upon the compensation she is no longer entitled to it. The commission entered a petition for a judgment to enforce the award. Judgment was awarded the commission in behalf of the administrator of deceased employee, and the metal works company brought error. In sustaining the judgment on the award the court said in part:

The workmen's compensation act contains no provision for the existinguishment of compensation where the widow of the deceased employee remarries, and we can see no reason, on principle, for reading such a provision into the act. We do not adopt the view of counsel for plaintiff in error that the basis of the act is merely that of providing support through "a period of adjustment," but, as its title indicates, the act is based on the idea of compensation for death or injury arising out of and in course of the employment. The act is also based on the broad economic theory that such death or injury is an incident of industrial activity and production, and that compensation therefor is properly chargeable as a part of the cost of such activity and production.

The legislature has power to place limitations upon the right of beneficiaries, but courts have not power to put a limitation upon

a right legally given by the legislature, unless by a fair construction of the act it can be said that such limitation was in furtherance of legislative intent. Such a limitation as is contended for by plaintiff in error can not be placed on this act, without reading into the act that which is not to be found either in its language or spirit. The right to compensation being a vested right of the beneficiary, the liability of the employer, on the vesting of that right, becomes fixed, and in the absence of an act of the legislature under which such right becomes divested, we are unable to see wherein the conduct of the beneficiary can be said to affect such liability on the part of the employer.

WORKMEN'S COMPENSATION—DEPENDENTS—RIGHTS OF CHILD ON TERMINATION OF PAYMENTS TO WIDOW—*Catlin* v. *William Pickett & Co., Supreme Court of Pennsylvania (Oct. 7, 1918), 105 Atlantic Reporter, page 503.*—Charles Catlin was killed while in the employ of the defendant company and left surviving him a widow and a minor child. The law limits payments to the widow to 300 weeks, and a dispute arose as to whether the child could be given an award to commence after the expiration of payment of compensation to the widow. The commission made such an award, which the trial court refused to disturb. The supreme court affirmed the decision of the court below, rendering the following decision:

The question which is squarely raised on the record is this: If both a widow and a dependent minor child survive a workman killed in the course of his employment, under the workmen's compensation act can an award be made in favor of such dependent minor child, to begin after the expiration of the 300 weeks during which the widow is to receive compensation and to continue until the child reaches 16 years of age? We think that such an award is required under section 307 of said act.

That section provides for compensation to be paid to a decedent's children, including therein those "to whom he stood in loco parentis," "if there be no widow or widower entitled to compensation," and, subject to certain contingencies, not necessary to be considered here, further provides that payments to children shall continue until each reaches 16 years of age, and as to all others shall continue for 300 weeks. This section then proceeds:

"Should any dependent of a deceased employee die, or should the widow or widower remarry, or should the widower become capable of self-support, the right of such dependent, or of such widow or widower, to compensation under this section shall cease. If the compensation payable to any person under this section shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased."

The contention of the appellant is that the above-quoted words "for any cause" are to be limited to the causes stated in the preceding sentences. We do not so construe them. An additional word or words

would have to be interpolated in order to reach that conclusion, and we are not at liberty to add them unless it is clearly necessary so to do in order to effectuate the legislative intent. No such necessity exists here. On the contrary, we are convinced that the addition of limiting words would defeat that intent. Compensation to decedent's children until they reach 16 years of age is expressly given "if there be no widow or widower entitled to compensation." At the expiration of 300 weeks the compensation to the widow or widower "ceases," and because of that "cause" the compensation to children still under 16 years of age arises, with the same effect as if they had "been the only persons entitled to compensation at the time of the death of the deceased."

The judgment is affirmed.

WORKMEN'S COMPENSATION—DEPENDENTS—WIFE NOT LAWFULLY WEDDED—*Temescal Rock Co. et al.* v. *Industrial Accident Commission et al., Supreme Court of California (June 24, 1919), 182 Pacific Reporter, page 447.*—This is a proceeding by the Temescal Rock Co., employer, and others against the commission to have annulled an award granted under the workmen's compensation act to Dolores Lopez. One Silviano Lopez was killed by an accident arising out of and in the course of his employment with the Temescal Rock Co. Silviano and Dolores were both ignorant of the marriage laws, and when they had received a marriage license they both thought they had become man and wife and proceeded to live together as such. The commission allowed an award in favor of Dolores and the employer appealed on the ground that she was not the deceased employee's lawfully wedded wife. In affirming the award the court quoted the following subsection of section 14 of the workmen's compensation act of 1917 (Stats. 1917, p. 844):

"(*b*) In all other cases, questions of entire or partial dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

Continuing, the court rendered in part the following opinion:

Dolores Rodriguez does not come within the provisions of subdivision 1 of subsection (*a*). That part of the subsection includes only those who stand in the relation of husband and wife. Its language necessarily implies that the relation must be lawful, and therefore it excludes persons who, though not lawfully married, live together believing themselves to be husband and wife.

Subsection (*b*), however, clearly empowers the commission to inquire into the actual conditions of dependency and to ascertain whether or not the applicant was in fact dependent upon the decedent for support at the time of the injury, and finding such dependency complete or partial, thereupon to award compensation accordingly. Standing alone, this clause would authorize compensa-

tion to any person, regardless of relationship or place of abode. But it is expressly qualified and limited in these particulars by the provisions of subsection (*c*). The latter attaches two conditions to the powers given by subsection (*b*). The first one is that the person claiming to be a dependent must be "in good faith a member of the family or household of such employee." The facts found bring Dolores Rodriguez within these conditions.. Lopez had a dwelling house and a household, consisting of himself and said Dolores. She was a member of that household. Both the findings and evidence show that she was living there and was such member in the utmost good faith, believing that she was the lawful wife of Lopez. The conditions are fully met by the facts.

WORKMEN'S COMPENSATION—DISABILITY—IMPAIRED FUNCTION—DEGREE—*Globe Indemnity Co. et al.* v. *Industrial Commission of Colorado et al., Supreme Court of Colorado (Jan. 5, 1920), 186 Pacific Reporter, page 522.*—This is an action to review an award of the Industrial Commission of Colorado in favor of one Matt Kamby, a miner, who was injured while in the employ of the Colorado Mining & Development Co. The Globe Indemnity Co. is the employer's insurer under the workmen's compensation law. Kamby was injured by a falling timber which broke his left leg about 2 inches above the knee. The result of this injury was so to impair the function of the leg as to render Kamby incapable of ever again engaging in the work of a miner, in which occupation he had been engaged for nearly all of 28 years. He was not a man of very high mentality. Three doctors testified as to the degree of Kamby's disability. Dr. Buchtel stated that Kamby would be disabled about 10 months, and thereafter the degree of disability would be 5 per cent. Dr. Stuver stated that "considering this man's occupation I believe that his permanent partial disability is not less than from 15 to 20 per cent." Dr. Hegner was of the opinion that Kamby would never be able to resume his occupation as a miner, and that his disability amounted to 70 per cent, which he believed might in time become greater, inasmuch as Kamby's usefulness was limited to his occupation as a miner. The award was granted in favor of Kamby on the basis of 70 per cent disability, and the employer and its insurance carrier appealed. The opinion of the court is in part as follows:

It appears that the rule contended for by plaintiffs in error for determining the "impairment of earning capacity of claimants," and which we will designate as "Rule No. 1," is, "The degree of disability is to be determined by the claimant's general impairment of earning capacity without respect to any particular kind of labor," to support which the following, among other authorities, are cited: Grammici *v.* Zinn, 219 N. Y. 322, 114 N. E. 397; Goscarino et al. *v.* C. & D., Inc., 220 N. Y. 323, 115 N. E. 710; Modra *v.* Little, 223 N. Y. 452, 119 N. E. 853. Whereas the rule contended for by defendants

in error, and which we will designate as "Rule No. 2," is, "The degree of disability is to be determined by the claimant's impairment of earning capacity as it relates to the kind of labor at which he was employed when injured," to support which the following, among other authorities, are cited: Duprey *v.* Md. Cas. Co., 219 Mass. 189, 106 N. E. 686; Gillen *v.* O. A. & G. Corp., 215 Mass. 96, 102 N. E. 346.

We are of the opinion that the widest possible discretion is vested in the commission to determine whether, under a given set of circumstances and a particular state of the evidence, the first or second rule, or a combination of both, should be applied. Age, education, training, general physical and mental capacity, and adaptability may, and often should, be taken into consideration in arriving at a just conclusion as to the percentage of impairment of earning capacity.

The claimant in the instant case testified before the commission. They were thus enabled to make an application of these tests which is impossible to us. It will be observed that Dr. Hegner in his testimony gave due weight to these considerations, and that Dr. Stuver did not claim to do more than fix a minimum per cent of impairment of earning capacity. There is sufficient in the record as it comes before us to demonstrate that the commission was justified in finding, and may have found that, as to claimant's ability to change his occupation or perform general physical labor, he was a much older man than his years would indicate; that he was a person of low mentality and scant adaptability; that a 70 per cent impairment of his earning capacity as a miner, which might have been nothing more than a 5 per cent impairment of the general earning capacity of many men, was in fact, by reason of his special limitations, a 70 per cent impairment of his general earning capacity. It thus appears that the alleged error in the instant case goes solely to a finding of fact made by the commission upon conflicting evidence. That this court will not disturb such a finding so made is too well settled to admit of further discussion.

The judgment is therefore affirmed.

WORKMEN'S COMPENSATION — DISABILITY — INJURY TO FINGERS — LOSS OF USE OF HAND—*Updike Grain Co.* v. *Swanson, Supreme Court of Nebraska (Nov. 15, 1919), 174 Northwestern Reporter, page 862.*— Albert Swanson was employed by the grain company as a carpenter and millwright. While engaged at his duties a heavy plank fell upon his hand, badly cutting and crushing it, so that he was totally disabled from working at his trade. Upon suit for compensation the court found that Swanson's third, fourth, and fifth fingers of his left hand were injured and awarded him compensation at the rate of $12 per week for 30 weeks, basing the award on the schedule relating to injuries to fingers. Two physicians testified that a fair percentage of loss of the use of the hand was 50 per cent. Swanson was dissatisfied with the award and appealed, claiming that he should have compensation for 50 per cent of the loss of the use of

his hand. The court reversed the award and advised the entering of an award in accordance with Swanson's contention. The opinion in part is as follows:

We think the court erred in holding that the injuries were confined to the fingers alone. The evidence discloses that in its present condition Swanson's hand presents a case "involving permanent partial loss of the use or function" of that member and comes clearly within the provisions of section 3662, Rev. Stat. 1913, as amended, Laws 1917, ch. 85, sec 7.

This section provides two-thirds of the wages for 150 weeks for loss of the hand, and proportionate amounts for partial loss or loss of use.

Respecting the present condition of Swanson's hand, and that is the time to which the inquiry should be directed, the evidence is clear and seems to show that under the act, on the ground of "permanent partial loss," at the present time he is entitled to $12 a week for 75 weeks from the date of the injury.

WORKMEN'S COMPENSATION—DISABILITY—"LOSS" OF FINGERS—LOSS OF USE—*In re Merchant's case, Supreme Judicial Court of Maine (Apr. 8, 1919), 106 Atlantic Reporter, page 117.*—Clarence N. Merchant was by occupation a painter, and while in the employ of the Maine & New Hampshire Granite Corporation he met with an accident which inflicted an injury upon him consisting of a laceration of the back of the left hand, and resulting in the loss of the use of two fingers but not in their amputation. Compensation was refused, and on appeal the decision was affirmed, the court saying in part:

It is agreed that the injury arose out of and in the course of the employment, and that the earning capacity of the claimant, who is a painter, has not been diminished by the accident.

The real and only issue is whether the claimant has "lost" these two fingers within the contemplation of R. S. ch. 50, sec. 16, and should receive the compensation specified therein, to wit:

"For the loss of the third finger, one-half the average weekly wages during eighteen weeks. For the loss of the fourth finger, * * * one-half the average weekly wages during fifteen weeks"—or whether he has suffered a partial disability and should be compensated as provided in section 15; the basis of compensation being the difference in his earning capacity before and after the accident.

The court, after reviewing the context of the statute, continued:

Throughout these sections when loss of use without removal or severance is contemplated, it is so stated in unambiguous words, and when "loss" is used it means loss in the ordinary acceptance of the term; that is, physical loss of a member.

It may be that in fixing an arbitrary compensation for the loss of these various parts the legislature purposely refrained from extending these provisions to loss of use in all but the two excepted instances before referred to (loss of sight in both eyes, and paralysis due to injury to the spine) for the reason that a use which might be deemed loss at the beginning might be regained in whole or in part long before the expiration of the arbitrarily fixed period, while the loss by severance is irreparable. Some uncertainty might exist with regard to the one, none in regard to the other.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF HAND—LOSS OF USE OF ARM—*Pater* v. *Superior Steel Co., Supreme Court of Pennsylvania (Jan. 4, 1919), 106 Atlantic Reporter, page 202.*—The right arm of Elmer Pater, an employee of the Superior Steel Co., was caught in one of its rolls and badly crushed. Amputation followed, about an inch or three-fourths of an inch below the elbow, and the referee found that as a result Pater had suffered the loss of use of the right arm for all practical purposes and allowed an award for 215 weeks' compensation. Defendant contests this award, claiming that as the amputation was below the elbow only the loss of a hand resulted and that the compensation should be only for 175 weeks. The award of the referee was affirmed by the compensation board and by the court below. In affirming the award this court in rendering its decision said in part:

The act is remedial and should be given a liberal construction. But aside from this, under the fact found by the referee, the express words of the statute called for the award made to the claimant. He had permanently lost the use of his arm. While the act declares that amputation at any point between the elbow and wrist shall, ipso facto, be considered the equivalent of the loss of the hand, it further provides in the same clause that permanent loss of the use of an arm, with or without amputation, resulting from injuries sustained by a workman, shall be the equivalent of the actual loss of the arm. If in the present case there had been no amputation but the arm had been so crushed as to hang permanently useless at the side of the claimant, could his right to compensation for 215 weeks be questioned? The finding of the referee is that as a result of the injuries which he sustained in the course of his employment he has permanently lost the use of his arm, and the amputation which necessarily followed is not a determining factor in fixing the basis upon which compensation is to be allowed. This was the correct view of the learned court below.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF PART OF PHALANGE—*Edward E. McMorran & Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 284.*—Alfred Habel was employed by the Edward E.

McMorran company, and during the course of his employment he sustained an injury to the index finger of his right hand. The injury arose out of and in the course of his employment and resulted in the loss of one-sixteenth of an inch of the first phalange of the right index finger. The injury after it had healed did not disable him in any way from the use of his finger or hand. The industrial commission allowed him an award under the schedule in the workmen's compensation act for permanent partial disability as for the loss of the entire phalange. The case was certified to the supreme court by the circuit court which had affirmed the award. In reversing the decision of the circuit court and modifying the award the court stated the facts, then quoted from a case decided by the New York Court of Appeals (In re Petrie, 215 N. Y. 335, 109 N. E. 549), as follows:

"We think we should hold that the provisions of the statute * * * become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost."

Continuing, the court said:

This, we believe, is a reasonable construction of such provision. The evidence shows, without contradiction, that the applicant lost but one-sixteenth of an inch off the first phalange of the index finger; that the injury did not interfere at all with the use of the distal joint; that the tip of the finger, while susceptible to cold and heat, did not in any way interfere with the use of the entire finger.

While we are of the opinion that a liberal interpretation should be given to this class of cases, yet such interpretation should not go to the extent of becoming absurd. It can not be reasonably said that the loss of one-sixteenth of an inch of the first joint of a finger is the loss of the first phalange or that the legislature so intended.

We are of opinion that the circuit court erred in quashing the writ of certiorari issued in this cause and that the industrial commission erred in making an award for 17½ weeks at $6 per week, for permanent partial disability, as provided in paragraph (*e*) of section 8 of the workmen's compensation act. The award of $6 a week for a period of 6¼ weeks for total temporary incapacity is a proper award.

The case was therefore reversed and remanded, with directions to enter a finding in accordance with the views set forth above.

WORKMEN'S COMPENSATION—DISABILITY—TEMPORARY PARTIAL DISABILITY—REFUSING EMPLOYMENT—*Frank* v. *Deemer Steel Casting Co.*, *Superior Court of Delaware* (*June 4, 1920*), *110 Atlantic Reporter, page 561.*—The plaintiff, Frank, was injured while in the employ of the defendant and was awarded compensation at the rate of $10.50 per week based on a weekly wage of $21, payments to continue dur-

ing the term of temporary total disability. He later petitioned the industrial accident board to commute his compensation into a lump sum. This the board did, but upon the appeal of the defendant to the superior court of New Castle, the decision of the board was reversed on the ground that the board had incorrectly classified Frank's injuries (108 Atl. 283). The defendant company then petitioned the board to reduce Frank's compensation, alleging that he was able to work and earn at least 25 cents per hour for a 52½-hour week and that his wage loss should be reduced accordingly. The company offered to reemploy Frank on the above terms but he refused. The board made an order reducing the amount of the award and Frank appealed. The superior court in upholding the decision of the board rendered in part the following decision:

The court believe it is not necessary to determine the general earning power of the injured employee in cases where work is offered suitable to his capacity by the employer, for the reason that under section 3193nn, Code 1915, section 133 of the Delaware workmen's compensation law of 1917, as amended, it is provided:

"If an injured employee refuses employment suitable to his capacity, procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the industrial accident board such refusal was justifiable. * * *"

We think that the industrial accident board was justified by the evidence and had the power and authority under section 133 to order Mike Frank, the claimant, to go to work for the Deemer Steel Casting Co., at the employment procured which was suitable to his capacity for work, and under section 103, subsection "*b*," to make an order reducing his compensation from $10.50 per week to $3.94 per week, until otherwise ordered by said board or terminated by the Delaware workmen's compensation law of 1917, as amended.

For the reasons stated, the award and order of the said board is in all things affirmed.

WORKMEN'S COMPENSATION—DISABILITY—"TOTAL LOSS OF ONE EYE"—LOSS OF POWER OF ACCOMMODATION—*Juergens Bros. Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 337.*—The claimant, Kaage, was employed by the Juergens Bros. Co. when he sustained an injury to his eye from an accident arising out of and in course of his employment. Various complications set in, resulting in an operation which necessitated the removal of the lens of the eye. The sight of the injured eye was reduced to such an extent that only with special lenses could it be used, and it could not in any case be used coordinately with the remaining good eye. Even when used alone and with special lenses the sight of the injured eye was greatly impaired. Kaage was awarded compensation at the rate of $10.50 per week for

100 weeks, according to a special schedule contained in the workmen's compensation act, which allowed 100 weeks' compensation for the "total loss of one eye." The employer appealed, asserting that as Kaage had not suffered the total loss of vision in his injured eye, and that if he lost his remaining good eye he could still use his injured eye, he could not be allowed compensation for the total loss of one eye. The court refused to take this view of the case and affirmed the award, saying in part:

Paragraph "*e*" of section 8 of the workmen's compensation act, as amended in 1915 (Laws 1915, p. 403), provides:

"In addition to compensation during the period of temporary total incapacity for work resulting from such injury, * * * for the loss of the sight of an eye, fifty per centum of the average weekly wage during 100 weeks."

Plaintiff in error contends that should Kaage lose the sight of his good eye he could by the use of lenses gain the use of the injured eye, and therefore he has not lost the sight of the injured member. The question before this court is whether or not this man has for all practical uses and purposes lost his eye. The application of laws of this character should not be made to depend upon finespun theories based upon scientific technicalities, but such laws should be given a practical construction and application. For all practical purposes, when a person has lost the sight of an eye, he has lost the eye, and to say that the statute providing compensation for the loss of the sight of an eye does not apply here because of the remote possibility of Kaage losing his good eye, whereby he can through artificial means gain a certain amount of use of the injured member, is to place a construction on a remedial act which deprives it of all practical effect. Such could not have been the intention of the legislature in passing this act.

WORKMEN'S COMPENSATION—DISABILITY—WAITING PERIOD—LUMP-SUM SETTLEMENTS—*Raffaghelle v. Russell, Supreme Court of Kansas (Dec. 7, 1918), 176 Pacific Reporter, page 640.*—Paul Raffaghelle was employed in the coal mine of the defendant Russell when a large rock fell upon a workman with whom he was working. In attempting to lift the rock from the injured man he strained himself, sustaining a femoral rupture. He was not totally disabled and continued to work, although he suffered great pain and was unable to do the heavier work of his occupation. He recovered compensation in the lower court and the employer appealed. In affirming the award for compensation the court said in part:

Defendant contends that there was no evidence to sustain the finding of diminished capacity, and cites part of section 5896 of the General Statutes of 1915, which before the amendment of 1917 (Laws 1917, ch. 226), provided:

"That (*a*) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period

of at least two weeks from earning full wages at the work at which he is employed."

The statute quoted does not mean that, unless a workman's injuries totally disable him from laboring for the first two weeks succeeding his mishap, he can not recover. It means that, unless the injury is sufficiently serious to disable him for two weeks, the injury is considered by the statute to be too trivial for its concern. The statute would discourage malingering and the harassing of employers with petty claims of little or no merit. But it would never do to say that the courageous workman who sticks to his task notwithstanding his pain and injury is to be penalized for so doing. Neither would it do to say that an injured workman who in pain and distress and with the gratuitous help of his fellow workmen can still earn as much as he was wont to do before his strength and vigor were impaired is not entitled to compensation. A workman who is injured is not compelled to lay off then and there for two weeks to protect his rights under the act. The soldier who is wounded, but still "carries on," is looked upon as a hero; the injured workman who likewise attempts to "carry on" will lose nothing by so doing when his rights become a matter of judicial determination.

The court discerns no trouble as to the sufficiency of the evidence of diminished earning capacity. The plaintiff was so much distressed that he had to go to another State, to a mine where the coal vein was eight feet thick and where his "buddies" (friendly fellow workmen) would help him with heavy lifting. The court attaches no controlling significance to the fact that his semimonthly pay checks were sometimes as large or larger after his injury than they were before he was hurt. The evidence showed that in the days of his full vigor he occasionally took a lay-off to enjoy himself; since his injury he is occasionally compelled to take a lay-off because of pain which now attends his arduous vocation. These were merely circumstances to be considered with all the other facts, pro and con, in determining whether plaintiff's claim was genuine or spurious.

The trial court had allowed a request for a commutation to a lump sum, and the contention was made that it had erred therein, abusing its discretion. The supreme court recognized the possibility of a recovery within the period of eight years during which payments might continue, if the workman should undergo an operation, but this did not prove that the court had abused its discretion. Citing a provision of the Kansas statute authorizing lump-sum awards in cases where the employee is compelled to sue to recover benefits under the act, the court said:

Since the statute gave the injured workman a right to a lump-sum judgment, and merely added a grant of discretionary power to the court to modify that right, a failure to exercise a discretionary power which the trial court might or might not care to use does not ordinarily amount to abuse of discretion.

The judgment is affirmed.

WORKMEN'S COMPENSATION—DISFIGUREMENT—CONSTITUTIONALITY OF STATUTE—*Sweeting* v. *American Knife Co. et al., Court of Appeals of New York (Apr. 8, 1919), 123 Northeastern Reporter, page 82.*—The plaintiff, Sweeting, was employed in the grinding department of the American Knife Co. The explosion of an emery wheel destroyed the bridge of his nose, giving him what is commonly known as a flat nose, with deep scars upon his face. The commission made an award of $2,500 for serious facial disfigurement according to the provisions of subdivision 3 of section 15 of the workmen's compensation law (Consol. Laws, ch. 67, as amended in 1916), allowing a maximum award of $3,500 as compensation for disfigurement. The employer and insurance carrier insisted that this provision was unconstitutional and void because, as they argue, such injuries have no relation to the loss of the employee's earning power. The lower court affirmed the award of the commission and on appeal the award was again affirmed, the court of appeals saying in part:

The award would stand, therefore, though the facial disfigurement were unrelated to loss of earnings. But in truth it is related, and so the legislature must have found. One can not defeat a statute by a presumption that in its enactment the truths of life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others. There may, of course, be individual instances of disfigurement without impairment of earning power. That is true also where there has been the loss of a finger or a foot or an eye. Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.

This case was carried to the Supreme Court of the United States on appeal and there affirmed, in conjunction with other cases under the same statute. (See next case below.)

WORKMEN'S COMPENSATION—DISFIGUREMENT—CONSTITUTIONALITY OF STATUTE—LOSS OF EARNING CAPACITY—DUE PROCESS OF LAW—*New York Cent. R. Co.* v. *Bianc, American Knife Co. et al.* v. *Sweeting, Clark Knitting Co. (Inc.) et al.* v. *Vaughn, United States Supreme Court (Nov. 10, 1919), 40 Supreme Court Reporter, page 44.*—This decision is the result of appeals by three employers and an insurance carrier from orders issued by the appellate division of the Supreme Court of New York, and affirmed by the New York Court of Ap-

peals, affirming awards by the State industrial commission of compensation to the injured employees for facial or head disfigurement. It is contended that the provision of the compensation statute allowing awards for disfigurement, added by an amendment of 1916, is unconstitutional as an unreasonable exercise of the police power of the State, and that it deprives the employers of their property without due process of law because it allows compensation where no loss of earning capacity has been suffered. Mr. Justice Pitney delivered the opinion of the United States Supreme Court upholding the constitutionality of the provision.

He first called attention to the fact that the compensation law had been held constitutional by the court prior to the amendment. (New York Central R. R. Co. *v.* White, 243 U. S. 188, 37 Sup. Ct. 247 [see Bul. No. 224, p. 232].) Continuing, Mr. Justice Pitney said:

The sole contention here is that the amendment of 1916 deprives the respective plaintiffs in error of property without due process of law, in contravention of the fourteenth amendment.

The argument is that an award for disfigurement, made wholly independent of claimant's inability to work, is not based upon impairment of earning power; that only such impairment can justify imposing upon an employer without fault compulsory payment by way of compensation to an injured workman; and hence that the "disfigurement clause" is not a reasonable exercise of the police power, but is arbitrary and oppressive.

Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work.

Under ordinary conditions of life a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing or at least less pleasing to employer, to fellow employees, and to patrons or customers. (See Ball *v.* Wm. Hunt & Sons (Ltd.), 1912, App. Cas. 496.)

But we can not concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement, although it does not impair the claimant's earning capacity. (Matter of Erickson *v.* Preuss, 223 N. Y. 365, 368; 119 N. E. 555 [Bul. No. 258, p. 167]; and see opinion of Judge Cardozo in the present case, 226 N. Y. 199, 200; 123 N. E. 82 [above].) In view of this, and there being no specific finding of such impairment in these cases, it is proper

to say that in our opinion the "due process of law" clause of the fourteenth amendement does not require the States to base compulsory compensation solely upon loss of earning power.

The New York law as at first enacted, the Washington, and the Arizona laws presented for our consideration three different methods adopted for the purpose of imposing upon the industry the burden of making some compensation for the human wastage attributable to the hazards of the work. We were unable to find that any of these ran counter to the "due process" clause. Nor does that provision debar a State from adopting other methods or a composite of different methods provided the result be not inconsistent with fundamental rights.

And we see no constitutional reason why a State may not in ascertaining the amount of such compensation in particular cases take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

For the reasons thus outlined it was not unreasonable, arbitrary, or contrary to fundamental right to embody in the New York workmen's compensation law a provision for a special allowance of compensation for a serious disfigurement of the face or head. Nor is there any ground for declaring that the allowance prescribed by the 1916 amendment exceeds the constitutional limitations upon the State power.

Judgments affirmed.

WORKMEN'S COMPENSATION—ELECTION—MINORS—*Chicago, R. I. & P. Ry Co.* v. *Fuller et al., Supreme Court of Kansas (Dec. 6, 1919), 186 Pacific Reporter, page 127.*—Fuller, a minor of 20 years, was injured in November, 1917, while in the employ of the railway company. The compensation law of Kansas by amendments made in 1917 automatically brought all employers and employees under the act, and those not desiring to be governed by the law were required to make a written election to that effect. The railway company submitted the question of Fuller's compensation for his injuries to an arbitrator, who made an award under the workmen's compensation act (Laws 1917, ch. 226) which was affirmed by the district court. Fuller appealed from the award, declaring that because he was a minor he was not subject to the provisions of the act. The court failed to take this view and affirmed the award, saying in part:

The appellants also contend that because Fuller was a minor when the accident occurred he was not bound by the provisions of the law making the statute applicable to employees who filed no notice of an election to the contrary. (Gen. Stat. 1915, sec. 5939; Laws 1917, ch. 226, sec. 24.) The argument is that the matter is contractual, and that a minor is not bound by his contracts. The compensation act by various references to minor workmen fairly shows an intention to bring them within its provisions. It is competent for the legislature to place upon minors the obligation of an affirmative election not to come within the compensation act in order not to be subject to its

provisions (Young *v.* Sterling Leather Works, 91 N. J. Laws, 289, 102 Atl. 395), and this it appears to have done. If the result sought to be attained is inconsistent with the general law with respect to the extent to which a minor is bound by his contracts, then the more recent act controls, the prior law being repealed by implication to the extent of the conflict. Provision is made in the statute for any right, privilege, or election accruing to an "injured workman" being exercised in his behalf by his guardian (Gen. Stat. 1915, sec. 5904), but the language obviously has no relation to the choice between coming within the law or rejecting its provisions before injury. The attention of the legislature having been directed to the matter of guardianship and no provision having been made for the action of a guardian in the matter of electing whether to come within the law or not, the inference seems just that the intention was for the minor to be left to make his own choice, or to change the choice which the State may be deemed to have made for him in the first instance.

The judgment is affirmed.

WORKMEN'S COMPENSATION—ELECTION—PRESUMPTION—*Storrs* v. *Industrial Commission, Supreme Court of Illinois (Dec. 18, 1918), 121 Northeastern Reporter, page 267.*—Jacob Dier was regularly employed by the foreman of the plaintiff, Storrs, who was engaged in no other business than the managing, maintaining, and keeping in repair of some 12 or 15 buildings. Dier was a painter, and in the course of his employment he received an injury to one eye which destroyed the sight. The law of Illinois was at the time elective; and Storrs had made no election. He therefore claims that he was not subject to the workmen's compensation act. The court, in affirming the judgment of the lower court that he was, spoke, in part, as follows:

Every employer enumerated in subdivision 1 of paragraph (*b*) of section 3 (sec. 128) is conclusively presumed to be subject to the act unless he elects to the contrary. Plaintiff in error (Storrs) made no election. Among the occupations, enterprises, or businesses enumerated in paragraph (*b*) are "the building, maintaining, removing, repairing, or demolishing of any structure, except," etc. If plaintiff in error was subject to the act, it was because he was engaged in the occupation or business of maintaining buildings. He looked after renting the property and collecting the rent, and for the purpose of keeping it in good condition he had a regularly employed foreman and also employed such other help as was needed. He engaged in no work of any kind for others and was not a contractor or builder. All he did was to look after and care for his property and that of his children. Lexicographers define "maintain": "To hold or keep in any particular state or condition; in a state of efficiency or validity; to keep up." It would seem clear that plaintiff in error was engaged in the business or occupation of maintaining buildings within the usual and ordinary meaning of that term. If he had not been the owner, but had contracted to look after, maintain, and keep

in repair the buildings for other owners, from whom he received compensation for his services, it could not reasonably be disputed that his business or occupation would come within the act. The fact that he was the owner and received his compensation from rents of the properties we can not believe to relieve him from liability under the provisions of the workmen's compensation act.

We are of the opinion the contention that the plaintiff in error was not engaged in an occupation subject to the act can not be sustained.

WORKMEN'S COMPENSATION—EMPLOYEE—COURSE OF EMPLOYMENT—*Farrington* v. *United States Railroad Administration et al., Court of Appeals of New York (Mar. 9, 1920), 127 Northeastern Reporter, page 272.*—John Farrington and another laborer were engaged in unloading some screenings for their employer from a Long Island Railroad freight car standing on the tracks of the railroad company. The two men had completed their days' work and had boarded a motor truck of their employer to return to their homes when the station agent of the Long Island Railroad, who together with a helper was endeavoring to shut the door of a box car, called to them to help him close the door. This the men did, but in so doing the tip of Farrington's finger was clipped off. An infection set in and he later died of tetanus. The lower courts affirmed an award by the industrial commission and the defendant appealed. The decision and award were reversed by the court of appeals on the ground that Farrington was not an employee of the railroad company and therefore the accident did not occur in the "course of employment" by the railroad company, so as to render it liable under the workmen's compensation act.

In taking this action, the court of appeals adopted the dissenting opinion of Judge Henry T. Kellogg in the trial in the supreme court, appellate division (179 N. Y. Supp., 920), which reads in part:

The agent [of the railroad company] testified that he had no authority to employ labor, and particularly to employ the two men whose help he asked. These men had finished their work and were about to go home on their employer's truck, when they were called upon to do a friendly act requiring the exertion of their strength but for a moment of time. To call their acts those of a new employment, rather than acts of kindness gratuitously performed, is to supply a mercenary motive, where the proven facts indicated that none existed.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT—WELL REPAIRER—*Otmer* v. *Perry, Supreme Court of New Jersey (Dec. 15, 1919), 108 Atlantic Reporter, page 369.*—Frank J. Perry was employed by Matilda Otmer to repair a well. He was paid $8 per day and was free to make the repairs

in whatever way he deemed best. He worked on the pump for 3 days and then was discharged and another hired, but after some days the second man was also discharged and Perry was reemployed to finish the work at the old rate of $1 per hour. There was only two hours' work, and in part payment Perry was to receive the old pump. While he was completing the work a pipe which had been insecurely joined slipped and injured his index finger, disabling him for 10 weeks. He brought proceedings under the workmen's compensation act and was allowed an award for 6 weeks. The employer appealed and the decision was reversed on the ground that Perry was an independent contractor and not an employee under the workmen's compensation act. The opinion of the court is in part as follows:

The work which the petitioner contracted to perform in this instance was of a distinct and specific character, in the execution of which he was unhampered and uncontrolled by the views and orders of an immediate superior; and when the work was executed the relationship of the parties arising out of the contract was at an end. In that fact inheres the distinction which differentiates the work or employment of the ordinary servant from that of an independent contractor.

The legal status existing between these parties under their contract was manifestly one in which the defendant contracted for a certain specific result, and left the modus operandi entirely to the petitioner. The defendant obviously was interested only in the specific result of reparation, and not in the means of its execution, and that feature of the contract was entirely left to the judgment and discretion of the petitioner.

The rule applicable to the situation is therefore that to which I have adverted, and not the familiar doctrine arising from the relationship of master and servant, arising out of the "servitium" of the civil and common law, as expounded in 1 Blackstone, 423. Emphasis is given to this distinction by the provisions of the act upon which this application is based, which provides that the word "employer" is declared to be synonymous with "master," and "employee" with "servant." Section 3, Laws 1911, ch. 95.

The judgment awarding compensation was therefore reversed.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—FINDINGS OF INDUSTRIAL BOARD—*Muncie Foundry & Machine Co.* v. *Thompson*, *Appellate Court of Indiana, Division No. 1* (*May 9, 1919*), *123 Northeastern Reporter, page 196.*—Thompson was employed by the machine company to unload coke from freight cars into bins provided for that purpose. He was paid 40 cents for each ton he unloaded. While at work a conveyor became stuck and his hand was injured while attempting to dislodge some lumps of coal. The industrial board allowed him an award for the injuries he sus-

tained. The company appealed, alleging that Thompson, inasmuch as he was being paid by the ton, was an independent contractor and not an employee and that the findings of the commission were not sufficient. The court held that Thompson was not an independent contractor, but also held that the findings of the commission were insufficient, saying in part:

It is frequently said in cases that—

"To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to lay down on this subject are not always simple of application."

What contract, as an independent contractor, did the appellee have with the appellant? How many cars must he unload at 40 cents per ton, before his contract would be complete? Or during what period of time was he, under his contract, to unload cars for the appellant? As to each of these questions there is no answer found in this record favorable to the appellant.

Contracts are entered into for the purpose of acquiring rights, on the one hand, and imposing obligations on the other. The appellee could cease to labor for the appellant at any time he chose, and the appellant had the right to discharge him at any time it chose. Appellee's pay instead of being measured by the hour, day, week, or month, was, by this contract, to be measured by the ton of coke unloaded; but he was none the less a laborer, in the employ of the appellant, doing appellant's work at the time he received the injury in question.

In cases of this character there are five facts which must be found as a legal basis for an award of compensation, viz.:

(1) That claimant was an employee.

(2) That he received an injury by accident.

(3) That the accident arose out of and in the course of the employment.

(4) The character and extent of such injury.

(5) Claimant's average weekly wage.

For the failure of the board to find facts necessary to sustain its award, this cause is reversed and remanded to said industrial board, with directions to restate its findings of fact, and for further proceedings not in conflict herewith.

WORKMEN'S COMPENSATION — "EMPLOYEE" — SHOT FIRER IN MINE—*Bidwell Coal Co.* v. *Davidson, Supreme Court of Iowa (Nov. 15, 1919), 174 Northwestern Reporter, page 592.*—The law of Iowa requires mines to employ shot examiners, and it is admitted that they are mine employees. The miners of the Bidwell Coal Co.'s mine considered it desirable that only one person be permitted to fire the dynamite shots used in blasting down solid coal. The miners worked for the mine under an agreement whereby they were to receive a certain sum per ton for each ton of coal mined. They were permitted to select the person who was to act as shot firer, and they were also permitted to discharge him. The company deducted a certain sum from

the amount to be paid the miners on each ton mined for the purpose of paying the shot firer, because it is part of a miner's duty to fire his own shots. The miners usually appointed the shot examiner to act as shot firer and had appointed one Medford to act in this capacity. Medford left and, with the knowledge and consent of both the company and the miners Davidson took his place as shot examiner and shot firer. While engaged in firing a shot Davidson was killed. The compensation commission refused to grant his widow an award on the ground that Davidson was not an employee of the company. On appeal the district court held that Davidson was in fact an employee of the company, and that compensation should be awarded. The company appealed to the supreme court, which affirmed the judgment of the district court allowing an award. The opinion is in part as follows:

Under the stipulation but one question remains open for consideration: Was Ben Davidson an employee of the plaintiff company at the time he received his injuries?

It is true, as a general proposition, and we think the record shows it was so understood in conferences between the miners and the company, that the management of the mine and the direction of the mine are vested exclusively in the operators of the mine, and that the miners have no right to abridge this right. The selection of a shot firer was given by the company to the miners in the mine, and it is said that whenever a majority of the miners in any mine decide to do so, they may select the shot firers for the mine. That is, the company, having authority to select its own employees, delegated to the miners the right to select certain persons to do certain work in the mine. The work to be done in the mine was for the use and benefit of the mine owners. The power to select the workmen rests originally and primarily in the owners. They may delegate that right to select to another. The selection made under this delegated power is the selection of the mine operators themselves.

This thing is clear: This man was working in the mine, doing work for the company in the mine, with the knowledge and consent of the company, and for the purpose of more effectually carrying on the work in which the operators were engaged. He was engaged at the time he was injured in performing an indispensable part of the mining operations carried on in the mine. He was doing a part of the business of mining for which miners were directly employed. The appellant knew that he was doing this work for them. If he had been employed directly by the company as shot firer, the liability of the company would be apparent under the workmen's compensation act. The fact that they had delegated to the miners the right to select him to do this particular work, indispensable to a proper carrying on of the work, does not change the relationship.

WORKMEN'S COMPENSATION—EMPLOYEE—VOLUNTEERS—*George S. Mepham & Co.* v. *Industrial Commission, Supreme Court of Illinois (Oct. 27, 1919), 124 Northeastern Reporter, page 540.*—Stephens was

employed by George S. Mepham & Co. to operate two paint mixers known as chasers. On the other side of the room in which Stephens was employed were two other chasers operated by Roberts. A heavy belt which turned the shaft that transmitted power to Roberts's chasers broke and had to be repaired by the millwright. The broken belt in no way affected Stephens's chasers. The foreman called Roberts and one Tipton to help put the belt back on the pulley. While they were doing this Stephens, who was passing, offered to do it for them, and before the foreman could prevent him he took a rod and attempted to push the belt on the pulley, but the belt pushed the rod against the pulley in which it became caught and whirled Stephens around and threw him to the floor. When picked up he was dead. His widow brought proceedings for compensation and was allowed an award, but on appeal the award was quashed. The widow appealed from the decision quashing the award, but that decision was affirmed by the supreme court. The opinion is in part as follows:

In the instant case deceased was neither required nor expected to assist in adjusting this belt. The foreman had called two men to help, and it is apparent no more were needed. It was merely a question of time until the belt would have been adjusted. There was no emergency. The condition of that belt did not affect the part of the work which deceased was employed to do. Deceased here volunteered his services, and before his foreman could command him not to perform the service he had placed himself in such a position that he could not save himself from injury. A "volunteer" is one who introduces himself into matters which do not concern him and does or undertakes to do something which he is not bound to do, which he has not been in the habit of doing with his employer's knowledge or consent, or which is not in pursuance of any interest of the master and which is undertaken in the absence of any peril requiring him to act as on an emergency.

As it appears from the testimony of the fellow employees of deceased that deceased was volunteering his services and was of his own volition intermeddling with something entirely outside the work for which he was employed, the judgment of the circuit court must be and is affirmed.

Judgment affirmed.

WORKMEN'S COMPENSATION—EMPLOYEE—WATCHMAN QUALIFIED AS DEPUTY SHERIFF—*Engels Copper Mining Co.* v. *Industrial Accident Commission et al., Supreme Court of California (Nov. 4, 1919), 185 Pacific Reporter, page 182.*—The mining company had in its employ one Franklin H. Smith, who was a general utility man, fire marshal, and watchman. In order that he might perform his duties with the authority of law he was deputized as a sheriff. He had never served the sheriff in a criminal matter but had acted in several civil cases.

One evening a Mexican brought some whisky into one of the shacks and a drunken orgy ensued, in the course of which one of the occupants threatened gun play. Smith was called upon to quell the disturbance, and when he went to the shack he was shot and killed. His widow was awarded compensation, and the company brought certiorari to review the award, claiming that because Smith was a deputy sheriff his wife could not recover under the workmen's compensation law. The court affirmed the award. Its opinion, in part, is as follows:

Respondent relies upon section 8 (*a*) of the statute (St. 1917, p. 835), which defines the term "employee," and includes "all elected and appointed paid public officers," but excludes "any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of the appointee, but receives no compensation from the county or municipal corporation or the citizens thereof for the services of such duty." The section, however, provides:

"That such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment."

The question presented in the instant case involves the construction to be placed upon the words of the proviso above quoted. Petitioner contends that the "employment" referred to in the proviso has no relation to the performance of official acts, and that a deputized person can be an employee only when performing some act in no wise connected with his official duties. With this construction we can not agree. It would not, we think, require an express statutory reservation to secure to a deputy sheriff the right to compensation for an injury received in the course of working at a mechanical art or trade. The clause in question should not be regarded as intended to effect this purpose, and thereby be interpreted as a purely supererogatory enactment, if it may fairly be construed in such a manner as to give it a rational purpose. In our opinion the statute is to be construed in the light of the common practice of property owners to choose as watchman or special officers men who are deputized officers of the law and to secure the deputization of such watchman or special officers engaged by them as are not already deputies. It is obviously to this class of deputies that the excluding clause of the statute refers in sharp contrast to the provisions of the including clause. It is in the light of the meaning of the excluding clause that the proviso in question must be read. So read, its clear effect is to provide that, where a deputy performs acts which, while official in their nature, are advantageous to the employer and directed by him, not incidentally merely, but as part of the duties prescribed and contemplated in the contract of employment, then such deputy is acting in the course of his private employment within the meaning of the provisions of the workmen's compensation act.

Upon this view of the statute, petitioner can not escape liability to compensate the widow for the death of Franklin H. Smith on the

plea that in performing the duties incident to his employment he was also fulfilling a duty to the county.

The award is affirmed.

WORKMEN'S COMPENSATION—EMPLOYEE—WORKING DIRECTOR OF COMPANY—*Miller's Mutual Casualty Co.* v. *Hoover et al., Court of Civil Appeals of Texas (Nov. 8, 1919), 216 Southwestern Reporter, page 475.*—This action was brought by the widow and surviving children of Guy Frank Hoover against the insurer of the G. B. R. Smith Milling Co. for compensation under the workmen's compensation act for the death of the husband and father of the plaintiffs. Guy Frank Hoover was general manager and head miller of the milling company. He was also a director in the corporation. He did not have authority to hire and discharge the employees of the company although occasionally he was permitted to do so, that function being exercised by the president, G. B. R. Smith, who took active part in the management of the business. Hoover was killed while in the performance of his duties as head miller, and upon proceedings being brought therefor the plaintiffs were awarded compensation. The insurer appealed, contending that because Hoover was a director in the corporation he could not at the same time be an employee and therefore recovery was barred under the act by the provisions as amended that "the president, vice presidents, secretary, or other officers * * * and the directors" of corporations which accept the act "shall not be deemed or held to be an employee within the meaning of that term as defined" in the act (article 5246–83, vol. 2, Vernon's 1918 Supp. Civ. & Crim. Stats.). The court affirmed the award, replying to this contention as follows:

We are unable to agree with the contention. The provisions of the quoted article, which exclude officials of the corporation from participating in the benefits of the act, we are convinced refer to them as such; that is to say, while they are engaged in the performance of the duties conferred on them by the directors or the by-laws of the corporation. The article purports to deal with them in that respect only. It neither directly nor inferentially denies the right of such officials to have other and different relations with the corporation. Conceivably, and not unnaturally, officers and directors of corporations might be employed in the performance of duties of a character wholly distinct from and unrelated to those ordinarily exercised as such officials. The act as a whole neither denies them the right to serve in the capacity of an ordinary servant or employee, nor denies the corporation the right to engage their services in that particular. If, as matter of fact, they are so otherwise employed, and that the employment is such as to bring them within the definition of "employee" contained in the act, and while so engaged they are injured, they are, in our opinion, entitled to the benefits of the act. What employees or servants are included in the definition, or

what particular test is to be applied to determine that issue, will depend largely upon the facts of each case.

In the present case it is not claimed that Hoover was engaged in the performance of his duties as director when injured. It is, in effect, conceded that his services were such as to raise the ordinary relations of master and servant, as it is also conceded that he was in the employ of the milling company under a contract of hire. Such being the facts, and having reached the conclusion that the article excluding corporate officials from the provisions of the act applies to them only as such, it becomes our duty to affirm the judgment of the trial court.

WORKMEN'S COMPENSATION—EMPLOYER—"BUSINESS"—OWNING AND RENTING HOUSES—*Lauzier* v. *Industrial Accident Commission of California et al., District Court of Appeal of California, Second District (Oct. 22, 1919), 185 Pacific Reporter, page 870.*—Clotilde Lauzier was a housekeeper for her son-in-law and daughter, who gave her "board and upkeep" in exchange for her services. She owned four small frame dwellings, the income from which was very meager. The houses were in the care of an agent, who collected the rent and looked after the property. The roof of one of the houses needed repairing, and the agent employed a carpenter to do the work, which consumed one hour and cost 30 cents. While descending from the roof of the house the carpenter fell and sustained injuries, for which the commission awarded him compensation under the act. Mrs. Lauzier claimed that she was not liable under the workmen's compensation act as amended (Stats. 1917, p. 831), and appealed. The award was annulled. The opinion of the court is in part as follows:

It is argued, however, by respondent, in justification of the award made that the amendment to the act made in 1917 worked an extension of the ordinary definition to be applied to the terms "trade or business," and made appropriate the inclusion of conditions which the facts of this case disclose. Particular emphasis is placed upon the amendatory phrases that the words, "trade, business, profession, or occupation of the employer," "shall be taken to include any undertaking actually engaged in by him with some degree of regularity." As we interpret that amendment, it is designed to have a clarifying effect only upon the original terms of the enactment. The use of the word "undertaking" we think of itself does not make less applicable the ordinary definition of the word "business," and we believe that that phrase should be read as though the word "business" immediately preceded the word "undertaking." Such seems to us to be the evident and plain meaning. It was no doubt the intention by the amendment to make it clear that the act should cover a business undertaking, whether the same was continually carried on or only engaged in at intervals. We do not intend to intimate it as our opinion that because the principal business of the petitioner was that of housekeeper she might not, still within the meaning of the compensation act, be engaged in other business enterprises. We hold

simply that the mere owning and renting of a house or houses by an individual for purposes of investment, conceding that such owner has no particular or principal business, does not come within the purview of the act.

The findings and award of the respondent commission are annulled.

WORKMEN'S COMPENSATION—EMPLOYER—EMPLOYEE OF CITY CONTRACTOR—*City of Milwaukee* v. *Fera et al., Supreme Court of Wisconsin (Dec. 2, 1919), 174 Northwestern Reporter, page 926.*—The city of Milwaukee contracted with one Boadi for the removal of garbage from the city to the city's incinerator. Boadi was not under the workmen's compensation law. Fera worked for Boadi as a teamster and it was his duty to haul garbage to the incinerator. While he was leaving the incinerator with his team and wagon and the city's garbage box, on his way to the barn to put the equipment away, the horses ran away and the wagon was turned over, throwing Fera to the ground and seriously injuring him. Fera was awarded compensation by the industrial commission against the city of Milwaukee. The city appealed, claiming that Fera was not in its employ within the meaning of the compensation act, but the decision was affirmed and the award upheld. The opinion of the court, as expressed by Chief Justice Winslow, is as follows:

In order to be entitled to compensation under the workmen's compensation act, the claimant must have been, at the time of the accident, (1) an employee of the party of whom compensation is claimed, and (2) performing some service growing out of and incidental to his employment. (Stats., sec. 2394–3.) It seems clear to us that the claimant here answered both requirements.

It must be conceded not only that the claimant was in the employ of Boadi at the time of the accident but that he was then engaged in his regular work as such employee. Boadi was not subject to the provisions of the compensation act, and that act provides (Stats., sec. 2394–3) that an employer subject to the provisions of the act shall be liable for compensation to an employee of a contractor or subcontractor under him who is not subject to the act in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

The city of Milwaukee is subject to the provisions of the act, and this provision plainly made the claimant here the employee of the city while carrying out Boadi's contract with the city to the same extent that he was an employee of Boadi so far as the purposes of the compensation act are concerned. So there can be no doubt of the existence of the relation of employer and employee within the meaning of the compensation act at the time of the accident. That the claimant was then performing service growing out of and incidental to his employment seems equally beyond doubt. He was taking the garbage collection equipment, part of which belonged to the city, to its usual place of storage and care so that it should be ready for the work of the following day.

WORKMEN'S COMPENSATION — EMPLOYERS' LIABILITY — FEDERAL STATUTE—CONCURRENT EMPLOYMENTS—LIABILITIES OF JOINT EMPLOYERS—*San Francisco-Oakland Terminal Ry.* v. *Industrial Accident Commission, Supreme Court of California (Mar. 4, 1919), 179 Pacific Reporter, page 386.*—One Robinson was employed as a watchman by the Southern Pacific Co. and the plaintiff under an agreement between the two companies whereby the Southern Pacific Co. was to employ, direct, supervise, and carry him on its pay roll, but the plaintiff was to pay half of his salary. This arrangement arose out of the fact that the Southern Pacific Co. and the plaintiff maintained and operated parallel railway lines and only one watchman was necessary for both. The Southern Pacific Co. did both an interstate and an intrastate business, while the plaintiff did only an intrastate business. While performing his duties upon the simultaneous approach of trains over each of the lines Robinson was killed, and it was held by the commission that the injury arose out of and in the course of his employment. Robinson's widow executed a release as to the Southern Pacific Co., and proceeded for compensation against the plaintiff and was allowed an award from which the plaintiff appealed on the grounds that Robinson was not its employee and that as he was performing duties of an interstate nature for the Southern Pacific Co., the State commission was excluded from jurisdiction under the Federal employers' liability act. In affirming the award the court said in part:

We are also of the opinion that, upon the facts we have stated, the commission correctly held that the deceased was in the employ of both companies, and that therefore the relation of employer and employee existed between deceased and petitioner. This appears to us to necessarily be the result of the arrangement between the companies and their course of conduct thereunder. The deceased was engaged to perform his service for both companies, and was in reality paid his wages by the two companies, each paying one-half. That he was selected for this service by the Southern Pacific Co., was placed upon its pay roll as its employee, was under its supervision, direction, and control, and was given his wages by it, was simply the result of the arrangement between the two companies as to the method by which the thing contemplated should be done. In all this, including the contract of employment, the Southern Pacific Co. was acting on behalf of the petitioner as well as itself, and in no respect an independent contractor. We can not see, looking at the substance of the transaction, why petitioner and deceased did not fully measure up to the definitions of employer and employee contained in our "workmen's compensation, insurance, and safety act."

With regard to the petitioner's claim that the case came under the exclusive jurisdiction of the Federal employers' liability act because

deceased was, when he was killed, doing interstate work as well as intrastate work, the court said in part:

The claim further loses sight of the fact that the jurisdiction of the State commission is excluded by the Federal employers' liability law only as to such matters as are covered by the act, and necessarily the Federal act can not be held to affect the rights under the State law of an employee of a common carrier by railroad in no way engaged in interstate commerce, or the rights of his dependents in event of his death, to obtain compensation under such State law on account of injuries or death occurring in the course of his employment by such carrier and arising out of such employment.

It is suggested, though not argued by petitioner in his briefs, that a release given by the claimant to the Southern Pacific Co. had the effect of releasing petitioner. It appears that, prior to the commencement of this proceeding before the commission, the claimant, in consideration of $250 paid her by such company, executed a written release of the company from all claims and causes of action on account of the death of her husband. This amount was credited by the commission to petitioner in its final award, thereby reducing the full compensation of $1,539 by $250. The release did not "provide for the payment of full compensation in accordance with the provisions" of the act, and it was never "approved by the commission." In so far as any claim under the workmen's compensation, insurance, and safety act is concerned, it was therefore invalid (sec. 27), and it is material only in considering any claim that may be asserted against the Southern Pacific Co. under the Federal employers' liability law.

The award is affirmed.

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF REMEDY—BENEFITS TO FIREMAN UNDER CITY CHARTER—*Markley* v. *City of St. Paul, Supreme Court of Minnesota (May 9, 1919), 172 Northwestern Reporter, page 215.*—Markley was in the employ of the city of St. Paul as a fireman when he was injured. His injuries were sustained in the course of his employment, and he demanded, and upon refusal he sued for, six months' full salary while he was disabled. According to the provisions of the city charter of May, 1912, as set forth in section 52, he was entitled to this salary; but the city claims that, as it and the fireman are both subject to the provisions of the workmen's compensation act, Markley can not have the benefit allowed in the charter. Defendant demurred to the complaint, the demurrer being overruled and, upon its refusal to plead further, judgment was entered for plaintiff. In affirming this judgment the court said in part:

That a member of a fire department is an employee within the meaning of the workmen's compensation act was settled in State ex rel. City of Duluth *v.* District Court (134 Minn. 28, 158 N. W. 791 [Bul. No. 224, p. 344]). We are of the opinion that section

52 of the charter remains in force, notwithstanding the compensation act passed subsequently thereto.

Our constitution, amended in 1898, authorizes cities to frame their own charters, which must be consistent with and subject to the laws of the State. (Sec. 36, art. 4.) The statute enacted to make the foregoing constitutional amendment operative, and under which the charter in question was amended, is section 1345, G. S. 1913. [Section quoted.]

The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs.

The theory of the compensation act includes the idea that the wage earner ought not to be required to bear the whole result of a personal injury arising out of and in the course of his employment, and that the community ought to share in the loss. The carrying of this theory into practical effect, the subject of which is one of public policy, must necessarily be committed to the legislature for governmental control. But such provision will not prevent a city operating under a home-rule charter from providing additional compensation to a fireman injured in the course of his employment. Nor is a charter so providing inconsistent with the object of the compensation act. It follows that section 52 of the charter in question was not repealed, but remains in force. If the city wishes to avoid the provisions of the same, it must do so by a repeal of the section in question by proper authority.

Affirmed.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—COMITY—*Union Bridge & Construction Co.* v. *Industrial Commission, Supreme Court of Illinois (Feb. 20, 1919), 122 Northeastern Reporter, page 609.*—Eloy Williams was in the employ of the plaintiff company as a laborer or "sand hog." He was engaged in excavating sand and mud for the purpose of sinking a caisson in the river. The caisson was attached to the river bottom on the Kentucky side of the Ohio River. When passing over a plank from the caisson to a barge where the workmen were permitted to rest and get coffee Williams slipped and fell into the river and was drowned. His mother applied for compensation and her application was rejected by the arbitrator. The commission reversed the arbitrator and allowed an award, and on appeal the circuit court affirmed the award. In reversing the circuit court and refusing to allow the award to stand the supreme court said in part:

It is assigned for error that the circuit court erred in holding the workmen's compensation act to apply to injuries occurring outside of the State. No law of this State has any effect as law by its own force beyond the territorial limits of the State, and if it is enforced in any other jurisdiction it is by the rule of comity; but a law effective in this State as such may create rights and liabilities arising from acts occurring outside of the State.

The compensation act has been held, on account of its elective features, to create a contract obligation, but the obligation so created

is that the employer will provide and pay compensation according to the provisions of the act, and he does not agree to provide and pay compensation for injuries not included within the act. There have been decisions in other States that compensation is to be awarded for injuries occurring beyond the territorial limits of the State, but they have been based upon provisions of the acts showing such a legislative intention.

The decision was within the rule that the act being elective in nature every provision of the act became a part of the contract, and the employer became bound to pay according to the terms of the act. The workmen's compensation act of this State is remedial in its nature, and should be liberally construed to carry out its beneficient object; but there is no provision of the act which can be construed to authorize compensation for an injury occurring outside of the State.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—CONSTITUTIONALITY OF STATUTE—DISCRIMINATORY PROVISIONS—*Quong Ham Wah Co.* v. *Industrial Accident Commission et al., Supreme Court of California (Oct. 5, 1920), 192 Pac. Reporter, page 1021.*—Owe Ming, while working for the Quong Ham Wah Co. under a California contract, but outside the State, was injured, and upon submitting his case to the industrial accident commission of California was granted an award of compensation. The Quong Ham Wah Co. appealed and the decision granting the award was reversed on the ground that the section of the law depended upon was unconstitutional. A rehearing was granted, however, and the earlier decision was reversed and the award permitted to stand. The point in dispute involved the question of the extraterritorial effect of the statute and the constitutionality of section 58 of the workmen's compensation act, which reads as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1917, p. 870.)

Judge Lennon in rendering the decision of the majority of the court, said in part:

In the instant case, the compensation act does not give the commission jurisdiction over controversies arising out of injuries sustained abroad by workmen who are not residents of California. It is clear, therefore, that a nonresident would have no standing before the commission or before any court to make a claim under the act; and, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensa-

tion nor the constitutional question involved. Since, therefore, no member of the class discriminated against can ever raise the constitutional question, the petitioner is entitled to assail the constitutionality of the statute, since a determination of that question is clearly relevant in determining its rights herein.

The theory of territorial sovereignty has been too long established as a principle of international law to admit of question at this time. Rights created by one State may be recognized and enforced by another State at its pleasure, and likewise a status attached to a person by one State may be recognized by another State, into which that person may travel, at the pleasure of the latter State; but as law the mandates of the sovereign of a given State can have no effect beyond the territorial limits to which his rule is extended. When, therefore, it is said that a statute, such as the workmen's compensation act, has an extraterritorial effect, it can not mean that the law does, or attempts to, create rights abroad; it can only mean that an act occurring beyond the geographical limits of the State is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within this State. The power of an absolute sovereign to thus sanction the enforcement, within the territory subject to the jurisdiction of that sovereign, of rights based upon acts occurring abroad, can not be questioned upon the ground of any inherent deficiency. It is therefore a power which may be exercised by this State, subject only to the restrictions of the State and Federal Constitutions.

We may assume, in accordance with the contention of respondents, that if the imposition of the obligation to compensate a servant, not domiciled within the State, for injuries sustained without the geographical limits of the State, were an attempt to create an obligation merely as an incident to a status, such legislation would conflict with well-defined principles. The effect and purpose of the act now under consideration, however, can not be held to be the regulation of a status or imposition of a tort liability. It is true that the extension of the liability imposed by the act to acts occurring beyond the territorial limits of the State can not be supported on the simple theory that the obligation so imposed is, strictly speaking, purely a contractual liability, for the proposition that a compulsory statute is a contract has been definitely repudiated by this court. (North Alaska Salmon Co. *v.* Pillsbury, 174 Cal. 1, 162 Pac. 93 [Bul. No. 246, p. 231].)

The right of the legislature to impose reasonable regulations upon contracts subject to its sovereignty is unquestioned. When, however, the legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment when entered into in this State by citizens of this State, and that that privilege shall not be incident to identical contracts of employment when entered into in this State by citizens of other States of our Union, the enactment is clearly in contravention of section 2, clause 1, article 4 of the Federal Constitution.

The Constitution provides that:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the

internal policy of the State or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a State may, in the valid exercise of its police power, limit the right of individuals to engage in certain professions or callings. Such regulations will be upheld, even though their effect is indirectly to place noncitizens at a disadvantage, but the regulation must be inherently reasonable.

Respondents make the contention that the court should uphold the right of the State to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the State as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other States.

No consideration of public policy requires that citizens of sister States be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister States as strongly as they require their extension to citizens of this State furnishes absolutely no sound reason for the exclusion of the former, and affords no reasonable basis for the discrimination.

It follows that the discrimination made in section 58 of the workmen's compensation act contravenes the provisions of the Federal Constitution.

It is contended, however, and correctly, that the provisions of the Federal Constitution do not have the effect of rendering invalid that portion of the workmen's compensation act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid, and automatically and without regard to the intent of the State legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister States. In support of this contention respondents rely upon Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. No good reason has been advanced for departing from the doctrine therein declared.

Where a State by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other States, the Federal Constitution operates, by the very force of its own language, to place citizens of other States in the same category and upon the same footing as citizens of the State, in so far as concerns the right to have and enjoy the privileges and immunities conferred by the State upon its own citizens. In other words, the Federal constitutional provision was designed for the protection of noncitizens, and therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen.

It follows that, despite the invalidity of the discrimination, the statute itself is valid, and may be made to apply uniformly to citizens of California and the citizens of the other States.

The award is affirmed.

Following this decision, the Quong Ham Wah Co. sought to have the case reviewed by the Supreme Court of the United States on a writ of error, but the court dismissed the case for want of jurisdiction (Mar. 21, 1921, 41 Sup. Ct. 373), saying in part:

It is elementary that this court is without authority to review and revise the construction affixed to a State statute as to a State matter by the court of last resort of the State.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—WHAT LAW CONTROLS—PLACE OF MAKING CONTRACT—*Thompson* v. *Foundation Co. et al., Supreme Court of New York, Appellate Division, Third Department (June 30, 1919), 177 New York Supplement, page 58.*—The defendant company is a New York corporation having its principal office in New York City, but carrying on construction work in Pennsylvania. Thompson while in New York received a letter from the defendant's boss carpenter in Pennsylvania making him a tentative offer of employment in the latter State. Thompson did not respond to the letter, but later went to Pennsylvania and there entered the employ of the defendant as a carpenter. He was injured and was awarded compensation by the Pennsylvania Workmen's Compensation Board. After receiving these benefits for nearly one year he put in a claim for compensation with the New York commission and was granted an award. From this award the defendant appealed. In reversing the award the court said in part:

The award was granted solely on the theory that the contract of employment was entered into in the State of New York, whereas the undisputed facts clearly established that the contract was made in the State of Pennsylvania. The letter which he received in New York was an incomplete and indefinite offer, the acceptance of which in New York would not have created a contract, for the offer contained no term concerning compensation, hours of labor, character of work, or any other thing by which the employer would be definitely bound, if there were an acceptance.

Moreover, there was no overt act on the part of the claimant, unequivocally indicating an acceptance of any offer, through which claimant would be bound, were the offer sufficient. He started on a journey for Jefferson, Pa., on receipt of the letter; but this may or may not have been for the purpose of accepting the indefinite offer made him. It is clear that the contract was made in Jefferson, Pa., where a written agreement was entered into between the claimant and his employer.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—INDEPENDENT CONTRACTOR—*Cinofsky* v. *Industrial Commission, Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 286.*—Cinofsky was engaged in the junk business and maintained a

junk yard where he had engines and boilers stripped and other metal prepared for use by foundries. Decker had worked for Cinofsky off and on for 13 years. He came to Cinofsky on October 25, 1917, and applied for work. Cinofsky told him that he was expecting some cars of scrap iron to arrive, and that as soon as the cars were placed he could go to work on them, and that meanwhile he could strip some engines, for which he would be paid $4 per engine. Decker went to work on the engines, and while so working with a chisel and hammer a piece of steel flew off and struck him in the eye, so injuring it as to necessitate the removal of the eyeball. Decker sued for compensation under the workmen's compensation law and was granted an award, which on appeal was affirmed by the circuit court. The employer brought certiorari to review the award, claiming that the junk business is not extrahazardous, and, therefore, did not come under the law, and, further, Decker was an independent contractor and not an employee within the meaning of the law. The court affirmed the award, and said in part:

Counsel for plaintiffs in error argues that the business or enterprise in which plaintiffs in error were engaged did not bring it within the classification set forth in section 3 of the workmen's compensation act (sec. 128) as extrahazardous, and that as they had not elected to come under the act they could not be held liable thereunder unless it is shown as a matter of fact that the business was extrahazardous. (Hahnemann Hospital *v.* Industrial Board, 282 Ill. 316, 118 N. E. 767 [Bul. No. 258, p. 188].) This court held in this last case that a hospital conducted under certain character might be a hazardous business while it would not be so under others. The mere receiving or buying of junk of a certain character might not be extrahazardous, but that was not the whole of the plaintiffs in error's business. The evidence shows that they were operating a junk yard—that is, they were collecting, sorting, and preparing junk and metals for market—and that in this work they were sometimes required to use shears driven by electric motor and an acetylene torch. There can be no question that the preparation of this junk for sale was a necessary part of the business, and that the work was of such a nature as to bring it within the rule of being extrahazardous in fact; plaintiffs in error should be held within the act on that account.

Counsel for plaintiffs in error also argues that the applicant, Decker, was not an employee but an independent contractor. The evidence already set out shows that on this point it was conflicting. Decker and Ashcraft testified that they were employed and held on piecework only until certain cars were set, when they were to be paid by the day, and it is conceded that they did not furnish their own tools. It has been held that the principal test as to whether one is an employee or an independent contractor lies in the degree of control retained and exercised by the person for whom the work is being done. Little supervision was required for this particular work. If the applicant once had his instructions, it would not be difficult for him to proceed with his work of stripping the engines

without any interference from his employer. The mere fact that the employment is for one job only does not necessarily take the employment from under the act. (American Steel Foundries *v.* Industrial Board, 284 Ill. 99, 119 N. E. 902.)

The judgment of the circuit court will be affirmed.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STENCIL CUTTER IN BUSINESS OFFICE—*Gowey* v. *Seattle Lighting Co., Supreme Court of Washington (Oct. 15, 1919), 184 Pacific Reporter, page 339.*—Elizabeth C. Gowey was a clerk in the office of the defendant lighting company. She was injured in the course of her employment by having her hand crushed in the machinery of an electrically-driven multiple-head imprinter with which she was making zinc plates or stencils for the printing of gas bills. She sued for damages for personal injuries, claiming that because she was a clerk and her work was not "hazardous" she was not required to proceed under the workmen's compensation law. The trial court failed to accept this view and rendered judgment for the defendant, and Miss Gowey appealed. The court affirmed the judgment, declaring that the work she was engaged in when injured was "hazardous" within the meaning of the workmen's compensation law, and said in part:

Among the extrahazardous works enumerated in the workmen's compensation act (sec. 6604–2, Rem. Code) are "factories, mills, and workshops where machinery is used."

Was the office of the defendant a "factory" or "workshop" wherein power-driven machinery was being employed, in so far as the operation of this machine by electric power in the making of zinc plates or stencils was concerned, within the meaning of the workmen's compensation act? We think it was. It is plain that the machine was a power-driven machine, and that the operation of it in the making of zinc plates or stencils was the manufacture and change of zinc plates into the form of stencils; we also think the conclusion can not be escaped that such work was extrahazardous, regardless of the fact that it may have been carried on in the general offices of the defendant rather than in some place apart from the office. Plainly, it was not clerical work. Its character, to our mind, was not different than if it had been carried on in a manufacturing plant devoted exclusively to such work. We are equally convinced that the plaintiff was engaged in extrahazardous work when she was operating this machine, though she also had other duties of a clerical nature, even though such duties constituted the larger part of her employment.

WORKMEN'S COMPENSATION — INJURIES — ACCIDENT — POWERS OF COURTS—*E. Baggott Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page*

254.—Joseph Cripps was employed as a plumber by the E. Baggott Co., which was engaged in installing plumbing in a building. Cripps was working on the sixth floor and along with another man was engaged in lifting bundles of iron pipe from the ground by means of a derrick and hand windlass. He was a strong man and in good health and had never suffered any hemorrhages or trouble with his heart. The last load of pipe the two men lifted weighed about 250 or 300 pounds, but was not out of the ordinary and did not require any unusual exertion to raise. When the load had been landed Cripps suffered a hemorrhage and coughed up blood and asked the foreman to get a doctor. Later the hemorrhages recurred until, after 12 days, Cripps died. A post-mortem examination disclosed a large longitudinal tear and several smaller transverse tears in the walls of the aorta. The industrial board allowed an award under the workmen's compensation act and the employer appealed. The circuit court affirmed the award and entered judgment thereon ordering the issuance of execution. The employer again appealed and the award was again affirmed, but the order issuing execution on the judgment was reversed. The employer contended that the death of Cripps was not the result of an "accident" under the compensation act, but was due to a preexisting disease of the heart. The opinion is in part as follows:

In the instant case all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. The circumstances were clearly such that the commission was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the first hemorrhage, the deceased was working in the manner habitual to his employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident can not be gainsaid. There was ample evidence in the record to justify the finding of the industrial commission that the deceased came to his death by accident, and the circuit court therefore properly confirmed the award. (Peoria Terminal Co. *v.* Industrial Board, 279 Ill. 352, 116 N. E. 651; Matthiessen & Hegeler Zinc Co. *v.* Industrial Board, 284 Ill. 378, 120 N. E. 249 [Bul. No. 258, p. 159]; Western Electric Co. *v.* Industrial Com., 285 Ill. 279, 120 N. E. 774; State *v.* District Court, 137 Minn. 30, 162 N. W. 678.)

The circuit court erred in entering a judgment directing the payment of the award of the commission and ordering execution thereon. The only authority which the circuit court had on review by certiorari was to confirm the findings and award of the industrial commission or to set aside the same and enter such a decision as is justi-

fied by law or remand the cause to the commission for further proceedings. (Baum *v.* Industrial Com., 288 Ill. 516, 123 N. E. 625; Otis Elevator Co. *v.* Industrial Com., 288 Ill. 396, 123 N. E. 600.)

The judgment is therefore reversed, and the cause remanded to the circuit court of Cook County, with directions to enter an order confirming the decision of the industrial commission.

WORKMEN'S COMPENSATION—INJURIES—DISEASE CAUSED BY ACCIDENT—*Murdock* v. *New York News Bureau, Supreme Court of Pennsylvania (Feb. 10, 1919), 106 Atlantic Reporter, page 788.*—Murdock was employed as a lineman by the defendant. While engaged in his work on a pole he came into contact with a highly charged electric wire which caused him to fall to the ground. In landing his knees " doubled up " and struck him violently on the chest, making breathing difficult. Three days later he returned to work, but was not able to resume his former duties, and because of the pain he suffered he was obliged to again return to his home, and 10 days after the accident he died from lobar pneumonia. Murdock's widow was awarded compensation, which on appeal was affirmed by the common pleas court. Appeal was again taken on the ground that the evidence did not show that the disease from which Murdock died was the result of the injury received at the time of the accident. In affirming the award the supreme court said on this point:

The findings of the referee clearly show the injury to the chest resulted in continuous pain from the time of the accident until the trouble was diagnosed by the physician as lobar penumonia. and we find nothing in the record to justify the inference that, between the time of receiving the injury and the development of the disease, there were other causes from which pneumonia might have been contracted. That the physician failed to discover a fractured rib does not detract from the weight to be given the undisputed facts that a blow on the chest received was followed by continuous pain, resulting a week later in the disease which finally caused death. The nature of the injury and its resultant effects, followed so closely by the development of the disease, constitute sufficient evidence to support the conclusion of the referee and the court below, particularly as a consideration of the record indicates ample expert medical testimony upon which the referee based his conclusion that the injury to the chest was the proximate cause of the disease which terminated in the death of claimant's husband.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—ANTHRAX—ACCIDENT—*Chicago Rawhide Mfg. Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Feb. 18, 1920), 126 Northeastern Reporter, page 616.*—The Chicago Rawhide Manufacturing Co. had in its employ a foreman by the name of Tophoven.

Tophoven while getting dressed for work one morning scratched open a pimple on his neck. During that day he handled many hides in the employer's factory. The pimple became infected with anthrax bacilli and later caused Tophoven's death. His widow upon application was awarded compensation under the workmen's compensation act, and the employer brought error on the ground that the finding of an accidental injury was not warranted by the evidence. The court affirmed the award, saying in part:

It is a reasonable conclusion from the evidence that the anthrax bacillus came in contact with the abrasion on Tophoven's neck, caused by his scratching off the pimple on Saturday morning. Nobody saw the anthrax bacilli enter his system. In the nature of things the entrance of the microscopic organism was not perceptible, but the broken skin was there, the swelling followed, the characteristic malignant pustle developed, the rapid destruction of tissue occurred, the anthrax bacillus was present, and the speedy death resulted. This sequence of events is scarcely susceptible of any explanation except the acquiring of the anthrax bacillus from the hides in plaintiff in error's tannery. Indeed, no attempt is made by the plaintiff in error to account for Tophoven's inoculation with anthrax baccilli, but the plaintiff in error relies wholly upon the insufficiency of the proof against it.

These circumstances tend to show that Tophoven contracted the disease by an accident arising out of his employment.

There was evidence from which the industrial commission might find that the defendant contracted anthrax on Saturday morning at the plaintiff in error's factory by accidentally coming in contact with the anthrax bacillus in the course of his employment, and that his death was the result of such accident. In Turvey *v.* Brinton (1905) A. C. 230, and McCauley *v.* Emperial Woolen Co., 261 Pa. 312, 104 Atl. 617, the contracting of anthrax, from which the employee died, was held to be an accidental injury.

The judgment of the circuit court will be affirmed.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—ANTHRAX—*Eldridge* v. *Endicott, Johnson & Co. et al., Court of Appeals of New York (Jan. 20, 1920), 126 Northeastern Reporter, page 254.*—Eldridge was employed as a subforeman in the defendant company's tannery and his work involved the handling of hides. In November, 1915, he was cut on the neck while being shaved by a public barber and later went to work with this open sore. The sore developed into a pimple and three days later he died of anthrax. The industrial commission allowed his widow an award of compensation under the workmen's compensation act (Consol. Laws, ch. 61) for his death, and on appeal to the appellate division, third department (189 App. Div. 53, 177 N. Y. Supp. 863), the decision was affirmed. The employer appealed to the court of appeals, which

reversed the award and remanded the case. The decision is, in part, as follows:

No evidence was given as to the nature of anthrax, whether hides such as those in question have anthrax bacteria and whether and in what manner it may be transmitted to men. The commission has presumed that, because Eldridge had a cut or pimple, worked in a tannery about hides, and died of anthrax, he must have received the injury in the course of his employment. On this appeal it is said by the respondent that the employer conceded that the deceased got the anthrax germ at his work. We do not so read the record.

We do not think this is a case where the commission were justified in taking judicial notice or in presuming that hides such as those in question usually or frequently contain anthrax germs, and that a person working about them with an open wound is likely to receive the germ and die of anthrax.

In Webster's dictionary anthrax is defined to be "an infectious, and usually fatal, bacterial disease of animals, especially cattle and sheep, and occasionally of man, to whom it may be transmitted by inoculation."

In the absence of all proof upon the subject the commission were not justified in presuming that the hides in question had anthrax, and that the germ could pass to a person working about them; in other words, the commission could not take judicial notice of the nature of these skins or their susceptibility to anthrax or to the method or likelihood of inoculation by an employee. Some evidence should have been given upon these matters to justify the assumption and finding made.

Section 21 of the workmen's compensation law (Cons. Laws, c. 67) is not a substitute for facts, and does not help the claimant in this particular. The commission is not authorized to make an award under this section in the absence of at least some evidence that the employee might with his cut have taken anthrax while at work about the hides. (Collins *v.* Brooklyn Union Gas Co., 171 App. Div. 381, 156 N. Y. Supp. 957.)

If this employee had been inoculated through the cut in his neck with anthrax germs from the hides and the cut had been received a few days before at the barber shop while being shaved, a question might arise as to whether the inoculation were an accidental personal injury arising out of the course of his employment.

We do not reach this question, and shall not attempt to decide it, as the facts of the case are not substantiated by any evidence, and the matter must be sent back to the commissioner for a rehearing.

The order of the appellate division and the determination of the industrial commission should be reversed, and the claim remitted to the commission for rehearing, with costs to abide event.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—GLANDERS—ACCIDENT—*Richardson* v. *Greenburg*, *Supreme Court of New York, Appellate Division* (*May 19, 1919*), *176 New York Supplement, page 651.*—**Greenburg owned a number of horses,**

one of which became afflicted with a disease known as glanders. Greenburg instructed one Richardson, who was employed by him as a stableman, to lead the affected horse from the stable to the dock where it was to be killed. While leading the horse from the stable to the dock as instructed, Richardson breathed and inhaled the disease-laden breath of the horse and became also afflicted with the disease, which caused his death 14 days later. His mother brought proceedings for compensation for his death under the workmen's compensation act. The commission granted her an award and the employer appealed. The court denied the award and dismissed the mother's claim on the ground that her son did not meet his death from an accidental personal injury such as is covered by the workmen's compensation law, but died from a disease. In expressing the prevailing opinion of the court Judge Henry T. Kellogg said in part:

Compensation is payable by an employer only "for the disability or death of his employee resulting from an accidental personal injury." (Workmen's compensation law (Consol. Laws, ch. 67, sec. 10).) Of such an injury the definition is given:

"'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." (Workmen's Compensation Law, sec. 3, subd. 7.)

Had it been the intention of the legislature to include within the meaning of "injury" or "personal injury" all diseases of whatever nature, it would not have been necessary expressly to mention, in addition to "accidental injuries," "such disease or infection as may naturally and unavoidably result therefrom." This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must "result" from "accidental injury"—that is to say, it must be preceded by such injury, and therefore can not constitute the injury which it follows. Evidently "disease" and "accidental injury" are in contrast with each other, so that the former is never comprehended by the latter. The workmen's compensation law was drawn with painstaking care, and it can not be supposed that words and phrases found therein, particularly in the defining clauses, were needlessly, meaninglessly, or obscurely used. The plain meaning of its words, without the aid of judicial interpretation, induces the conclusion that the legislature intended to make compensable no condition or death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of a disease.

It is a matter of common knowledge that the conditions generally prevailing in cases of infectious disease are caused by poisons or toxins exuded by living organisms or bacteria present within the human body.

It is in this respect that a condition of disease differs from a condition resulting from the taking of a poisonous drug. In the former all the poisons which harm or kill are generated within the human body, while in the latter all the poisons are extraneous. It is one of the characteristics of injuries that they are the result of the applica-,

tion to the human body, internally or externally, of an external force.

We think that for legal purposes glanders is a disease which, when contracted without previous accidental injury occurring in the course of employment, can not be classed under the workmen's compensation law of this State as an accidental injury arising out of and in the course of employment.

A lengthy dissenting opinion was rendered by Presiding Judge John M. Kellogg, in which one other judge concurred, and in which it was declared that death from the disease suffered and contracted as it was in this case was covered by the workmen's compensation law.

The law of New York was amended in 1920 (ch. 538) so as to include certain occupational diseases, naming anthrax and glanders.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—INFLUENZA—CONSTITUTIONALITY OF STATUTE—*City and County of San Francisco* v. *Industrial Accident Commission et al., Supreme Court of California (June 30, 1920), 191 Pacific Reporter, page 26.*—The city and county of San Francisco had in its employ in one of its hospitals a steward by the name of Slattery at the time the influenza epidemic came upon the city. The rush of work at the hospital caused him to be continuously and very laboriously occupied. During his labors he was exposed to at least 12 cases of influenza. Ultimately he contracted the disease himself on October 15, 1918, and died eight days later. His widow brought proceedings for compensation under the workmen's compensation act and was granted an award by the industrial accident board on the ground that her husband had died from an occupational disease as defined in subsection 4 of section 3 of the act (St. 1917, p. 831). The city and county of San Francisco appealed, declaring, first, that the law gave the commission no power to award compensation for death by disease the origin of which was not a bodily injury suffered through violence, and if it did it was unconstitutional; and, second, that because an epidemic of influenza was raging in the city Slattery was exposed to a danger which was common to the general public, and therefore the disease from which he died could not be held to have been caused by his employment. The court decided both of these contentions against the appellant and affirmed the decision of the industrial accident board. The opinion of the court is in part as follows:

In the present case the legislature has construed the constitution and has placed upon the word "injury" the broader meaning possible to it.

Subdivision 4 of section 3 of the act defines injury as follows:

"4. The term 'injury' as used in this act shall include any injury or disease arising out of the employment. * * *"

The constitution can not be given the more limited meaning contended for by the city without declaring this provision in the statute void. This we can not do unless there is a plain and unmistakable conflict between the statute and the constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction of the constitution. This being the case, it must be held that the provision of the compensation act, whereby a disease arising out of employment is declared to be an injury for which compensation shall be paid, is not unconstitutional, but is operative and controlling.

It is also contended, and truly, that compensation is not due merely for injury by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute or, concretely, it must affirmatively appear here that Slattery contracted the disease from which he died because of his employment.

On the other hand, the evidence shows that the incubation period of the disease is from one to four days; that Slattery in the course of his duties during the five days preceding his being taken ill had had to handle and had been exposed to at least 12 developed cases of influenza; that so far as known he was not exposed to any cases except in the course of his employment; that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard and had gone directly from his home to his work and from his work to his home and had not been out; that his exposure because of his work was far greater than that of the average person; and that among the nurses in the hospitals of the city, a class exposed in much the same degree as Slattery, the proportion who contracted the disease ran from 50 to 85 per cent as against 10 per cent for the community in general. The preponderance of the medical testimony also was to the effect that Slattery contracted the disease as a result of his peculiar exposure to it incidental to his employment.

If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of persons exposed as was Slattery the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This

ratio is so great that it can not be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread and to draw conclusions from their observations.

Award affirmed.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—INFLUENZA—*Engels Copper Mining Co.* v. *Industrial Accident Commission, Supreme Court of California (Sept. 7, 1920), 192 Pacific Reporter, page 845.*—One Rebstock was employed by the mining company at its mine in Plumas County as a "safety engineer." In the fall of 1918 the influenza epidemic swept the small community of miners and their families where he lived. Medical attendants and hospital facilities proved inadequate to accommodate those afflicted with the disease, and among the temporary places used in which to care for the sick was Rebstock's office. At the request of the mine superintendent he was required to aid in the nursing of the patients. A few days later he contracted influenza himself, the result of which left him with a weak heart so that he was incapacitated for anything but light work. He was granted an award of compensation and the employer appealed. In affirming the award the court said in part:

The case markedly resembles what is known as the Slattery case, San Francisco *v.* Industrial Accident Commission, 191 Pac. 26 [above], decided by us since the submission of the present case, and the question presented by the first ground urged for annulment, which is purely a question of law, was there discussed and determined adversely to the contention of the petitioner here. No discussion, therefore, of that question is necessary other than a reference to that decision and the statement that we adhere to the views there expressed.

The company's first claim is that the exceptional exposure to which Rebstock was subjected, and by reason of which alone it can be claimed that he contracted his illness in the course of his employment, was incurred by him, not in the performance of the duties for which he was employed, but in the performance of services outside his duties, voluntary in nature, and not so much for the benefit of his employer as for that of the little community of which he was a part. The second claim of the company is that in any case there is nothing to show that Rebstock contracted his disease by reason of the exceptional exposure to which he was subjected; that it is not at all improbable that he acquired it by reason of the general exposure to which every member of the community was subjected at the time; that it is not possible to determine with any reasonable certainty whatever which exposure was the cause of his illness, and to endeavor to do so is but guessing; and that the award of the commis-

sion can not be justified by a mere guess, but in order to be valid requires for its support an affirmative showing which takes the determination out of the realm of mere conjecture.

As to the first claim, it is true that an injury suffered by an employee in voluntarily doing something entirely outside of his employment, even though of benefit to his employer, is not an injury suffered by him in the course of his employment, and if the facts of this case were only those we have stated, it might be that the award would have to be annulled on that ground. But there was evidence in the case which would justify the commission in believing that the further fact was present that the company's superintendent had directed Rebstock to assist in caring for the company's influenza patients. This fact, for we must take it to be the fact, at once took Rebstock's services in that respect out of the class of purely voluntary services. Although the services were exceptional, and without the usual scope of Rebstock's employment, they were within its actual scope at the immediate time, because rendered in response to the company's direction. (Miner *v.* Franklin County Telephone Co., 83 Vt. 311, 75 Atl. 653.)

As to the second contention of the company, it is of course true that the burden rested upon Rebstock to show that his illness resulted from the exceptional exposure to which he was subjected in caring for the patients of the company. It is also true that it can not be said from the facts of the case that it is certain that Rebstock contracted the disease because of his exceptional exposure to it. But as was said in the Slattery case, 191 Pac. 29:

"Certainty is not required. It is not even required that the award be, in our judgment, in accord with the preponderance of the evidence in order that we be not at liberty to annul it. We can not disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did."

The test so stated in the last sentence just quoted is that which must be applied here.

Upon the point as to how the disease was contracted by the employee, whether because of the exceptional exposure to which he was subjected or because of the exposure to which he was subjected in common with the rest of the community, the material facts are the same as those of the Slattery case.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—NEURALGIC PAIN DUE TO FAULTY POSTURE—*Pimental's case, Supreme Judicial Court of Massachusetts (May 22, 1920), 127 Northeastern Reporter, page 424.*—Moses Pimental was a cigar maker and had worked continually at his trade for 14 or 15 years. Early in 1918 he experienced pains at the back of his neck and in February, 1919, when he consulted his physician he was told he was suffering from occupational neurosis. In May, 1919, he was unable to continue at his work. He thereupon put in an application for compensation under the Massachusetts compensation law and was granted an award which, on appeal, was affirmed by the superior court. The employer

again appealed and the decision was reversed by the supreme court, and the award annulled on the ground that Pimental had not suffered an injury covered by the workmen's compensation law.

Pimental was examined by several physicians to determine his condition and the causes of his disability. One impartial physician testified in part that:

In consequence of his working and using the movements he did his work as a cigar maker was a certain consequence of causing his condition. In the first place he sits faulty; his left buttock being undeveloped [due to an old trouble with the hip], his left pelvis sags. He does not sit evenly on the buttocks. In that way he crowds the vertebra unevenly in the other parts of the spine, so that any sitting occupation could contribute to the brachial pain. The particular movements which produce this condition are the rolling process at the end of the making of a cigar, whereby a weight of the forearm, the arm, and some of the shoulder and shoulder girdle are brought down upon the cigar in order to make a firm wrapper.

He was "of opinion that if the employee had a sitting-down job where there was no muscular loading or tension, as in the rolling process, he might have supported the condition of his spine for years longer without trouble. He believed that the upset factor in the thing was the muscular tension and the loading incidental upon the rolling movements. * * * That the employee's condition would come on or did come on quicker because he rolled cigars than it would have had he worked at any other sitting-down occupation. * * * He thought that the rolling movements are the movements which brought about the pain. * * * This employee has not neuritis."

In his opinion, any sitting occupation is likely to cause the neuralgic pain which this employee experienced in the region of his neck. If he sat for eight hours a day in his home reading a book "with his hip in that position, in any position" he would be likely to have the same sort of a pressure in that brachial region as he had while sitting at work. If he sat in a chair at his home over a period of 14 years, reading a book every day, he might get from that the neuralgic pain which he experienced in March of 1919.

Upon a hearing of all the evidence a single member of the industrial-accident board made a finding which was adopted by the full board. It is in part as follows:

That "while there was an underlying and preexisting condition following hip disease it was the muscular action in rolling cigars for a number of years which precipitated the neuralgic pain and brought into being the personal injury which totally incapacitated the employee for work," and that "finally, as a result of the effect of the muscular movements required by his employment in making cigars, acting upon his particular condition of health, neuralgic pain, a personal injury under this act, developed. The employee's total incapacity for work is due to that personal injury, and will continue for a period which is not now determinable."

Notwithstanding these findings and testimony, the court reversed the decision of the board, Judge Crosby rendering an opinion, from which the following is quoted:

The case at bar is similar in many respects to Maggelet's case (228 Mass. 57, 116 N. E. 972 [Bul. 246, p. 274]), and is governed by it. While the board found that the neuralgic pain was induced by muscular action in rolling cigars for a number of years, the impartial physician testified that any other occupation was likely to cause the pain from which the employee suffered, and that this condition could result independently of any occupation and could come from any sitting or standing occupation. In view of this, together with all the other evidence, we are of opinion that the pain could not have been found to have been a reasonably necessary result of the employment, and can not be said to have been a personal injury peculiar to it. We are also of opinion that there was no sufficient evidence to warrant a finding that the employee had neurosis—a disease with which cigar makers are sometimes afflicted—and the impartial physician so testified; nor is there evidence that he had any disease, the reasonable inference being that the neuralgic pain was not due to his occupation but was rather the result of faulty posture brought about by long and laborious work, a condition which would have been equally liable to arise in whatever employment he might have been engaged or if not employed at all. Although the condition arose during the course of the employment, it can not be found to have arisen from it.

WORKMEN'S COMPENSATION—INJURY ARISING IN COURSE OF EMPLOYMENT—EVIDENCE—ENGINEER KILLED BY BULLET—*Keyes et al. v. New York, O. & W. Ry. Co., Supreme Court of Pennsylvania (May 21, 1919), 108 Atlantic Reporter, page 406.*—Minor T. Keyes was employed on an engine by the defendant company. He was alive and engaged at his work at 2.30 a. m. on November 23, 1916. Ten minutes later he was found lying on the ground by the engine dead from a bullet wound through the jaw. No evidence appeared to indicate a suicide nor could it be proved that the death had been inflicted by a third person. Keyes' widow and minor child were awarded compensation under the workmen's compensation act, and the employer appealed. The point in dispute is, upon whom lies the burden of proof of how the death was caused. The compensation board held the burden was upon the employer to prove that the death was caused by suicide or by the intentional act of a third person so as to prevent a recovery under the act, but on appeal the lower court decided to the contrary. The widow appealed to the supreme court, which reversed the lower court and sustained the award. The opinion in part is as follows:

A claimant's case is prima facie made out by proof of affirmative facts showing the employer's liability, and that rule is not changed

by the fact that earlier in the section the burden of proving suicide is expressly placed upon the employer. When, as here, there is nothing to throw light upon the occurrence, it would impose an unreasonable burden upon claimants and defeat the beneficent purpose of the act, to require them to establish the negative proposition that the injury was not inflicted by a third person because of some reason personal to the employee. The court below concludes, in effect, that the affirmative of the proposition should be presumed, as it was not suicide; but that view can not be accepted. There is always a presumption of innocence, and we can not assume that the wound was feloniously inflicted. It may have been accidental. No one heard the sound of a shot or knows whence it came. It was in the dark, and may have been a random shot, discharged by some officer or other person for an innocent purpose and with no thought of harm. Probably not 1 shot in 20 fired upon the street is with felonious intent; so the fact that a man sustains a fatal bullet wound, while exposed at night, does not of itself prove an intentional homicide. To sustain defendant's contention we must presume a felonious homicide, and add to that the further presumption that it was committed because of some reason personal to the victim. Assuming a willful killing, it may have been because of the employment or from some other motive, entirely aside from Mr. Keyes, and by a stranger, or by one possessed of a homicidal mania, in which cases the employer would be liable. Our act is broad, and embraces cases of injury sustained in course of the employment, although not arising therefrom, and therein differs from enactments in many jurisdictions.

WORKMEN'S COMPENSATION—INJURY ARISING IN COURSE OF EMPLOYMENT—PRANKS OF FELLOW SERVANTS—*White* v. *Kansas City Stockyards Co., Supreme Court of Kansas (Jan. 11, 1919), 177 Pacific Reporter, page 522.*—White was in the employ of the defendant company. One day while washing up preparatory to going home after the day's work some of White's coemployees, among whom was one of the defendant's foremen, attached a highly charged electric wire to an iron door through which White would have to pass on leaving the place. This form of joke had been practiced a number of times previously on other employees. White grasped the door to open it and received a severe shock and other injuries, for which he claimed compensation. In affirming the lower court's award of compensation Judge Dawson, expressing the opinion of the court, said in part:

It is needless to discuss the question whether plaintiff was injured in the course of his employment. Under not dissimilar circumstances it has been so held in this State.

It has also been held that while ordinarily a master is not liable under the compensation act for injuries to a workman which have been caused through the mischievous pranks and sportive jokes of his coemployees, yet the rule is otherwise where the master has know-

ingly permitted such mischievous pranks to continue. In such cases the pranks become an incident to the employment.

It is true that this foreman had no general authority, but he was the person plaintiff had to obey while in the defendant's employment. To that extent he was a foreman, and his knowledge of the electrical mantrap on the door was notice to his principal.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACCIDENT—PROOF—CARRYING MATCHES IN POCKETS—*Steel Sales Corporation* v. *Industrial Commission et al., Supreme Court of Illinois (June 16, 1920), 127 Northeastern Reporter, page 698.*—Frederick Schwinn was an employee of the steel company, working as a machine hand in the basement of the company's plant, and was engaged in cutting steel plates. His work caused his overalls to become very greasy and oil soaked. Adjoining his workroom was a toilet room containing lockers where the company's employees could change out of their work clothes. The toilet room had only one window and no electric light of its own, and as a consequence was very dim. Schwinn went into the toilet room and shortly afterward emerged again with his clothing on fire. He rushed up the stairs and into an alley, where a blanket was thrown around him and the fire extinguished. He died from his injuries. His brother, who was a fellow employee, testified that Schwinn said to him shortly after the accident, "I went into the washroom and bumped into the locker, and had matches in my pocket." There was a rule of the company in force prohibiting smoking during working hours, but as no one was present when Schwinn's clothing caught on fire it was not known exactly how the accident occurred. The arbitrator refused an award for compensation, but his decision was reversed by the industrial commission, which was upheld by the circuit court. The supreme court, in again affirming the award of the commission allowing compensation, spoke in part as follows:

The principal question raised here is whether the injury arose out of and in the course of the employment. The applicant has the burden of proof as to whether the injury was accidental and as to its cause, but it is not necessary in order to make this proof that such testimony be given by an eyewitness. The proof may be made by direct or circumstantial evidence. (Ohio Building Vault Co. *v.* Industrial Board, 277 Ill. 96, 115 N. E. [Bul. No. 246, p. 249].) An employee while at work for his employer may do those things which are necessary to his own health and comfort, even though they are personal to himself, and such acts will be considered incidental to his employment. (Rainford *v.* Chicago City Railway Co., 289 Ill. 427, 124 N. E. 643.) There can be no question, under the authorities, that the deceased had a right to be where he was at the time of the accident. Somewhat analogous as to facts, though with,

perhaps, not the same reason for the application of compensation acts, are those cases where an accident arises from something incidental to smoking where smoking has not been prohibited by the employer. Such acts have frequently been held to be covered by compensation acts as arising out of the employment. (Bradbury on Workmen's Comp. (3d ed.), sec. 88, p. 660; Boyd on Workmen's Comp. Act (1913), sec. 482.)

Counsel for plaintiff in error (company) argue that the brother's testimony that the deceased told him the matches were ignited by striking against the locker was hearsay testimony, and therefore improperly admitted. We do not see how counsel for plaintiff in error are entitled to raise this question. That evidence was brought out on cross-examination by counsel for plaintiff in error, and we can find no objection made to it or motion to strike it from the record. The word "accident" as used in the workmen's compensation act should not be construed technically.

Carrying matches is a very common practice among men, especially those who smoke, in all employments, and unless expressly prohibited where the surroundings are not apparently dangerous to employees to carry matches it could hardly be held unreasonable as a matter of law for an employee under the circumstances here shown to have matches in his possession. Under the evidence in this record we think the industrial commission was justified in finding that it was a reasonable inference that the accident arose out of and in the course of the employment, and there being such evidence in the record it can not be held as a matter of law by the court that such accident did not arise out of or in the course of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—COMMON HAZARD—*Moran's case, Supreme Judicial Court of Massachusetts (Jan. 9, 1920), 125 Northeastern Reporter, page 591.*—John Moran was employed by the John Hancock Mutual Life Insurance Co. as a solicitor and collector. In accordance with instructions from his superior officer he left his home on the evening of January 2, 1919, and in attempting to catch a street car he was accidentally killed. The employer claimed that Moran's widow was not entitled to an award of compensation under the workmen's compensation act because he met his death from an accident upon the street, the hazards of which are common to all persons. In affirming the decree allowing the award of compensation the court said in part:

Upon the facts the insurer contends that the hazards of the street in their relation to the employment of the decedent are hazards common to persons engaged in any employment who have occasion to travel along the streets and are not a causative danger peculiar to Moran's employment, and cites as authorities for his position Hewitt's case, 225 Mass. 1, 113 N. E. 572 [Bul. No. 224, p. 318], and Donohue's case, 226 Mass. 595, 116 N. E. 226 [Bul. No. 246, p. 251]. These were cases "where the causative relation between injury and

employment was too remote to charge the employment with the risk of the particular injury received." (Kearney's case, 232 Mass. 532, 534, 122 N. E. 739, 740.)

In the case at bar the workman to do the work of his employment must continually stand in danger of receiving an injury from accidents resulting from exposure of whatever risks or hazards are commonly attendant on the use of public streets and conveyances, which risks to him are greater because more constant than those that are incidental to the occasional and casual use of such streets by persons who use them in the ordinary way. We are of opinion that the risk and hazard of the decedent's employment were not too remote in their causative relation to the employment, and that the case is governed by Kearney's case, supra, and similar cases, and is distinguishable from Hewitt's case, supra, and from Donohue's case, supra.

Decree affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH CAUSED BY FELLOW EMPLOYEE.—*Industrial Commission of Ohio* v. *Pora, Supreme Court of Ohio (June 24, 1919), 125 Northeastern Reporter, page 662.*—Sylvester Pora had been employed as a helper to a molder by the Youngstown Foundry and Machine Co. The molder, who was his superior, ordered Pora to get an electric riddle. Pora went after the riddle but found it in the possession of the helper of another molder who had as much right to have the riddle as Pora and who refused to surrender the implement. A controversy was engaged in, and the other helper struck Pora over the head with a shovel, injuring him so that he subsequently died. The industrial commission refused to allow Pora's widow an award of compensation under the workmen's compensation act, on the ground that the injury was not sustained in the course of the employment. The widow appealed to the common pleas court and was awarded judgment in the sum of $8.63 per week for 312 weeks, which was affirmed by the court of appeals. The commission again appealed and the supreme court, in affirming the judgment in favor of the widow, said in part:

With the advantage of the hindsight we now possess, it would have been wiser if Pora, when denied possession, had retired from the scene and reported the situation to his superior. It was, however, the natural thing that he should be disposed to argue the matter when denied the thing to which he was entitled in an equal sense with the immediate possessor.

In seeking to obtain the possession he was carrying out the order of his superior, and his failure to make some reasonable effort to obtain it would have constituted a breach of his apparent duty. He was seeking the implement that would enable him to properly pursue his employment, and without which it must be assumed he could not labor to the advantage of his employer.

Conflicting inferences might be drawn, it is to be admitted, from the use of the descriptive term "controversy"; but the inference most favorable to the prevailing party below is to be accepted by a court of review.

It was held in the case of the Mentone Irrigation Co. *v.* Redlands Electric Light & Power Co., 155 Cal. 323, 331, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222, that where the decision of the trial court is based on conflicting inferences reasonably deducible from the evidence, it is as conclusive on the appellate court as though based directly on conflicting evidence.

This rule of law appeals to us as being altogether sound and its adoption calls for the application, as its supplement, of the long-established rule of law, that the judgment must be sustained if there is any evidence in its support.

With this conception of the law, we are not willing to say that Pora's conduct was such as to place him outside the pale of his course of employment.

To deny the defendant in error the compensation she has been awarded would be sadly missing the fine spirit of the workmen's compensation act.

Section 1465–91, Page & A. General Code Supp., provides that—

"Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules or procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

The real spirit of this act is to measurably banish technicality and to do away with the nicety of distinction so often observable in the law, and commands a liberal construction in favor of employees.

The judgment of the court of appeals is affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH CAUSED BY FELLOW EMPLOYEE—*Mueller* v. *Klingman, Appellate Court of Indiana, Division No. 1 (Dec. 18, 1919), 125 Northeastern Reporter, page 464.*—Mueller employed Klingman as a laborer to aid in the construction of a reinforced concrete building. He made it a rule among his workmen that they should aid each other in their tasks; that is, one workman was not to remain idle while waiting for another workman to complete a particular task but he was to aid him as much as possible. Three workmen, one of them Klingman, were carrying a 40-foot steel rod to its appointed place to be used as reinforcement for the concrete. When they were about to place the rod the discovery was made that one of the U-irons into which it was to be placed was out of position. One of the workmen asked Howard, the other workman, to "straighten up" the U-iron, which he accordingly did, but in doing so he remarked, "I ain't got time to fool with you people." Klingman replied to this by saying, "I won't ask anybody to help

me do my work, I will do it myself." Whereupon Howard threw a hammer at Klingman, striking him on the back of his head inflicting an injury from which he later died. Klingman's widow was awarded compensation under the workmen's compensation act and the employer appealed. In affirming the decision the court said in part:

It has been held that an employee is injured in the course of his employment, where the injury occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental thereto. (Swift & Co. *v.* Industrial Com., 287 Ill. 564, 122 N. E. 796.) It has also been said that there must be some causal relation between the employment and the injury; that it is not necessary to 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. In Pekin Cooperage Co. *v.* Industrial Com., 285 Ill. 31, 120 N. E. 530 [Bul. No. 258, p. 191], it was said, after reviewing a number of cases:

"All concur in the rule that the accident, to be within the compensation act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When 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."

Under the above rules, upon the record before us, there can be no question as to the death of deceased having been caused by an accident arising out of and in the course of his employment. The findings are sustained by the evidence.

The award of the Industrial Board is affirmed, and the amount thereof is increased 5 per cent, as provided by section 3 of the amendment of 1917. (Acts 1917, p. 155.) [This amendment provides that where an appeal is taken from an award made by a full board, and the award is affirmed, it shall be increased 5 per cent.]

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH FROM CYCLONE—*Central Illinois Public Service Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Feb. 18, 1920), 126 Northeastern Reporter, page 144.*—Kilgore was employed as an engineer in the electric generating station and ice plant of the Central Illinois Public Service Co. While closing the plant a tornado swept down upon the building housing the engines and ice machine and destroyed it. Kilgore was found in a standing posture completely surrounded by bricks. The steam from

the boilers had severely scalded him and the fumes from the broken ammonia pipes of the ice machine tended to cause suffocation. Kilgore died from his injuries, and proceedings were brought by his administratrix for compensation. An award was made which on appeal was reversed by the circuit court and the industrial commission appealed. It was contended by the company that Kilgore met his death from a catastrophe, to which all persons in the immediate vicinity were subject, and that therefore it could not be said that the injury arose out of the employee's employment. The supreme court refused to take this view of the question and reversed the decision of the circuit court which had set aside the award of compensation. The opinion is in part as follows:

We believe the reasonable rule to be that if deceased, by reason of his employment, was exposed to a risk of being injured by a storm which was greater than the risk to which the public in that vicinity was subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment, although unexpected and unusual. An injury, to come within the compensation act (Laws 1913, p. 335), need not be an anticipated one, nor, in general, need it be one peculiar to the particular employment in which one is engaged at the time. While the risk arising from the action of the elements, such as a cyclone, is such a risk as all people of the same locality are subjected to, independent of employment, yet the circumstances of a particular employment may make the danger of receiving a particular injury through such storm an exceptional risk, and one to which the public generally is not subjected. Such injury may be then said to arise out of the employment. In the instant case, while the risk of being injured by this cyclone may be said to have been a risk common to the public in the vicinity of such cyclone, regardless of employment, yet if there was in the circumstances of Kilgore's employment an unusual risk or danger of injury from the destruction by storm of the building in which he was employed, such risk may be said to be incident to the employment of the deceased, and the injury received to arise out of such employment. Deceased at the time the storm broke was engaged in assisting and directing the closing up of the plant of defendant in error. These duties took him among the steam pipes and ammonia coils, which subjected him to an unusual risk of being injured from escaping steam and ammonia fumes should the building be destroyed by storm. The evidence shows that the ammonia fumes and scalding steam contributed most largely to the injuries which caused his death. We are therefore of the opinion that there were in the circumstances of the employment of the deceased risks of being injured by the storm not common to the public in that vicinity, and the circuit court therefore erred in setting aside the award.

The judgment of the circuit court will therefore be reversed, and the cause remanded, with directions to that court to enter an order confirming the award.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH FROM LIGHTNING—*Chiulla de Luca* v. *Board of Park Commissioners of City of Hartford, Supreme Court of Errors of Connecticut (July 31, 1919), 107 Atlantic Reporter, page 611.*—The late husband of the plaintiff was employed by the defendant as a park workman in Colt Park. He was raking leaves in said park when a violent thunderstorm arose, and no other shelter being provided he took refuge from the storm under a tree, which was struck by lightning and he was killed. The compensation commissioner allowed the widow compensation for his death and the defendants appealed. In advising the superior court to affirm the award the court said in part:

The remaining reasons of appeal present the claim that as a matter of law under no circumstances can death by lightning constitute a personal injury for which an allowance can be made under our compensation act.

If the place under the tree were the more dangerous, the fact that the deceased chose it as the place of refuge from the storm and that he was injured at this place does not prevent recovery. The act of seeking and obtaining shelter arose out of—that is, was within—the scope or sphere of his employment and was a necessary adjunct and an incident to his engaging in and continuing such employment. Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over was not only necessary to the preservation of the deceased's health, and perhaps his life, but was incident to the deceased's work, and was an act promoting the business of the master. (L. R. A. 1916A, 348.)

"A personal injury to an employee which is sustained while he is doing what he was employed to do, and as a proximate result thereof, arises out of and in the course of his employment."

"An injury which is the natural and necessary incident of one's employment is proximately caused by such employment, as it is also when the employment carries with it a greater exposure to the injury sustained than the exposure to which persons generally in that locality are subjected."

The superior court is advised to affirm the award of the compensation commissioner.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH OF SUPERINTENDENT CAUSED BY FELLOW SERVANT—INSURANCE OF EMPLOYEE—*American Smelting & Refining Co.* v. *Cassil, Supreme Court of Nebraska (Jan. 17, 1920), 175 Northwestern Reporter, page 1021.*—Cassil was killed while in the employ of the American Smelting & Refining Co. and his widow brought proceedings for compensation. She was allowed an award, but on appeal the district court disallowed it, and the widow brought this appeal from the decision of the district court.

Cassil was an assistant superintendent of a department and one Casey was head watchman of the plant. Cassil and Casey could not

get along together and were constantly quarreling. It seems Cassil owed Casey $35, and Cassil accused Casey of intimacy with his wife. These were long-standing grounds for dispute. On the occasion of Cassil's death, Casey came into Cassil's office on the premises of the employer and said that he understood that Cassil had accused him of saying that one Sweetman, who was to relieve Cassil as assistant superintendent, "was no good in and around the plant." A dispute arose into which the above grounds for dispute were also injected. When Cassil turned to go away, Casey drew his revolver and shot Cassil in the back. Later Casey was tried for murder and sentenced to life imprisonment. The employer contended that the injury did not arise out of and in the course of the employment but was the result of a personal quarrel. The court failed to take this view of the matter and reversed the decision of the district court, which set aside the award. The opinion is in part as follows:

The workmen's compensation act is by construction a part of the contract of employment. It is a remedial statute, enacted for the benefit of workmen and is liberally construed to carry out the legislative intent. The protection of workmen and dependents under the act should not be limited by general principles of law having no application to the claim for compensation.

Is the evidence in support of defendant's theory that the quarrel and resulting homicide arose out of the employment more convincing than that in favor of plaintiff's theory that Cassil lost his life in a quarrel over personal matters? The tragedy occurred at a time and place where defendant was protected by the workmen's compensation act if the homicide arose out of the employment. The participants were on the premises of their employer. Cassil was in his office and was about to leave for the night. The fatal shots were fired after Cassil left his office. The bullets struck him in the back on the left side. The revolver used was the property of plaintiff, the employer. It was carried by Casey as a duty of his employment. He was officious, meddlesome, and irritating in his conduct toward other employees over whom he had no authority. He had been twice reprimanded by the superintendent for misconduct in these respects. Complaints of his bringing whisky into the plant in violation of the rules had been made to an employee described as the "safety first" man. Cassil was the superior. On his recommendation Casey had been promoted. A few minutes before the shooting occurred Cassil in preparing to leave for the night had gone into his office. While there with other workmen intending to depart with him Casey came in and started the quarrel by a reference to George W. Sweetman, jr., who had arrived at the usual hour to relieve Cassil as assistant superintendent. In accosting Cassil, Casey said he understood he had been accused of saying that "Sweetman was no good." Cassil denounced Casey as a liar. The latter then asked about Cassil's debt of $35 and the whisky. Casey testified he had been told by Sweetman in the morning before the quarrel that Cassil said to Sweetman that Casey had said he "was no good in and around the plant." Casey also said he had promised to ask Cassil

about this statement in presence of Sweetman before Cassil left the plant that night. Casey also testified that during the quarrel he had accused Cassil of borrowing money from workmen without intending to pay it back; of permitting employees to sleep on the job; of complaining because Casey performed his duty; of beating workmen out of a portion of their wages; of defrauding the employer out of a portion of the labor; of bringing whisky into the plant in violation of the rules; of being drunk on duty; of allowing drunken employees in the plant; of disparaging the work of Casey and of plotting against him as watchman. Some of these charges related to the duties of both Casey and Cassil as employees of plaintiff. They were made by Casey during the quarrel culminating in the homicide, according to his version of the controversy as told at his trial for murder. These charges against Cassil, the superior, would naturally imperil Casey's position if Cassil were left to tell the tale. The unpaid loans amounting to $35 and the conversion of the keg of whisky, old grievances, were mere trifles compared with the loss of Casey's position. This suggests a more substantial motive for the homicide than revenge for personal grievances. The preponderance of the evidence seems to indicate that the quarrel and resulting tragedy arose out of the employment within the meaning of the workmen's compensation law. In these views of the statute and the evidence defendant established her claim to compensation.

There remains to be considered a demand for a credit of $1,690 on account of insurance carried by plaintiff on the life of Cassil and paid to defendant. This insurance was procured and kept in force by plaintiff without any expense whatever to insured. Nothing was deducted from his compensation for premiums. Payment of insurance was to be made only in absence of a recovery for compensation or for damages. It was paid to defendant before the liability of plaintiff for compensation had been determined. It should therefore be allowed as credits. The judgment of the district court is reversed, with directions to award compensation and to allow credits to the extent of $1,690 on account of the insurance received by defendant from plaintiff.

Reversed with directions.

WORKMEN'S COMPENSATION — INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEPENDENTS—"ORPHANS"—*State ex rel. Raddisson Hotel et al.* v. *District Court of Hennepin County, Supreme Court of Minnesota (June 20, 1919), 172 Northwestern Reporter, page 897.*—Compensation was awarded by the district court for the death of one Vera Meakins, who had been employed as an elevator starter by the hotel. The hotel and the surety company bring certiorari to review the judgment in an effort to have it reversed. Vera Meakins had been employed by the hotel company as starter in charge of its elevators at a salary of $80 per month and her room and board. She left surviving her a husband and three minor dependent children. The husband had deserted his family three years before the accident. On the occasion of the accident

Mrs. Meakins had removed her uniform and donned her street attire and punched out on the time clock. A few minutes later she entered an elevator and rode up and down a number of times conversing with the operator. While so occupied she got out of the car after a passenger on the tenth floor and the operator closed the door and the car started to move upward. Mrs. Meakins pushed the doors open and attempted to reenter the car. She tripped and fell under the car into the elevator shaft to her death. The employer contends that because she was in her street costume and had punched out on the time clock the accident did not occur during the course of her employment. It is also contended that her dependent children are not orphans, because the father is living. In answering these arguments and affirming the award the court said, in part:

Relators make much of the fact that deceased had "punched out" on the time clock and that she was dressed for the street; hence, it is said, the finding is not sustained that she met death in the course of her employment from an accident arising out of it. This overlooks some persuasive testimony given by the assistant manager of the employer, to the effect that deceased had no stated hours of work, but was practically on duty all the time, as he put it, "24 hours in the day"; that she used her own discretion as to the time within which she was to do that which was expected of her; that the wearing of the uniform was not obligatory for her; and that she was not required to punch the time clock, for her wages were not paid upon its record. The inference is near at hand that she was at the moment of the accident engaged in her work, endeavoring to ascertain whether the doors of the elevator she was riding on locked properly. It seems their defective condition in this respect was the direct cause of her death. We can not say that the court's finding is not sustained under the rule announced in State ex rel. Niessen *v.* District Court, 172 N. W., 133.

We need not determine whether the evidence justifies a finding that the children were in fact wholly dependents, for section 8208(1), G. S. 1913, as amended by section 5, chapter 209, Laws 1915 (Gen. St. Supp. 1917, p. 8208), provides that minor children under the age of 16 years shall be conclusively presumed to be wholly dependent. The minor children thus referred to are the children of an employee accidentally killed in the course of the employment. The law does not in terms exclude the children of the female employee, and no good reason occurs to us why they should be excluded by construction. That dependents of female employees are intended to be protected by the act is clear, for a dependent husband is specifically provided for in subdivision 11 of said section 5.

The decisions, as well as the dictionaries, recognizing that the term "orphan" may properly be applied to a motherless as well as to a fatherless child, we think it meets with no difficulty of construction to hold that the minors here in question are orphans within the meaning of subdivision 10 of section 5, chapter 209, Laws 1915. They have been deserted by their father and bereft by death of their mother, the only parent who for the last three years made any attempt to

support them. The original idea of designating fatherless children orphans, the same as those who had lost both parents, seems to be that the father was the head of the household and responsible for the care and support of the minors therein. When the father has abdicated that place and deserted the family the children become indeed orphans when also bereft of their mother. The purpose of the workmen's compensation law is to provide for the dependents of the employee who accidentally meets with death in the employment. To accomplish the beneficent purpose intended the law should be given a broad rather than a narrow construction.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO WORK—*Great Lakes Dredge & Dock Co.* v. *Totzke*, *Appellate Court of Indiana, Division No. 2 (Jan. 31, 1919)*, *121 Northeastern Reporter, page 675.*—The dock company was engaged, under contract, in driving piles on the Lake Michigan water front of the Inland Steel Co., which covered a large tract of ground and upon which were many railway tracks over which trains and cars were constantly being switched. Only persons with passes could get into this tract. Totzke, an employee, presented his pass, issued by the dock company, and was admitted, and while walking on the regular and usual road to his work on the water front he was run down and killed by a locomotive. His dependents recovered an award and on appeal the award was affirmed, the court saying in part:

In all these cases the question whether the injury or death arises out of and in the course of the employment does not depend upon the minute details of what the workman was doing at the time of the accident, or how he was doing it, or whether he was in any manner at fault. It depends rather upon the broader and simpler question whether the injury or death was due to a hazard to which the workman would not have been exposed, apart from the business in which he was employed. (See Dow's case (Mass.), 121 N. E. 19.) The workmen's compensation law of the State of Iowa (Acts 35th Gen. Assem., ch. 147, sec. 17) contains the following declaration:

"The words 'personal injury arising out of and in the course of such employment' shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business."

There is much sense and wisdom in this legislative interpretation of a group of words which has caused the courts no end of trouble. It will be observed that the idea of place is the controlling feature of this interpretation, and we approve and adopt it. When Totzke entered the inclosure of the Inland Steel Co. undoubtedly he was in a place where his employer's business required him to be, and so long as he remained in that place he was exposed to certain inherent

dangers to which he would not have been exposed apart from the business of his employer. By one of the inherent hazards of that place he was fatally injured, and the industrial board was justified in finding that the injury which resulted in his death arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO WORK—*Scalia* v. *American Sumatra Tobacco Co., Supreme Court of Errors of Connecticut (Dec. 17, 1918), 105 Atlantic Reporter, page 346.*—Catherine Scalia and some other women were employed as tobacco pickers on the Vietts plantation. The defendant company, whose plantation was some distance away from that of Vietts, sent an agent to the Vietts plantation to engage some tobacco pickers who had completed their work there. The agent of the defendant company told them that if they wanted work they should go to the waiting station in Thompsonville the next morning to be transported to the defendant's plantation. This they did and were placed in an automobile owned and run by the defendant company and were transported to the plantation of the defendant. While on the way the automobile skidded and struck a tree, killing Catherine Scalia and another woman. The dependents of the deceased women sued for compensation under the workmen's compensation act and recovered awards which the defendant attacks on the ground that the women were not at the time of their death in its employ. In rendering decision in favor of the awards the court said in part the following:

There is no difficulty in reaching the conclusion that at the time these women were injured there was a contract of employment existing between them and the American Sumatra Tobacco Co. A more serious question presented by the evidence is: Were they injured before this employment began?

There was not any direct evidence as to the time when the employment of these women began. The compensation commissioner inferred that their transportation was an essential part of the contract of employment and reasonably incident thereto. There was evidence which reasonably supported such a conclusion. Although the decedents at the time of the accident had not actually commenced their work upon the plantation of the defendant company, it is plain that their transportation was part of the contract of employment with this defendant. When they were injured they were not passengers, paying a stipulated fare for the conveyance to their work. The automobile which skidded and caused the accident in question was furnished and paid for by the defendant company. The relation that then existed between the women and the Sumatra Tobacco Co. was that of master and servant and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the tobacco company. This being so, the case is like Swanson *v.*

Latham et al., 92 Conn. 87, 101 Atl. 492 [Bul. 246, pp. 249, 250], in which we stated that:

"An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment."

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTENTIONAL INJURIES—ACTS OF STRIKERS—*Baum* v. *Industrial Commission, Supreme Court of Illinois, (June 18, 1919) 123 Northwestern Reporter, page 625.*—This is a proceeding by the employer, Baum, against the commission to secure the reversal of an award made by the latter in favor of Constance Tomczyk for the death of Edward Tomczyk, employed as a cutter in his factory in Chicago. The workroom was a large one, and 25 women and 2 men were employed in it. The International Garment Workers' Union sent Baum a letter demanding that he sign up with the union to avoid strikes and other difficulties. This Baum refused to do. Some time later this union declared a strike which was more or less general throughout Chicago. Baum's employees did not belong to the union, but continued to work. During the course of the strike a party of rioting strikers rushed into Baum's workroom, in spite of efforts to prevent them from entering. The women in the room became frightened and screamed and fled to the rear of the room in a panic. Tomczyk came to the assistance of his employer, Baum, and tried to eject the rioters, and while doing so he was stabbed, causing injuries from which he died. Baum contends that he is not liable under the workmen's compensation act for Tomczyk's death. The court held that Baum was so liable, saying in part:

While 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. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment. Such was our holding in Pekin Cooperage Co. *v.* Industrial Com., 285 Ill. 31, 120 N. E. 530 [Bul. No. 258, p. 191]. Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

It is conceded that Tomczyk was a peaceable and law-abiding citizen. It is also conceded that the strikers rushed into the workroom without any warning and that plaintiff in error tried to eject them. The evidence shows that there was great excitement in the workroom, and that the women employees fled, screaming, to the back of the room. Nothing was said between the plaintiff in error and Tomczyk. Tomczyk, seeing his employer and his fellow employees in apparent danger, came to the rescue. He was assisting his employer in the de-

fense of his person and his property, and was acting in defense of his fellow employees, all of whom were women. We have held that it is the duty of an employee to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. (Dragovich *v.* Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999 [Bul. No. 189, p. 267].) That the fellow employees of deceased were not actually in danger of losing their lives can not change the rule. The danger was clearly apparent to Tomczyk. He acted as any man would have acted under the circumstances. The rioters had rushed in without warning and threw the women employees into a panic. It was up to deceased to act, or to abandon the workroom and its occupants to trespassing strangers, apparently bent upon doing damage to whatever came in their path. The situation was an unusual and unforeseen one, and called for quick action. From every point of view it was the duty of deceased to defend himself and his employer, and to assist his employer in defending the persons of his women coworkers. Where the trouble arises out of the employer's work, and as a result of it one of the trespassers injures an employee who is defending his employer's business, it may be inferred the injury arose out of the employment.

An assault arises out of one's employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circumstances, are liable to attack him. (Ohio Building Vault Co. *v.* Industrial Board, 277 Ill. 96, 115 N. E. 221 [Bul. No. 246, p. 249].) Such was the situation in this case. Deceased was assaulted, not for anything he had done, but because he was in the employ of the plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are therefore of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH HOUR ACCIDENT—*Rochford's case, Appeal of Liberty Mut. Ins. Co., Supreme Judicial Court of Massachusetts (Nov. 25, 1919), 124 Northeastern Reporter, page 891.*—Francis Rochford was employed by the Woodbury Shoe Co. and worked on the second floor. In order to reach his place of work he had to pass through a packing room. His lunch hour was from 12 to 1 p. m. On returning from his home, about 20 minutes before 1 o'clock, he stopped in the packing room to talk to some other employees who ate their lunch there. He sat in a chair near a monogram press and took one of the girl employees of about 17 years of age on his knee. When the whistle blew to go back to work he put his hand on a part of the press in order to enable him to arise. At that time the machinery started and the press came down on his hand and injured it. The industrial accident commission allowed him compensation and the employer's insurer appealed. In reversing the decision the court said in part:

It is apparent from this recital of facts that there was no causal connection between the employment and the injury. It was no part of the employment to wait for 20 minutes under the circumstances disclosed in the packing room, although the employee was required to pass through it in a reasonable and orderly way to reach his labor. Whatever else may be said respecting his manner of spending that period of time, plainly it was no part of his duty and had no relation to it. The injury occurred while he was attempting to extricate himself from a posture and course of behavior utterly foreign to the business of the subscriber. That risk was not incidental to his employment. The subscriber was in no wise responsible for it. It was intentionally, intelligently and voluntarily incurred by the employee on an escapade of his own. Conditions may arise where the employee on the way to or on the return from meals may be injured on the master's premises as a rational result of the contract of service, although not actually engaged at the moment in the work for which he was hired. (Sundine's case, 218 Mass. 1, 105 N. E. 433 [Bul. No. 169, p. 244]; Hallett's case, 232 Mass. 49, 121 N. E. 503.) The case at bar is not of that nature; it belongs to the class illustrated by Savage's case, 222 Mass. 205, 110 N. E. 283 [Bul. No. 189, p. 269].

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH HOUR ACCIDENTS—*Thomas* v. *Proctor & Gamble Mfg. Co., Supreme Court of Kansas (Mar. 8, 1919) 179 Pacific Reporter, page 372.*—Daisy Thomas, a 17-year-old girl, was in the employ of the defendant company. She was paid by the hour and was allowed a lunch period of half an hour. During the lunch period it was the habit or custom of the plaintiff and other girls to play on some trucks used in their department to pull boxes about on. On the day of the accident plaintiff and two other girls were riding on the truck when it slid, causing two of them to fall to the floor, injuring plaintiff's knee and ankle. She brought proceedings to recover compensation and was allowed an award, and the employer now appeals on the ground that the injury did not arise out of and in the course of her employment, because it happened during the lunch hour when she was not at work. In affirming the award the court said, in part:

We conclude that there was room for a finding that the plaintiff's injury occurred in the course of her employment. If it had been the result of some accident which was due to the physical conditions under which the work was performed—say to the falling of plaster in the rooms where the girls were playing—this would be quite obvious, and the judgment for the plaintiff would be clearly warranted.

Whether the plaintiff's injury arose out of her employment is a more difficult question. Injuries received in play are not usually capable of being so classified. If the present case is to be taken out of the general rule, it must be upon the ground that the habit of the

girl employees to play with the trucks during the noon intermission, with the knowledge and express consent of the foreman and without objection by anyone representing the defendant, made such practice one of the conditions under which the business was carried on, upon much the same principle as employers are held liable for the results of horse play which had grown into a custom. (White *v.* Stockyards, 177 Pac. 522 [p. 402].)

Inasmuch as the evidence may be regarded as establishing that the play in which the plaintiff was injured has become a settled custom, with the knowledge and, indeed, the express approval of the foreman in charge of the department, and without objection on the part of anyone, the court is of the opinion that her injury may be regarded not only as having occurred in the course of her employment but as having arisen out of it.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VISITING ABOUT SHOP—*Barber* v. *Jones Shoe Co., Supreme Court of New Hampshire (Dec. 2, 1919), 108 Atlantic Reporter, page 690.*—Barber, a minor of 19 years, was injured while in the employ of the Jones Shoe Co. and brought this action to recover compensation under the workmen's compensation law. At the time of the injury Barber had been in the employ of the company for about one week. He had completed the work he had been given, and when he attempted to do some other work the foreman stopped him. While waiting for more work, he walked across the shop about 20 feet and engaged in a conversation with the operative of a "heel breast shaving" machine. This machine had a set of unguarded revolving knives on each end of it, and while Barber was talking to the operative the suction from the air blower caught the right sleeve of his jumper and drew his right arm into the revolving knives so that the back of his arm was cut just above the elbow. The employer contended that because Barber was "visiting" about the shop and was not doing any work at the time of the accident his injury did not arise out of and in the course of his employment. The court in affirming an award in favor of Barber said in part:

The employers' liability and workmen's compensation statute was enacted for the benefit and protection of the mill and factory operatives of the State. It is a remedial statute, and should be liberally construed to fully and adequately effectuate the purpose of its enactment.

Such a construction of the statute would warrant a finding upon the evidence that the plaintiff was in the course of his employment when he was injured. It could be found that it was customary for the employees to go about and talk with their fellow workmen when waiting for work, and that this custom was known to the plaintiff, and had existed for such a length of time that the defendants knew it, or ought to have known it; that it was the fault of the defendants,

and not of the plaintiff, that he had no work; that while he was without work he simply did what he had seen others do, and what was customarily done, and did not do anything that he had been told not to do; that he was not enjoying a rest for a definite period, but his leisure was for an indefinite time, and might be terminated at any minute, and while it continued he was there in the room, holding himself in readiness to return to work, and subject to the orders of the defendants. Some latitude must be allowed a workman while engaged in his employment. It can not be said as a matter of law, if he is without work for a brief space of time and goes away from his work place a few yards to speak to a fellow workman employed in the same room, that he places himself beyond the protection of the statute. Such an interpretation of the law would be repugnant to the humane intent and purpose of the act.

The defendants claim that no duty was imposed upon them to guard the machine upon which the accident occurred to protect the plaintiff from injury. As it can be found that it was a custom in that room, which was known, or ought to have been known, to the defendants, for employees, when waiting for work, to go about the room and talk with the operatives at the machines, it can also be found that it was the duty of the defendants to reasonably guard this machine to protect the employees from injury while they were there engaged in the course of their employment.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—COMMON-LAW ACTION DISMISSED—*Hansen* v. *Northwestern Fuel Co., Supreme Court of Minnesota (Nov. 7, 1919), 174 Northwestern Reporter, page 726.*—Hansen was employed by the Standard Laundry Co. to collect and deliver laundry. When he returned to the laundry on the occasion of the accident and had stabled his horse during the noon hour, he discovered he had forgotten a bundle of laundry from a hotel and returned on foot to get it. While returning with the bag on his back he was run into and injured by a truck driven by an employee of the defendant fuel company. Hansen, the laundry company, and the defendant were all under the workmen's compensation act. Hansen elected to sue the fuel company at common law for damages, as under the compensation law he was entitled to do. As the fuel company was also under the compensation act, no more could be recovered against it at common law than the amount for which the laundry company as employer was liable in compensation. The defendants moved that plaintiff's common-law action be dismissed and that the court either grant or deny compensation under the compensation act, and the motion was granted. Hansen appealed from the order granting this motion. In affirming the order the supreme court approved the finding of the court below that the injury, though due to a "street risk," arose out of and in the course of the employment.

Continuing, the court said:

The compensation act provides that the person injured may proceed under the compensation act against his employer, or against a third party by a common-law action for negligence. To recover against the third party he must prove his common-law cause of action. If he recovers in a common-law action he can have no greater amount than that fixed by the compensation act. If he takes under the compensation act his employer is subrogated to his common-law action against the third party and his recovery is limited to the amount payable under the compensation act. (G. S. 1913, p. 8229.) The statute gives no right to proceed against the third party under the compensation act.

At the close of all the testimony the defendant moved that the case be dismissed as a common-law action and that the court either grant or deny compensation under the workmen's compensation act. The motion was granted. The defendant invited an award of compensation. It can not contest the question of its liability to the extent to which the laundry company was liable. There is nothing now to do but fix compensation. (See Mahowald *v.* Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913, 159 N. W. 565 [Bul. No. 224, p. 326].)

The order is affirmed and the case remanded with directions to the court to entertain such further proceedings as may be appropriate.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—ELECTION—RECOVERY OF COMPENSATION—*Mayor and Council of Hagerstown* v. *Schreiner et al., Court of Appeals of Maryland (Jan. 16, 1920); 109 Atlantic Reporter, page 464.*—Clarence M. Schreiner was killed by an accident arising out of and in the course of his employment with the Cumberland Valley Telephone Co. The accident was due, according to the allegations of the widow, to the joint negligence of the employer and the municipality of Hagerstown. Schreiner's widow brought proceedings under the workmen's compensation act (ch. 800, Acts of 1914) in behalf of herself and minor children, and the industrial board granted her an award of $8.08 per week. She then brought suit for damages against the mayor and council of Hagerstown under section 57 of the compensation act (codified as sec. 58, art. 101, of the Code), which permits damage suits against negligent third parties. She recovered judgment and the mayor et al. appealed, declaring that Mrs. Schreiner having elected to take compensation was estopped from suing for damages. The court accepted the defendant's contention and reversed the decision. The opinion is in part as follows:

We think the plain meaning of section 58, so far as concerns the question here involved, is this: If the injury or death has been caused under such circumstances as to fix a legal liability upon some person or persons other than the employer, the employee or in case of his death his personal representatives or dependents, may elect to sue

such other person or persons at law, or may claim compensation under the act, but he or they can not pursue both remedies. If he or they accept compensation under the act such payment must be held as declared by section 36, article 101, to be "in lieu of any and all rights of action whatsoever against any person whomsoever." This construction is in accord with the design and general purpose of the act and is in harmony with its provisions.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—RECOVERY OF COMPENSATION—*Podgorski* v. *Kerwin*, *Supreme Court of Minnesota* (*Dec. 19, 1919*), *175 Northwestern Reporter*, *page 694*.—The plaintiff Podgorski, was an employee of the People's Coal & Ice Co., and while at work making a delivery of coal to a customer was run into and injured by one Kerwin who was driving his automobile on his way to work. An agreement for the payment of compensation was entered into between Podgorski and the ice company. Thereafter Podgorski brought an action for damages against Kerwin, alleging negligence on the part of the latter, and succeeded in securing a judgment in his favor for $7,000. Podgorski and his employer were both subject to the workmen's compensation act (Gen. Stat. 1913, secs. 8195–8230), and as to his employees Kerwin was also subject to this act. Kerwin was in the wholesale paper business and was on his way to work when he injured the plaintiff. It is his contention that, being himself under the compensation law, Podgorski must proceed against him in accordance with that law and can not maintain an action for damages. Kerwin also contended that Podgorski, having entered into an agreement for compensation with his employer, was no longer entitled to proceed against a third party, that right resting solely with the employer. The court failed to accept either of these contentions and affirmed the decision. The following is in part the decision:

By the terms of section 8203, where both the employer and the employee are subject to the act, the latter is entitled to compensation for an injury received during the course of his employment without regard to the question of negligence on the part of the employer; compensation follows from an accidental injury. Under subdivision 1 of the section under consideration an employer who is within the act is made liable for compensation for injuries to the employees of another employer where the injury is caused under circumstances creating a legal liability against him. While the statute makes it clear that in either case the injury for which compensation is given must as to the employee arise out of and in the course of the employment, there is no express provision prescribing when and under what circumstances the third party employer may or may not claim the benefits of the limited liability thus imposed upon him; it does not prescribe that to be entitled to the protection

of the statute he must show that the act causing the injury was committed at a time when he was engaged in the affairs of his own employment. But we think, though the statute is silent upon the particular point, that it should be so construed. It seems clear that the legislature did not intend to extend the protection of the statute to the culpable third party employer merely because he happened to be an employer of labor and as to his own employees within the statute. No reason occurs to us why such an employer should receive protection from a negligent injury occasioned while in the pursuit of his personal affairs, wholly disconnected with and unrelated to his business employment, as upon a pleasure drive with his automobile on a holiday or of a Sunday. It is a well-known fact that business concerns, through their servants and employees, have frequent and almost daily transactions with each other in the delivery of commodities by one to the other, which necessarily expose their employees to injury when upon or about the premises of the employer with whom such transactions are had, as well as when the employees come in contact with each other in the discharge of their duties elsewhere. This was well understood by the legislature when framing and enacting the statute, and we conceive the purpose of that body to have been to limit the liability of the third party employer to injuries arising from relations of that kind, and not to extend to him a blanket exemption from liability for his wrongful acts, based on the naked fact that he occupies that relation to industrial life. (Hade *v.* Simmons, 132 Minn. 344, 157 N. W. 506.) We so construe the statute, from which it follows that the limited liability is not available to defendant, unless the act causing the injury here complained of had some relation to and connected with the business which he then carried on, as to which he was an employer within the meaning of the law.

The further contention of defendant that, though the case comes within the second subdivision of the third-party provisions of the act, plaintiff can not maintain the action, for the reason that the settlement for his injuries with his employer and the payment of the amount agreed upon operated by force of the statute to transfer his right of action to his employer. The contention is not sustained. The right of action against the third person not subject to the act is expressly given to the employee notwithstanding settlement has been made with his employer. The statute is clear on the subject, and a recovery in such an action necessarily will conclude all parties and not expose the third party to a second suit. Such is the rule in practically all of the States having statutory provisions similar to our own. (Book *v.* City of Henderson, 176 Ky. 875, 197 S. W. 449; Gones *v.* Fisher, 286 Ill. 606, 122 N. E. 95; Rogers *v.* Ill. Central Railway Co., 210 Ill. App. 577.)

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—SUBROGATION OF EMPLOYER PAYING COMPENSATION—*Black* v. *Chicago Great Western R. Co., Supreme Court of Iowa (Nov. 22, 1919), 174 Northwestern Reporter, page 774.*—Black was an employee of the Ware Transfer Co. and was injured by the defend-

ant railroad in the course of his employment. He was paid $378 as compensation for his injuries by his employer. Later he brought this action against the railroad for damages and recovered judgment. The defendant appealed, claiming that the action could not be maintained by this plaintiff as his rights had passed to his employer. In affirming the judgment the court said in part:

Was the plaintiff, after having received from his employer payments due him under the provisions of the workmen's compensation act (Code Supp. 1913, ch. 8a), entitled to maintain this action for damages against the defendant? The trial court held the issues of negligence and contributory negligence, under the evidence, to be issues of fact, and submitted the same to the jury. It also held that the recovery, by plaintiff, from his employer, of benefits of the compensation act, did not prevent his recovery of damages from the defendant for its negligence and instructed the jury, in case it found for plaintiff in excess of $378, to deduct from the amount to which they found plaintiff entitled the amount he had received as compensation. The amount of compensation which had been paid plaintiff by his employer was $378. The verdict and judgment was $7,197. Plaintiff has not appealed, and says in argument that he does not object to the deduction made.

The compensation was paid solely because plaintiff was an employee of the transfer company. Plaintiff seeks to hold the defendant for its negligence, and to hold it liable as a person other than the employer, for damages under section 2477m6 of the Supplement to the Code.

Defendant's theory is, as we understand it, that the transfer company is completely subrogated to all the rights of the plaintiff, and that this has the force of an assignment of plaintiff's entire claim, and that therefore plaintiff may not maintain this action, because the employer is substituted in the right of plaintiff to recover damages from the defendant.

We hold that appellant's contention that plaintiff can not maintain the action can not be sustained. The statute does not provide how the employer's indemnity or subrogation shall be adjusted, whether by intervention after verdict in the action for damages, or during the trial, or whether it should be made a party defendant, or whether the wrongdoer may serve notice on employer before paying the judgment or payment of money on settlement, if there is one, and so protect itself. At any rate, where it appears that compensation has been made under the compensation act, the employer should in some way be brought in. (37 Cyc. 388; 25 R. C. L. 1395.)

Under the peculiar circumstances shown, the cause is removed, with directions that the employer be brought in, to the end that any compensation which has been paid by him may be deducted from the judgment and paid to him, and the balance to plaintiff. We find no prejudicial error, and the judgment is therefore affirmed.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION—LETTER ANNOUNCING INTENTION TO SEEK COMPENSATION—*Arkansas Valley Ry., Light, and Power Co.* v. *Ballinger, Supreme*

Court of Colorado (Jan. 6, 1919), 178 Pacific Reporter, page 566.—This is an action for damages by the widow of one Ballinger who was killed during the course of his employment while working for the Colorado Trading & Transfer Co., which was engaged in installing a generator in the power company's premises. Ballinger and another man were working together. The generator which they were to move into the power company's plant would not go through the door, and so under instructions they undertook to remove the door, but a rope which was used to open and close the door would not pass through its pulley. Ballinger thereupon mounted a ladder, after first being told by an employee of the power company that two wires over the pulley were "dead," and attempted to remove the clevis from the pulley. While doing this his monkey wrench slipped from the nut and struck one of the wires, which was in fact charged with electricity, causing him to receive a shock so that he fell upon a lightning arrester and was electrocuted. After writing to the compensation commission on the subject of a claim his widow sued for damages, and the power company appealed from a judgment in her favor, contending that as she had elected to take compensation she could not sue for damages. The opinion of the court in affirming the judgment is in part as follows:

The plaintiff in error (power company) contends that the court erred in refusing to permit it to introduce testimony in support of its defense alleging that the plaintiff had filed her claim for compensation with the industrial commission under the workmen's compensation law, and that thereby and by operation of law she has assigned whatever right or cause of action she may have had against the defendant on account of the death of her husband, and is not now the owner of said claim.

But the testimony offered shows that the plaintiff did not make any such application. What she did was to write the commission a letter stating the fact of the accident and death of her husband, and that she would apply for compensation. The commission replied to this letter inclosing an application blank, but nothing further was done. This can not constitute an election under the law, even though the parties had been subject to its provisions, which does not appear either from the pleadings or proof offered.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—FEDERAL STATUTE—EXCLUSIVENESS OF REMEDY—*Dahn* v. *McAdoo, Director General of Railroads, et al., United States District Court, Northern District of Iowa (Apr. 16, 1919), 256 Federal Reporter, page 549.*—Dahn was a railway mail clerk in the employ of the Post Office Department of the United States, working on the Illinois Central Railroad in Iowa when he received injuries alleged to have resulted from

the negligence of the railroad company. He brought suit for damages for personal injuries against the Illinois Central Railroad Co. and the United States Director General of Railroads. The action was dismissed as to the railroad company but not as to the director general, who was given permission to file a demurrer, which was done. After dismissing the first ground of demurrer as to the liability of the director general, the court proceeded to consider the second ground, which was that Dahn being a Federal employee his remedy was under the Federal employees' compensation law and no other action could be maintained. In overruling this demurrer the court said in part:

It is next urged in support of the demurrer that plaintiff, a railway mail clerk, at the time of his alleged injury, can recover for that injury, if at all, only under the "Federal employees' compensation act" of Congress, approved September 7, 1916.

The petition alleges that the plaintiff was an employee of the Government, in the performance of his duties as a mail clerk upon the Illinois Central Railroad in Iowa, at the time of the accident which resulted in the injuries of which he complains. The Congress, in the act to which reference is above made, has imposed upon the United States a liability for injuries to its employees when in the performance of their duties, except under the conditions prescribed in the act; and it may be that Congress might have required the injured employee to seek redress for such disability or injury exclusively from the United States, and in the manner provided in the act. But, be this as it may, the Congress has not done so. By section 1 of that act it is provided:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty," except under the conditions prescribed in the act. (Comp. St., sec. 8932a.)

Other sections of the act provide in detail the method and procedure by which the injured employee may recover from the United States the compensation therein provided for such injury. That a mail clerk employed by the United States in a mail car used in the carriage of mails upon railroads is an employee of the United States, within the meaning of this act, is not doubted, nor is it disputed, and when such an employee is disabled or killed in the performance of his duties, and seeks to recover from the United States the compensation so provided, it is obvious he must proceed in the manner provided by this act. But in no part of the act is it directly or by reasonable implication provided that the injured employee or his legal representatives shall be limited to the amount of compensation so provided in this act as against a wrongdoer, who by some negligent or other wrongful act has caused the death or disability of the injured employee, and to so prohibit would be to amend the act, which the court will not do.

This ground of demurrer is also overruled, and it is accordingly so ordered.

WORKMEN'S COMPENSATION—INJURY DUE TO ACCIDENT—DEATH FROM STREPTOCOCCIC INFECTION—CAUSAL CONNECTION—*Bethlehem Shipbuilding Corporation (Ltd.)* v. *Industrial Accident Commission of California, Supreme Court of California (Nov. 8, 1919), 185 Pacific Reporter, page 179.*—An employee of the plaintiff company by the name of Caffrey while engaged at his work sustained a contused wound of the great toe of his right foot, from an injury which arose out of and in the course of his employment. Caffrey went to a doctor to have the toe dressed several days later. The following day the toe caused him so much pain that he was compelled to go home, but instead of calling a doctor he sought to treat the wound himself, and in so doing he communicated the infectious germs from his toe to his face. The toe developed erysipelas, and by reason of the transmission of the infection erysipelas developed in the face also and resulted in septicemia from which Caffrey died. Compensation was awarded to Caffrey's dependents, and the employer appealed, contending that Caffrey's death was not the proximate result of the injury to his toe. In refusing to accept this view and in affirming the award, the court said in part:

In the light of medical knowledge properly presented to the commission that such a transfer of a streptococcic infection from a discharging wound as that found to have taken place in Caffrey's case is not only possible but highly probable, we are of the opinion that the fact that the germs reached the face by external means and not through the system can not, as a matter of law, be said in itself to have broken the chain of causation. But petitioner contends that Caffrey's conduct was such as to require a finding of negligence on his part. Caffrey was, of course, under a duty to use reasonable care to restore himself to health. But if he conducted himself as would a reasonably prudent person in his situation and circumstances and innocently enhanced the original injury it was within the province of the commission to find that the original cause continued to the end and accomplished the final result and was therefore the proximate cause.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—RETURNING HOME FROM JOURNEY—*Haddock* v. *Edgewater Steel Co., Supreme Court of Pennsylvania (Jan. 4, 1919), 106 Atlantic Reporter, page 196.*—Haddock was a mechanical engineer employed on a salary by the defendant steel company, with no fixed hours of service. He had been directed to go to another city for information for use in his employer's business, and on his return, after 11.30 p. m., and while going from the station to his home before reporting, was killed by an automobile. Compensation was awarded and defendant appealed. In affirming the award and holding that the injury occurred in the course of the employment, the court said in part:

This is not the case of an employee injured after regular working hours on the way to his home, and we agree with the court below that there is nothing on the record to show Haddock had, at the time of the accident, "ceased to be active in the furtherance of his employer's business." True, the facts as found indicate that plaintiff's husband intended stopping at his own residence to sleep for the night before reporting the results of his trip of investigation to the president of the defendant corporation; but, none the less, he was still upon his employer's errand, and in that sense actually engaged in the furtherance of the latter's business or affairs. Since deceased was compelled to return to the city at an hour when he could not at once communicate with his superior, and had to stay somewhere until he could report, he can not be charged with a departure from his employer's service because when hurt he was going to his home for a lodging rather than to a hotel; hence the findings of the referee are ample to sustain the ultimate conclusion upon which the award of compensation rests, to the effect that plaintiff's husband met his death by accident during the course of his employment with the defendant company.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—VIOLATING RULES OF EMPLOYER—*Employers' Liability Assur. Corp. (Ltd.)* v. *Industrial Accident Commission, District Court of Appeal, Second District of California (Mar. 22, 1918), 177 Pacific Reporter, page 171.*—Tryon & Brain operated some motor-driven street flushers on the streets of Los Angeles and had in their employ as a chauffeur one Booth. The employer had specifically instructed him that he was not to permit anyone to ride upon the vehicle entrusted to him to operate. Booth on the occasion of his injury permitted one Schilling, an experienced motor driver, to ride with him and drive the vehicle while he manipulated the levers which permitted the water to flow upon the street. While manipulating these levers he saw a wrench lying on the footboard of the truck. Thinking that the wrench was about to fall to the ground and in an effort to save it, he leaned over to pick it up, but losing his balance he fell and sustained injuries for which he was awarded compensation. The employer's insurers contest the award. In affirming the award the court said in part the following:

Petitioners' first point is that Booth's injury did not occur in the course of his employment, for the reason that when he surrendered the running of the truck to Schilling he stepped aside from his employment and took upon himself an added risk not within the course of the employment.

The employee of Tryon & Brain did not abdicate either the place or the character of his employment. He gave up a part of his work to another, it is true, as he permitted Schilling to run the truck, but it was strictly within the line of his duty to operate and care for the levers which controlled the flow of water from the tank of the truck

to the street. The same may be said of his attempt to prevent the wrench from falling from the footboard. He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the performance of the remainder of it.

WORKMEN'S COMPENSATION—INJURY "INCIDENTAL TO EMPLOYMENT"—SALESMAN INJURED ON STREET—*Schroeder & Daly Co. et al.* v. *Industrial Commission of Wisconsin, Supreme Court of Wisconsin (June 25, 1919), 173 Northwestern Reporter, page 328.*—One Toll was a salesman in the employ of the Schroeder & Daly Co. His duties required him to go from place to place in the city of Milwaukee to sell produce to grocerymen. While so engaged and while traveling from one place to another, and while on the public street, he slipped and injured his right leg. Upon application he was awarded compensation by the industrial commission. The employer appealed on the ground that Toll's injury was not one growing out of and incidental to his employment, because it was sustained on the public street and did not happen as a result of a peculiar hazard of the industry, but was the result of a hazard to which the entire public was subject. In upholding the award the court said in part:

If it should be held that messengers, deliverymen, salesmen, and others who by the nature of their employment are required to be continually on the streets and highways are not entitled to compensation for injuries received in the course of their employment, if the injury occur on a street or highway, a large class of worthy applicants would be cut off and the workmen's compensation law emasculated. If an employee in the course of his employment is required to go up and down a stairway occasionally or frequently, and while so doing falls and injures himself, should he be denied compensation because everyone uses stairways and is continually liable to receive like injuries? Clearly not. The risk of injury to the applicant in this case was incidental to his use of the street in the course of his employment, and was peculiar to the employment in that the work of the employee could not be carried on without his subjecting himself to that risk. It therefore grew out of his employment. The fact that others may be exposed to like risks does not change the character of the risk to which the applicant was exposed. (Globe Indemnity Co. *v.* Industrial Commission (Cal. App.), 171 Pac. 1088.)

WORKMEN'S COMPENSATION—INSURANCE—EMPLOYER—SCHOOL DISTRICT—ACTION FOR PREMIUMS—*School District No. 1 in City and County of Denver* v. *Industrial Commission of Colorado, Supreme Court of Colorado (Nov. 3, 1919), 185 Pacific Reporter, page 348.*—This was an action brought by the industrial commission against the school district for the recovery of compensation insurance premiums

in the amount of $16,865.74 alleged to be due the State insurance fund under the provisions of the workmen's compensation act (Laws 1915, p. 515). Judgment was rendered for the commission after a trial upon stipulated facts, and the school district brings a writ of error to review the decision. It is claimed by the school district that it is not an employer and that the action here instituted can not be maintained, but that the proper action is one for a writ of mandamus to compel the school officials to pay the premiums. The court reviewed the various provisions of the compensation act and came to the conclusion that the proper action had been brought and affirmed the award. The opinion is, in part, as follows:

Section 21 of the act provides as follows:

"If any employer shall be in arrears for more than five days in any payment required to be made by him to the State compensation insurance fund, as provided in this act, he shall by virtue of such arrearage be in default of such payment, and the amounts due from him shall be collected by civil action against him in the name of the commission as plaintiff."

This section plainly provides the proper proceedings in court, to which reference is made in section 47.

By section 4, subsection *d* (1), of the act, the term "employer" is expressly and directly made to include school districts, and all public institutions and administrative boards thereof, without regard to the number of persons in the service of any such public employer; and provides that all such public employers shall at all times be subject to the compensation act. In order to hold that by the provisions of section 47 a school district is immune from the penalties and process of section 21, it would be necessary to construe section 47 as declaring that in case of nonpayment by a school district the only remedy provided was one against delinquent State or county officers, and in effect to withdraw from the section in cases where a school district is involved, the provision therein that:

"When any default is made in the payment of the sums hereinbefore required to be contributed, * * * it shall be the duty of the commission forthwith to institute the proper proceedings in court to compel such payment or payments to be made."

To so hold as to school districts would manifestly be unreasonable, discriminatory, and in view of section 21, illogical and utterly unwarranted.

The decision of the court below was therefore affirmed.

WORKMEN'S COMPENSATION — INSURANCE — EXCLUSIVE STATE FUND — REGULATION OF INSURANCE BY COMMISSION — *Thornton* v. *Duffy et al., Supreme Court of Ohio (Dec. 31, 1918), 124 Northeastern Reporter, page 54.*—This is a proceeding for an injunction against the members of the Ohio Industrial Commission to prevent them from changing or modifying certain findings of fact previously

made by them with regard to Thornton's insurance. In 1914 Thornton, who is an employer of some 40 workmen under the workmen's compensation law, applied according to the provisions of the law as it then read for a certification by the commission of its financial ability to pay directly to its injured employees its liabilities for compensation and medical benefits under the act. The commission investigated and made findings of fact and certified to the fact that Thornton was financially able to pay his liabilities direct to his injured employees. Thornton thereupon entered into an annual contract of insurance with the Aetna Life Insurance Co. on April 29, 1914, by which the latter company undertook to pay Thornton's liabilities under the workmen's compensation act. In 1917 the General Assembly of Ohio made several amendments to the compensation law, pursuant to which the commission adopted a resolution revoking the privileges of self-insurance to all employers who protected themselves from liability as self-insurers by insuring with private insurance companies. Thornton attempted to prevent, by injunction, the commission from revoking its findings of fact as to his financial ability and enforcing its resolution. He asked for a temporary injunction to April 29, 1918, the date of the expiration of his annual insurance contract with the Aetna company, which was granted, and also asked for a perpetual injunction, which was refused. Plaintiff, Thornton, appealed, and in refusing to grant the perpetual injunction against the commission the court upheld the commission's authority to revoke its own findings of fact, speaking in part as follows:

The question in this case does not depend merely upon the general authority of the legislature to exercise police powers, but rather directly upon the constitutional grant of power and the further consideration that the privilege granted to certain employers by section 22 of the workmen's compensation act, to pay compensation direct, is an exception to the general provision of that act in their favor.

There is therefore no reasonable hypothesis upon which to base the theory that a private contract, to continue for an indefinite number of years, could in any way prevent the legislature from withdrawing this privilege or adding other and further conditions.

There is, however, a further provision in section 22 of the original act that seems to have been overlooked in the argument of this case. That provision (as amended, 107 O. L. 160) reads as follows:

"The Industrial Commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employees."

The experience of four or more years under this workmen's compensation law may have demonstrated to the entire satisfaction of

this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct and have later entered into a contract with an indemnity company.

While section 54 of the workmen's compensation law (section 1464–101, General Code), as it read prior to the amendment of February 16, 1917, undoubtedly permitted the writing of such a contract, nevertheless that section must be construed in connection with section 22 of the same act, which authorizes the industrial commission to change or modify its findings of fact provided for in that section, whenever in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of that act.

It therefore follows that the industrial commission would have the power under this provision of section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct, if it should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result, not only in avoiding a strict compliance with the provisions of the act, but also in some instances defeat its intent and purpose, especially where the injured employee or the dependents of an employee killed in the course of his employment are not fully advised of their rights under section 27 of this act and rule 18 adopted by the industrial commission under authority of the act creating that commission.

But the right of the Industrial Commission of Ohio to change or modify its former findings of fact does not now depend upon this construction of this paragraph of section 22. The amendment of March 20, 1917, of section 1465–69, General Code (107 O. L. 159), specifically limits the privilege of electing to pay compensation individually or from a benefit fund, department, or association, to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof," and therefore it becomes the duty of the Industrial Commission to change or modify its former findings of fact in reference to such employers, and make the same conform to the provisions of the amended section.

This added condition precedent to the exemption of certain employers from the general provisions of the act is not only clearly within the power of the general assembly, but it is in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the State, out of which fund compensation shall be paid to workmen and their dependents for death, injuries, or occupational diseases occasioned in the course of employment.

If insurance is desired, the State will furnish it out of the fund created and maintained for that purpose; for it would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts of insurance with private companies and compel all other employers to contribute to the State insurance fund, but it would also hinder and perhaps utterly demoralize the

method and defeat the object and purpose of the creation of such a fund.

This case was heard in the United States Supreme Court on a writ of error, and the decision of the Supreme Court of Ohio was affirmed (Dec. 20, 1920), 41 Supreme Court Reporter, page 137. The opinion of the court as delivered by Mr. Justice McKenna is in part as follows:

In support of the contention that the Constitution of the United States makes the legislation and the action under it illegal, it is said that insurance against loss is the right of everybody, and specifically it is the right of employers to indemnify themselves against their liability to employees and that the right is so fixed and inherent as to be an attribute of liberty removed from the interference of the State.

The provisions of the legislation are necessary elements in the consideration of the contention: The constitution of Ohio authorizes workmen's compensation laws. Explicity it provides for the passage of laws establishing a State fund to be created by compulsory contributions thereto by employers, the fund to be administered by the State. The constitutionality of a law passed under that authorization was sustained by this court in Jeffrey Manufacturing Co. *v.* Blagg, 235 U. S. 571, 35 Sup. Ct. 167 [Bul. No. 169, p. 203], against the charge that its classifications were arbitrary and unreasonable.

We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the constitution of the State, as much a part of both as if expressed in them, and we are unable to yield to the contention that the legislation or the requirement transcends the power of the State, or in anyway violates the Constitution of the United States. The law expressed the constitutional and legislative policy of the State to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions.

We are not disposed to extend the discussion. Indeed, we think the case is in narrow compass. We are not called upon to controvert the right to insure against contingent losses or liabilities, or to minimize the value of insurance to business activities and enterprises, or discuss the general power or want of power of the State over it. We are only called upon to consider its relation to and possible effect upon the policy of a workmen's compensation law, and we can readily see that it may be, as it is said the experience of Ohio demonstrated, inimical to that policy to permit the erection of an interest or a power that may be exerted against it or its subsidiary provisions. This was the view of the supreme court of the State, and by it the court justified the power conferred upon and exercised by the commission.

WORKMEN'S COMPENSATION — INSURANCE — SELF-INSURANCE — REQUIREMENT OF BOND—AMOUNT—*Bank of Los Banos et al.* v. *Industrial Accident Commission of California, Supreme Court of Cali-*

fornia (Aug. 26, 1919), 183 Pacific Reporter, page 538.—This proceeding is a petition for a writ of certiorari, to review the action of the industrial accident commission in requiring Miller & Lux (Inc.) to deposit a bond or securities in the sum of $20,000 as a prerequisite to the issuance of a certificate permitting self-insurance under the workmen's compensation act. The petitioners are subsidiaries of Miller & Lux (Inc.), which is a very rich corporation, employing many employees. In demonstrating its ability to carry its own insurance under the compensation law, Miller & Lux listed among its assets United States Liberty bonds in the sum of $28,000, and the commission requested the deposit of $20,000 of these bonds as the security of Miller & Lux and all its subsidiaries for the payment of their compensation liabilities. The petitioners claim that under the law they can not be required to give a bond or securities, inasmuch as they have demonstrated their solvency and financial ability. The court upheld the action of the commission, saying in part:

We must decide, therefore, whether or not any bond or deposit may be required, and if that question be answered in the affirmative, whether or not the amount ($20,000) is reasonable, under all the circumstances. By the workmen's compensation act of 1917 (Stats. 1917, p. 831), it is provided (p. 857) that—

"Every employer as defined in section 7 hereof, except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways: * * *

"2. By securing from the commission a certificate of consent to self-insure, which may be given upon his furnishing proof satisfactory to the commission of ability to carry his own insurance and pay any compensation that may become due to his employees. The commission may, in its discretion, require such employer to deposit with the State treasurer a bond or securities approved by the commission, in an amount to be determined by the commission. Such certificate may be revoked at any time for good cause shown."

Petitioners insist that the commission may require the bond or securities specified in the statute when there is any reasonable doubt of the employer's ability to carry his own insurance, but that where no such doubt exists the commission must grant the certificate of consent without the giving by the applicant of any security. There might be some force in this position if solvency of the petitioning employer were the only matter involved, but the highest purpose of the workmen's compensation statutes is not merely to obtain payment of just claims, but to have such demands promptly adjudicated and paid in such way as to be available to the injured employees when most needed. Any corporation, no matter how rich, may be subject to lawsuits, and it is easily conceivable that all the funds of a given corporation might be held by injunction, or other order of court, in such manner as not to be immediately available for settlement of awards of compensation found by the industrial accident commission. It is therefore highly desirable that a proper fund or

bond be provided and that such security be under the control of the industrial accident commission. The requirement of security is also justified by the fact that payments of compensation sometimes extend over long periods of time. A corporation solvent at the time it may secure permission to carry its own compensation insurance may have many changes in its financial status during the years of its obligation to pay persons who may be injured while in its service. The fund or bond authorized by the statute not only keeps safe the installments of indemnity due from time to time to the injured employees, but it makes unnecessary the otherwise constant watchfulness of the industrial accident commission over the possibly diminishing resources of the self-insurer.

We can not say, from the record before us, that the industrial accident commission abused its discretion when acting upon the applications of these petitioners. This record discloses the fact that petitioners are engaged in very extensive business operations of many sorts. These activities are only made possible by the employment of many persons.

In view of the magnitude of the business of petitioners, and the probability of frequent injuries to their employees, we can not say that this record reveals an abuse of discretion on the part of the industrial accident commission.

WORKMEN'S COMPENSATION—INSURANCE—WHEN NOT REQUIRED—DIFFERENT CLASSES OF EMPLOYEES—*Puget Sound Bridge & Dredging Co.* v. *Industrial Insurance Commission, Supreme Court of Washington (Jan. 10, 1919), 177 Pacific Reporter, page 788.*—The industrial insurance commission, the defendant in this action, claims that all employees of the plaintiff are subject to the workmen's compensation act (Laws 1911, p. 345), and that premiums should be paid on account of the work of all the employees engaged in dredging operations. Employees of the plaintiff company may be said to be engaged in three kinds of work: First, those who work on the dredge entirely; second, those who work on land entirely; and, third, those who work partly on land and partly on the dredge and who are often engaged in going back and forth. The dredge was operating in navigable waters, and would be covered by the admiralty laws. The court, in deciding whether the plaintiff must pay premiums, said in part:

As to those employees who work exclusively upon the dredge, we are firmly of the opinion that the plaintiff should pay no premiums, for the dredge, as a vessel, is subject to admiralty jurisdiction, and if premiums were paid for employees engaged exclusively thereon the company, in the event of an injury occurring to one of such employees, would receive no protection under the act.

The second class of workmen, employed solely on land, comes within the operations of the provisions of this act, and for them premiums are collectible.

As to the third class, we are confronted by the perplexing question of this case. The workmen's compensation act was passed with the avowed purpose of providing the exclusive manner of compensating employees engaged in hazardous work and occupations, and within the scope of the act all employees of a company such as the plaintiff are to be brought within the operation of that act, so far as it is within the power of the legislature to do so. The legislature, not bringing within the act those employees who are within the jurisdiction of admiralty, can not compel the employer to pay premiums for those employees for whose injuries the employer would be liable in admiralty. On the other hand, the employer is not absolved from the duty of paying premiums for those employees who are not within the admiralty jurisdiction and for whose injury the employer would have been liable in a suit at common law before the passage of the workmen's compensation act. It may be, as here, an onerous task to so segregate for the purpose of computing the premium to be paid the time of employees who are alternately on land and on the navigable water, but this is a matter of detail of the business which must be worked out by the employer and the commission, and it is not one which calls for judicial action. If this segregation is impracticable, the remedy must lie in some alteration of the act by the legislature.

As to those employees falling within the third class, the industrial insurance commission is entitled to a collection of premiums for such time as those employees are engaged in work upon the land and is not entitled to receive premiums representing the time that they are without the protection of the act and subject to the rules of admiralty jurisdiction.

WORKMEN'S COMPENSATION—INTOXICATION—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—*State ex. rel. Green et al.* v. *District Court of Ramsey County, Supreme Court of Minnesota (Feb. 6, 1920), 176 Northwestern Reporter, page 155.*—Thomas Davis was employed as a furnace man in the Fey Hotel by Nancy Green, the defendant, at a wage of $35 per month. To reach the furnace he was required to enter the building in the rear from the alley and descend to the basement by means of a stairway. The stairway had no railing or banister and was not in very good repair. Davis came to work in an intoxicated condition, and while descending the stairs tripped and fell, sustaining injuries from which he died. The district court awarded compensation under the workmen's compensation act (Gen. St. 1913, secs. 8195–8230) and the employer appealed. The decision of the supreme court affirming the award is in part as follows:

General Statutes 1913, section 8203, of the compensation act provides that compensation shall be paid according to the schedules therein contained in every case of injury or death of an employee by accidental means, without regard to the question of negligence, "except accidents which are intentionally self-inflicted or when the intoxi-

cation of such employee is the natural or proximate cause of the injury, and the burden of proof of such fact shall be upon the employer."

The question whether the intoxication of the decedent was the natural cause of his injury and death may be passed without comment. It clearly was not. Whether it was the proximate cause thereof presents another and different question, though on the facts here presented we hold that it was correctly disposed of by the trial court.

In controversies under the workmen's compensation act the contributory negligence of an injured employee is not a bar to his right to compensation. The intoxication of a person injured by the alleged negligence of another has usually been treated in actions at law for damages as a contributing cause thereof, and sufficient to defeat a recovery. But that condition of the injured person is not per se contributory negligence. (2 Dunnell's Dig. 7028 and cases there cited.) It constitutes a bar to relief under the compensation act only when shown to be the proximate, as distinguished from the contributory, cause of the injury complained of. This distinction necessarily follows from the express language of the statute by which contributory negligence of the employee is expressly excluded from consideration in determining the liability of the employer.

The record also shows that at the time of the accident the stairway, the means of access to decedent's place of work, was to some extent not in good order. There was no railing by which one might guard his course up or down the stairway; one was placed therein soon after the accident. On the day following the injury some ice and snow was found on the first three or four steps of the stairway, and the trial court might well enough have assumed its presence on the day of the accident. From this state of the evidence we conclude that the proximate cause of the accident lay between the intoxication of decedent and the condition of the stairway, presenting a question of fact for the trial judge, whose conclusion thereon is not open to review in this court.

Judgment affirmed.

WORKMEN'S COMPENSATION—LUMP-SUM COMMUTATIONS—"UNUSUAL CIRCUMSTANCES"—*Jensen* v. *F. W. Woolworth Co., Court of Errors and Appeals of New Jersey (Feb. 6, 1919), 106 Atlantic Reporter, page 808.*—Tressa M. Jensen was employed by the defendant as a window trimmer. While engaged in her work she swallowed some pins, causing her great injury. One of the pins lodged near the base of her brain. She was bedridden and needed constant attention. In the opinion of the physician attending her an operation was necessary to save her life. For the purpose of securing funds for her care and the operation she requested that the award for compensation which she had received be commuted to a lump sum. This request was granted and the employer appealed. In affirming the judgment allowing the lump-sum award the court said in part:

The statute provides, among other things, that, as commutation is a departure from the normal method of payment, it is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. If to be bedridden, with the requirement of a surgical operation to save the patient's life, is not an unusual circumstance, and such a one as warrants commutation of future weekly payments into a lump sum, to enable the patient to procure the services of a surgeon and the proper medical attention and nursing, it is hard to conceive of circumstances that would call for the making of an order for commutation. It is plain, therefore, that there was sufficient evidence before the Morris County court of common pleas to support the order.

Going now to the letter and spirit of section 6 of the act of 1913, amending section 2, paragraph 21, of the act of 1911, we find that the court may order commutation if it appear that it will be for the best interest of the employee. Surely it will be for the best interest of Miss Jensen to be placed in funds which it appears may save her life, rather than that she be compelled to take the chance of almost certain death without them. Then, too, commutation may be made to prevent undue hardship. The same reasoning applies.

Commutation in these circumstances is not to be defeated by the concluding provision of the statute that it shall not be made to enable the employee to satisfy a debt, or to make payment to physicians, lawyers, or other persons. This inhibition against commutation for payment to physicians, lawyers, or other persons is evidently meant to protect the employee in the enjoyment of the periodical payments, by making it impossible for him to yield to importunities of creditors for the discharge of their already due obligations, or to raise money to be spent in enterprises of a doubtful or hazardous nature, or where it does not appear that commutation will otherwise be for the best interest of the employee, or is not needed to avoid undue expense or hardship, or when it does not appear that some unusual circumstances warrant a departure from the normal method of periodical payments.

In our opinion the Supreme Court reached the right result in this case, and its judgment should be affirmed, for the reasons above expressed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN BY EMPLOYEE—*Leadbettor* v. *Industrial Accident Commission, Supreme Court of California (Dec. 30, 1918), 177 Pacific Reporter, page 449.*—Frank G. Pryor was a bridge carpenter in the employ of Leadbettor and was working on a job at Hermosa Beach when he sustained an injury to his back by reason of a bent falling upon it. His foreman knew of the injury. He went at once to a doctor for examination and then returned to his work, although he was suffering considerable pain at the time. He later went to Porterville and consulted another physician, who after examining him sent him to an osteopath for treatment. Thereafter he went to Portland, Oreg., and incurred further medical and hospital bills. The treatment received in Porterville was with the knowledge of the em-

ployer, Leadbettor, who made no tender of other medical service of his own choosing, but the treatment in Portland was unknown to the employer. In fact, Pryor wrote a letter to Leadbettor which was sufficient to make the latter believe no further treatment was necessary. Pryor's claim for medical services came to the commission who considered the matter and found that Pryor had refused medical treatment when tendered him by his employer, but when he sought treatment later the employer had knowledge of the fact and did not again tender medical service, and that therefore the employer was liable for all the medical service received both in Porterville and in Portland. This was done on the ground that under the statute (sec. 15a St. 1913, p. 291) the employer is liable to provide all necessary medical, surgical, and hospital treatment the injured employee may require, and if the employer shall neglect or refuse seasonably to do so the employee may provide the same at the employer's expense.

The supreme court after carefully considering the case allowed the award for medical expenses incurred at Porterville for the reasons above stated, but refused to allow any award for the expenses incurred in Portland on the ground that from Pryor's letter it was plain that no further service was required by him.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN BY EMPLOYER—*Radil* v. *Morris & Co.*, *Supreme Court of Nebraska* (*Jan. 4, 1919*), *170 Northwestern Reporter, page 363.*—Radil was injured while working for the defendant in its packing house. An award for compensation was confirmed, but the medical-service bill was disallowed. When Radil was hurt he went with his foremen to the office of the company's physician, who was out. The physician's assistant rendered the necessary first-aid service and told Radil to return the next day. Upon the advice of his mother he went the next morning to his family physician, who retained charge of the case. The compensation law of Nebraska makes no specific provision as to who may first choose the physician to treat an injury other than the following:

Provided further, That where the injured employee refuses or neglects to avail himself of such medical or surgical treatment, the employer shall not be liable for any aggravation of such injury due to said neglect or refusal.

Judge Dean, expressing the opinion of the court, affirmed the refusal to allow the bill for medical services of the family physician, saying:

The employer having been made liable for the services contemplated by the act, it seems from the language used that it must have

been the legislative intent that he should be permitted to furnish a physician of his own choice, and if his selection is such as would satisfy a reasonable man under like circumstances the employee would not be heard to complain. That is the general rule in manufacturing centers, where employers' liability acts with provisions similar to ours were in effect before our act was adopted. (Pecott's case, 223 Mass. 546, 112 N. E. 217; Keigher *v.* General Electric Co., 173 App. Div. 207, 158 N. Y. S. 939.)

It seems to us that the plaintiff's conduct was in effect and within the meaning of the act an unjustifiable refusal to allow the defendant to furnish the reasonable services and medicines that the act contemplates, and that the defendant is not therefore liable for the medical expenses that he incurred. We have examined the case de novo, and our conclusion is the same as that arrived at by the trial court.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN—OFFER BY EMPLOYER—*Cella* v. *Industrial Accident Commission, District Court of Appeal, First District, Division 1, California* (*Nov. 25, 1918*), *177 Pacific Reporter, page 490.*—Cella made application to have an order of the commission denying him an award annulled. The opinion of the court, which also states the facts, is as follows:

This is an application for a writ of review for the purpose of having annulled an order made by the respondents refusing to make an award in behalf of the petitioner covering hospital charges.

About November 9, 1917, Rafaelo Cella was injured while in the employment of Producers' Hay Co. (which is hereinafter referred to as the company). On the 16th he was told by the company's physician to go to the St. Francis Hospital. The petitioner did not do so, but went to the St. Joseph's Hospital, and now claims that he did so through ignorance. In this behalf he alleges that he is an Italian and can neither read, write, nor speak English. However, the fact was clearly established that the petitioner was directed to go to the St. Francis Hospital and the address was given in writing. These facts do not show any neglect or refusal on the part of the company to furnish the petitioner hospital service. Yet it is clear that the commission could not make an award to the petitioner for such services except it be first shown that the company had neglected or refused to furnish such service. (Stat. 1913, p. 279, sec. 19, subd. (b).) The respendent commission did not exceed its jurisdiction in refusing the petitioner an award. The order is therefore affirmed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN—REFUSAL TO ACCEPT PROFFERED AID—*Neary* v. *Philadelphia & Reading Coal & Iron Co., Supreme Court of Pennsylvania* (*Mar. 24, 1919*), *107 Atlantic Reporter, page 696.*—This is a case brought under the Pennsylvania workmen's compensation act of June 2, 1915 (P. L. 736). Neary was employed as a car runner by

the iron company and while engaged in his duties he got one of his fingers so crushed as to require surgical aid. For three days he accepted the surgical aid provided by his employer, but thereafter he consulted his own family doctor, who assumed charge of the case. The employer contends that by refusing the surgical aid proffered by it Neary forfeited his right to compensation. It appears that the change of physicians in no wise injured the claimant or increased his incapacity. The employer appealed from an award allowing compensation. The court affirmed the award, saying in part:

It is strenuously contended that plaintiff, by his refusal to accept the reasonable assistance so tendered, forfeited all right to compensation for the injury. This contention is based on the last clause of paragraph "*e*" of section 306 of the act (p. 743), which states:

"If the employee shall refuse reasonable surgical, medical, and hospital services, medicines, and supplies, tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

The manifest purpose is to protect the master from any loss that might result because of the servant's refusal to accept the tendered assistance, not to penalize the latter for exercising the important privilege of employing his own physician. However, by so doing the employee assumes the responsibility for his own treatment, and must bear the loss resulting from neglect or lack of skill therein.

If by refusing the tendered assistance the servant forfeits all right to compensation for the injury he has sustained, then the balance of the sentence is meaningless; for if his right to recover for the primary disability is gone, the whole claim is gone, and the master has no concern with the question of increased incapacity, which would be but a part of the claim already forfeited; and the fact that the employer is expressly released from liability for the increased incapacity caused by the employee's refusal to accept the proffered medical assistance is inconsistent with the claim of an entire forfeiture, as the express provision that certain conduct shall constitute a forfeiture of a designated part of the claim implies that the balance remains.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SERVICE IN EXCESS OF STATUTORY OBLIGATION—*Collins* v. *Joyce et al., Supreme Court of Minnesota (July 2, 1920), 178 Northwestern Reporter, page 503.*—This is an action by Dr. J. S. Collins against Joyce & Rasmussen, employers of one Boltz, who was injured in their employ, for the recovery of $325, which sum represented the value of hospital services and medicines. The compensation law fixes the limit of an employer's liability for medical services at $200. The services were rendered to Boltz, in this case at the request of Rasmussen, who assured Dr. Collins that he would be paid for his serv-

ices. Joyce & Rasmussen later refused to be held liable for any sum greater than that fixed in the workmen's compensation law—namely, $200. Dr. Collins was awarded judgment for the full amount of the bill in the lower court and the defendants appealed. In affirming the decision in favor of the plaintiff the court said in part:

The services were rendered at the request of defendants to one Levi Boltz, one of their employees, who was injured while in their employ. Defendants and Boltz were both within the scope of the workmen's compensation act (Gen. St. 1913, secs. 8195–8230). That act made it the duty of the defendants to provide Boltz with medical and surgical treatment and medicines and medical and surgical supplies, up to $100. The court administering the compensation act might, under certain conditions, allow $200. (G. S. 1913, sec. 8212.)

Defendants contend that, inasmuch as the statute made it the duty of defendants to provide this service for Boltz up to a certain amount only, a contract to pay more than that amount would not be implied from a request to perform this service, and that neither can a verdict be sustained for more than the amount fixed by the compensation law, on the theory of an express contract.

We are not called upon to consider the principles of implied contract applicable to such cases, for this action is plainly based on an express contract, and the trial court so submitted the case to the jury.

We see no good reason why defendants might not agree to furnish medical and hospital attention and supplies to their employee in excess of their statutory obligation, if they saw fit to do so, and no reason why they might not obligate themselves to pay plaintiff the full value of such services, furnished to their employee at their request.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO EXAMINATION—PENALTY OF REFUSAL—*Rose* v. *Desmond Charcoal & Chemical Co., Supreme Court of Michigan (May 29, 1919); 172 Northwestern Reporter, page 415.*—Rose was injured while in the employ of the chemical company, and as a result of the disability thus sustained he entered into an agreement with the company, which was approved by the industrial accident board and which provided that the employer's insurer was to pay to Rose the sum of $6.125 per week during disability. The employer and insurer after an investigation came to the conclusion that after paying compensation for over three years Rose had recovered from the disability he had sustained from the injury, and they accordingly invited him to submit himself at their expense to a medical examination. Rose agreed several times to do this, but each time found some excuse for not doing so. It was believed that an X-ray examination would reveal the fact that Rose was no longer disabled, and the insurer and employer brought action for permission to cease the payment of com-

pensation, but the industrial commission issued an order denying this permission. The employer then brought certiorari, and the court in setting aside the order of the commission said in part:

Whether claimant's recovery is established depends upon the evidence of his present condition.

We have read the evidence upon the subject of the claimant's injury and condition, the medical testimony and his own. We think it can not be said that it is conclusive establishing the fact that he has recovered from his injury. It must be said there is some, if slight, evidence supporting a contrary conclusion. It tends strongly to prove that claimant is recovered. But the doubt which it leaves in the mind is a small one, and the refusals of claimant to submit his person to expert X-ray examination demand, we think, application of section 19, part 2, No. 10, Public Acts 1912 (ex. sess.) and such application will suspend his right to compensation. This, in our opinion, is the order which the board ought to have made in the premises. We do not intimate that it is our opinion that he has not had expert X-ray examination, which was some time in the year 1915. But it is a fair consensus of the opinions expressed by the medical witnesses that any doubts now existing about his condition may be resolved by an expert X-ray examination made presently. Claimant has only to give his time in order that such examination may be made.

Order set aside.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO EXAMINATION—PERMANENT TOTAL DISABILITY—*Texas Employers' Ins. Assn.* v. *Downing, Court of Civil Appeals of Texas (Jan. 14, 1920), 218 Southwestern Reporter, page 112.*—Downing was injured while in the employ of Alex and Sam Davidson by being crushed between some blocks of ice. His spine and one hand were hurt. The nature of the injury to the spine caused a curvature, which in turn caused one leg to be longer than the other. Downing claimed that he was partially paralyzed, that his hearing and eyesight had been affected by the injury, and that he was totally and permanently disabled. The industrial accident board allowed an award of compensation under the workmen's compensation act and Downing brought suit to have the award set aside and a judgment entered allowing him compensation in a lump sum. The Texas Employers' Insurance Association, the insurer, demanded that Downing submit himself to examination by an X-ray specialist, an eye and ear specialist, and one other doctor. This Downing refused to do, declaring that he was not, in a suit to set aside an award, required to submit to an examination, and further the provisions of the law requiring submission to physical examination were unconstitutional and void. Judgment was rendered in favor of Downing and the defendant appealed, assigning as error, among other things, the

action of the court refusing the physical examination. The court of civil appeals reversed the judgment, holding that such examination should have been ordered. The decision on this point is in part as follows:

The power of the court in the premises is logically the first matter for consideration in the examination of the question, and we will first consider such matter. We may begin its consideration with the proposition that we must look to the workmen's compensation law for any authority the court may have to order a physical examination without the consent of the plaintiff, for in the ordinary case the court is without such power. (Austin & Northwestern Ry. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403.)

The provisions of the said workmen's compensation law that may be applicable are contained in sections 42 and 44 of the act (arts. 5246–42 and 5246–44, Vernon's Civil Statutes, 1918 Supp.). In the first article named it is provided that the industrial accident board "may require any employee claiming to have sustained injury to submit himself for examination before such board or someone acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board to a physician or physicians authorized to practice under the laws of this State. If the employee or the association requests, he or it shall be entitled to have a physician or physicians of his or its own selection present to participate in such examination. Refusal of the employee to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal."

Provisions for examination under the directions of the board in special circumstances are also found in other parts of the law, but we need not further refer thereto, but may say that it appears from the entire act that physical examination, either at the instance of the board or the insurance association, is made an important feature in the administration of the law, and evidently regarded by the lawmakers as being an important means of ascertaining the extent of the injury for which compensation is sought. The mere bringing of the suit in the courts in practical effect sets aside the award made by the accident board. The court thereafter has continuing jurisdiction of the proceeding, with power to make such orders therein from time to time in reference to allowing, diminishing, increasing, or discontinuing the weekly compensation that may have been allowed. We think it clear that it was the intention of the legislature that the provisions for physical examination should be applicable after the proceeding should have been transferred to the courts, as well as while it was pending before the board, and the only other inquiry pertinent to this phase of the question is whether such provision is in violation of the personal rights guaranteed by section 9, art. 1, of the Constitution.

The Supreme Court of the United States held that there were no constitutional objections to such a proceeding when it was authorized by legislative enactment. (Camden Ry. Co. *v.* Stetson, 177 U. S. 172, 20 Sup. Ct. 617.) Such is also the holding of some other courts. (R. C. L., vol. 14, p. 703, and authorities.) We have found no authority which denies the constitutional power of the legislature to enact

such laws. We conclude that the court had the power to order such an examination as was prayed for in this motion, and must now ascertain how this power is to be exercised, and whether the party may review the action of the court therein.

The motion itself, we think, states sufficient facts to show the necessity for such examination. The facts as developed on the trial of the motion and the case on its merits show that the issue as to the true extent and effect of the plaintiff's injuries is left in doubt after the introduction of the available testimony. The questions propounded by the jury to the court show that the jury was in doubt as to the truth of the case. The facts further show, we think, that an X-ray examination, and an examination by an ear and eye specialist, would probably ascertain the truth and clear up the doubt as to such matter. Under these circumstances we think the court should have granted the motion and ordered an examination under such reasonable conditions as might be named in the order. We therefore sustain the first assignment.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO EXAMINATION—X-RAY—ATTORNEYS' FEES—*United States Fidelity & Guaranty Co.* v. *Wickline, Supreme Court of Nebraska* (*Dec. 14, 1918*), *170 Northeastern Reporter, page 193.*—Mrs. Wickline was injured while in the employ of the Northwestern Iron & Metal Co., which was insured against compensation liability by the plaintiff company. Mrs. Wickline suffered some injury, presumably a tear, to her kidney. She submitted herself to the required physical examination and was awarded compensation for her disability. The plaintiff company paid the compensation for eight weeks and then stopped because Mrs. Wickline refused to submit to having an X-ray photograph taken. The compensation law of the State of Nebraska requires that persons injured who claim compensation under the act must submit themselves for physical examination, making as a penalty for refusal the denial of compensation. The lower court gave judgment to the plaintiff company and the defendant appealed. In reversing the judgment, the court rendered its decision, in part, as follows:

Under the statute the request for an examination must be reasonable, but it does not appear to have been so in this case. The testimony before us shows affirmatively that neither an X-ray examination nor an X-ray photograph was necessary. No physician or other person testified that either was necessary, nor does it appear that a request was made by plaintiffs to the court to require defendant to submit to either.

The compensation law provides that upon request the county attorneys or attorney general for the State shall appear for the claimant for compensation, and in view of this provision the court held

that the court below had properly refused to assess attorneys' fees as a part of the award, saying:

The employers' liability act in its entirety is a summary proceeding. One of its objects is to facilitate an inexpensive and speedy settlement of controversies between employer and employee that arise out of personal injuries. It does not appear that the county attorney was requested to appear as counsel for claimant, or that he refused to appear. That such official would perform his duty in the premises when called upon to act in his official capacity is presumed.

For the error in regard to the physical examination, the case was reversed and remanded for a new trial.

On the new trial a judgment was again rendered in favor of the claimant, Wickline, and both parties appealed, the Supreme Court of Nebraska rendering its decision on July 16, 1919 (173 N. W. 689). The opinion reads in part:

Defendant's physician testified that she "thought an X-ray picture was a reasonable and a necessary thing," and that she had so advised defendant. A physician skilled in the art of making and reading X-ray photographs testified that in order to properly determine the extent and character of defendant's injury an X-ray photograph of the kidney ought to be made. He stated that in order to make a proper photograph it might be necessary to inject into the kidney an opaque solution called "colorogol," and described in detail the method of making this injection, stating:

"In the hands of an expert there is no danger whatever."

He further testified:

"That is a procedure that is not used so extensively as formerly because we are now able to X-ray the kidney without difficulty without injecting it."

He explained that he found it necessary to use this solution in a few cases. Defendant testified that if the court called upon her to have an X-ray picture taken, she would permit that to be done, but she would refuse to have colorogol injected into her kidney.

The district court found that the demand upon her was not reasonable, and that her refusal ought not to bar her from a recovery.

The district court was required (under our former opinion) to determine whether under the circumstances the request in this case was reasonable. It will be seen from the testimony of the expert produced by plaintiff that it is only in rare instances that it is necessary to inject this substance into the kidney, and it would seem that plaintiff ought to have availed itself of defendant's offer to submit to an X-ray examination without this injection. It may be that an injection was not necessary. We are constrained to hold, with the trial court, that the demand upon Mrs. Wickline was not reasonable.

By cross-appeal, counsel for defendant again asks us to tax an attorney fee against plaintiff. In the former opinion it was properly held that an attorney fee could not be taxed as part of the costs, and that holding is the law of the case. The statute was amended by the legislature of 1919 (Laws 1919, ch. 103), but the amendment is not applicable to this case.

The supreme court held that the lower court, in view of the facts before it, should have fixed the amount of compensation due to date. Its judgment was therefore modified by adding an award of the amount, and with this addition, the judgment was affirmed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO OPERATION—PENALTY FOR REFUSAL—CONCURRENT AWARDS—*O'Brien* v. *Albert A. Albrecht Co., Supreme Court of Michigan (May 29, 1919), 172 Northwestern Reporter, page 601.*—O'Brien sustained injuries to his feet and ankles while working for the Bryant & Detwiler Co. in the capacity of a carpenter. He and the company entered into an agreement whereby he was to receive compensation in the amount of $9.45 per week, and later another agreement was made fixing the compensation at $7 per week; both agreements having been approved by the industrial accident board. Later O'Brien entered the employ of the Albrecht company and sustained another injury resulting in a hernia. The board allowed him compensation in the amount of $10 per week for total disability against the Albrecht company and failed to require him to submit to an operation to cure the hernia which the Albrecht company had tendered. In reversing the order of the board the court said, in part:

In the Jendrus case (Jendrus *v.* Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563) Mr. Justice Stone fully considers this question. It was a case of a major operation of a very serious character. The workman was an ignorant foreigner, who refused for some time to consent to the operation, but who finally did consent. Under all the circumstances of that case it was held that the refusal to consent to the operation was not an unreasonable one.

Applying then the rule announced by Lord McLaren and adopted by this court to the facts of the instant case, we are impressed that the plaintiff's refusal was unreasonable. The operation was not as serious a one as in the Jendrus case. Indeed the record discloses that it was not a serious case of hernia. The operation is not attended with danger to life or health, and could be performed by the use of either a general or local anesthetic. The doctors agree that it is advisable, and it is not disputed that it is the only thing that can be done to affect a cure. Until the plaintiff submits to an operation, which should be at the expense of the defendants, he is not entitled to compensation from them.

It will be noted from the above facts that O'Brien was already receiving $7 per week for partial disability from the Bryant & Detwiler Co. when he was granted the award of $10 per week for total disability against the Albrecht company. On this point the court said in part:

The maximum compensation for total disability fixed by the statute is $10 per week. (Section 5439, Comp. Laws 1915.) It must be obvious that a man can not be more than totally disabled. It should be equally obvious that he can not receive compensation for more than total disability. Our statute does not provide for concurrent compensation. It fixes a maximum of $10 per week, and it can not exceed that sum, whether it is paid by one employer or several.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ACTION FOR DAMAGES NOT PERMITTED—*Rasi* v. *Howard Mfg. Co.*, *Supreme Court of Washington* (*Jan. 19, 1920*), *187 Pacific Reporter*, *page 327*.—The defendant was a manufacturer of woodenware in the city of Seattle and was under the workmen's compensation act. Hilda Rasi was a girl between 15 and 16 years of age who was employed by the defendant without a working certificate, which was contrary to the law. While so employed she lost four fingers of her left hand by getting them caught in the rollers of a machine on which she was working as an off-bearer. She brought suit at common law for damages for her injuries and recovered a judgment. Defendant appealed, claiming that the case came under the workmen's compensation act and that the present action should be dismissed. The court adopted this view, speaking in part as follows:

The appellant insists that the sole remedy of respondent is to be found in the terms of the workingmen's compensation act and that she has no redress by statute against her employer. This position must be sustained. The first section (Rem. Code, sec. 6604–1) of that act provides as follows:

"The common law system governing the remedy of the workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided."

If the respondent was a workman, within the meaning of this act, there can be no doubt that her sole redress must be found in the terms of the act. If she had been of the age of 16 years, there could be no reasonable contention that she did not come within the terms of the act.

Respondent's position seems to be that, because it was unlawful for appellant to employ the child under the age of 16 years, she was not confined for redress to the terms of the workingmen's compensation

act. Counsel rely principally upon the case of Hillestad *v.* Industrial Insurance Commission, 80 Wash. 426, 141 Pac. 913 [Bul. No. 169, p. 269]. We are satisfied that case is not authority for the position of the respondent here. Section 2447, Rem. Code, makes it a misdemeanor for an employer to employ "any male child under the age of 14 years or any female child under the age of 16 years at any labor" in any factory without the written permit of a judge of a superior court of the county wherein such child may live. This statute does not make it unlawful for a child under the prohibited age to work and imposes no penalty upon the child when it does work. It follows that the child neither gains nor loses any rights by such employment, even though the employer may be penalized.

The workmen's compensation act plainly recognizes that a child less than the maximum age for the employment of a minor is a workman within the meaning of that act. It follows that whether the child is employed either lawfully or unlawfully such child is entitled to all the privileges of the workingmen's compensation act and must seek its remedies under the terms of that act.

The judgment must therefore be reversed and the action dismissed.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ACTION FOR DAMAGES PERMITTED—*New Albany Box & Basket Co.* v. *Davidson, Supreme Court of Indiana (Jan. 28, 1920), 125 Northeastern Reporter, page 904.*—The New Albany Box & Basket Co. employed Davidson and put him to work to assist in the operation of a wood joiner. Davidson was a minor under 16 years of age, and was engaged by the company without the consent of his parents and without a work certificate. On the same day that he was employed, and while working at the wood joiner, his right hand came in contact with one of the knives of the machine and cut off his fingers. He brought suit for damages under the common law, and the company in defense pleaded the workmen's compensation act (Laws 1915, ch. 106), contending that the common-law action could not be maintained.

On appeal of the company the supreme court affirmed a judgment in favor of Davidson for $4,500. In rendering its opinion the court quoted statutes as to age certificates and the employment of children under 16 at designated dangerous employments. The appellant company admitted liability to penalties for violation of these laws but claimed their violation carried no further consequences. As to this the court said:

We can not agree with appellant that this is the extent of the application of the statute in the instant case. In Hetzel *v.* Wasson Piston Ring Co. (Court of Errors and Appeals of New Jersey), 89 N. J. Law, 201, 98 Atl. 306, it was held that the workmen's compensation act has no application to a child under 14 years of age employed in a workshop, factory, or mill or other place in violation

of a statute, and an action for injuries to such child, based upon the common-law liability of the employer, may be maintained.

All decided cases which we have examined hold that employment when referred to in the workmen's compensation laws means lawful employment. We think that a fair construction of the Indiana workmen's compensation act requires us to hold that in enacting the law with reference to the rights and remedies of employers and employees the legislature referred to legal employment.

In the instant case the appellee was employed in direct violation of sections 8022 and 8022–e of the statutes (Burns, 1914), and, such being the case, the employment was illegal, and he is not embraced within the provisions of the workmen's compensation act, and his action was properly brought.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—INSURANCE—*Maryland Casualty Co.* v. *Industrial Accident Commission, Supreme Court of California (Feb. 11, 1919), 178 Pacific Reporter, page 858.*—This action is a writ of review brought by the Maryland Casualty Co., which was the insurrer of Bronstein & Le Blanc, employers of Frank T. Sharon, a minor of the age of 15 years and 2 months, who was killed while in their employ, against the industrial accident commission to have an award by that body annulled. An agent of the casualty company induced Sharon's employers to agree to insure their workmen's compensation liabilities after calling their attention to the liabilities incurred in employing such young men as Sharon. The policy of insurance which was delivered after but with full knowledge of Sharon's injury and death contained a provision stating that it would cover "such injuries, including death, sustained by an employee legally employed." Bronstein & Le Blanc employed Sharon without his having issued to him and presented to them an age and schooling certificate as required by the child-labor law. The court in annulling the award of the commission in favor of the mother said in part:

Among other places in which employment is prohibited by the provisions of section 1 so referred to is "any manufacturing establishment or workshop," which would include the employment in which the decedent was engaged at the time of his death. It is therefore argued that even though the employment during the hours the schools were in session was illegal without an age and school certificate it was not illegal at the hour in question, for although the schools of the city were in session November 14 they had adjourned before 4.30, and that therefore the decedent was not working "during the hours that the public schools are in session." But the contract of employment was an entirety and required the decedent to work six days in a week during the whole day and while school was in session. The contract was therefore one prohibited by law, and the fact that decedent might have been legally employed after school

hours on the day in question does not alter the fact that the contract of employment in question was illegal and in violation of the plain terms of the law.

Respondents, however, claim that in construing the child-labor law the court should look to its purposes, and that as the main purpose is to secure the education of the child that purpose had been fully accomplished in the case of Frank T. Sharon by reason of the fact that he had entered a public night school on November 13 and was intending there to continue his education. No consideration of the general purposes of the law would justify a departure from the plain provisions of the law, nor is it true that education was the main consideration entering into the child-labor law. The compulsory school law (Stats. 1905, p. 388, and its amendments, 1907, p. 95; 1911, p. 949; 1915, p. 762) provides for the attendance of all children between 8 and 15 years, with certain exceptions. The age and schooling certificate required by the child-labor law is also required by the compulsory school law, but the main purpose of the child-labor law is, as therein stated, to prohibit children under certain ages from engaging in certain forms of labor. Considerations of public health and safety enter into the general plan as well as matters of education.

There is no significance in the issuance of the policy after the death of the employee, and the cases of fire insurance in which such issuance after a loss have been held to waive certain conditions do not apply to this character of insurance where the policy is a continuing liability even after an accident, nor for the same reason does the acceptance or retention of the premium under the circumstances operate as a waiver.

On the whole, therefore, the contract of employment in violation of the child-labor law was illegal and not included in the policy of insurance, and there being no waiver or estoppel the petitioner is not liable under the policy for the accident in question.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—TREBLE COMPENSATION—CONSTITUTIONALITY OF STATUTE—*Brenner* v. *Heruben, Supreme Court of Wisconsin (Feb. 10, 1920), 176 Northwestern Reporter, page 228.*—Peter Heruben, a minor under 17 years of age, was employed by Brenner in his restaurant as a helper. While grinding some meat for a Hamburg steak Heruben was injured, and he instituted proceedings for compensation under the workmen's compensation law. He was awarded treble compensation under subsection 6 of section 2394–9 of the statutes, which provides that if a minor under 17 years of age be employed without an employment certificate and is injured his employer shall be held liable to pay compensation under the workmen's compensation act at treble the regular rate. When Heruben was employed he was over 16 years of age and did not need, as the law then stood, an employment certificate, but by an amendment (ch. 674, Laws of 1917) the age of minors for whom work certificates must be issued was raised from 14 to 17

years, and Brenner failed to demand the necessary work certificate. He appealed from the award, declaring that the provision of the act allowing treble damages to injured minors without work certificates was unconstitutional and void; but the court affirmed the award and upheld the constitutionality of the provision, although Judge Eschweiler rendered a lengthy dissenting opinion. The decision of the majority of the court is in part as follows:

The argument against its constitutionality runs, in substance, like this: Treble compensation is a penalty and its exaction is in fact the enforcement of a penal or criminal statute, namely, that of the child-labor law, which is not in any way germane to the subject of compensation for industrial accidents. The right to a jury trial for the enforcement of a penalty has never been waived by employers in electing to come in under the workmen's compensation act.

The argument is not without force, and were we to justify the amendment upon common-law principles alone, without reference to the wide departure therefrom made by the workmen's compensation act, the task would not be an easy one. But the question is not whether it is a justifiable common-law scheme, but whether it is fairly germane to, and within the limits of the general scheme of, the workmen's compensation act. If it is, then it is constitutional, for an employer in coming under the act waived his common-law remedies and agreed to be bound by the remedies afforded by the act and all lawful amendments thereto. (Anderson *v.* Miller Scrap Iron Co., 169 Wis. 106, 170 N. W. 275, 171 N. W. 935.)

It was not until the enactment of chapter 624, Laws of 1917, that section 2394–7 (4) was amended so as to include a minor of permit age, employed without a permit to become an employee under the act. Previous to that amendment injuries to such minors were not compensable thereunder because not employees within the meaning of the law. When this feature of chapter 624 came up for legislative consideration it presented this question: If injuries to minors of permit age employed without a permit are to be compensable under the workmen's compensation act, under what conditions shall they be made compensable so as not to emasculate one of the purposes of the child labor law? If no civil liability was attached to a violation of section 1728a by employers under the workmen's compensation act, who constitute the great bulk of employers of minors of permit age in this State, then a part at least of the purpose of the child labor law would miscarry.

It was no doubt a consideration of those facts that induced the legislature to permit injuries to minors of permit age employed without a permit in direct violation of the law, to be compensated under the workmen's compensation act upon conditions that treble compensation should be paid. It was within the legislative field to prescribe reasonable conditions for permitting injuries under such employments to be so compensated. Conditions thus prescribed can not be set aside by courts unless so severe as to be confiscatory, or to amount to a denial of due process of law. The condition in question does not come within either class, and must be held lawful.

The classification made by the legislature, if any, is one of employers, not one of minors. It divides them into those who obey the

law and those who violate it. Obviously this clear-cut cleavage is one of substance, and furnishes a good basis for classification. (Borgnis *v.* Falk Co., 147 Wis. 327, 133 N. W. 209.)

As before stated, delicts of both employer and employee are recognized by the act, and are made the basis of difference in the amount of compensation granted. No violation of rights is perceived by so doing. A public policy can be effectuated through the workmen's compensation act in connection with other public laws, and especially so where the laws involved are of a cognate nature. We therefore conclude that the amendment is constitutional, and that the judgment must be affirmed.

Judgment affirmed.

WORKMEN'S COMPENSATION—PERMANENT INJURY—IMPAIRMENT—INJURY WITHOUT LOSS OF EARNING CAPACITY—*Hercules Powder Co.* v. *Morris County Court of Common Pleas, Supreme Court of New Jersey (June 24, 1919), 107 Atlantic Reporter, page 433.*—An employee of the powder company was injured by an explosion arising out of and in the course of his employment. The nature of his injury was the loss of one of his testicles. The defendant court granted the employee an award under the workmen's compensation act and the powder company brings certiorari on the ground that an injury of this nature is not a "permanent bodily impairment" under the compensation law. In affirming the award in favor of the employee the court said in part:

The statute, section 11, concedes the awarded compensation (1) "where the usefulness of the member is permanently impaired," and (2) "where any physical function is permanently impaired."

The lower court found that as a result of the injury, the defendant's morale, courage, and marital efficiency were lessened. Whatever view the medical experts may entertain upon that phase of the case, the indisputable fact remains that the injured defendant has suffered the loss of a portion of his anatomy, which nature implanted in the human organism, as a dual reservoir of complete efficiency equally with eyes, ears, and limbs, and that to deprive him of one of these natural attributes is to take from him a component portion of the perfect genus homo, and to that extent at least impair the physical attributes of his manhood. This impairment may not prove to be so conspicuous in the ability to produce wages, in the industrial world, but there are other spheres for the employment of human energy, talents, and the possession of physical attributes besides the industrial world into the activity of which the defendant is entitled to bring, possess, and enjoy all the physical attributes with which nature endowed him.

In harmony with these considerations, it has been held that the sole criterion of a disability, partial in character and permanent in quality, under the statute, is not limited to the loss of earning power. (De Zeng Co. *v.* Pressey, 86 N. J. Law, 469, 92 Atl. 278, affirmed 96 Atl. 1102 [see Bul. 169, p. 207]; Burbage *v.* Lee, 87 N. J. Law, 36, 93 Atl. 859.)

Whether, therefore, we consider the physical status of the injured defendant as lessened by the loss of a physical attribute, which serves to constitute the perfect genus homo, or as possessed of a dual entity which in natural and moral law he had a right to retain, as a reserve factor in the cosmic dispensation, the loss he sustained was a permanent impairment of his physical entity under the provisions of our statute and was properly compensated for as such by the award of the common pleas.

The award will be affirmed.

WORKMEN'S COMPENSATION—PERMANENT INJURY—IMPAIRMENT—INJURY WITHOUT LOSS OF EARNING CAPACITY—"DISABILITY"—*Centlivre Beverage Co.* v. *Ross*, *Appellate Court of Indiana, Division No. 2* (*Nov. 19, 1919*), *125 Northeastern Reporter, page 220.*—The claimant, Ross, who was employed by the Centlivre Beverage Co., strained himself when he slipped while piling kegs upon an icy floor. He was disabled and could work only with pain and was not able to do a full share of work. He was examined by a physician supplied by the employer who declared that Ross was suffering from an orchitis involving the left testicle. Not having been relieved by the prescriptions of the employer's physician, Ross later went to a physician of his own selection who told him he had varicocele and that it would be necessary to remove one of his testicles, which was done. The workmen's compensation act (Laws of 1915, ch. 106), section 31, makes provisions for compensation for certain injuries specified in clauses *a* to *i*. In the last paragraph of the section provision is made in cases of permanent partial disability not covered by clauses *a* to *i*. This section is as follows:

"In all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunity of the injured employee, compensation in lieu of all other compensation shall be paid when and in the amount determined by the industrial board, not to exceed fifty-five per cent of the average weekly wages per week for a period of two hundred weeks."

Compensation was awarded for 100 weeks at $9.95 per week under this provision and the employer appealed. In reversing the award with directions to modify it the court said in part:

The injury which appellee suffered is not one of the specific injuries provided for in subdivisions *a* to *i* of said section 31. The last paragraph of said section, heretofore quoted, dealing as it does with injuries coming within its terms from the standpoint of permanent disability and resulting diminution in earning power, and the legislature not having specifically provided for said injury, the fact of disability and the resulting diminution of earning power must be found as a matter of fact, and that finding must be sustained by the evidence in order to sustain an award.

We must keep in mind the fact that the act does not give compensation for loss of a member, such as the loss of a limb, but for the loss of earning capacity actually caused by the loss of the limb [citing cases from various States].

That compensation must be based upon a diminution of earning power was clearly recognized by this court in the Denton case, 117 N. E. 520 [Bul. 246, p. 289], wherein it was held that section 31 dealt with injuries from "the standpoint of the consequent permanent disability, and resulting diminution in earning power extending through life."

There was no evidence that the removal of the particular organ mentioned had or would in the slightest degree impair the future usefulness or opportunity of appellee, or that it had or would produce any disability for work, or to work, or a loss of any physical function. Notwithstanding the injury and operation, his earning capacity and every physical function remained unimpaired.

The award of the board is reversed, with directions to modify its findings and award in accordance with this opinion.

WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—PARTIAL LOSS OF USE OF HAND—*State ex rel. Broderick Co.* v. *District Court of Ramsey County et al., Supreme Court of Minnesota (Nov. 21, 1919), 174 Northwestern Reporter, page 826.*—An employee of the Broderick Co. was injured while at her work. It seems that while feeding a press she in some way got her hand caught in the machinery and mangled so that parts of her little and ring fingers had to be amputated. Infections and poor knittings of the bones served to reduce the usefulness of the hand to the extent of one-half. Judgment was awarded to the employee for compensation for permanent partial disability and the employer appealed, claiming that the award should have been only for the loss of the two fingers. In affirming the judgment of the court below the following opinion was rendered:

The only question presented by the record is whether the findings of the court to the effect that plaintiff suffered a permanent partial disability are sustained by the evidence. Our examination of the record discloses ample evidence to support the findings. A discussion thereof would serve no useful purpose, and we refrain. While the compensation act makes express provision for the loss of fingers, from the thumb down, it does not necessarily follow therefrom that an injury of the character here disclosed should be treated as a matter of law as the loss of the little and ring fingers only. If the nature of the injury in such a case, taken as a whole, shows by relation a reduction in the power and usefulness of the hand, as well as the injury to and loss of the fingers, the court may, and properly should, find the fact accordingly, for the intent and purpose of the compensation act secures to the injured employee compensation for the disability actually sustained. (State ex rel. Kennedy *v.* District Court Clay County, 129 Minn. 91, 151 N. W. 530.)

Within the rule guiding us in cases of this character the evidence sustains the findings, and the judgment must be and is affirmed.

WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—SECOND INJURY—LOSS OF THREE-FOURTHS OF VISION—*State ex rel. Melrose Granite Co. et al.* v. *District Court, Seventh Judicial District et al., Supreme Court of Minnesota (Aug. 8, 1919), 173 Northwestern Reporter, page 857.*—Zinken was employed by the Melrose Granite Co. as a stone mason. Previous to this employment Zinken had suffered an injury to his left eye, which had reduced its vision one-half. While working at his occupation for the granite company some mortar was negligently splashed into his face and eyes, burning the latter so badly that the right eye had to be removed and the left eye was so injured that he could no longer work at any occupation. Compensation was awarded to Zinken on the basis of permanent partial disability at the rate of $11 per week for 300 weeks. The employer and its insurer appealed, claiming that compensation should be awarded on the basis of the loss of one eye ($11 for 100 weeks) and the loss of half the other eye ($11 for 50 weeks). In affirming the decision of the lower court in favor of Zinken the court rendered in part the following decision:

The amount of compensation to which Zinken was entitled must be ascertained by referring to the following provisions of the compensation act:

G. S., 1913, page 8209, reading as follows:

"If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

It was contended in Zinken's behalf, and the court found, that his is a case of permanent partial disability, entitling him to compensation at the rate of $11 per week for 100 weeks for the loss of his right eye and to $5.50 per week for the same period for the injury to his left eye. We are now asked to construe the statute to mean that a workman's eyes are to be valued separately—a good eye, in the case of a man earning the wage of Zinken, at $1,100, and an eye which is only 50 per cent efficient at $550. It would be both narrow and illiberal so to construe it, whereas we have consistently held that it is to be liberally construed in favor of workmen.

His employer is liable for compensation for the permanent partial disability suffered by Zinken, and the court so finds. It is also found that the extent of such disability is equivalent to "75 per cent of the loss of both eyes."

Such loss must of necessity be occasioned by an injury to both eyes which may not wholly destroy either of them or may destroy one and reduce the sight of the other one-half as was the case here.

We conclude, therefore, that compensation in such a case as we have here is not to be made on the basis suggested, but rather under

that clause of the schedule which governs in all cases of permanent partial disability not specifically enumerated in the schedule. Zinken is entitled to 50 per cent of the difference between his wages when injured and the wages he is able to earn in his partially disabled condition, subject to a maximum of $11 per week for not more than 300 weeks.

He has been wholly unable to earn any wages since he was injured, hence he is entitled to $3,300, less $1,100 already paid.

WORKMEN'S COMPENSATION — RAILROAD COMPANIES — INTERSTATE COMMERCE—WATCHMAN—*Chicago & A. R. Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919); 125 Northeastern Reporter, page 378.*—Joseph P. Lambert was employed as a watchman by the railroad company. His duties were to guard the property of the company and the property of shippers while it was in the company's yards. Some of his duties were in connection with interstate commerce and some of them were not. Merchandise had been stolen off train No. 98, which was an interstate train, on several occasions, and in an effort to catch the thieves Lambert was sent ahead of the train as it was leaving the company's yards. He hid himself behind a pile of ties to await the arrival of the train. While he was so waiting and before the train arrived he saw two men approaching him carrying sacks filled with coal When he called to them to stop they opened fire on him and killed him. Lambert's widow was awarded compensation under the workmen's compensation act and the employer appealed, claiming that Lambert when killed was engaged in interstate commerce and that recovery must be had, if at all, under the Federal employers' liability act. The court held that the workmen's compensation act applied, rendering a decision from which the following is quoted:

Some of the duties of the deceased had no connection with interstate commerce or its movement and transportation. His duties were to protect his employer's yards and property from thieves, and to catch thieves found in the yards. Not every employee of an interstate carrier is engaged in interstate commerce. The work of the employee must constitute a real and substantial part of the interstate commerce in which the carrier is engaged. (Illinois Central Railroad Co. *v.* Behrens, 233 U. S., 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91].) Under the stipulation of facts and the decisions referred to deceased was not at the time of his injury engaged in interstate commerce, and the workmen's compensation act applied.

WORKMEN'S COMPENSATION—RECOVERY OF COMPENSATION—RELEASES—PREEXISTING DISEASE—*Hines, Director General of Railroads,* v. *Industrial Accident Commission of California et al., Supreme Court of California (Mar. 4, 1920), 188 Pacific Reporter, page 277.*—

Desiderio Dell 'Era applied to the Southern Pacific Co. for employment, and was given a physical examination, where it was discovered that he suffered from a condition which made him extremely susceptible to hernia. Before employing him the company required him to sign a release of his rights under the workmen's compensation act for any disability he might sustain from hernia. This release was in the following form:

"Having submitted myself to an examination by an examining physician of the Southern Pacific Co., with a view of entering the service of that company, it has been found that I have a congenital defect—viz, lax inguinal rings. I have been fully advised and informed concerning such condition, and it has been explained to me that because of such congenital defect a protrusion of the abdominal contents, commonly known as rupture or hernia, may take place at any time, and due wholly to said congenital defect. Realizing this and in consideration of my employment by the Southern Pacific Co. I hereby agree to hold the said company blameless in event of said rupture or hernia so appearing and that I will not apply to said company or its hospital department during my term of service for any operation or treatment therefor, and for the consideration hereinabove expressed I do hereby release the Southern Pacific Co. from any and all claims that may arise on account of rupture or hernia so appearing while in its service.

"It is further understood and agreed that I am not entitled to hospital benefits for the following further disability from which I am now suffering, to wit, chronic affection of tonsils.

"It is further understood and agreed that I am entitled to and will be given hospital benefits for all other disabilities than those I am now subject to, in accordance with the rules and regulations of the hospital department of the said company."

It was held that this release was of no effect under the compensation act, which forbids all contracts waiving rights thereunder. The decision of the court is as follows:

We are satisfied that in view of the provisions of section 27a of the workmen's compensation, insurance, and safety act of 1917 (St. 1917, p. 855) petitioner can not avail himself of the agreement relied on.

The application for a writ of review is denied.

WORKMEN'S COMPENSATION—SECOND INJURY—LOSS OF USE OF HAND—*Mark Mfg. Co.* v. *Industrial Commission, Supreme Court of Illinois (Feb. 20, 1919), 122 Northeastern Reporter, page 84.*—Frank P. Criner had his left hand crushed while in the employ of the plaintiff company, resulting in the loss of the use of his hand. Prior to this injury he had sustained an injury to the second finger of his left hand, which necessitated part of it being amputated. The employer has now raised the question whether it must be held

liable for compensation for the loss of the use of the hand or for the loss of the index, third, and fourth fingers. In affirming the judgment of the lower court in allowing an award for the loss of the use of the hand, the court said in part:

Though the defendant in error had previously lost a part of one finger, he had the use of his hand, with a capacity somewhat reduced by reason of the defect. The fact that his hand was not perfect did not render its loss any less complete. As the result of his injury he has totally lost the use of the hand, which he previously had, and under the statute he is entitled to compensation for that loss. (Wabash Ry. Co. *v.* Industrial Commission, 286 Ill. 194, 121 N. E. 569; In re Branconnier, 223 Mass. 273, 111 N. E. 792 [Bul. No. 224, p. 228]; Schwab *v.* Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099 [Bul. No. 189, p. 288]. The fact that he might have recovered for the first injury did not reduce the amount of compensation to which he is entitled for the loss of the use of his hand.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT TOTAL DISABILITY—LOSS OF LEG—*Wabash Ry. Co.* v. *Industrial Commission, Supreme Court of Illinois (Dec. 18, 1918), 121 Northeastern Reporter, page 569.*—Claude Williams was employed by the Wabash Railway Co. as a watchman for its locomotive shops. Prior to his employment in this capacity he had lost his left arm by amputation near the shoulder. The watchman of the blacksmith shop was not on duty on one occasion and Williams's duties took him to that shop. While returning to the locomotive shop he stumbled over some scrap iron and injured his knee, which became so painful that he had to surrender his keys to another employee and go to the hospital, where he remained over two months. The employee surrendered his keys to the foreman the following morning and informed him of Williams's injury. On June 20, 1916, on the supposition and belief that the injury was cured, Williams signed a release and went back to work. In October his old injury recurred and he was again sent to the hospital, where it was discovered that tuberculosis of the bone had developed and his leg was amputated 6 inches from the hip joint. Williams applied to the industrial commission to have the release agreement reviewed and compensation allowed. The commission granted an award, which on appeal the circuit court modified, allowing $2,400 for total permanent disability and after the payment of that sum a pension of $16 per month for life. The railroad appealed and the court, in affirming the judgment of the circuit court, said in part:

The evidence clearly discloses that the disability of Williams was the result of an injury arising out of and in the course of his employment. The fact that Williams may have been predisposed to tu-

berculosis of the bones does not affect the result, as the evidence shows that the tuberculosis of the left knee developed as a result of the injury.

It is contended that the industrial commission did not have jurisdiction. The notice to the foreman or superintendent of the shops that Williams had been injured was sufficient notice under the statute, as he was the plaintiff in error. (Parker-Washington Co. *v.* Industrial Board, 274 Ill. 498, 113 N. E. 976.)

The principal contention made by the plaintiff in error is that the circuit court erred in holding that it was liable to pay compensation for a total and permanent disability. The basis of this contention is that the loss of one leg does not constitute total permanent disability. The defendant in error, Williams, contends, on the other hand, that the loss of his left leg, combined with the previous loss of his left arm, constitutes total permanent disability, and that the judgment of the circuit court is correct. This precise question has not arisen before in this State. It has arisen in other jurisdictions under compensation acts similar to our own. In Massachusetts and New York it has been held that under such circumstances the disability occasioned is total and permanent. (In re Branconnier, 223 Mass. 273; 111 N. E. 792 [Bul. 224, p. 228]; Schwab *v.* Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099 [Bul. No. 189, p. 288].) The Michigan court takes the contrary view. (Weaver *v.* Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993 [Bul. No. 189, pp. 289, 290].)

We are disposed to follow the reasoning of the Massachusetts court construing a statute quite similar to ours, and hold that this act applies where the loss of one of the members mentioned occurred previous to the employment, and the result of the other is the result of an injury arising out of and in the course of the employment. This, in our opinion, is the fair intent and meaning of the act. When Williams was employed by plaintiff in error he had lost his left arm, and his capacity for work was to that extent impaired. He was employed to do work which could be performed by a man having but one arm, and he was paid upon that basis. By the loss of his leg such capacity as he had for work was entirely destroyed, and under the provisions of the act he was entitled to compensation for total permanent disability. Such a construction of the act works no hardship upon the plaintiff in error. Williams was employed and paid as a man of limited capacity, and the compensation which the plaintiff in error is required to pay is based upon the wages it was paying him as a man of limited capacity.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT TOTAL DISABILITY—LOSS OF SECOND EYE—*Brooks* v. *Peerless Oil Co.* (*Inc.*), *Supreme Court of Louisiana* (*Jan. 7, 1920*), *83 Southern Reporter, page 663.*—Brooks, the plaintiff, was injured while in the employ of the Peerless Oil Co. His injury resulted in so impairing the vision of his one remaining eye as to totally incapacitate him for the work at which he had spent his entire life. The trial court allowed compensation for permanent total disability under the workmen's compensation (called in the opinion the employers' liability) act, sec-

tion 8, subsection 1 (e). The employer appealed, but the judgment was affirmed. The following is the decision:

While plaintiff was engaged in drilling an oil well for the defendant company, the "tongs" (whatever part of the drilling machinery may be meant by that) "flew around" and hit him on the side of the head, across the left ear, knocking him unconscious, in which state he remained, he says, "you might say, for a week." This was in December, 1918. When this case was being tried, in April, 1919, his condition was that his left eye could not rotate to the left beyond a straight line in front of him, or, in other words, could not rotate to the left at all, and when in repose was turned toward his nose, making him cross-eyed, as an effect of the external muscle on that side being paralyzed, and his distance vision in that eye was so affected that letters which a normal eye can read at 100 feet he could not make out at 20 feet. This was all the vision left to him; for he had already lost one eye. As an effect of the injury and of the imperfection of his vision, the sight of moving objects would bring on dizziness. Even objects in repose he saw so imperfectly that he could not have been able, for instance, to distinguish a cotton plant from grass, if he had undertaken to hoe. That condition was permanent. In addition to the foregoing, he was still subject to pains in the back of his head.

He sues under the employers' liability act (Act 20, p. 44, of 1914, amended by Act 243, p. 512, of 1916), and the question is as to whether he is entitled to recover as for "permanent total disability to do work of any character," under subsection 1 (e) of section 8, which would be $10 for 400 weeks, or as for the impairment of one eye, under the next to last paragraph of subsection 1 (d) of the same section 8, which would be "such compensation as is reasonable in proportion to the compensation hereinabove specifically provided in the cases of specific disabilities above named," which specific disabilities would in the present case be as for the loss of one eye, the compensation for which is fixed at "50 per centum of wages during 100 weeks."

The learned trial judge found for permanent total disability, reserving to the defendant the right to ask for a revising of the judgment at any time, should the plaintiff recover in part his ability to work, and we agree with that view. Plaintiff is a laborer, whose life work has been as a "rough neck" in oil fields. For that character of work he is now totally incapacitated, and his qualification for laborer's remunerative work of any kind is more than doubtful.

The rationale of these employers' liability acts is that the employment in which the workman has been disabled owes him a living, and it stands to reason that the workman is as totally disabled from work by the loss of one eye as by the loss of two, if he had but one, and by the impairment of the sight as much as by the loss of it, if the impairment be to such a degree as to disable him entirely from work. In speaking of the workman being only partially disabled by the loss of one eye, one arm, or one foot, this employers' liability act has reference evidently to the normal man, having both eyes, arms, or feet.

Judgment affirmed.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT TOTAL DISABILITY—LOSS OF SECOND EYE—*Jennings* v. *Mason City Sewer Pipe Co., Supreme Court of Iowa (Nov. 22, 1919), 174 Northwestern Reporter, page 785.*—The claimant, Jennings, was injured while in the employ of the defendant pipe company. The injury resulted in the loss of his eye which was the only one he had at the time and the loss left him totally blind. The industrial commissioner awarded him compensation as for total disability, and the employer appealed. In affirming the decision the court spoke in part as follows:

The one question in the case is whether our workmen's compensation act (Code Supp. 1913, ch. 8a) establishes a fixed compensation value for the loss of one eye, regardless of whether the eye thus lost is the only eye of the injured party. The question involves a construction of section 2477m9 (*i*) and (*j*).

It will be noted that subdivisions (*i*) and (*j*) classify permanent disability as "total" and "partial." For disability total in character and permanent in quality subdivision (*i*) establishes a weekly compensation of 50 per cent of the wages for 400 weeks. Subsection (16) of subdivision (*j*) establishes the compensation "for the loss of an eye" at 50 per cent of the wages for 100 weeks.

The contention of appellant is that this section fixes the compensation for the loss of an eye, regardless of whether such loss results in total or only partial disability. It will be noted also that under subsection (17) the loss of both eyes constitutes a total permanent disability. Subdivision (*i*) deals with disability total in character and permanent in quality. Subdivision (*j*) deals only with disability partial in character and permanent in quality. Which subdivision, therefore, is applicable to the case before us? We think the case is necessarily ruled by subdivision (*i*).

In this case the industrial commissioner allowed the compensation rate for 300 weeks only, and not for 400 weeks. It is urged by the appellant that this presents an inconsistency in the action of the commissioner, in that, if there was a total disability, then there should have been an allowance for 400 weeks.

Granting the inconsistency, the appellant is not hurt by it. The theory of the commissioner was that, though the disability was total, nevertheless the extent of the injury was less than would have been the loss of two eyes. The commissioner, therefore, deducted from the allowance for total disability, the compensation value of the first loss of an eye, deeming that as a partial disability. It was an effort on the part of the commissioner at attaining equity and worked no prejudice to the appellant.

The order of the commissioner will be affirmed.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL DISABILITY—LOSS OF INDEX FINGER—LOSS OF USE OF HAND—*Schimmel* v. *Detroit Pressed Steel Co., Supreme Court of Michigan (July 17, 1919), 173 Northwestern Reporter, page 206.*—Schimmel was an electrician in the employ of the defendant company. While engaged at his work he

was injured by having a traveling crane run over his hand. His hand was badly crushed and it became necessary to amputate the index finger. Schimmel entered into an agreement with the employer whereby he was to receive the maximum weekly compensation of $10 for a period of 35 weeks, which is the period allowed by law for the loss of an index finger. Later the arbitration board of the industrial accident commission made an award on these terms. Thirty-four weekly payments were made, but Schimmel refused to accept the thirty-fifth or to sign a settlement receipt. He claimed that the condition of his hand was such that he was unable to perform the same duties as prior to the accident. It seems that his second finger and the tendons of his hand were lacerated to such an extent that he could no longer engage in his former occupation of electrician. The case was reopened by the commission and an award was made granting Schimmel the $10 of the thirty-fifth payment for the loss of his finger and a sum computed at the rate of $10 per week up to the date of the award, and in addition thereto he was to receive $10 per week "during the period of his total disability in the employment in which he was engaged when injured." The employer appealed, contending that a greater compensation could not be awarded for the loss of a finger than was allowed by the law for the loss of a hand (150 weeks). In upholding the award the court said in part:

Appellants state in their brief that the only question presented by the record arises out of the failure and refusal of the industrial accident board in its order to properly limit compensation to the amount specified by the workmen's compensation act (Acts Ex. Sess. 1912, No. 10) for the injuries applicant suffered, to wit, "the loss of the index finger of the left hand and an injury to the palmar surface of the same hand." Attention is called to the provision contained in section 10, part 2, of the workmen's compensation act, which reads as follows:

"In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand."

Here the claimant is asking that compensation shall continue during the period of disability as that disability shall from time to time appear. Claimant's position in this court is that the statute does not, under the specific disability section, provide for the loss of use of a hand, except in so far as that loss of use tends to or does actually affect the ability of the injured servant to earn in the same employment in which he sustained his injury.

Attention is called by claimant's counsel * * * to the point that the test of disability lies in the capacity to earn in the same employment in which the employee was injured.

We are of the opinion that, under the authority of the cases cited, the claimant is entitled to compensation as granted by the industrial accident board. As this court said in Limron *v.* Blair, 181 Mich. 76, 147 N. W. 546 [Bul. 169, p. 211]:

"The statute speaks in terms of disability. * * * When the period of disability ends, compensation ceases."

An examination of the record shows that there were ample facts before the board upon which to base its findings, and no error in the record appearing the order of the board is affirmed.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—MULTIPLE INJURIES—LOSS OF USE OF EYE—*Keyworth v. Atlantic Mills, Supreme Court of Rhode Island (Nov. 14, 1919), 108 Atlantic Reporter, page 81.*—Keyworth was employed as a painter by the Atlantic Mills. While so employed he fell out of a second-story window and sustained two broken ribs, the loss of the sight of his right eye, and various bruises. Compensation was awarded for total disability for an indefinite period but not exceeding 500 weeks. Keyworth petitioned for additional or special compensation under section 12, paragraph (*b*) of article 2 of the workmen's compensation act (Pub. Laws 1911–12, c. 831) for the loss of his eye, but the court refused to grant the additional compensation and he appealed. It seems that although his right eye was so injured that he could no longer use it in any vocational pursuit, he nevertheless still retained 10 per cent of the normal vision which was useful to a limited extent for certain purposes. In affirming the decision refusing special compensation the court said in part:

The petitioner argues that, having lost so much of the vision of the right eye that it would no longer serve him in any occupation in which he might engage in earning his livelihood, this court should give to the words of the statute, "the entire and irrecoverable loss of sight of either eye," an interpretation broad enough to cover his case; in other words, that a man with the sight of his eye reduced to 10 per cent of the normal vision should be deemed to have suffered the "entire and irrecoverable loss of sight" therein.

With this contention of the petitioner we can not agree. We think the words of the statute must be taken in their ordinary sense, and that their meaning is clear. To say that this statute was designed to go any further than to provide for additional compensation for injuries which resulted in total and complete loss of sight would amount to a distortion of its language. The view which we now take is in accord with the opinion of this court in Weber *v.* American Silk Spinning Co., 38 R. I. 309, 95 Atl. 603.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—AWARD OF ADDITIONAL COMPENSATION—CONSTITUTIONALITY OF STATUTE—*E. Clemens Horst Co. v. Industrial Accident Commission of California et al., Supreme Court of California (Oct. 20, 1920), 193 Pacific Reporter, page 105.*—The E. Clemens Horst Co. maintained a vegetable drying plant at Wheatland, Calif., in which a Mrs. Hamilton was

employed. Potatoes were peeled by machine and conveyed on a revolving belt to a slicing machine. It was Mrs. Hamilton's duty to stand on a platform raised 2 feet from the floor and remove from the belt and peel all improperly treated potatoes. Directly overhead and parallel with the conveyor belt and about 5½ feet from the platform was a rapidly revolving shaft, which operated the various machines in the plant. This shaft was protected by a board on the side nearest the employee but was unprotected below. The slicer machine became clogged, and Mrs. Hamilton leaned over the belt and under the shaft to clear the potatoes away. As she did so her hair was caught in the rapidly revolving machinery and pulled off so that she was completely scalped. She was awarded $8.89 regular weekly compensation for temporary total disability and the weekly sum of $4.45 as additional compensation because of the company's "willful misconduct" in failing to guard the overhead shaft and render the work place safe. The company denied it had been guilty of willful misconduct and appealed. In affirming the award granting the additional compensation the court rendered an opinion, of which the following is a part:

The first question presented is, then, was the commission justified in finding that the petitioner was guilty of "serious misconduct"? There is no statutory definition of this term.

There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. "Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that, according to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting immediately over and in close proximity to the conveyor belt was such serious misconduct. Mrs. Hamilton's testimony that she had been instructed to keep the belt and the "slicer" clear is uncontroverted, and it plainly appears from the testimony of the other employee that in order to do so it was natural that she should lean over the belt, thereby bringing her head in dangerous proximity to the revolving shaft. From the evidence which we have summarized we can not hold that the commission was not justified in finding that the place at which the employee was required to work was unsafe.

Next as to whether such serious misconduct was "willful." It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of."

According to the findings, the failure to guard the shafting was in direct violation of a general safety order of the commission. It is not contended that the making of this regulation was not within the power of the commission, and, by sections 48 and 49 of the workmen's compensation act, such orders "are conclusively presumed to be reasonable and lawful." In the face of the evidence it can not be held that the finding that the petitioner was guilty of serious and willful misconduct in maintaining the unguarded shafting is without support.

We now turn to consider petitioner's claim that section 6 (*b*) authorizing increased benefits in cases of willful misconduct is unconstitutional. The constitution as it stood at the time the legislation in force on June 7, 1919, was enacted, empowered the legislature to create a liability on the part of employers "to compensate their employees" for any injury received in the course of their employment, "irrespective of the fault of either party." (Article 20, 21.) This language does not authorize the creation of a liability for anything more than compensation. If the 50 per cent to be added in cases where the injury is caused by the willful misconduct of the employer is given as a penalty on the employer for such misconduct, and not as compensation to the employee for his injury, the provision is not within the power given to the legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.

But the provision in question is founded upon a different theory. It is obvious from the language of sections 6 and 9 of the act of 1917, and from the act as a whole, that the ordinary schedule of compensation there established was not considered to be full and complete compensation for the injuries received. The purpose was to take a part of the burden imposed by the injury from the injured employee and transfer that part to the employer, to be ultimately borne by the community in general as an addition to the cost of production.

It is therefore to be assumed the legislature found that the actual injury by loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least 50 per cent more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by willful misconduct of the employer, he should be made to pay a greater proportion of the burden, and the allowance in such a case should be increased by adding 50 per cent thereto. This considered, the additional allowance is really for additional compensation in the strict sense, and not for exemplary damages. This being the case, the power to enforce it was properly given to the commission under the provisions of section 21, article 20, of the constitution.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—DISOBEDIENCE OF RULES—*Indianapolis Light & Heat Co.* v. *Fitzwater*, *Appellate Court of Indiana* (*Dec. 11, 1918*), *121 Northeastern Reporter, page 126.*—Fitzwater was employed by the heat company as a lineman.

While in the company's employ he was engaged in removing some heavy copper wires from a pole of the company and replacing them with lighter wires. He had fastened a rope to one of the heavy wires and cut it and had lowered it to the ground. He then proceeded to fasten some tape to the wire where the rope was fastened to it, and while doing so he received an electric shock which killed him. The company had issued written rules for its employees designed to make them observe habits that would promote their safety. Copies of these rules had been given to Fitzwater long before his death, but the company had never made any great attempt to enforce them. An award was made to Fitzwater's widow, from which the employer company appealed, claiming that the failure of the deceased to use rubber gloves and an insulating stool and to otherwise obey its rules constituted willful negligence, for which no recovery could be lawfully had. In allowing the award to stand, Judge Ibach, speaking for the court, said, in part:

As we have said, the determination of the controversy in this case depends entirely upon whether the injury and death of the decedent was caused by his own willful misconduct, and the burden of showing this fact rested upon the appellant (employer). It has repeatedly been held that "willful misconduct" means something different from and more than negligence, however great; it involves conduct of a quasi criminal nature, the intentional doing of something, either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences. (Haskell Barker Car Co. *v.* Kay, 119 N. E. 811 [Bul. No. 258, p. 230].)

It may be conceded that the evidence shows decedent to have been guilty of contributory negligence in doing the particular work required of him—that is to say, he did not exercise that degree of care which the conditions and circumstances called for; but negligence does not prevent compensation. And it might be said that there was some evidence before the board which would justify the inference that the decedent was guilty of an infraction of certain rules of appellant company which were enforced with little or no diligence and were left largely to the option and discretion of its employees for their enforcement, but this falls far short of willful misconduct as intended and contemplated by the statute. There must be shown an intentional disobedience to a strictly enforced rule to support the defense of willful misconduct.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—EXCLUSIVENESS OF REMEDY—EXEMPLARY DAMAGES—*Stricklen* v. *Pearson Const. Co., Supreme Court of Iowa (Dec. 14, 1918), 169 Northwestern Reporter, page 628.*—The plaintiff, Stricklen, was in the employ of the defendant company, and during the construction of a pier the foreman ordered Stricklen to descend into a pier hole to do some work there. While working in this hole the earth caved in and he was

injured. Both parties had chosen to be governed by the workmen's compensation law, and Stricklen was granted an award for compensation, which the defendant has paid. Stricklen now, however, brings an action at law for exemplary damages because of the gross and reckless negligence of the defendant and its foreman. The lower court refused to allow the exemplary damages, and the plaintiff appeals. In affirming the judgment of the lower court Judge Weaver spoke in part as follows:

The pleadings are not in all respects quite clear, but, as we understand the record, the first and principal claim advanced by the plaintiff is that, although both parties had accepted the terms of the compensation act and damages had been awarded and paid pursuant to such act, the plaintiff may still sue his employer at law and recover exemplary damages if his injury was received under circumstances which would have justified the assessment of exemplary damages had the compensation act not been adopted.

The proposition is unsound, and no authority holding otherwise has been called to our attention. Generally speaking, exemplary damages are never a matter of right. If a party suffers an actionable injury, the extent of his right to demand a recovery of damages is the sum or amount which the jury (or court if it be tried without jury) finds from the evidence will fairly compensate him. If the jury or court in any given case goes beyond that measure of recovery and increases that amount found in his favor by an allowance of exemplary damages, it is not because they are needed to make him whole but because the wrongful act of which he complains has been done in malice or in such high-handed and reckless disregard of duty that the award is thus increased by way of punishment or example. It is true the plaintiff gets the benefit of exemplary damages when recovered and collected, but they come to him by the grace of the law, and not as a matter of right. If a plaintiff is awarded a fair compensation for his injuries no court will grant him a new trial because the jury has failed to award him exemplary or punitive damages.

In short, plaintiff, having accepted compensation from his employer for the injuries of which he complains, can have no standing in court to assert the employer's further liability to him on that account.

WORKMEN'S COMPENSATION—"WILLFUL MISCONDUCT"—FAILURE TO USE RESPIRATOR—*General American Tank Car Corporation* v. *Borchardt, Appellate Court of Indiana (March 13, 1919), 122 Northeastern Reporter, page 433.*—Borchardt was in the employ of the tank car corporation when he and another employee were instructed to dry out three tank cars and paint their interior. This they proceeded to do at the command of a foreman, who provided them with a respirator and cautioned them not to go into the tank cars without wearing it. After the tanks had been dried out Borchardt went into the tank wearing the respirator and proceeded to paint the interior

of the tank. After several minutes he came out and announced that the respirator did not work, whereupon his coemployee went into the tank to continue with the painting and without wearing the respirator. When he came out after four or five minutes, Borchardt again went into the tank, but this time he did not wear the respirator and stayed eight or ten minues, but did not come out. Upon investigation it was discovered that he was dead, having been overcome by the poisonous fumes of the paint. His mother applied for and received compensation, which the corporation contested on the ground that Borchardt met his death through his own willful misconduct. In affirming the judgment of the lower court which sustained the award, the court said in part:

There is no evidence that the deceased ever refused to obey orders or to follow instructions. The fair and reasonable inference to be drawn from the finding of the board, as well as from the evidence, is that, if the respirator had not become out of order he would have used it. He put it on and tried to use it, but for some unknown cause it was out of order and would not work. His failure to use the respirator was not because of willfulness on his part, but because it was out of order.

"Willful misconduct" means a deliberate purpose not to discharge some duty necessary to safety. It implies obstinacy, stubbornness, design, set purpose, and conduct quasi criminal in nature.

WORKMEN'S COMPENSATION — WILLFUL MISCONDUCT — IMPULSIVE ACT—*Hyman Bros. Box & Label Co.* v. *Industrial Accident Commission, Supreme Court of California (May 29, 1919), 181 Pacific Reporter, page 784.*—This is a proceeding for a writ of certiorari to review an award of the industrial commission made in favor of one Fred Weiss, a minor 20 years of age, who was employed by the Hyman company as a press feeder. Weiss was injured by having his hand caught in a printing press, to which he was "feeding" pieces of pasteboard that were cut by the machinery into proper shape for use in making pasteboard boxes. At the time of the injury he was an experienced worker. When he was first employed by the Hyman company he had been explicitly instructed and warned that he must not place his hand in the machinery while it was in motion, but on the occasion of the injury he impulsively made a grab for some loose sheets which were falling into the body of the press and had his hand caught and injured. The Hyman company claimed that Weiss's act, in disregard of his instructions and the warning, amounted to willful misconduct and that he was therefore not entitled to compensation. The court rejected this contention, saying in part:

The industrial accident commission found that in attempting to catch the card "the employee acted instinctively, without reflection, and such act did not constitute willful misconduct, and that therefore said injury was not caused by willful misconduct of the employee." Petitioners attack this finding as contrary to the evidence. This, they say, is the case of an employee who, with full appreciation of the danger, violated specific instructions given him for his own protection. The question before us, therefore, is whether or not the described actions of the employee amounted to willful misconduct. That an answer to such a problem goes to the jurisdiction of the industrial accident commission is settled by decisions of this court. (Great Western Power Co. *v.* Pillsbury, 170 Calif. 180, 149 Pac. 35 [Bul. No. 189, p. 292]; Fidelity & Deposit Co. *v.* Industrial Accident Commission, 171 Cal. 728, 154 Pac. 834 [Bul. No. 224, p. 351].)

The doctrine that an unpremeditated and impulsive act in violation of orders may not be willful misconduct finds some support in the authorities, but usually nonage is an element of the decisions in which such doctrine has been upheld. It seems to us, however, that the age of the person injured does not necessarily make a material difference. The tendency to recover something falling from a machine; to reach for a hat blown off the head by a sudden gust of wind; to apply the brakes to a "skidding" automobile; in short, to perform acts of many sorts upon the impulse of the moment is not the failing of youth alone. The true tests to be applied have reference to the nature of the work being performed and the circumstances of each particular case. This court has been at pains more than once to define "willful misconduct." Perhaps the best definition (and, incidentally, the one cited by both parties to this controversy) is the one found in the opinion in Great Western Power Co. *v.* Industrial Accident Commission, 170 Calif. 180, at page 189, 149 Pac. 35 [Bul. No. 189, p. 292]. The court used this language:

"Willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. But it can not be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

In that case there was no room for the application of the doctrine of sudden impulse. The facts of the present case are vastly different. Admittedly the petitioner Weiss knew the rule. Admittedly he did something in apparent violation of the rule, which, if it had been the result of deliberate intention, would have amounted to willful misconduct; but the circumstances were such that any person, experienced or not, might have impulsively put himself in jeopardy as this young man did, without any intent to violate a known rule. There is evidence to support the conclusion reached by the industrial accident commission, and we are of the opinion that upon this branch of the case a correct conclusion was reached.

The decision in this case was followed in a subsequent case (Western Pacific R. Co. *v.* Industrial Accident Commission, 181 Pac., 787) where one Earl Dean, a young man of 18, operating a drill with an

upright shaft, which machine carried the warning sign, "Stop before oiling, repairing," etc., on seeing a stream of grease running down the framework made an impulsive dive with a cloth at it, so that his hand was drawn into the machine and injured.

But where a workman undertook to chip a burr off a bar in which he was drilling holes and neglected to obtain and use goggles, the use of which was specifically directed in such cases, and suffered injury thereby, it was said:

He voluntarily and intentionally omitted to obtain and use goggles, contrary to rules of which he had knowledge and contrary to specific instructions, all of which were laid down for his protection. The only reasonable explanation is that he disliked the goggles because they were, as he said, "in his way," and so he preferred to take the chance of personal injury. This was misconduct and it was serious. (McAdoo, Director General of Railroads, *v.* Industrial Accident Commission, 181 Pac. 400.)

The customary award was therefore reduced one-half, as provided in such cases.

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