

U. S. DEPARTMENT OF LABOR
JAMES J. DAVIS, Secretary
BUREAU OF LABOR STATISTICS
ETHELBERT STEWART, Commissioner

BULLETIN OF THE UNITED STATES } No. 344
BUREAU OF LABOR STATISTICS }

LABOR LAWS OF THE UNITED STATES SERIES

**DECISIONS OF COURTS AND
OPINIONS AFFECTING LABOR
1922**

**LINDLEY D. CLARK
AND
DANIEL F. CALLAHAN**



SEPTEMBER, 1923

**WASHINGTON
GOVERNMENT PRINTING OFFICE
1923**

CONTENTS.

Review of decisions of courts and opinions affecting labor, 1922.	
	Page.
Introduction.....	1, 2
Opinions of the Attorney General.....	3
Decisions of the courts.....	3-56
Aliens.....	3
Contract of employment.....	3-5
Enforcement.....	3
Breach.....	4
Construction.....	4
Clearance cards.....	5
State regulation of employment, etc.....	5
Interference with employment.....	5
Wages.....	6-10
Assignment.....	6
Mode and time of payment.....	6, 7
Bankruptcy.....	7
Rates.....	7, 8
Minimum wage.....	8
Garnishment.....	9
Mechanics' liens.....	9
Seamen.....	9, 10
Hours of labor.....	10
Municipality, etc., engaging in business.....	10
Cost of living.....	10, 11
Relief associations.....	11
Employment of children.....	11
Mine regulations.....	11
Railroads.....	12
Employers' liability.....	12-22
Assumption of risk.....	12, 13
Negligence.....	13-16
Course of employment.....	16
Employees.....	16, 17
Children illegally employed.....	17-19
Admiralty.....	19
Railroads.....	19-21
Interstate commerce.....	19, 20
Defenses.....	20, 21
Release.....	21, 22
Occupational diseases.....	22
Liability of State.....	22

Decisions of the courts—Concluded.	Page.
Workmen's compensation-----	22-47
Coverage-----	22-24
Extraterritoriality-----	24
Aliens-----	24, 25
Hazardous employments-----	25, 26
Admiralty-----	26, 27
Railroad service-----	27, 28
Election-----	28
Notice and claim-----	28-30
Awards-----	30-33
Review-----	33
Accident-----	33-35
Injury arising out of and in the course of employment-----	35-39
Injury by third party-----	39
Disability-----	40, 41
Disfigurement-----	41, 42
Minors illegally employed-----	42
Willful acts-----	42-44
Dependency-----	44, 45
Death without dependents-----	45
Insurance-----	45, 46
Attorneys' fees-----	46
Medical and surgical aid-----	46, 47
Labor organizations-----	47-56
Collective agreements-----	47, 48
Conspiracy-----	48
Strikes-----	48-51
Picketing-----	51.
Interference with employment-----	51, 52
Monopolies-----	52
Injunction-----	52, 53
Contempts-----	53, 54
Rules, etc-----	54, 55
Industrial Workers of the World, etc-----	55, 56
Opinions of the Attorney General.	
Child labor—child-labor tax law—effectiveness in Territories-----	57
Hours of labor of women—Federal law—public employees—female employees in District-----	57, 58
Decisions of courts affecting labor.	
Aliens—contract laborers—draftsmen—learned professions (Ex parte Aird)-----	59, 60
Child labor—child-labor tax law—constitutionality of statute—taxation—regulation (Bailey v. Drexel Furniture Co.)-----	60-62
Contract of employment:	
Agreement between relatives—presumption (Baker v. Lyell)-----	62, 63
Breach—	
damages (Granow v. Adler)-----	63-65
damages (Safford v. Morris Metal Products Corp.)-----	65, 66
enforcement by injunction (Sherman v. Pfefferkorn)-----	66-68
injured workman—agreement for life employment (Fisher v. John L. Roper Lumber Co.)-----	68, 69
"straight time"—sickness during employment (Red Cross Mfg. Co. v. Stroop)-----	70

	Page.
Contract of employment—Concluded.	
Enforcement—power of courts—prior rights among employees (<i>Chambers v. Davis</i>)	71, 72
Engaging in similar business—injunction (<i>Federal Laundry Co. v. Zimmerman</i>)	72, 73
Cost of living—production and distribution of coal—prices—Lever Act—constitutionality (<i>Ford v. United States</i>)	73, 74
Employer and employee—service letter—constitutionality of statute (<i>Prudential Insurance Co. of America v. Cheek</i>)	75-77
Employers' associations:	
Monopolies—antitrust laws—"Commodity of common use"—foundations for buildings (<i>People v. Amanna</i>)	78, 79
Monopolies—relief (<i>Overland Publishing Co. v. Union Lithograph Co.</i>)	79-81
Employers' liability:	
Admiralty—	
hydroaeroplane a vessel within admiralty jurisdiction (<i>Reinhardt v. Newport Flying Service Corp. et al.</i>)	81, 82
jurisdiction—lake fisherman (<i>Foppen v. Peter J. Fase & Co.</i>)	82, 83
negligence—violation of statutory prohibition (<i>Wilks v. United Marine Contracting Corp.</i>)	83-85
Assumption of risk—	
contributory negligence (<i>Belkin v. Skinner & Eddy Corp.</i>)	85, 86
latent danger—duty of employer (<i>Hines, Director General of Railroads, v. Thurman</i>)	86, 87
negligence—failure to provide safety devices—goggles (<i>Emerson Brantingham Co. v. Grove</i>)	87, 88
safe place (<i>Bingham Mines Co. v. Bianco</i>)	88, 89
safe place—impairment of health (<i>Newberry v. Central of Georgia Ry. Co.</i>)	89, 90
safe place and appliances—interstate commerce—company producing and transporting gas (<i>Smith v. United Fuel Gas Co.</i>) ..	90-92
Course of employment—	
accidental discharge of pistol (<i>American Ry. Express Co. v. Davis et al.</i>)	92, 93
injury to third party by employee—duty of selecting employees (<i>Davis v. Merrill</i>)	93, 94
intentional injury by foreman to employee (<i>Zaitz v. Drake-Williams Mount Co.</i>)	94, 95
Employee—temporary assistant of employee (<i>Baltimore & O. S. W. R. R. Co. v. Burtch</i>)	95-97
Employee—temporary assistant of employee—volunteer (<i>Early v. Houser & Houser</i>)	97, 98
Employment of children—	
interstate commerce—State regulation (<i>St. Louis-San Francisco Ry. Co. v. Conly</i>)	98, 99
misrepresentation of age—contributory negligence—receipt of compensation payments (<i>Volpe v. Hammersley Mfg. Co.</i>)	99, 100
misrepresentation of age—recovery for death (<i>International Agricultural Corp. v. Cobble</i>)	100, 101
street occupations—employment during school term (<i>Cincinnati Times-Star Co. v. Clay's Administrator</i>)	101, 102
violation of statute—contributory negligence—Independent contractor (<i>Waldron v. Garland Pocahontas Coal Co.</i>)	102, 103

Employers' liability—Continued.

Page.

Negligence—

charitable corporations—unlawful employment of minor (<i>Emery v. Jewish Hospital Assn.</i>)	104, 105
contributory negligence—duty of employer (<i>Mackay Telegraph-Cable Co. v. Armstrong</i>)	105
contributory negligence—guarding dangerous machinery—violation of ordinance (<i>Unrein v. Oklahoma Hide Co.</i>)	106, 107
contributory negligence—last clear chance (<i>Miller v. Canadian Northern Ry. Co.</i>)	107, 108
dangerous instrumentalities—volunteer—minor employee (<i>King v. Smart et al.</i>)	108, 109
dangerous machinery—statute requiring guards—"other establishment" (<i>Stoll v. Frank Adam Electric Co.</i>)	109, 110
effect of denial of compensation on suit for damages (<i>Katzenmaier v. Doeren</i>)	110, 111
employee of independent contractor—liability for injuries (<i>Craig v. Riter-Conley Mfg. Co.</i>)	111, 112
guard for dangerous machinery—injury to eye—purpose of statute (<i>Mansfield v. Wagner Electric Manufacturing Co.</i>)	112, 113
injury to employee of third party—joinder of subrogated employer—workmen's compensation (<i>Gentile v. Philadelphia & R. Ry. Co.</i>)	113, 114
occupational disease—workmen's compensation law (<i>Trout v. Wickwire Spencer Steel Corp.</i>)	114, 115
overexertion—rule of haste (<i>Jirmasek v. Great Northern Ry. Co.</i>)	115, 116
safe instrumentalities—safe place to work—youthful worker (<i>Sutton v. Melton-Rhodes Co. (Inc.)</i>)	116, 117
unguarded machinery—liability of landlord for injury to tenant's employee (<i>Tomlinson v. Marshall et al.</i>)	117-119

Railroad companies—

Federal statute—

assumption of risk—contributory negligence (<i>Outcalt v. Chicago, B. & Q. R. Co.</i>)	119, 120
assumption of risk—negligent act of fellow servant (<i>Reed v. Director General of Railroads</i>)	120, 121
employees' compensation act—alternative remedies—Panama Railway (<i>Panama R. R. Co. v. Minnix</i>)	121, 122
fraud—limitation (<i>Gauthier v. Atchison, T. & S. F. Ry. Co.</i>)	122, 123
interstate commerce—car repairer (<i>Richter v. Chicago, M. & St. P. Ry. Co.</i>)	124
interstate commerce—going to work (<i>Atlantic Coast Line Ry. Co. v. Williams</i>)	124, 125
interstate commerce—installing electric transformers (<i>Halley v. Ohio Valley Electric Ry. Co.</i>)	125, 126
negligence—attempted rescue—contributory negligence (<i>Bacon v. Payne</i>)	126, 127

Release—

infancy—effect (<i>Robison v. Floesch Construction Co.</i>)	127-129
infancy—fraud—question for jury (<i>Neversweat Mining Co. v. Ramsey</i>)	129-131
joint tortfeasors (<i>McNamara v. Eastman Kodak Co. et al.</i>)	131, 132

Employers' liability—Concluded.	Page.
State's liability—moral and equitable obligation—relief statute (Fairfield, State Auditor, <i>v.</i> Huntington)	132, 133
Workmen's compensation—negligence—injury by third person—parties to proceedings—railroads (Goldsmith <i>v.</i> Payne)	134, 135
Examination, licensing, etc., of workmen:	
Barbers—constitutionality of statute (Cooper <i>v.</i> Rollins)	135-137
Plumbers—constitutionality of statute (Trewitt <i>v.</i> City of Dallas) ..	137, 138
Hours of labor:	
Drug clerks—nine-hour day—penal statute construed (Ex parte Twing)	138, 139
Public works—regulation of wages—hours of service act—constitutionality of statute (State <i>v.</i> Tibbetts)	139, 140
Interference with employment—conspiracy—malice (Beardsley <i>v.</i> Kilmer)	140-142
Labor disputes:	
Industrial court—constitutionality of statute (State ex rel. Hopkins, Atty. Gen., et al., <i>v.</i> Howat et al.)	142
Railroad labor board—jurisdiction—powers (United States R. R. Labor Board et al. <i>v.</i> Pennsylvania R. R. Co.)	142-148
Labor organizations:	
Collective agreement—breach—injunction—application against employer and employee (Schwartz et al. <i>v.</i> Cigar Makers' International Union et al.)	148, 149
Collective agreement—violation by employers—injunction (Schlesinger <i>v.</i> Quinto)	149-153
Conspiracy—interference with performance of contract—injunction—bond to pay damages (Central Metal Products Corp. <i>v.</i> O'Brien et al.)	153-157
Conspiracy—liability for damages—torts of members—relation of general and local organizations (United Mine Workers of America <i>v.</i> Coronado Coal Co.)	157-165
Hostile attitude—anticipation of violence—injunction—use of army (Consolidated Coal & Coke Co. <i>v.</i> Beale)	165-167
Industrial Workers of the World—criminal syndicalism—membership as violation of law (People <i>v.</i> Roe)	167-169
Injunction—	
contempt—jury trial—Clayton Act (Cancee Creek Coal Co. <i>v.</i> Christinson)	169, 170
contempt—punishment (Campbell <i>v.</i> Motion Picture Machine Operators et al.)	171, 172
contempt—punishment—pardoning power (State ex rel. Rodd <i>v.</i> Verage)	172-175
parties—equitable rights and remedies (R. R. Kitchen & Co. <i>v.</i> Local Union No. 141, International Brotherhood of Electrical Workers)	175-177
Interference with employment—refusal to work for nonunion employer (Sheehan <i>v.</i> Levy et al.)	177-179
Monopolies—fixing price of products (Standard Engraving Co. <i>v.</i> Volz)	179-181
Picketing—	
injunction—acts of union workers (Keuffel & Esser <i>v.</i> International Association of Machinists)	181-183
ordinance against display of banner—constitutionality (Watters <i>v.</i> City of Indianapolis)	183, 184
termination of strike—injunction (Yates Hotel Co. <i>v.</i> Meyers) ..	184, 185

Labor organizations—Concluded.	Page.
Restraint of trade—injunction (<i>Campbell v. Motion Picture Machine Operators' Union of Minneapolis, Local 219</i>)	185-187
Revocation of charter—property rights (<i>Grand Lodge of International Association of Machinists v. Reba</i>)	187, 188
Rules—	
effect of waiver—status (<i>Bruns v. Milk Wagon Drivers' Union, Local 603</i>)	188, 189
expulsion of local from international union—injunction (<i>Bricklayers', Masons', and Plasterers' International Union of America, Local No. 7, v. Bowen</i>)	189-192
expulsion of members—right of petition (<i>Flynn v. Brotherhood of Railroad Trainmen</i>)	192, 193
payment for work done for union (<i>Moore v. Marine Firemen, Oilers, and Watertenders' Union of the Pacific</i>)	194, 195
Socialist party—workers' educational association—restriction of membership (<i>Workers' Educational Assn. v. Renner et al.</i>)	195, 196
Strikes—	
advertisement for new employees—constitutionality of statute (<i>Biersach & Neidermeyer Co. v. State</i>)	196, 197
advertisement for new employees—construction of statute (<i>Walter W. Oeflein (Inc.) v. State</i>)	197-199
“breach of good faith”—persuasion to break contract (<i>Rice, Barton & Fales Machine & Iron Co. v. Willard</i>)	200, 201
injunction—	
contempt—civil or criminal procedure (<i>Forrest v. United States et al.</i>)	201-204
interference with interstate commerce (<i>Danville Local Union No. 115 of United Brick and Clay Workers of America et al. v. Danville Brick Co.</i>)	204, 205
interference with interstate commerce (<i>Great Northern Railroad Co. v. Local Great Falls Lodge of International Association of Machinists, No. 287, et al.</i>)	205-208
interference with interstate commerce—Sherman Act—Clayton Act (<i>United States v. Railway Employees' Department of American Federation of Labor et al.</i>)	208-213
order of railroad labor board (<i>Portland Terminal Co. v. Foss et al.</i>)	213-216
property rights—interference of strikers (<i>Crane & Co. v. Snowden</i>)	216-218
public welfare—milk delivery (<i>Gottlieb v. Matckin</i>)	218
surrender of route books of drivers (<i>Borden's Farm Products Co. (Inc.) v. Sterbinsky</i>)	218-220
picketing—	
injunction—Anti-injunction law of Oregon—constitutionality (<i>Greenfield v. Central Labor Council of Portland and Vicinity</i>)	220-222
injunction—good will as property (<i>Robison v. Hotel and Restaurant Employees, Local No. 782</i>)	222-225
Mine regulations—washroom—exercise of option—constitutionality (<i>Commonwealth v. Beaver Dam Coal Co.</i>)	225, 226
Municipality engaging in business—coal and wood yard—constitutionality of statute—public purpose (<i>Central Lumber Co. v. City of Waseca et al.</i>)	227

	Page.
Railroads—shelters for workmen—paint-spraying machines—constitutionality of statute—injunction—criminal law (<i>Chicago & N. W. Ry. Co. v. Railroad and Warehouse Commission of Minnesota</i>)	227-231
Relief associations—taxation—"charitable purposes" (Board of County Commissioners of Chaffee County et al. <i>v. Denver & R. G. R. Co. Employees' Relief Assn.</i>)	231
State engaging in business—operation of coal mines—emergency (<i>Dakota Coal Co. v. Fraser</i>)	231-234
Trade secrets:	
Right of employees to engage in competitive business—injunction (<i>Fulton Grand Laundry Co. v. Johnson</i>)	234, 235
Use of list of customers—interference with employment—procuring breach of contract—injunction (<i>Shevers Ice Cream Co. v. Polar Products Co.</i>)	235-237
Wages:	
Assignment—	
absolute sale—construction of statute (<i>Tollison v. George</i>)	237, 238
constitutionality of statute—presentation of void assignment causing discharge—damages (<i>Alabama Brokerage Co. v. Boston</i>)	238, 239
usury laws—evasion by fraud (<i>Tennessee Finance Co. v. Thompson</i>)	239, 240
Bankruptcy—"employee"—"mechanic"—"workingman"—"laborer" (<i>Van Vlaanderen v. Peyet Silk Dyeing Corp.</i>)	240, 241
Bonus—rights of discharged employee (<i>Roberts v. Mays Mills</i>)	241, 242
Garishment—public officers—salaries—constitutionality of statute (<i>Cavender v. Hewitt et al.</i>)	243, 244
Mechanics' liens—manual labor—use of teams (<i>Messerail v. Dreyer</i>)	244, 245
Minimum wage law—constitutionality of statute—freedom of contract (<i>Children's Hospital of the District of Columbia v. Adkins et al.</i>)	245-254
Mode and time of payment—deduction for advance payment (<i>Princeton Coal Co. v. Dorth</i>)	254-256
Nonpayment—penalty—assignment (<i>Martin v. Going</i>)	256, 257
Nonpayment—penalty—effect of tender (<i>Robinson v. St. Maries Lumber Co.</i>)	257, 258
Rates—	
basis—jurisdiction of industrial court—enterprise operated at a loss (<i>Court of Industrial Relations v. Charles Wolff Packing Co.</i>)	258-261
city ordinance—constitutionality (<i>Jahn v. City of Seattle</i>)	261, 262
power of municipality—delegation of powers—constitutionality of ordinance (<i>Wagner v. City of Milwaukee et al.</i>)	262-264
power of railroad labor board—constitutionality of statute—recovery of wages (<i>Rhodes v. New Orleans Great Northern Ry. Co.</i>)	264-266
Seamen—	
contract of employment—fishermen—seaworthiness of vessel—labor certificates issued under duress (<i>Heino v. Libby, McNeill & Libby</i>)	267-269
liability of owner and master (<i>Everett v. United States</i>)	269-271
release—good cause for setting aside (<i>Brown et al. v. United States</i>)	271, 272
"strikers"—deserters—forfeiture of wages by desertion (<i>The M. S. Elliott</i>)	272, 273

Workmen's compensation:

Accident—	Page.
death from shock—weakened condition caused by acid poisoning—mental shock (<i>Klein et al. v. Len H. Darling Co.</i>).....	273, 274
heart disease (<i>Heider v. Luce Furniture Co.</i>).....	275
heart failure—findings of fact by board conclusive (<i>Busch v. Louisville Water Co. et al.</i>).....	275, 276
hernia—rules of commission (<i>Staker v. Industrial Commission et al.</i>).....	276, 277
occupational disease—fumes from molten brass (<i>General American Tank Car Corp. v. Weirick</i>).....	277, 278
overwork and strain (<i>Young v. Melrose Granite Co.</i>).....	278, 279
poisoning—dipping hand in poisonous solution (<i>Jeffreyes v. Charles H. Sager Co. et al.</i>).....	279, 280
Admiralty—	
construction of vessel (<i>Grant Smith-Porter Ship Co. v. Rohde</i>)	280, 281
construction of vessel—compulsory compensation statute (<i>Los Angeles Shipbuilding & Drydock Co. v. Industrial Accident Commission</i>)	282
diver laying submarine cable (<i>De Gaetano v. Merritt & Chapman Derrick & Wrecking Co.</i>).....	282, 283
insurance in State fund—contract (<i>West v. Kozer</i>).....	283-285
longshoreman unloading vessel (<i>State Industrial Commission v. Nordenholt Corp.</i>).....	285-287
Alien beneficiaries—treaty rights (<i>Frasca v. City Coal Co.</i>).....	287-289
Assault by foreman—willful injury—damages (<i>Perry v. Beverage</i>)	289, 290
Award—	
basis—loss of sight of one eye—earning capacity (<i>Abbott v. Concord Ice Co.</i>).....	290, 291
basis—loss of use of right arm—earning capacity (<i>Kerwin v. American Ry. Express Co.</i>).....	291
basis of computation (<i>Georgia Casualty Co. v. Darnell</i>).....	291, 292
death of beneficiary—vested rights (<i>State Accident Fund v. Jacobs</i>)	292, 293
disability followed by death—deductions—payments to children (<i>Nupp v. Estep Bros. Coal Mining Co.</i>).....	293, 294
lump sum—jurisdiction of courts (<i>Employers' Indemnity Corp. v. Woods</i>).....	294-296
power to revoke—rights of two wives—death of claimant before award (<i>Industrial Commission of Ohio v. Dell et al.</i>).....	296-299
reopening and review—power of commission (<i>Terry v. General Electric Co.</i>)	299, 300
total weekly wages—two employers (<i>Bamberger Electric R. R. Co. v. Industrial Commission of Utah</i>).....	300, 301
Award for specific injury—death of beneficiary—vested rights (<i>Wenning et al. v. Turk et al.</i>).....	301, 302
Claim—	
limitation—	
finding of court (<i>Ex parte Sloss-Sheffield Steel & Iron Co. [Steagall case]</i>).....	302, 303
injury arising out of and in course of employment—assault—second injury—total disability (<i>Guderian v. Sterling Sugar & Ry. Co. (Ltd.)</i>).....	303, 304

Workmen's compensation—Continued.

Claim—Concluded.

limitation—Concluded.

Page.

mental incapacity (<i>Lough v. State Industrial Accident Commission</i>)	305
settlement (<i>Hopper v. Wilson & Co.</i>)	305, 306

notice—

absence of prejudice (<i>In re Troutman, In re Kirk</i>)	306, 307
actual knowledge—reasonable excuse (<i>Patton Hotel Co. v. Milner</i>)	307, 308
prejudice—medical service (<i>Lawson v. Wallace & Keeney</i>)	308-311
reliance on promise to settle—liberal construction—estoppel (<i>Mulhall v. Nashua Mfg. Co.</i>)	311-312

Coverage—

business for gain—religious corporation—grave digging (<i>Dillon v. Trustees of St. Patrick's Cathedral</i>)	312, 313
farmers as miners (<i>Hanna et al. v. Warren</i>)	313, 314
"four or more workmen"—employee working separately (<i>Ward & Gow v. Krinsky</i>)	314, 315
policemen—public officers (<i>Marlow v. Mayor and Aldermen of City of Savannah</i>)	315, 316
special officer—official (<i>Walker v. City of Port Huron</i>)	316
workmen regularly employed (<i>Jurman v. Hebrew National Sausage Factory et al.</i>)	316-318

Decedent without beneficiaries—

payment to State (<i>Cook v. West Side Trucking Co.</i>)	318
payment to State—constitutionality of statute—powers of commission (<i>Yosemite Lumber Co. v. Industrial Accident Commission of California</i>)	318, 319

Dependency—

aged father—trustee (<i>Tintic Milling Co. v. Industrial Commission of Utah</i>) [<i>Christensen case</i>]	319, 320
child living with grandmother—statutory presumption as to dependency (<i>Madera Sugar Pine Co. v. Industrial Accident Commission of California</i>)	320, 321
member of family—absence of marriage relationship (<i>Federal Mutual Liability Insurance Co. v. Industrial Accident Commission</i>)	321, 322
member of family—aliens (<i>Passini v. Aberthaw Construction Co.</i>)	322, 323
member of family—cousins (<i>Holmberg v. Cleveland-Cliffs Iron Co.</i>)	323, 324

Disability—death—status of claims—notice (<i>Hill v. Ancram Paper Mills</i>)	324-326
--	---------

Disability after return to work—business depression (<i>Johnson's case</i>)	326, 327
---	----------

Election—

notice to employees (<i>Producers' Oil Co. v. Daniels</i>)	327, 328
original acceptance binding on subsequent employment (<i>Size-more v. Beattyville Co.</i>)	328, 329

Workmen's compensation—Continued.

Employee—	Page.
domestic employment—hotel service (<i>Barres v. Watterson Hotel Co.</i>)	329, 330
officer of corporation—stockholder (<i>Southern Surety Co. v. Childers</i>)	330, 331
partner—estoppel by contract (<i>Employers' Liability Assurance Corp. (Ltd.) v. Industrial Accident Commission et al.</i>)	331, 332
volunteers (<i>Hogan v. State Industrial Commission</i>)	332, 333
when relationship begins and ends—"upon the premises" (<i>Ross v. Howieson et al.</i>)	333, 334
working director of company—dual status (<i>Millers' Mutual Casualty Co. v. Hoover</i>)	334, 335
Employers' liability—	
"lawful requirement"—construction of statute (<i>Patten v. Aluminum Castings Co.</i>)	335-338
railroad companies—Federal statute—interstate commerce—repair of locomotive (<i>Industrial Accident Commission v. Payne</i>)	338-340
railroad companies—Federal statute—option of remedies (<i>Dahn v. Davis</i>)	340, 341
railroad companies—interstate and intrastate commerce—conclusiveness of award (<i>Williams v. Southern Pacific Co.</i>)	341-343
Exclusiveness of remedy—rights of parents (<i>Wall v. Studebaker Corp.</i>)	343
Extraterritoriality—	
what law controls—place of making contract (<i>Darsch v. Thearle Duffield Fire Works Display Co.</i>)	343, 344
what law controls—place of making contract (<i>Hulswit v. Escanaba Mfg. Co.</i>)	344, 345
Hazardous employment—	
employee at logging camp (<i>Dewey v. Lutchter-Moore Lumber Co.</i>)	345
janitor in printing establishment—notice—commutation to lump sum (<i>Okmulgee Democrat Pub. Co. v. State Industrial Commission of Oklahoma</i>)	346, 347
power of commission to declare work extrahazardous—delegation of legislative authority (<i>State v. Bayles et al.</i>)	347-349
Injury—	
disease—typhoid fever (<i>Industrial Commission v. Cross</i>)	349, 350
disease—typhoid fever (<i>Wasmuth-Endicott Co. v. Karst</i>)	350, 351
disfigurement—crooked finger (<i>Frank W. Williams Co. v. Industrial Commission et al.</i>)	351, 352
disfigurement—Independent compensated injury (<i>Seneca Coal Co. et al. v. Carter et al.</i>)	353
hernia—recurrence of disability—recourse against prior employer (<i>Gaglione's case</i>)	353, 354
preexisting disease (<i>Centralia Coal Co. v. Industrial Commission et al.</i>)	354, 355
preexisting disease—excitement by inhaling gas (<i>Tintic Milling Co. et al. v. Industrial Commission of Utah et al.</i>) [<i>Snyder case</i>]	355-357
Injury arising out of and in the course of employment—	
act of humanity (<i>Sichterman v. Kent Storage Co. et al.</i>)	357, 358
bite by mad dog (<i>Chandler v. Industrial Commission of Utah</i>)	358, 359

Workmen's compensation—Continued.

Injury arising out of and in the course of employment—Concluded.	Page.
chief engineer doing other work (<i>Wilson v. Dakota Light & Power Co.</i>).....	359
death by shooting—action without authority (<i>Chicago & Alton Railroad Co. v. Industrial Commission</i>).....	359, 360
death from drowning in preparing to wash (<i>Tennessee Chemical Co. v. Smith et ux.</i>).....	360, 361
drinking ice water while in heated condition (<i>Gilliland v. Edgar Zinc Co.</i>).....	361
faint following inoculation (<i>Freedman v. Spicer Mfg. Corp.</i>).....	362
fight between employees (<i>Taylor Coal Co. v. Industrial Commission</i>).....	362, 363
fight between employees—injury to innocent employee (<i>Gavros' case</i>).....	363, 364
going from work (<i>Clifton v. Kroger Grocery & Baking Co. et al.</i>).....	364, 365
horseplay (<i>Lee's case</i>).....	365, 366
horseplay (<i>Stark v. State Industrial Accident Commission</i>).....	366, 367
injury by fire—disobedience of orders (<i>Kraft v. West Hotel Co.</i>).....	367, 368
murder by employee (<i>Scholtzhauer v. C. & L. Lunch Co.</i>).....	369
street risks—stabbing by madman (<i>Katz v. Kadans & Co. et al.</i>).....	370, 371
sudden impulse to save property (<i>Sebo v. Libby, McNeill & Libby</i>).....	371
violation of rules (<i>Hamberg v. Flower City Specialty Co.</i>).....	371, 372
Injury arising out of employment—	
death by fall due to disease—proximate cause—willful and serious misconduct (<i>Gonler v. Chase Companies</i>).....	372, 373
death due to storm—negligence (<i>Merrill v. Penasco Lumber Co. et al.</i>).....	374, 375
Injury by third party—	
choice of remedies (<i>Bristol Telephone Co. v. Weaver</i>).....	375, 376
employee's right to sue (<i>Whalen v. Athol Mfg. Co.</i>).....	376, 377
subrogation—constitutionality of statute—construction (<i>City of Taylorville v. Central Illinois Public Service Co.</i>).....	377-379
subrogation of insurer (<i>Hartford Accident & Indemnity Co. v. Englander</i>).....	379, 380
Injury sustained in the course of employment—	
death from act of robbers (<i>Lumbermen's Indemnity Exchange et al. v. Vivier</i>).....	380, 381
horseplay—unintentional shooting (<i>United States Fidelity & Guaranty Co. v. Cassell</i>).....	381, 382
Insurance—	
constitutionality of statute—prescribing form of insurance policy (<i>Travelers Insurance Co. v. Industrial Commission</i>).....	382-384
failure to insure (<i>People v. Donnelly</i>).....	384, 385
failure to insure—employers' liability—presumptions (<i>Martin v. Chase</i>).....	385, 386
rates—retroactive operation of law (<i>Builders' Limited Mutual Liability Insurance Co. v. Compensation Insurance Board</i>).....	386, 387
State fund—payment of premiums—occupation enjoined—contempt of court (<i>State v. McCoy</i>).....	387, 388
Lawyers' fees—right to regulate (<i>Gritta's case</i>).....	388-390

Workmen's compensation—Concluded.

	Page.
Medical and surgical aid—	
choice of physician (<i>Smith v. State Industrial Accident Commission</i>)	390, 391
contract with doctor—jurisdiction of commission (<i>Associated Employers' Reciprocal v. State Industrial Commission</i>)	391, 392
purposes of industrial compensation (<i>Union Iron Works v. Industrial Accident Commission of California</i>)	392, 393
refusing operation (<i>Bronson v. Harris Ice Cream Co.</i>)	393, 394
refusing operation (<i>Frost v. United States Fidelity & Guaranty Co.</i>)	394, 395
refusing operation—choice of physician (<i>Newhall Land & Farming Co. v. Industrial Accident Commission</i>)	395-397
Minor illegally employed—	
"employee" (<i>Galloway et al. v. Lumbermen's Indemnity Exchange et al.</i>)	397, 398
"employee" (<i>Grand Rapids Trust Co. v. Petersen Beverage Co.</i>)	398, 399
"employee" (<i>Indiana Manufacturers' Reciprocal Assn. et al. v. Dotby</i>)	399
statute held applicable (<i>Garcia v. Salmen Brick & Lumber Co.</i>)	399-401
suit for damages—compensation agreement (<i>Delaney v. Philadelphia & Reading Coal & Iron Co.</i>)	401, 402
Partial disability—lump sum or periodical payments—amount (<i>Anderson v. Commonwealth Oil & Refining Co.</i>)	402, 403
Review—	
conclusiveness of commission's findings—limitation— incompetents (<i>Whitehead Coal Mining Co. v. State Industrial Commission</i>)	403, 404
power of court—independence of the judiciary—constitutionality of statute (<i>Otis Elevator Co. v. Industrial Commission et al.</i>)	404-406
Second injury—	
loss of second eye—"permanent loss"—total disability (<i>Heaps v. Industrial Commission et al.</i>)	406, 407
loss of second eye—specific and general provision (<i>Stevens v. Marion Machine Foundry & Supply Co.</i>)	407, 408
total or partial disability—notice of injury—constitutionality of statute (<i>Chicago Journal Co. v. Industrial Commission</i>)	408-410
Willful carelessness—remedy exclusive (<i>DeCarli v. Associated Oil Co.</i>)	410, 411
Willful misconduct—	
intention to injure (<i>Delthony v. Standard Furniture Co.</i>)	411
violation of law (<i>Fortin et al. v. Beaver Coal Co.</i>)	411, 412

BULLETIN OF THE U. S. BUREAU OF LABOR STATISTICS

NO. 344

WASHINGTON

SEPTEMBER, 1923

REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1922.

INTRODUCTION.

Prior to the year 1912 the series of bimonthly bulletins of the bureau (earlier the Department of Labor, now the Bureau of Labor Statistics) carried court decisions as a part of their contents. Beginning with that year, separate bulletins have been published, devoted exclusively to the presentation of the decisions of courts and the opinions of the Attorney General of the United States bearing on various phases of labor. These bulletins have been annual, except for the years 1919 and 1920, which were combined. They are numbered 112, 152, 169, 189, 224, 246, 258, 290, and 309.

It is not attempted to reproduce all cases of the classes used, but rather to present illustrative cases embodying the principles under consideration from time to time. No bulletin is therefore a complete treatise of the laws of labor, but, taking the series together, practically every form of legal question within the field is passed upon. The cases used are in the main from the State courts of last resort and the Federal courts, though in some instances cases from courts of appellate but not final jurisdiction are taken. This is notably true with regard to the Supreme Court of New York, which furnishes a number of important cases affecting labor organizations, the appellate court of Indiana determining many compensation cases, and a few other courts of secondary rank for which decisions are published by the West Publishing Co. in the National Reporter System. This system of reports is depended upon in the main for the cases presented, the Washington Law Reporter furnishing material for the District of Columbia, and advance sheets of the opinions of the Attorney General for the Department of Justice.

The material is abridged, the statement of facts being in the language of the editors, usually with quotations from the language

of the court setting forth the conclusions of law, though occasionally the findings are stated in a briefer form by the editors without quotations. The decisions used are for the most part those appearing in the publications named, during the calendar year covered. The present bulletin presents material as follows:

Opinions of the Attorney General, volume 33, page 107, to volume 34, page 395.

Supreme Court Reporter, volume 42, page 66, to volume 43, page 99.

Federal Reporter, volume 275, page 881, to volume 284, page 304.

Northeastern Reporter, volume 133, page 1, to volume 137, page 176.

Northwestern Reporter, volume 185, page 353, to volume 190, page 784.

Pacific Reporter, volume 202, page 1, to volume 210, page 496.

Atlantic Reporter, volume 115, page 369, to volume 118, page 768.

Southwestern Reporter, volume 234, page 721, to volume 244, page 1119.

Southeastern Reporter, volume 109, page 625, to volume 114, page 624.

Southern Reporter, volume 90, page 1, to volume 93, page 927.

New York Supplement, volume 190, page 865, to volume 196, page 768.

Washington Law Reporter, volume 50.

The year has been unusually fruitful of important decisions. The Supreme Court of the United States has had before it questions involving the status and liability of labor organizations, as in the *Coronado* case; the powers of the Railroad Labor Board have received their first authoritative definition in the case of the *Pennsylvania Railroad v. The Railroad Labor Board*; and the minimum wage law of the District of Columbia and the child labor tax law have been declared unconstitutional. The status of maritime and quasi maritime workers continues to be a subject of discussion, while that of railroad employees affords an undiminished stream of cases uncertainly moving between the boundaries of interstate and intrastate determination. The upholding of the "service letter" laws of Missouri and Oklahoma sets at rest the power of the State to require a statement of the cause of discharge on the termination of employment—a point on which State courts of last resort have differed.

The accumulation of precedents naturally suggests the settlement of certain principles and an indication of direction for legislation; but an occasional reversion to authorities supposedly discredited tends to disturb the course of this desirable attainment.

OPINIONS OF THE ATTORNEY GENERAL.

Certain opinions of the Attorney General of the United States construing labor legislation, which would normally appear in the current bulletin were noted in Bulletin No. 309. In addition there were in 1922 a consideration of the applicability of the Federal child labor tax law to the Territories and the District of Columbia, despite its unconstitutionality in the States. The opinion was against the recognition of the law in any jurisdiction. (Child labor tax law, p. 57.) A second opinion related to the application of hours of labor law for women of the District of Columbia to Federal employments, where again the answer was a negative. (Hours of labor law, p. 57.)

DECISIONS OF THE COURTS.**ALIENS.**

The only case presented under this head relates to the application of the contract labor law to a Scotch draftsman of expert qualifications, who came to this country on promise of employment and with his fare paid. He was found to be not a laborer but a man of technical attainments, exempt from the prohibitions of the immigration law. (Ex parte Aird, p. 59.)

CONTRACT OF EMPLOYMENT.**ENFORCEMENT.**

Though the rule is, as commonly stated, that no contract for the performance of personal services can be enforced as such, the effect may be indirectly produced by prohibiting an employee from rendering similar services to any other party. One form of this prohibition affects what are known as "trade secrets"; and the question arose in *Fulton Grand Laundry Co. v. Johnson* (p. 234) as to the right of a driver and collector of the laundry company to use a list of the former employer's customers for a competitive business. The Maryland Court of Appeals ruled that no prohibition was warranted, declaring that anyone interested could discover the patrons of the company without difficulty. The Supreme Court of Michigan took a very similar view in *Federal Laundry Co. v. Zimmerman* (p. 72); while the Supreme Judicial Court of Massachusetts (*Sherman v. Pfeffercorn*, p. 66) found a restrictive contract enforceable against a driver for a rival company. Fraud and misrepresentation were involved in a case involving similar conditions, passed upon by the Supreme Court of New York (*Shevers Ice Cream Co. v. Polar Products Co.*, p. 235), so that an injunction against certain practices was allowed.

BREACH.

A salesman engaged for one year at a weekly salary plus commission was allowed judgment for the entire year's wages and estimated commissions following his discharge after about one-third of the year had expired. (*Granow v. Adler*, p. 63.) Two conflicting methods of computing damages in such a case were discussed, with the reasons for adopting that followed by the courts of the State (Arizona). In *Safford v. Morris Metal Products Corp.* (p. 65) the Supreme Court of Errors of Connecticut found a valid contract for a fixed term and an unjustified breach by an employer, warranting an award of damages measured by the salary payable up to the date of bringing the suit.

A promise of lifetime employment as consideration for injuries was before the Supreme Court of North Carolina in *Fisher v. John L. Roper Lumber Co.* (p. 68). The agreement to pay a living wage was kept for a number of years, but when the cost of living advanced the wage was not increased. The company's denial of liability was held not good, and damages for its failure to carry out the agreement were allowed.

CONSTRUCTION.

The Appellate Court of Indiana ruled that time lost by sickness was not to be deducted where the contract called for a yearly wage payable monthly for "straight time" (*Red Cross Mfg. Co. v. Stroop*, p. 70), the matter being one within the power of the parties to the contract, and, while the term was ambiguous, it seemed apparent that the loss by sickness was not to be deducted.

In another case (*Chambers v. Davis*, p. 71) the Supreme Court of Mississippi declined to construe a contract between a railroad company and its employees as to prior rights, the majority holding that it was not the proper function of the court to arbitrate a labor dispute, though one justice dissented strongly, welcoming the opportunity to assist in the maintenance of stable industrial conditions by preventing disputes.

Under this head may also be noted a claim of a woman and her daughter for payment for domestic services rendered during several years to an elderly sister and aunt. (*Baker v. Lyell*, p. 62.) Admitting that the presumption is against wages for services rendered relatives, it was found that in the instant case a wage allowance should be granted.

CLEARANCE CARDS.

A regulation of the transactions involved in hiring and discharging labor has been made in a number of States in regard to the furnishing of a service letter or clearance card. The courts have taken conflicting positions with regard to these laws, but that of Missouri sustained the statute of that State, the Supreme Court of the United States taking a similar view. (*Prudential Insurance Co. v. Cheek*, p. 75.) The law applies to corporations, and was said to have been enacted to meet a practice developed by such corporations in the conduct of their business of hiring and discharging workmen. A similar statute of Oklahoma upheld by the courts of that State was similarly sustained by the Supreme Court on the same day. (*Chicago, R. I. & P. R. Co. v. Perry*, p. 77.)

STATE REGULATION OF EMPLOYMENT, ETC.

The power of the State to prescribe qualifications for persons offering themselves as qualified to do certain kinds of work was upheld in regard to barbers by the Supreme Court of Georgia (*Cooper v. Rollins*, p. 135) over the contention that the act was discriminatory and a denial of the equal protection of the laws. Similar approval was given to an ordinance of the city of Dallas, Tex., relating to examinations and licensing of plumbers. (*Trewitt v. City of Dallas*, p. 137.) Both pieces of legislation were sustained on account of their relation to the public health.

INTERFERENCE WITH EMPLOYMENT.

A novel case was before the Appellate Division of the Supreme Court of New York, involving an action for damages for loss of employment by a newspaper employee. (*Beardsley v. Kilmer*, p. 140.) Kilmer, proprietor of a patent medicine, had been a subject of newspaper attacks, and in retaliation had published a rival newspaper with such success as practically to drive the former publication out of existence, resulting in the loss of employment complained of. The court approved the dismissal of the complaint, finding nothing unlawful or actionable in the methods used by Kilmer, even if there was a "conspiracy" to carry out the end in view.

The Kansas Court of Industrial Relations sought to prevent the interruption of production by adjusting labor controversies without recourse to strikes. Violation of several injunctions issued in connection with the administration of this law was followed by punishment for contempt, whereupon the constitutionality of the act was challenged, but it was sustained by the Supreme Court of Kansas on the authority of earlier decisions. (*State v. Howat*, p. 142.)

WAGES.**ASSIGNMENTS.**

The constitutionality of an Oklahoma law regarding the loan of money to be secured by assignment of wages was upheld in *Alabama Brokerage Co. v. Boston* (p. 238), and the company was mulcted in damages for presenting an unlawful assignment to an employer, resulting in the discharge of the employee. A Tennessee law on this subject was enforced against a lending company, whose methods were found to be mere "shams and frauds" to cover up evasions of the statute. (*Tennessee Finance Co. v. Thompson*, p. 239.) On the other hand, the Supreme Court of Georgia released an alleged offender against the law of that State, finding that there had been an absolute sale of wages already earned and not a loan secured by future earnings. As no penalty existed for such a transaction, the arrest had been unwarranted. (*Tollison v. George*, p. 237.)

MODE AND TIME OF PAYMENT.

An Indiana law prescribes semimonthly payment of wages, another law requiring weekly payments, if demanded. It was held (*Princeton Coal Co. v. Dorth*, p. 254) that where the later law was not availed of by the employee, the employer who regularly made semimonthly payments might lawfully deduct 10 per cent from advances requested before the regular pay days. This deduction was said to be consideration for payment in advance of the date regularly observed, and the employee's acceptance of the reduced sum was binding upon him as satisfaction for the wages due.

A California law makes wages payable within 72 hours after the termination of employment, with a penalty of a continuation until paid or sued upon, but for not more than 30 days. Several men had assigned their wages to one man for collection, who sued for the total amount plus continuances for 30 days. As the suit was brought about 20 days after the debts accrued, the allowance of a 30-day penalty was held improper, and the legality of the assignments was questioned for lack of proof that they had been made in writing. The date of the assignment would also be of the essence, as no penalty would accrue to the assignee after the assignment by the wage-earner. (*Martin v. Going*, p. 256.) A penal statute of Idaho relative to the nonpayment of wages was construed in the case of *Robinson v. St. Maries Lumber Co.* (p. 257). Here there was a refusal of checks by a bank, but tender of the wages was made about a week later. This was rejected because the penal additions were not also tendered, and in a suit it was attempted to recover both wages and penalty up to the current date. The supreme court of the State held

that the effect of the tender of the wages alone had been to stop the accrual of the penalty, but that the workmen were entitled to the wages earned and to the penalty accruing up to the date of the original tender.

BANKRUPTCY.

It is quite generally provided that employees defined as workmen or laborers shall be entitled to a preference of the wages due them in case of the bankruptcy of the employer. Such provision was held not to avail the manager and supervisor of an establishment who with his wife was the sole owner of the stock of the employing corporation and whose weekly salary of \$200 might absorb the greater part of the assets to the exclusion of other creditors. (*Van Vlaanderen v. Peyet Silk Dyeing Corp.*, p. 240.)

RATES.

The Kansas Court of Industrial Relations was authorized to determine a suitable wage for the industries placed under its jurisdiction. A packing company declined to accept a prescribed scale, claiming that the court was without power to fix rates, and that the company had been operating at a loss, so that it was unable to meet the advances made by the order. The supreme court of the State found in favor of the validity of the order and that due process had been observed in the matter of jurisdiction in respect of the wage rate, but that certain employment conditions on which the industrial court had acted were not within its power to fix under the existing circumstances. (*Court of Industrial Relations v. Charles Wolff Packing Co.*, p. 258.) As to the ability of the company to pay the wages fixed the court found the necessities of the employees to be of the first consideration, and while employers are entitled to a fair return it must not be at the expense of the worker.

An ordinance of the city of Seattle, Wash., directs the payment of not less than the current rate of wage by contractors doing work for the city, and in any event not less than \$2.75 per day. Another ordinance directed the city to pay fixed amounts as a maximum for beginners and for those of some experience. Contractors were found guilty of paying less than the rate fixed by the city, but contended that there had been an unreasonable and unlawful fixing of rates and delegation of power to heads of departments. These contentions were rejected by the supreme court of the State and the constitutionality of the ordinance upheld, so that the judgment against the contractors was affirmed. (*Jahn v. City of Seattle*, p. 261.) Upon the other hand an unlawful delegation of power was found to be attempted by an ordinance of the city of Milwaukee,

which directed in effect that union rates should be paid; and while the council had in form adopted a schedule by its own action, in reality it had intrusted the matter to labor organizations. Such conduct was declared to be an abdication of legislative authority and an unlawful attempt to delegate it to others. (*Wagner v. City of Milwaukee*, p. 262.)

A decision which presumably led to a settlement of the case under consideration, but which would seem to be overruled by a later decision of the Supreme Court of the United States (p. 148) is one in which the Supreme Court of Mississippi declared that the United States Railroad Labor Board had the authority to fix wages, its decision being binding upon the employing company. (*Rhodes v. New Orleans G. N. R. Co.*, p. 264.)

Though not falling strictly under this head, there may be considered here a case in which the enforceability of a promise of a bonus was before the court. (*Roberts v. Mays Mills*, p. 241.) A cotton mill offered a 10 per cent bonus at the end of a year for all who would render continuous service from the date of the offer. A discharge without sufficient cause was held not to void the right of the workmen to claim the bonus for the period of the service actually rendered, even though it did not extend to the date proposed for its payment.

MINIMUM WAGE.

The minimum wage laws of the United States, some 15 in number, relate to the employment of women and minors. Several have been upheld by the State courts of last resort, but the Court of Appeals of the District of Columbia took the opposite view in *Children's Hospital v. Adkins* (p. 245). The act of Congress creating a minimum wage board for the District of Columbia was said not to be a proper exercise of the police power and was a violation of the fifth and fourteenth amendments protecting the freedom of contracts. The case was appealed to the Supreme Court, and the finding of unconstitutionality was there upheld by five justices. (*Adkins v. Children's Hospital*, p. 249.) The reasons given in the Supreme Court were much the same as below; the statement was also made that there was no causal connection between the employers' business and the requirement for the payment of the wages fixed by the board. Admitting that the hours of labor of women might be regulated, it was held that their contractual and political equality with men rendered inappropriate any attempt to restrict the freedom of contract in regard to wages. Vigorous dissenting opinions were presented by three justices.

GARNISHMENT.

A Tennessee statute placing municipal officers and employees on the same basis as employees in private undertakings as to the garnishment of their wages was passed upon by the supreme court of the State. (*Cavender v. Hewitt*, p. 243.) Though the act was in direct contravention of the common law as previously construed in the State, it was held to be valid as against various contentions of unconstitutionality offered.

MECHANICS' LIENS.

Mechanics' lien laws are enacted for the protection of the earnings of workers on practically all kinds of chattel and real property. A Minnesota statute gives a lien for "manual labor or other personal service" in logging. This was construed to cover not only wages but the contract earnings of a man and his team used in performing a piece of work under a contract for the services of team and teamster. (*Messerall v. Dreyer*, p. 244.)

SEAMEN.

Special rules of law as well as special legislation apply to seamen's contracts. A ship libeled for salvage was subjected to intervening libels to secure the wages of seamen. Their claims were given preference, and when the proceeds of the sale of the ship were not sufficient to pay their claims the owner and the master were held to be liable in the order named. (*Everett v. United States*, p. 269.)

Where the employer refused to pay wages due unless a release was signed for a statutory claim the court held that the release obtained under compulsion was not valid, being made a condition precedent to the receipt of amounts indisputably owed. (*Brown v. United States*, p. 271.) Leaving the service of a vessel at the solicitation of strikers was found to be desertion in the case of a part of a crew which had failed to conform with the requirements of the law as to demands for the payment of wages, the result being that they forfeited the balance of earnings which were to their credit before leaving the service. (*The M. S. Elliott*, p. 272.)

A situation contrasting with that in the *Brown* case above developed in a crew of seamen and fishermen engaged for service in Alaskan waters. The contract was for the season from Seattle and return. The ship sprang a leak on the way out but was repaired, and the trip was made in safety. However, the men agreed among themselves that they would not sail the vessel back, and, though it was certified to be safe by various inspectors, the refusal persisted. A suit to recover the wages claimed resulted in their defeat, the men

being found to have deserted and abandoned the ship without just cause, thereby forfeiting the unpaid wages. (*Heino v. Libby, McNeill & Libby*, p. 267.)

HOURS OF LABOR.

An Oklahoma statute fixes eight as the hours of labor to constitute a day's work. On public works of the State or municipality, wages must be at the current rate in the vicinity. Parties convicted of violating this law contended that it unlawfully interfered with the right to contract, but it was held by the court of criminal appeals to be valid. (*State v. Tibbetts*, p. 139.)

A California law fixes the hours of labor of drug clerks, limiting them to nine per day for persons engaged in selling at retail drugs and medicines and in compounding prescriptions. An employer sentenced for a violation of this act had his sentence reversed on the ground that the employee had actually sold drugs and medicines and compounded prescriptions for about two hours, the balance of the time being spent in selling cigars, candies, soft drinks, etc. The court ruled that as a penal statute it must be strictly construed, and if the employee was not engaged more than nine hours in the employments named in the law, it was not violated. (*Ex parte Twing*, p. 138.)

MUNICIPALITY, ETC., ENGAGING IN BUSINESS.

The city of Waseca, Minn., is authorized by its charter to establish a municipal coal and wood yard for its citizens. The right to do so was challenged on the ground that taxation for other than public purposes would be involved in the maintenance of the business. The supreme court held that the objection was without force in view of its opinion that the establishment of the yard was a public purpose in which the city might lawfully engage. (*Central Lumber Co. v. City of Waseca*, p. 227.)

The power of a State to act in emergency induced by disputes between owners and workmen in essential industries was challenged in the case, *Dakota Coal Co. v. Fraser* (p. 231). The United States district court declined to intervene where the operation of lignite mines was undertaken by the State of North Dakota as a means of relief from great and imminent suffering. After the question had become moot by reason of the termination of the emergency, the denial of the injunction was vacated by the circuit court of appeals, leaving the company free to prosecute the matter further if it desired.

COST OF LIVING.

The emergency war measure known as the Lever Act was invoked in the case of a dealer charged with selling coal at a price involving

profits in excess of those allowed by the act. (*Ford v. United States*, p. 73.) Conviction in the trial court was upheld by the United States Court of Appeals over contentions that the act deprived of property without due process of law and was not sufficiently explicit in its terms. This case was distinguished from the *Cohen* case noted in Bulletin 309, page 72, in which one section of the above law was declared unconstitutional.

RELIEF ASSOCIATIONS.

The only case coming up for notice under this heading is one involving the status of a relief association organized by a group of railroad employees in the State of Colorado. The association owned a hospital and about three acres of land and claimed exemption from taxation on this property on the ground that it was owned and used for charitable purposes. This contention was not accepted by the court, the association managing the property purely for the advantage of its members and not as a charity. (*Board of County Commissioners v. Denver & R. G. R. Co. Employees' Relief Association*, p. 231.)

EMPLOYMENT OF CHILDREN.

Various phases of child-labor legislation were involved in cases under employers' liability and workmen's compensation as incidental to the redress of accidental injuries. An important case on the status of child-labor legislation as such was before the Supreme Court of the United States on questions of constitutionality. This was the so-called child-labor tax law, by which a tax was to be levied on the products of child labor under certain circumstances. The statute was declared unconstitutional as an attempt by the Federal Government to regulate the employment of children—a power that belongs to the State exclusively. (*Bailey v. Drexel Furniture Co.*, p. 60.)

MINE REGULATIONS.

A Kentucky statute of 1920 requires certain employers to provide wash rooms if 30 per cent of the number of their employees request the same. A mining company was indicted for failure to carry out the provision of this act and raised the question of its constitutionality. The contention was sustained by the Supreme Court on the ground that the act was not in itself an enforceable requirement, and delegated to groups of employees the right to call it into operation, in contravention of a specific provision of the constitution of the State. (*Commonwealth v. Beaver Dam Coal Co.*, p. 225.)

RAILROADS.

A number of States have recently enacted laws prescribing the erection of shelters for employees doing repair work on railroad cars, trucks, etc. Such a law of Minnesota was held unconstitutional in *Chicago & North Western Ry. Co. v. Railroad and Warehouse Commission* (p. 227). The basis of this finding was in part the indefiniteness of the act in its requirement as to standards of protection against "inclement weather"; also because the act contained a prohibition of the use of paint-spraying machines inside the work sheds. This provision was said to be unreasonable and purely arbitrary in view of the present ingredients of the paint used, and also in view of the fact that the State itself used such machines inside buildings; other contentions of the railroad company were found to be without weight, but these were fatal.

EMPLOYERS' LIABILITY.**ASSUMPTION OF RISK.**

Despite the very general enactment of compensation laws, a considerable number of cases still come before the courts, even in compensation States, involving suits for damages, either under the common law or its statutory modifications.

A riveter on construction work was given a staging narrower than that to which he had been accustomed, and in placing his foot behind him to brace his body against his riveting gun, he stepped off the staging and fell. His suit for damages was contested on the ground that his own carelessness had been the cause of his injury; or, if the staging should be found defective, he had assumed the risk. The court refused the contention of assumed risk, saying that the rapidity of the work and the concentration of attention took the employee out from under the rule of assumed risk, and as the employer had failed to furnish a safe place, he was liable in the case. (*Belkin v. Skinner & Eddy Corp.*, p. 85.)

The defense was effective in a case before the United States Circuit Court of Appeals, in which the death of a mine worker was caused by contact with an electric wire. It was said that his age and experience were such that it must be presumed that he appreciated the conditions and assumed the risk, so that no recovery of damages could be allowed. (*Bingham Mines Co. v. Bianco*, p. 88.)

A boiler maker's helper, engaged in a class of work with which he was familiar, received an injury to his eye and sued for damages, claiming that he did not receive proper instructions or warning of the danger. Goggles were sometimes used in such work, but none were furnished at this time. The company contended that the injured

man assumed the risks ordinarily incident to such work, and that it had no duty of warning of its dangers. The judgment of the Kentucky courts was to the contrary, damages being allowed. (*Hines v. Thurman*, p. 86.) The injured man was less successful in a case before the Supreme Court of Indiana, involving very similar circumstances, where a workman injured by a sliver of steel striking his eye recovered damages in the trial and appellate courts, but the judgment was reversed in the supreme court, the workman being charged with an assumption of the risks in the absence of specific instructions given by the employer as to the method of doing the work. To the charge of negligence against the employer for failing to give warning of the danger, it was said that there was no knowledge of the workman's ignorance, and a mere general order to do a piece of work could not be regarded as negligence in the circumstances. (*Emerson Brantingham Co. v. Grove*, p. 87.) Similarly unsuccessful was the plaintiff in a case before the Supreme Court of Appeals of West Virginia. (*Smith v. United Fuel Gas Co.*, p. 90.) This, too, was an eye injury, received by working with simple tools, in a position of ordinary safety. The possibility of the employer providing different implements did not charge him with negligence, as the implement furnished was one of customary use. The defenses of assumed risk and contributory negligence were therefore said to be available to the employer.

A very different phase of the question of assumed risk was involved in the case (*Newberry v. Central of Georgia Railway Co.*, p. 89) in which the United States Circuit Court of Appeals ruled in favor of a telegraph operator whose health was impaired as the result of a night's work in a leaky office car. The plaintiff entered on his work in the night, without an opportunity to inspect his surroundings, and suffered impairment of health on account of the resulting exposure. Under the circumstances, the defense of assumed risk was held not to apply.

NEGLIGENCE.

In all cases in which the employer is held liable for damages, negligence on his part must be shown. A few cases are noted under this heading, indicating the nature of the act held negligent, and the relation thereto of the customary defenses. In *Mackey Telegraph-Cable Co. v. Armstrong* (p. 105), the Court of Civil Appeals of Texas affirmed a judgment in favor of a workman injured by undertaking to lift a heavy box, on the assurance that two men could handle it. The failure to furnish a sufficient number of men, or to sufficiently instruct those employed as to the dangers involved in the work, was said to be such negligence as to charge the employer

with responsibility. Also, in a case before the Supreme Court of Missouri (*Unrein v. Oklahoma Hide Co.*, p. 106), the failure to comply with the statute requiring elevator shafts to be guarded was held to support a judgment against the employer. The defense of contributory negligence charged against the workman in this case was not allowed in view of the specific statutory provision which had been violated. In another Missouri case, involving the construction of the statute as to safety installations, certain establishments are specified, and the general term "other establishments" is added as indicating the places to which the law applies. An electric wringer on display in a store was found not suitably provided with guards, and the resulting injury was held to entail liability, the mercantile establishment being classed as one of the "other establishments" to which the law was applicable. (*Stoll v. Frank Adam Electric Co.*, p. 109.)

Another case involving the construction of a safety statute was before the Supreme Court of Missouri, an injury to the eye having taken place, due, as was claimed, to the failure of the employer to guard a polishing wheel. The law requires such wheels to be provided with hoods to carry off the dust so as to prevent its inhalation. No hood was provided, and particles from the wheel entered the workman's eyes. The failure to provide the hood was said not to be a violation of the statute, so far as the present injury was concerned, the object of the law being not to prevent eye injuries, but injurious inhalations. (*Mansfield v. Wagner Electric Manufacturing Co.*, p. 112.)

That the owner and landlord was the responsible party for injury resulting from an unguarded mangle was held in *Tomlinson v. Marshall* (p. 117). The mangle caused injury to an employee employed by the operator of a laundry taken over from the owner on a so-called lease. The plant was taken as a going concern, and the original operator and actual owner was held responsible for the injury. Another case in this group applies common-law principles, no applicable statute existing in the State. A pressure bar was dangerously near a driving belt, and a 15-year-old boy was seriously injured while using it. Damages were allowed because of the employer's negligence in furnishing an unsafe instrumentality for the use of a youthful workman. (*Sutton v. Melton-Rhodes Co.*, p. 116.)

Less successful was a brakeman who carelessly threw the wrong switch and walked down the track to which he had directed the locomotive by this action, thinking that he was walking alongside instead of on the track. His failure to exercise "reasonable care" in the circumstances was held to be such contributory negligence that

even if the employer could be said to be negligent no recovery could be had. (*Miller v. Canadian Northern Ry. Co.*, p. 107.)

The Supreme Court of Minnesota had before it a case in which compensation had been claimed but denied on the ground that the injury did not arise out of and in the course of employment. Claiming, nevertheless, that the employer was negligent, the injured workman sued for damages, and his employer contended that the finding in the compensation case was a bar to the action. It was held that compensation and liability rested on different grounds, and that a denial of compensation was not a bar to an action based on negligence. (*Katzenmaier v. Doeren*, p. 110.)

The relationship of the employee of an independent contractor to the plant in which he was at work was considered in *Craig v. Riter-Conley Mfg. Co.* (p. 111). An addition to the company's factory involved the employment of a carpenter under conditions affected by the principal's conduct of operations. A crane operator permitted his crane to strike the carpenter, giving no warning of its approach. This was held to be such negligence as to sustain a judgment in favor of the injured man, the defense of contributory negligence being disallowed.

Another case involving the relations of a third party was before the Pennsylvania Supreme Court, involving also a provision of the compensation law of the State. An iron company's employee was injured by the negligence of a railway company delivering stone to the iron company's plant. A compensation award against the employer was followed by a suit against the railroad company, the employer being joined in the action on account of his subrogation to certain rights of the plaintiff under the compensation law of the State. The railroad company objected, claiming that the provision of the compensation act was unconstitutional, but this the court disallowed, declaring that the railroad company was not concerned as to the recipient of the damages recovered from it, its liability being neither increased nor diminished by the terms of the compensation act. (*Gentile v. Philadelphia & R. Ry. Co.*, p. 113.)

In an Illinois case (*Goldsmith v. Payne*, p. 134), a workman was injured by the negligence of a third person, and sued such third person (a railroad company) for damages without recourse to his employer. The railroad company contended that it, the employer, and the workman were all three under the compensation act so that no action for damages would lie. It was ruled that the compensation act authorized action for damages where the injury was due to the negligence of a third party, so that it would not be said that the compensation law was the sole recourse of the injured man. Furthermore, though the workman was not engaged in interstate commerce, the railroad was, so that it could not, in view of the

Federal liability statute, come under the compensation law of the State, and therefore must answer to the action in damages.

Somewhat similar to the Armstrong case above (p. 13) is one in which the plaintiff claimed to have been injured by overexertion induced by an order to hurry. The workman was handling mail, and had an unusually heavy bag to load on an outgoing train. He had received the bag earlier in the day, and it was held that he had opportunity at that time to discover its excessive weight (about 35 pounds above standard). This charged him with such knowledge of the facts as would prevent the claim that the instructions to "hurry up" were responsible for his injury. (*Jirmasek v. Great Northern Ry. Co.*, p. 115.)

COURSE OF EMPLOYMENT.

The Supreme Court of Arkansas denied the liability of an employer in a case in which a young helper to a depot agent was accidentally shot by a pistol furnished by the express company to its agent, the shooting being a sequel to a series of playful acts in which the agent and the boy had taken part. The agent was said to be discharging no duty but acting voluntarily for purposes of his own, so that the employer would not be liable. (*American Railway Express Co. v. Davis*, p. 92.) Liability for intentional injury was also denied in a Nebraska case where a foreman struck and injured a discharged workman who in his anger at his discharge called the foreman a vile name. The assault was said to be not within the scope of the foreman's duties as disciplining workmen and maintaining order; so that while he himself might be held personally liable, the employer was, under the circumstances, free from liability. (*Zaitz v. Drake-Williams Mount Co.*, p. 94.)

Under this heading, involving a variation from the above, may be noted a case in which a workman inflicted fatal injuries on a member of the public with whom his duties naturally brought him into contact. The employee was a gatekeeper at a railroad crossing and was said to suffer from a form of insanity which made him easily incensed and dangerous while in such a condition. He opened the railroad gates under protest, though no train was near, and immediately fired on the party for whom the gates were opened, killing one member. The company was held liable on account of its lack of care in selecting a suitable person for the position. (*Davis v. Merrill*, p. 93.)

EMPLOYEES.

Whether or not the injured party was in the relation of employee was the decisive question in *Baltimore & O. S. W. R. Co. v. Burch* (p. 95), decided by the Supreme Court of Indiana. The conductor

of a freight train undertook, with the aid of his brakemen, to unload a heavy machine at a way station. His force being insufficient, he called on a bystander to assist, and in the course of the latter's compliance with the request he was injured. The company contended in response to Burtch's suit that he was not an employee, but the court held that the conductor was the responsible representative of the railroad, and that his action was binding, so that liability as to an employee existed. An opposite conclusion was arrived at in a Georgia case in which the manager of a cotton gin called on a patron to assist him in replacing a belt that had slipped. Both the trial court and the court of appeals classed the helper as a volunteer, denying that the employment relation existed in such a way as to create liability for his injuries. (*Early v. Houser & Houser*, p. 97.)

The principles of law applicable to volunteers were held to apply in the case of a youthful employee going outside the scope of his employment and committing an act which inflicted serious injury. The duties of a 12-year-old boy required him to go in and out of the tool shed of his employer in which dynamite was stored. Seeing a piece of dynamite that looked to the boy like a tool, he thought it needed polishing and applied it to a revolving grindstone, resulting in an explosion and serious injury. The employer contended that as the boy had undertaken a service outside the scope of his employment there was no liability, the boy being guilty of contributory negligence in his voluntary assumption of duties not devolved upon him. This contention the Supreme Court of Massachusetts upheld, saying that the employer owed him no duty, in his departure from the scope of his employment, in the absence of willful and wanton disregard of the employees' safety. (*King v. Smart*, p. 108.)

CHILDREN ILLEGALLY EMPLOYED.

Injuries to children employed in violation of the law as a rule result in judgments in favor of the injured child. Thus in *Waldron v. Garland Pocahontas Coal Co.* (p. 102), the Supreme Court of West Virginia held the company liable for the death of a 13-year-old boy who had been employed in a mine, the statute fixing the minimum age at 16 years. The boy had been employed but discharged, but later returned on an errand for an alleged independent contractor. He was told not to enter the mine, but did so, and in the course of the evening he received fatal injuries. The responsibility was held to be on the company, in spite of the warning, since it was a statutory duty to see that no child is either employed or permitted to work in any mine. A vigorously contested case in New Jersey likewise resulted adversely to the employer who had violated the law in permitting a minor to work at a cylinder printing press. The boy had misrep-

resented his age, presenting employment papers belonging to another, but this was held not to be an excuse, since the employer must assure himself of the identity of his employees and the person named in the papers, at his own peril. (*Volpe v. Hammersley Mfg. Co.*, p. 99.) The defense of contributory negligence was denied, since the legislature had given its judgment that children of this age were too young to enter into service of this type. The fact that the boy had received compensation payments was also said not to bar the suit for damages, since to do so would be to override the legislative policy of the State in regard to such employments.

In a case in which fatal injuries resulted, misrepresentation of age played an important part. A lad of unlawful age for employment was in the service of the same employer with his father, the employment having been entered upon on the father's representation that the boy was of legal age. The fact that the father, who sued for damages for his son's death, would be the sole beneficiary of any judgment in the case was an essential one in leading to the court's decision that a judgment for damages must be reversed. The father had been guilty of a misdemeanor in permitting his son to be employed, and of fraud in misrepresenting his age, and could not be allowed to profit by such conduct. (*International Agriculture Corp. v. Cobble*, p. 100.)

The statute limiting the age of employment was held not to be applicable in a case before the Supreme Court of Arkansas, where a boy under age was injured while working for a railroad company engaged in interstate commerce. (*St. Louis-San Francisco Ry. Co. v. Conly*, p. 98.) It was held that the State child labor law could not apply, since it would change the liability of the railroad company, which was fixed exclusively by the Federal liability statute, as the injury occurred in interstate commerce. Construction of the child labor law of Kentucky also prevented recovery in a case in which a father sued a newspaper company for the death of his son from pneumonia said to have been incurred while unlawfully employed in selling papers. It was ruled that the law did not apply, because, though employment was during the term of school, it was not during the school hours; furthermore, the law as to street trades was not applicable in a small place, but limited by its terms to cities of the first, second, and third classes. (*Cincinnati Times-Star Co. v. Clay's Admr.*, p. 101.)

A difficult question involving unlawful employment of minors was before the Court of Appeals of Kentucky, in a case of injury to a boy operating an elevator in a hospital. (*Emery v. Jewish Hospital Assn.*, p. 104.) He was under the legal age and was injured by the negligence of the employer. However, under the construction of law that exempts charities from liability for such injuries, no redress ex-

isted against the association as such. The individual employer, however, the agent of the association in hiring the boy, was said to be personally liable, both civilly and criminally.

ADMIRALTY.

The difficulty of determining the boundary between maritime law and legislation of the States determining the liability of employers is comparable largely to the question of interstate and intrastate employment in commerce. The New York Court of Appeals was called upon in *Reinhardt v. Newport Flying Service Corporation* (p. 81) to pass upon the status of a hydroplane. The plane was moored in navigable waters in New York Harbor, and a workman injured by it while it was there located put in a claim for compensation. This was allowed and approved by the lower courts, but on appeal it was held that the hydroplane while on the waters is a vessel, and the workman's rights are governed by maritime law rather than by State legislation. A similar conclusion was reached in regard to the claim of a fisherman on Lake Michigan, the Supreme Court of Michigan reversed an award of compensation on the ground that the fisherman, drowned 15 miles off shore, was engaged in maritime employment, so that the workman's compensation law did not apply. (*Foppen v. Peter J. Fase & Co.*, p. 82.)

A different conclusion was reached in a case before the Supreme Court of New York, Appellate Division, the case being one of a vessel moored to a dock in the city of New York, which was being painted. A scaffold furnished by the employers collapsed, and the injured workman sued to recover damages, the action turning on the question of whether the State safety appliance law governed, or whether the case was purely maritime. The court ruled that the employment was not such as to disturb the general features of maritime law, and that the State laws and judicial practices applied. (*Wilks v. United Marine Contracting Corp.*, p. 83.)

RAILROADS.

Interstate commerce.—The fact that Congress has enacted a liability statute for interstate commerce takes injuries to railroad employees outside the scope of the State compensation laws unless the service is found to be intrastate. The question as to the nature of the employment is frequently difficult to determine, but the number of decisions rendered by the United States Supreme Court has aided to clarify the situation. In *Richter v. Chicago, M. & St. P. Ry. Co.* (p. 124), the Supreme Court of Wisconsin held that a car repairer working on cars which had been brought from another State, situated

on a repair track for needed repairs, was engaged in interstate commerce, even though he had completed his work and was attempting to board a train to return to his home. A similar view was taken of a case in which the fireman of a switch engine was injured while on his way to work, which would involve the shifting of cars and making up and breaking up interstate freight trains. (*Atlantic Coast Line Ry. Co. v. Williams*, p. 124.)

A different set of circumstances surrounded the case of a workman engaged in installing electric transformers for an electric railway engaged in interstate commerce. His work was said to be the repair and maintenance of an instrumentality used in interstate commerce, so that though he was not directly engaged in the movement of trains, he was nevertheless within the terms of the act. (*Halley v. Ohio Valley Electric Ry. Co.*, p. 125.)

Under what law the action may be brought is a question of serious importance, as appeared in the case *Gauthier v. Atchison, T. & S. F. Ry. Co.* (p. 122). A workman injured in California while in the baggage room of the company asked for compensation under the State act, but the commission decided that it did not have jurisdiction, as the claimant was engaged in interstate commerce. Subsequently, a suit for damages was begun, the plaintiff claiming that the company had promised to settle and that he need not sue. When action was brought it was more than two years from the date of injury, so that by the terms of the Federal statute the right to sue had expired. A contention also raised was that the company had practiced fraud in causing the delay by its promise; but the court found that there was not sufficient ground for this claim and the case was dismissed.

More fortunate was the suitor in a case involving an employee of the Panama Railway. (*Panama Ry. Co. v. Minnix*, p. 121.) The injured man sued the company and recovered a judgment for injury caused by the employer's negligence. The company contended that as the United States employees' compensation act was made applicable it was exclusive; furthermore, that the railroad company could not be sued, as the United States was the sole owner. The latter fact was held not to bar the action, and the court held that *Minnix* had two remedies, one by suit and another by claim under the compensation law, either of which he might avail himself.

Defenses.—The Federal statute modifies the customary defenses, but does not abolish that of assumed risk. In *Outcalt v. Chicago, B. & Q. R. Co.* (p. 119) the defense was not allowed, however, where the company attempted to apply it so as to cover a risk not so obvious as to be readily observable, the question being one for the jury to decide. Contributory negligence was also apparently suggested, but the court pointed out that this did not bar recovery, but

merely reduced the damages if found to exist. The Supreme Court of the United States found it necessary to reverse a judgment of the Supreme Court of Pennsylvania, which had applied the principle of assumed risks to a case in which the injury resulted from the negligence of a fellow servant. The defense of fellow service being abrogated completely by the act, it could not be said that the workman had assumed the risk of a fellow servant's negligence. (*Reed v. Director General of Railroads*, p. 120.)

A liability statute necessarily bases recovery on the negligence of the employer. A section foreman who erroneously concluded that one of the workmen had thrown the wrong switch for an approaching train lost his life in an effort to reverse the switch so as to prevent a fast through train from being sidetracked, though it would probably have resulted in no serious injury to the train. No recovery was allowed, since though his life was lost in the effort to avoid damage to property, the rule that might otherwise exonerate him did not apply, as his conduct was rash and reckless. The improper switching of the train would not have injured him, and his conduct in running too close to the track was held to be the sole cause of his death. (*Bacon v. Payne*, p. 126.)

RELEASE.

The effect of a release signed by a minor was passed upon by the Supreme Court of Missouri in the case of *Robison v. Floesch Construction Co.* (p. 127). An inexperienced youth undertook to move about an unfamiliar piece of machinery in the night and lost a limb. A settlement was formulated and a "friendly suit" carried on before a justice of the peace, leading to an apparent settlement. On a subsequent suit this was set aside, both because the minor had a right to disaffirm such settlement and because the "suit" was found to be merely a screen for an overreaching adjustment of the injured boy's case. Minority was also involved in a case that came to the Supreme Court of Oklahoma, where the signature of an injured boy was secured while he was still suffering severely from the mental and physical consequences of the accident. Here again both minority and a total disregard by the company for the rights of the plaintiff led to a setting aside of the release that had been signed. (*Neversweat Mining Co. v. Ramsey*, p. 129.)

A third case under this heading involved joint wrongdoers, the owner and the contractor of a building being held chargeable with the responsibility of the death of a workman. The trials, reversals, and retrials of the case illustrate the difficulties that have attended liability suits throughout their history, the final result being that a paper signed on representation of the receipt of a charitable grant

and not a settlement of the claim was construed as binding in the sense claimed by the defendant company, and that a settlement with one of two joint tort-feasors barred action against the other. (*McNamara v. Eastman Kodak Co.*, p. 131.)

OCCUPATIONAL DISEASES.

The New York workmen's compensation act provides awards for injuries due to certain designated diseases of employment. In *Trout v. Wickwire Spencer Steel Corp.* (p. 114) the supreme court of the State held that an occupational disease incurred by the negligence of the employer, but not included in the list covered by the compensation law, would support an action for damages, the remedy being by common law, not affected by the statute mentioned.

LIABILITY OF STATE.

A specific appropriation to pay monthly pensions to an injured employee of the State was held by the Supreme Court of Arizona to be a valid enactment as meeting a moral or equitable obligation of the State, and not a gratuitous present or special legislation for a private purpose, over contentions to the contrary. (*Fairfield v. Huntington*, p. 132.)

WORKMEN'S COMPENSATION.

COVERAGE.

The restriction of the New York law to employments "for pecuniary gain" was held to bar the claim of a workman injured while digging a grave for a religious corporation, whose income must be expended only for charitable objects. (*Dillon v. Trustees of St. Patrick's Cathedral*, p. 312.) The same (New York) law was construed by the Supreme Court of the United States in respect of its provision making the law applicable where four or more workmen or operatives are in the service of the employer. This provision was held to extend the benefits of the law to all employees, including in the instant case a newspaper salesman working alone, immediate contact with the "four or more workmen" not being essential to inclusion (*Ward & Gow v. Krinsky*, p. 314). The same phrase was construed by the appellate division of the supreme court of the State, with particular consideration of the qualifying adverb "regularly," that court finding that a general utility man, who at times was a waiter, at times cook, and at times counter man, was nevertheless regularly employed and was a workman within the terms of the act. (*Jurman v. Hebrew National Sausage Factory*, p. 316.)

The customary exclusion of farmers from the operation of compensation laws did not avail in a case in which the owners of a farm employed workmen to mine and load coal from an outcrop on their farm, an injury in this undertaking being not "farm labor" as that term is generally understood, so that the injured man was entitled to compensation. (*Hanna v. Warren*, p. 313.)

The compensation law of Michigan excludes "any official of any city" from its provisions; but a temporary employee, hired to perform certain duties of the nature of a park policeman or watchman for a time, was held to be not such an official even though he took the constitutional oath required of all officers entering upon their duties. In spite of this suggestion of official relation, the position was found to be one created by contract, so that he was an employee of the city, and as such entitled to compensation for injury. (*Walker v. City of Port Huron*, p. 316.) Where a policeman holds his position under regular appointment the court of appeals of Georgia ruled that he was a public officer and not under contract, so that the relationship of employee necessary to a compensation claim did not exist. (*Marlow v. City of Savannah*, p. 315.)

The Supreme Court of Oklahoma ruled that the president and major stockholder of a corporation, who spent a part of his time in manual and mechanical labor of the company, was an employee so as to be entitled to the benefits of the insurance policy covering employees of the company. (*Southern Surety Co. v. Childers*, p. 330.) On the other hand, where a partner drawing no wages but sharing the profits equally with his copartner was injured while at work in a rock pit, it was held that the fact that he was named as the person to whom the insurance policy in behalf of employees should be paid stopped him from making claim as an employee, so that no compensation under the policy could accrue for his injury. (*Employers' Liability Assurance Corporation v. Industrial Accident Commission*, p. 331.) The opposite conclusion was reached by the commission of appeals of Texas where the superintendent and head miller, also one of the board of directors of the company, was killed while working in the mill. The rule was laid down that one occupying a dual position as officer and employee was entitled to the coverage of the act while acting as employee. (*Millers' Mutual Casualty Co. v. Hoover*, p. 334.)

The exclusion of domestic servants was pleaded in a case carried to the Court of Appeals of Kentucky in a case in which a maid in a hotel was injured in an elevator accident. Hotel work was said to be industrial rather than domestic, hotels being institutions of a business nature in which the services of a domestic are a mere incident. An action for damages would not lie therefore, but recourse

must be had to the compensation act. (*Barres v. Watterson Hotel Co.*, p. 329.)

A question involved in the case last named arose from the fact that the claimant was leaving the hotel to go home at the time that she was injured in the elevator. The court ruled that as leaving the hotel was a necessary part of her duties, this did not cease until she was off the premises of the employer. This principle is of general application, but did not extend to an employee in a dressmaking plant which occupied rooms in a large building. The employer was held not to be responsible for conditions in a hall remote from his workrooms, so that even if the employee was on her way to work she was not yet upon the premises of the employer so as to charge him with responsibility for compensation for her injuries. (*Ross v. Howieson*, p. 333.)

The loss of an arm by a farmer while rendering services at the request of the manager of a cotton gin did not justify an award of compensation as for injury to an employee, according to a decision of the Supreme Court of Oklahoma. (*Hogan v. State Industrial Commission*, p. 332.) The employment status did not exist, and the rule as to volunteers barred the award.

EXTRATERRITORIALITY.

The Appellate Court of Indiana had before it a case in which the injured workman and his employer were residents of another State, the work being under a contract made in that State. The grant of an award was appealed from, and the appellate court ruled that the Indiana law had no application, since "the State of Indiana can not regulate the conduct of citizens of foreign States. (*Darsch v. Thearle Duffield Fireworks Display Co.*, p. 343.) However, where a contract was made between a resident corporation and a citizen of the State, compensation was payable in accordance with the law of the State, even though the entire service to be rendered was outside its boundaries, according to a decision by the Supreme Court of Michigan. (*Hulswit v. Escanaba Mfg. Co.*, p. 344.)

ALIENS.

A case came before the Supreme Court of Errors of Connecticut involving the right of aliens under the law as it existed before 1921, which allowed nonresident alien dependents but one-half the normal benefits. A claimant residing in Italy appealed from an award made on this basis on the ground that the treaty between the United States and Italy guaranteed equal consideration with the residents of the United States. The treaty was construed as affording protection without regard to nationality, but not dealing with the ques-

tion of nonresidence. A citizen's beneficiaries residing abroad, if aliens, would be entitled to exactly the same benefits that an alien's beneficiaries would receive, so that the discriminatory provision was said not to violate the treaty as drawn. (*Frasca v. City Coal Co.*, p. 287.) The same court construed the law of the State on this subject where aliens were involved, but the beneficiary was a dependent sister living in New York City. The attempt of the employer to reduce the rate to one-half failed by reason of the court's ruling that the statutory reduction applied only to nonresident aliens, and not to those within the bounds of the United States. (*Passini v. Aberthaw Construction Co.*, p. 322.)

HAZARDOUS EMPLOYMENTS.

The Oklahoma statute, as a number of others, is limited in its application to employments designated as hazardous. This would include manual or mechanical work in a plant where machinery is used, but the employer of a janitor in a printing establishment claimed that his employment, not involving work about the machinery, was not covered. The injury complained of was received while cleaning up waste metal under a linotype machine for remelting and further use, a finger receiving a puncture, infection following. The court ruled that this work was an essential part of the operation of the mechanical processes and must be regarded as within the law. (*Okmulgee Democrat Publishing Co. v. State Industrial Commission*, p. 346.) The workman in this case had furnished a substitute and also asked for assistance during his disability, but the employer both declined to render assistance or to consider that he had notice of the disability because not formally sent in. However, the court ruled that under the circumstances the plea of lack of notice could not avail. A third question involved the matter of a lump sum, the commission having made commutation equal to the undiscounted total of the weekly payments. This, too, was upheld as within the power of the commission to determine.

The Legislature of Washington authorized the Department of Labor to add to the list of hazardous employments named in the act, various prior attempts having been unsuccessful, as determined by the courts. The language finally used was held valid against the contentions that it was an unlawful delegation of legislative authority and that no standard was fixed by the act for the guidance of the department. (*State v. Bayles*, p. 347.)

A conclusion was arrived at by the Supreme Court of Louisiana involving somewhat similar conditions as in the case of the janitor in a printing office, but reaching a diverse conclusion. Here a "clean-up man" at a lumber camp was held not to be engaged in hazardous occupation under the statute, as his work was simply

about the camp and in no way connected with logging operations. A grant of compensation in this case was reversed, the supreme court regarding the particular duty of the workman as determinative rather than the general occupation of the employer. (*Dewey v. Lutchter-Moore Lumber Co.*, p. 345.)

ADMIRALTY.

The line between compensation and maritime laws received consideration by the Supreme Court of the United States in the case *Grant Smith-Porter Ship Co. v. Rohde* (p. 280). The claimant was a ship carpenter at work on an incompleated vessel in navigable waters, and it was held that his employment was not maritime so as to exclude the jurisdiction of the State compensation law of Oregon, distinguishing this from the *Jensen* case and the *Knickerbocker Ice Co.* case, in which compensation statutes had been found inapplicable on account of conflict with admiralty rules. The same conclusion was reached in *Los Angeles Shipbuilding & Drydock Co. v. Industrial Accident Commission* (p. 282), where a machinist was installing machinery on a launched vessel in Los Angeles Harbor. The employer claimed that the law as to maritime torts controlled, but the court of appeal held that the compensation law applied, even though the law of that State was compulsory, in contrast with the elective law of Oregon. A diver laying a submarine cable in the Harlem River was found by the Appellate Division of the Supreme Court of New York to be working under a maritime contract, he being one of the crew of a scow equipped as a floating derrick and engaged generally in the wrecking business. It was said that the nature of the employment was not material, since his work on the vessel was under a maritime contract. (*De Gaetano v. Merritt & Chapman Derrick & Wrecking Co.*, p. 282.)

The Supreme Court of the United States had a different question before it in the case of a longshoreman killed on the dock by the falling of a pile of bags of cement being taken off a vessel. Compensation had been allowed by the commission, but the State courts reversed the award. The Supreme Court in turn reversed the New York courts, pointing out that they had drawn unwarranted deductions from the *Jensen* and other cases, and that admiralty jurisdiction need not be invoked in the case in hand. (*State Industrial Commission v. Nordenholt Corporation*, p. 285.)

The Supreme Court of Oregon was asked to determine a number of cases in which awards had been made from the State insurance fund for injuries occurring on and about vessels. These involved shipbuilding, ferry operation, stevedoring, operation of motor boat in cannery work, and freight transportation work. The State indus-

trial commission had found each of these within its jurisdiction and had made awards, but the secretary of state declined to issue warrants for the payment of these awards from the State fund until an authoritative determination should be made. This was done in the instant case, instructions being issued for the issue of the warrants for each claimant. (*West v. Kozer*, p. 283.)

RAILROAD SERVICE.

Commerce by railroad, like maritime shipping, gives rise to continued difficulty on account of the relations of interstate and intrastate commerce and the two classes of legislation governing. A case was before the Supreme Court of the United States involving the injury of a workman while repairing a locomotive in a repair shop. The Industrial Accident Commission of California had awarded benefits under the compensation law of the State, but this was set aside by the State district court of appeal on the ground that the engine was an interstate instrumentality. The question before the Supreme Court was whether or not the previous use of the locomotive in interstate commerce gave it a continuing quality during its stay in the repair shop. The tests applicable were reviewed, and the distinction drawn between rolling stock and way fixtures, the court holding that the locomotive with its extended withdrawal from service had lost its interstate quality and the State compensation law would apply. (*Industrial Accident Commission v. Payne*, p. 338.) Another case before the same court involved an injury to a railway mail clerk by the wrecking of a car. Here the question of interstate commerce was not in question, but one as to the choice of remedies. The injured man had received compensation as an employee of the United States under the Federal employees' compensation act, and his suit against the railroad company and the Director General of Railroads (then under Federal control) was said to be barred by the fact of the compensation award. Grounds for dismissing the case against the road itself had been found, and the right of the injured man to sue the Director General was said to have been lost when he received compensation, though he might have chosen the other remedy if the choice had been made in time. (*Dahn v. Davis*, p. 340.)

A California claimant sought to safeguard the situation by suing for damages under the Federal act, and, pending the decision, also making claim under the State compensation law, fearing a determination adverse to the interstate claim necessary under the Federal statute. The commission proceeded to make an award on the assumption that it had jurisdiction, though requested to hold the matter in abeyance until the suit should be decided. The court

subsequently allowed damages. The employer opposed this judgment on the ground that the injured man was not engaged in interstate commerce at the time of his death, supporting this claim by evidence and by the proceedings before the State commission. This position was upheld by the court of appeal over contentions of the widow that she appeared as an individual in one case and as administratrix in the other, so that one finding should not be made use of in the other proceeding. The court denied her right to present conflicting evidence to support diverse claims based on the same status and facts. (*Williams v. Southern Pacific Co.*, p. 341.)

ELECTION.

The method by which an employer must notify his employees of his election to operate under the compensation act is not specified in the Texas statute. A suit for damages was contested by an employer on the ground that he had given suitable notice through signs and posters, but the question was certified to the supreme court of the State as to whether this was adequate. In the absence of specific direction it was held that the presumption would be that personal service would be necessary to bind both parties, such general provision as the posting of signs being insufficient. (*Producers' Oil Co. v. Daniels*, p. 327.) Under the Kentucky statute the employee must sign an agreement to accept the act, and a case was before the court of appeals as to the effect of a prior election on employment resumed after repeated interruptions. The court held that the original signing was binding upon the employee under the circumstances, so that he could not recover damages, but must accept compensation under the terms of the compensation act, the return to work "within a reasonable time" permitting the acceptance to continue in force. (*Sizemore v. Beattyville Co.*, p. 328.)

NOTICE AND CLAIM.

The general requirement of the presentation of a claim within a fixed time may be qualified by the factor of the presence or absence of prejudicial results. Thus in an Indiana case (*In re Troutman*, p. 306), the appellate court held that notice of injury within 30 days was a requirement subject to qualification under the law of that State, and that, no prejudice being shown, the employer could not plead the lack of notice as grounds for opposing the claim.

Where an injury developed only at a considerable time after the occurrence of the accident causing it, and further delay resulted from incorrect diagnosis, the employer's insistence on favorable action after an original disallowance of the claim on the ground that the time for notice had expired led to a reopening of the case. The in-

insurance company, on the other hand, raised the point of limitations, but the State law (New York) was found to safeguard only the employers' interest, even though the insurance company was the only party financially interested in raising the defense. (*Lawson v. Wallace & Keeney*, p. 308.) This case involved a point of interest in connection with medical service, the insurer not being held liable for service rendered prior to the notice to the employer.

The Kansas statute requires notice and claim within 6 months after the death of the party injured; the provision was held to be applicable in a case where a delay of 10 months intervened, the fact that a prior settlement for temporary disability had been made being held to suggest the final disposition of the case rather than that further demands might arise. (*Hopper v. Wilson & Co.*, p. 305.) Mental incapacity was held not to be a justifiable excuse for delay in presenting a claim of an injured workman under the law of Oregon. It was here held that the time began to run with the accident and not with a subsequently developed injury, and though in the present case the situation might be regarded "as one of great misfortune," the terms of the law were not subject to variation. (*Lough v. State Industrial Accident Commission*, p. 305.)

A case of peculiar hardship was one before the Supreme Court of Alabama, where a court administration exists. A defective petition was rejected by the trial court, and on its presentation in amended form the employer professed readiness to settle without contest. The court thereupon dismissed the case as offering nothing for it to determine, and no further action was taken until 18 months later when the court was again asked to settle the case. The employer's demurrer that the claim was now outlawed was held by the court to be valid, the supreme court affirming it though stating that the court below should have made a final determination on the presentation of the amended claim. (*Ex parte Sloss-Sheffield Steel & Iron Co.*, p. 302.) Somewhat in contrast with the allowance of the employer's plea of limitations is a case in which the promise of an insurance company through its agent that compensation would be paid without the injured party having to take any action was held to bar the company from offering the limitation of 6 months as a defense to a claim later submitted; the Supreme Court of New Hampshire ruled that the law called for a liberal construction, and that the reliance of the plaintiff on the agent's promise could not be made to operate against her and in favor of the promisor. (*Mulhall v. Nashua Mfg. Co.*, p. 311.)

Various points were involved in a case before the Supreme Court of Louisiana in which the right of a foreman to recover for injuries inflicted by a subordinate was considered. The injury resulted in the ultimate and unanticipated loss of sight of the only useful eye

the man had, so that a second injury resulting in total disability had to be acted upon. Though the injury was due to assault, it was held compensable; and in view of the fact that blindness developed only some months later than the blow causing it, it was ruled that the blow itself gave no cause of action at that time, and that until the injurious effects developed the workman could not be expected to give notice. The cause of action was therefore said to accrue at the time vision was lost, so that the limitation ran from that later date. As to the total disability produced by the loss of the one eye, it was said that the compensation should be awarded according to the consequences of the injury, which would be as for permanent total disability. (*Guderian v. Sterling Sugar & Railway Co. (Ltd.)*, p. 303.)

The plea that the limitation against claims would not run in the case of a minor until the appointment of his guardian, was rejected by the Supreme Court of Tennessee, where the law provides for payments to a widow for herself and dependent child, or children, so that her failure to present a claim within the time prescribed cut off all recovery in the absence of a showing of a "reasonable excuse" for the failure to give the statutory notice. (*Patton Hotel Co. v. Milner*, p. 307.)

AWARDS.

A case was before the Supreme Court of New Hampshire involving the question of the basis of an award to a man of two occupations. Injured while in the employment of an ice company, his capacity to work at a more remunerative employment as a mason was impaired, though he could continue with the ice company as before. The court ruled that compensation was based on the difference in the earning capacity before and after the accident in the employment in which he was engaged at the time of the injury. Though he lost an eye, he was out of work but four days, and under the two weeks' waiting-time rule of New Hampshire, no compensation whatever was received. (*Abbott v. Concord Ice Co.*, p. 290.)

The above ruling shows the effect of the absence of any schedule for specific injuries, the loss of an eye involving no compensation unless resulting in wage loss. In a case before the Supreme Court of Pennsylvania a more liberal doctrine was applied in the case of *Kerwin v. American Railway Express Co.* (p. 291). Here a truck driver suffered injury to his arm so that he could not engage in manual labor, though he could do clerical work under favorable circumstances. The court held that he was entitled to compensation for the loss of use of his arm, even though he might be able to earn as much as before in some different occupation.

Injury to a young workman was held by the Court of Civil Appeals of Texas to be compensable, not on the basis of his earnings for the

short period worked (six weeks) at the time of his death, but on the basis of the average annual wages of an employee of the same class in similar employment in the locality. (*Georgia Casualty Co. v. Darnell*, p. 291.) This was over the contention that the award could not be based on a higher wage than the beginner was earning, the court holding that the presumption that he would not advance in earning capacity would not be indulged in.

A few cases came before the courts involving the question of vested rights in awards made where death occurred before payments were completed. Thus in a Maryland case (*State Accident Fund v. Jacobs*, p. 292), a mother died at the expiration of less than one-half the period of compensation awarded on account of the death of her son. Against the contention of the Fund that no further payments were due under the award, the court of appeals affirmed the ruling of the State accident commission that the remainder should be paid to her estate. A similar ruling was applied by the Appellate Court of Indiana in a case in which an injured workman was receiving compensation for a specified term of weeks on account of the loss of an eye. About midway of this period the injured man died from an independent cause and the heirs—his widow and child—asked that the unpaid balance for the period be awarded them. The employer contended that no obligation existed beyond the term of the employee's life, but the court ruled that the balance of the award which he would have collected had he lived was payable to his heirs. (*Wenning v. Turk*, p. 301.)

A case complicated by an illegal marriage was before the Supreme Court of Ohio involving the power of the commission to revoke an award made and to consider a claim after the death of the claimant. On the death of the employee, his second wife (bigamous) was granted an award; on the discovery of the existence of a legitimate wife and children this was revoked, but the claim of the first wife was denied on the ground that she was not a dependent. Both wives appealed, the first one dying before the case was adjudicated. The court ruled that the second wife was without rights, as not being legally married, and that the board had power to revoke the award originally made in her behalf. As to the first wife, whom the deceased had long deserted without furnishing support, it was held that dependency rests on obligation and not on the question of its discharge. An award was therefore directed in behalf of her estate, running from the time of the employee's death to that of the death of his lawful wife. (*Industrial Commission of Ohio v. Dell*, p. 296.)

The power of an industrial commission to review an award received consideration also in a case before the Court of Appeals of New York, the employee in this case having received compensation for temporary disability and returned to work. Subsequently he

voluntarily left and took employment elsewhere, but died a few months later. The commission voluntarily reopened the case and made a finding that his death was due to the injuries received in the first employment and awarded compensation for wages lost before his death. The court of appeals ruled that the commission was without power to take this action, holding that as compensation is payable only to employees, no award could be made after the death of the employee, while no claim for benefits to dependents was under consideration. (*Terry v. General Electric Co.*, p. 299.)

Continuing disability followed by death existed in a case passed upon by the Supreme Court of Pennsylvania, the injured workman dying as a result of his injuries after having received compensation for 58 weeks. The law of the State limits statutory benefits for the widow to 300 weeks minus any period of prior compensation payments. The insurance carrier offered a settlement to the widow on this basis, also proposing to deduct 58 weeks from the amount payable to each child, the law providing for the continuance of such payments until the sixteenth birthday. The court ruled against this last deduction, saying that the law requires payment to 16; while under the proposed settlement they were stopped before they were 15, which would violate the statute. (*Nupp v. Estep Bros. Coal Mining Co.*, p. 293.)

A Texas statute requires commutation of awards to lump-sum payments to be approved by the industrial accident board. An injured employee desired such commutation, but undertook to anticipate the approval of the accident board by securing judgment in a justice court, which the claimant's attorney said would be binding. The insurer agreed to this, but the accident board refused to recognize the judgment and did not approve the lump-sum settlement. On contest the case reached the Commission of Appeals of Texas, where the justice court was said to be without jurisdiction, the purpose of the legislature being to give the accident board power to protect the public interest as well as that of the employees themselves. (*Employer's Indemnity Corp. v. Woods*, p. 294.)

A case involving the relative obligation of two employers was decided by the Supreme Court of Utah, reversing the action of the commission which charged both employers with responsibility, though at the time of his fatal injury the workman had entered upon the service of but one of his employers for the day. The court ruled that while the award should be based on the total amount of earnings received from both companies, only that employer in whose service he was at the moment of his fatal injury should be held responsible for the payment. (*Bamberger Electric Ry. Co. v. Industrial Commission*, p. 300.)

The exclusive application of the State compensation law was affirmed in a Michigan case in which an injured minor received an award for injuries, his father subsequently suing on his common-law right to recover for the loss of wages of his son. The father's right to recover was denied, the courts ruling that the boy, legally at work, was under the compensation act and that the enactment of this law had abrogated all other rights of recovery. (*Wall v. Studebaker Corp.*, p. 343.)

REVIEW.

The Legislature of Illinois provided for a review by the courts of the codes made by the State industrial commission, declaring that the findings of fact made by the industrial commission should not be set aside unless contrary to the manifest weight of the evidence. This provision was said to be an attempt to prescribe a rule for the courts which was beyond the power of the legislature to enact, so that the limitation was void. The case was therefore sent back by the supreme court to the circuit court for a review that would consider the facts as well as the law. (*Otis Elevator Co. v. Industrial Commission*, p. 404.)

In contrast with the foregoing, the Supreme Court of Oklahoma refused to weigh the evidence after a determination made by the industrial commission, so that an award made by the commission was affirmed on the record showing that there was evidence supporting it. (*Whitehead Coal Mining Co. v. State Industrial Commission*, p. 403.) Another contention in this case was that the action was barred by a limitation of one year from the date of the injury. This limitation was said by the court to apply to the making of a claim, which had been made in due time, and not to the present proceedings for a review.

ACCIDENT.

The Supreme Court of Michigan construed the law of that State as covering a death where a workman, in a nervous condition from sulphuric acid poisoning, died from nervous shock. He inflicted an accidental injury on a fellow workman, which he thought was fatal, and became highly nervous and delirious, dying, as the accident board found, as the result of the nervous and mental injuries suffered, construing this as an accident under the law. (*Klein v. Len H. Darling Co.*, p. 273.) The same court approved an award where death followed overexertion, causing acute dilation of the heart, applying the principle of unexpected consequence of an intended act, classifying such result as accidental within the law. (*Helder v. Luce Furniture Co.*, p. 275.) The same rule is applied by the Appellate Court of Indiana in the case, *General American Tank Car*

Corp. v. Weirick (p. 277), death in this case following the inhalation of poisonous gas arising from molten brass; the court ruled that an "injury may be the result of accidental means, though the act involving the accident was intentional."

Adverse decisions were rendered in cases closely comparable to the above, as, for instance, where the Supreme Court of Minnesota denied compensation to a workman who complained of injuries chargeable to overwork and strain, resulting in atrophy of the muscles and degeneration of the nerves. The supreme court reversed an award in the claimant's favor, saying that injuries resulting "from long continued effort without sudden or violent rupture or collapse of some physical structure" were not covered by the law. (*Young v. Melrose Granite Co.*, p. 278.) The Court of Appeals of Kentucky also ruled against a claim where death followed the hasty act of an employee who ascended a ladder and closed an opening following the blowing out of a steam valve. There was said to be no traumatic injury, but merely excitement affecting a diseased heart, which could not be classed as an injury under the law. (*Rusch v. Louisville Water Co.*, p. 275.)

Frequent and continuous exposure to injurious chemicals required the amputation of a finger poisoned by the repeated contacts, but the Appellate Division of the Supreme Court of New York, three to two, reversed an award made by the industrial board in the claimant's favor, ruling that the injury was progressive and continuous, and not an accident "capable of being assigned to a particular date." (*Jeffreyes v. Charles H. Sager Co.*, p. 279.)

The difficult question of compensation for hernia was before the Supreme Court of Utah on appeal from a denial of compensation by the industrial commission. The commission had adopted rules governing claims of this nature, and the testimony of physicians was conflicting as to the class of the case under the headings framed by the commission. An injury claimed to be due to the strain of carrying a moderately heavy load was the basis of the action, and the court refused to reverse the commission's findings, since to do so would be to usurp its administrative authority, there being also "some substantial evidence" to sustain the findings made. (*Staker v. Industrial Commission*, p. 276.)

The factor of preexisting disease was to some extent involved in two or three of the cases above mentioned. It was definitely considered in a case (*Tintic Milling Co. v. Industrial Commission*, p. 355) before the Supreme Court of Utah, where a man suffering with pulmonary tuberculosis became disabled following a violent "gassing" from fumes from an ore roaster. The court ruled that if his injury was due entirely to a preexisting disease, occupational

or otherwise, it did not come under the act; but if the injury received on the day of the unexpected inhalation of the fumes so accelerated it as to entirely disable him for work, the injury was accidental and compensable. A similar ruling was made by the Supreme Court of Illinois where a man whose earning power had been restricted by disease suffered accidental injury, entirely disabling him. The court held that an award could properly be made, not based on the effect of the disease as it existed prior to the injury, but on the result of the injury itself. (*Centralia Coal Co. v. Industrial Commission*, p. 354.)

Where the preexisting condition is chargeable to an earlier injury, its disabling recurrence while at work for a subsequent employer was held to charge the original employer with the obligation of making compensation payments. It was said that any injury received during the second service was not sufficient to break the causal action between the original injury and the recurrent disability (*Gaglione's case*, p. 353.)

A nonoccupational disease may be incurred during employment, as in the case of a workman drinking infected water supplied by the employer. In such a case the Appellate Court of Indiana affirmed an award made by the industrial board where typhoid fever had followed the drinking of contaminated water supplied to factory employees. The ailment was classed as an injury due to accident or an unexpected mishap arising out of and in the course of employment (*Wasmuth-Endicott Co. v. Karst*, p. 351). The opposite position was taken by the Supreme Court of Ohio in a very similar case (*Industrial Commission v. Cross*, p. 349), the court ruling that occupational diseases were not classed as injuries under the law in this State; it was said that much more nonoccupational diseases, as typhoid fever, must be excluded.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

The phrase "injury arising out of and in the course of employment," found in most of the compensation laws of the United States, is apparently the one that causes the greatest amount of controversy and the most frequent appeals to the courts. A departure fatal to the claim was held by the Supreme Court of Michigan to have been made where a traveling salesman was struck and killed by a passing automobile while undertaking to render service to a third party, who had been laid up by the road on account of injury to his wagon. The accident was said to be due "to an act of humanity entirely dissociated from the master's work," so that no compensation could be allowed. (*Sichterman v. Kent Storage Co.*, p. 357.)

An injury of a different nature befell a delivery man while on his way to his employer's garage for a car to be used in his work. He was attacked by a mad dog and died as the result of the bite received. The compensation commissioner denied the claim, as did the district court, but the Supreme Court of Utah ruled in the widow's favor, the employee being regarded as performing his duty and receiving the injury in the course of his employment, the injury also arising out of the same. (*Chandler v. Industrial Commission*, p. 358.) The manager of a store carrying home the money from late sales was said to be injured in the course of his employment when struck on the street by an automobile while on his way to take a car. (*Clifton v. Kroger Grocery & Baking Co.*, p. 364.) Another case coming under this head was the subject of repeated appeals and affirmation of award by a divided court, the Court of Appeals of New York sustaining the award by four to three. The case was one of a delivery man stabbed on the street by an insane man who was being pursued and was stabbing anyone who came near him. The occupation of the employee requiring him to be on the street was held to expose him peculiarly to the risk from which he suffered, and the award of the commission was sustained. (*Katz v. Kadans & Co.*, p. 370.)

A volunteer going aside from the course of his employment to do other work not in his line was held to be injured other than in the course of his employment, so as to take him outside the compensation law of South Dakota. (*Wilson v. Dakota Light & Power Co.*, p. 359.) Similarly the custodian of a pumping station not authorized to sell gasoline placed himself outside the scope of the law in so doing, so that no recovery could be had for his death that followed in an altercation arising from the sale. (*Chicago & Alton R. R. Co. v. Industrial Commission*, p. 359.)

A case involving a quarrel between employees was appealed to the Supreme Court of Illinois, the question in dispute being an alleged improper docking of wages by one of the parties. The industrial commission allowed compensation, and the court ruled that the obligation to pay rested on the employer, inasmuch as the accident arose out of a dispute connected with the employment. (*Taylor Coal Co. v. Industrial Commission*, p. 362.) In another case a fight between employees resulted in injury to a third employee, the "innocent bystander" who had advised the participants to cease fighting. Other employees thereupon struck him, inflicting injuries for which he asked compensation, but without result. His intervention in the fight was no part of his duties, nor was the injury one normally incident to the employment, so that it was not compensable. (*Gavros' case*, p. 363.)

The Industrial Board of New York and the appellate division of the supreme court agreed in allowing compensation to the mother of

a girl shot by a fellow employee because of his anger at a statement made by her. The court of appeals reversed this award, saying that while the accident occurred in the course of employment, it did not arise out of it, so that it was not compensable. (*Scholtzhauer v. C. & L. Lunch Co.*, p. 369.)

No less dangerous than anger is a form of alleged playfulness, the results of which have been noticed repeatedly in these bulletins. The use of compressed air is a constant temptation for alleged practical joking with repeatedly fatal results. Such was the case in *Stark v. State Industrial Accident Commission* (p. 366), in which the Supreme Court of Oregon approved an award made by the trial court in behalf of the dependents of the workman killed, as, under the facts in the case, the court held it a fair conclusion that the accident arose out of and in the course of employment. A contrary ruling was made in an injury case before the Supreme Court of Massachusetts, where one workman was injured by another being pushed against him as the result of a playful scuffle. This court said that though the injuries were received in the course of employment, they did not arise out of it, the act, whether playful or malicious, having no relation whatever to the employment. (*Lee's case*, p. 365.)

Coming within the terms of the statute of Tennessee was said to be the case of a workman in a fertilizer plant who was drowned while attempting to procure water to wash with before going home. (*Tennessee Chemical Co. v. Smith*, p. 360.) Death from drinking ice water while in a heated condition was also held to be an injury within the similar terms of the Kansas law. (*Gilliland v. Edgar Zinc Co.*, p. 361.)

An unusual case was one of a workman who fainted after receiving inoculation at the invitation of his employer during an epidemic of influenza. The inoculated man fainted and fell, suffering fatal injuries. The death was said by the Court of Error and Appeals of New Jersey to arise out of and in the course of employment. (*Freedman v. Spicer Mfg. Corp.*, p. 362.)

The Supreme Court of Iowa construed the law of that State to cover a case arising from a series of incidents, one of which involved disobedience of orders of the employer. A chambermaid in a hotel was injured while extinguishing a fire in her room, the fire having been occasioned by the use of an alcohol lamp, contrary to orders, for the purpose of curling her hair. The industrial commission denied compensation, but the court ruled that the injury was received while discharging a duty of putting out the fire, and though a negligent act intervened, the injury was due to an attempt to discharge a duty and was compensable. (*Kraft v. West Hotel Co.*, p. 367.)

Violation of rules was found by the appellate division of the Supreme Court of New York to bar a claim approved by the industrial

commission in a case in which a 15-year-old girl undertook to operate a freight elevator instead of walking to the fourth floor, where her workroom was, and was fatally injured. (*Hamberg v. Flower City Specialty Co.*, p. 371.) The use of the elevator was said to be an effort to favor herself and not to forward her employer's interest, so that the award must be reversed.

Exposing one's self to hazard in an impulsive effort to save property was held by the Supreme Court of Michigan not to take the injured man outside the scope of his employment in a case (*Sebo v. Libby, McNeill & Libby*, p. 371), in which a gardener undertook to stop a team which was unloading goods at his employer's plant. The injury was fatal, but the widow was entitled to an award because of the evident purpose of her husband to forward his employer's business.

Injuries obviously received in the course of employment but raising the question as to whether or not they arose out of it were considered by the courts of Connecticut and New Mexico, the first involving the case of a painter whose physician had advised against his working in high places on account of his tendency to have fainting spells, due to indigestion. The advice was disregarded, and he received a fatal fall. The Supreme Court of Errors of Connecticut approved an award on the ground that the death was due to the fall and not to the vertigo, though the fall itself might be attributed to his diseased condition. The contention that the man had been guilty of willful and serious misconduct in thus exposing himself was refused, as it could not be said that he did what he did purposely, knowing of the serious consequences that might follow. (*Gonier v. Chase Companies*, p. 372.) The New Mexico case was one of a teamster killed by a windstorm while in the woods skidding logs for his employer. No act of negligence could be charged, but this is not involved in compensation legislation, and the workman's exposure to the danger being due to his employment, it was held compensable. (*Merrill v. Penasco Lumber Co.*, p. 374.)

The law of Texas substitutes for the usual phrase the term "injury sustained in the course of employment." This is construed, however, so as practically to measure up to the more usual limitation. Injuries inflicted by a third party for personal reasons and not because of employment were held by the court of civil appeals to bar a claim for the death of a night watchman. The accident board had made an award in favor of his widow on the assumption that the duties of the watchman as such furnished the occasion of his death, while the court took the view that it was an assault for purposes of robbery, one justice dissenting; the majority view, therefore, excluding the injury from the class of those "sustained in the course of employment," even though obviously received while on

duty. (*Lumbermen's Indemnity Exchange v. Vivier*, p. 380.) The same reason led to a similar reversal where a stage employee was accidentally shot by a pistol in the hands of his superior, who was snapping the pistol in sport and with no intention to injure. The conduct was said to be foreign to his duty as vice principal, so that the injured man had no redress unless against him personally. (*United States Fidelity & Guaranty Co. v. Cassell*, p. 381.)

INJURY BY THIRD PARTY.

Specific provision for redress in case of injury to a workman by the negligence of a third party is found in practically all compensation laws. The death of an employee injured by the negligence of an electric company, not an employer, was said to give rise to a right of action against the company without limitation by the terms of the workmen's compensation act of Tennessee which apply only where the relation of employer and employee exist. The employee may choose his remedy, but the negligent third parties have no voice in the making of the choice. (*Bristol Telephone Co. v. Weaver*, p. 375.) In a Massachusetts case the injured man had exercised his option and secured compensation from his employer. He wished the employer then to exercise its right to sue the negligent third party, hoping that excess recovery might accrue to his advantage. The employer declined to sue and the injured man sought to bring action himself, but the right to do so was denied, the court saying that the employee having accepted compensation the right to sue rested with the employer alone. (*Whalen v. Athol Manufacturing Co.*, p. 376.)

The Illinois law on subrogation limits the amount that the employer may recover to the amount of compensation payable under the act to the injured workman. This provision was held constitutional, but the construction put on it by the trial court that the amount recoverable by the employer was the full amount of the compensation award was held to be incorrect, the defendant being entitled to offer proof in regard to its liability and against any liability whatever if the evidence is favorable, the limitation being one of a maximum and not of a fixed amount. (*City of Taylorville v. Central Illinois Public Service Co.*, p. 377.)

A different situation arose in a New Jersey case, the employee having secured an award which the employer's insurer proceeded to pay. The employee also sued the negligent third party and secured a settlement from it. The employer's insurer thereupon ceased to pay compensation and sued to recover payments previously made. The bill was dismissed, the court ruling that the insurer was in no relationship with the injured man allowing it to be benefited by any right of action lying against the third party. (*Hartford Accident & Indemnity Co. v. Englander*, p. 379.)

DISABILITY.

The appellate division of the Supreme Court of New York had before it a case of a workman struck by a falling icicle, but incurring no disability for several months. There had been an apparent injury to the skull, and a claim for compensation was submitted, but rejected on the ground that there were defects in the evidence connecting the accident and the alleged disability which could not be supplied (*Hill v. Ancram Paper Mills*, p. 324). Before the adjustment of the above claim, the injured man had died, and the dependents entered claim for death benefits, the cases being before the court at the same time. It was held that the evidence in respect to the death was sufficient to place this claim on such a foundation as to warrant its allowance. There was, however, a challenge to the claim on the ground that notice had not been given, but this was not allowed, as the employers had full knowledge of the course of events, had participated in the proceedings in regard to disability, and knew of the death by their own knowledge, so that they had not been prejudiced by the failure to give notice in statutory form.

The Supreme Court of Massachusetts sustained a renewal of payments based on a recurrence of disability after return to work. The claimant had earned as much or more than before his injury, working for the same employer, but being discharged on account of slack work, he had subsequently been unable to find employment except at reduced wages. The industrial board found that the physical condition resulting from the accident was a factor in the matter of securing employment, and though nearly four years had intervened, the wage loss should be compensated. (*Johnson's case*, p. 326.)

Multiple injuries affected the arm, body, knee, and throat of an injured workman for which various awards were made covering temporary total and permanent partial disability, as well as medical and hospital attention. The company contested the award on the ground that the aggregate exceeded the allowance for total disability, but the Supreme Court of Kansas found that statutory rules for computing the various disabilities had been followed, and if an apparent injustice resulted it was for the legislature to change the law, which had been properly applied. (*Anderson v. Commonwealth Oil & Refining Co.*, p. 402.) The question of commuting to a lump sum was involved in this case, but the court ruled that the power to decide rested with the trial court, so that its decision in that respect would not be disturbed.

A second-injury case involving total blindness was before the Appellate Court of Indiana, the claimant being a man who had lost one eye in childhood. The Indiana law in force at the time of the second accident made a specific grant of 100 weeks' compensation for

the loss of sight of one eye, and on this the employer stood in opposition to the employee's claim of 500 weeks' benefit for total disability. The court sustained the employer, holding that the injury had resulted in the loss of sight of one eye and nothing more, the prior injury not being entitled to consideration in connection with an industrial injury for which the compensation law makes specific provision. (*Stevens v. Marion Machine Foundry & Supply Co.*, p. 407.)¹

The Supreme Court of Illinois had before it a case of technical total disability, but of actual capacity to continue work without loss of wages. A subforeman whose work was supervisory had but one eye, and in an accident in his employment lost a hand. By the terms of the law the combined injuries constitute permanent total disability, but the man was in fact able to draw the same pay as before with his own employer, and probably would be able to command the same wages elsewhere. However, the commission awarded total disability payments, construing the law to warrant such proceeding. A lower court affirmed this, but the supreme court reversed the decision and award, saying that the employer could not be required to pay for total disability when the injury inflicted did not in fact cause such disability. (*Chicago Journal Co. v. Industrial Commission*, p. 408.) However, if total disability results from the loss of an essential organ, the employer at the time of the second injury is chargeable with the full consequences, this being the ruling of the same court in the case of *Heaps v. Industrial Commission* (p. 406). Here a man with one eye lost a second eye in an industrial accident, and the court ruled that the effect of this injury was to utterly destroy an existing capacity for work, for which the employer must be responsible, distinguishing this case from the one above, and also adopting a different view from that set forth by the Indiana court in the *Stevens* case above.

DISFIGUREMENT.

While the compensation laws have for their general basis redress for injuries causing physical disability, the industrial consequences of a disfiguring injury are regarded in many States as entitling the victim to awards. This rule was applied last year by the Supreme Court of Oklahoma where a mine workman lost an eye and suffered permanent disfigurement of his face by reason of an explosion. Separate awards were given for the loss of the eye and for the disfigurement, and this action was upheld by the supreme court, ruling against the contention that where there was an award for disability there could not be an additional one for disfigurement. (*Seneca Coal*

¹ Compare the *Guderian* case, p. 303.

Co. v. Carter, p. 353.) Injury to a finger involving disfigurement rather than loss of earning power was held compensable under the law of Illinois, the court saying that the statute does not require a showing of a loss of earning power where disfigurement results from an accident. (Frank W. Williams Co. v. Industrial Commission, p. 352.)

MINORS ILLEGALLY EMPLOYED.

The compensation law of Texas was held by the commission of appeals of that State not to apply in the case of a minor employed in violation of the child labor law, so that an insurer under the compensation act could not be required to pay for his death. (Galloway v. Lumbermen's Indemnity Exchange, p. 397.) The Louisiana Supreme Court on the other hand ruled that a boy employed at general work at a brick and tile factory was still within the compensation act although transferred by his employer to other and more dangerous employment; and while negligence might have been chargeable under the common law the fact that the compensation act was applicable barred any suit for damages. (Garcia v. Salmen Brick & Lumber Co., p. 399.)

The Supreme Court of Pennsylvania refused to set aside an agreement and settlement under the compensation law made by a minor with the consent of his father, so that suits based on the illegal employment could not succeed. The case was distinguished from one in which the employer sought to compel the acceptance of compensation, while here it had been validly accepted by the injured boy with the consent of his father. (Delaney v. Philadelphia & Reading Coal & Iron Co., p. 401.)

The Michigan law was held to exclude minors employed in violation of law, since they can make no valid contract of employment, and therefore can not elect to take a remedy under the compensation statute. (Grand Rapids Trust Co. v. Petersen Beverage Co., p. 398.) The same construction was given the Indiana law, and for a similar reason, in the case of a girl between the ages of 14 and 18 employed without a certificate. (Indiana Manufacturers' Reciprocal Assn. v. Dolby, p. 399.)

WILLFUL ACTS.

An assault by a foreman following a dispute as to a settlement on the termination of employment was followed by a suit for damages against both the foreman and the company and a judgment in the trial court. Affirming the judgment against the foreman, that against the company was reversed, the supreme court holding that the injury was covered by the compensation act, and while excess of damages over the amount receivable under the act might be

recovered there was nothing in the evidence to show what this excess was, so that further proceedings will be necessary in this respect. (*Perry v. Beverage*, p. 289.)

The Washington compensation law exempts from its operation cases in which a workman is injured by the deliberate intention of his employer to produce an injury, giving to the injured man the right to sue and make a possible larger recovery. This provision was invoked by a man injured by the explosion of a boiler near which he had worked, claiming that the company knew that the boiler was dangerous. The court held that this contention could not be allowed, as the act was at most one of mere carelessness or negligence, but did not show specific intent. (*Delthony v. Standard Furniture Co.*, p. 411.) Somewhat similar was the contention of a suitor under the California law, who claimed that the negligence of his employer in permitting the accident gave the right to sue. This the court denied, pointing out that though there was originally a grant of right to elect between suits and compensation claims, the present law provides for an increase in compensation if serious and willful misconduct of the employer is shown. (*De Carli v. Associated Oil Co.*, p. 410.)

The converse of the employer's willful misconduct is the willful disregard by the employee of provisions for his own safety. A case of this kind was before the Supreme Court of Michigan involving the killing of a mine worker by coal falling down a shaft while he was attempting to jump across it at the bottom instead of going around by the traveling way. A statute required the construction of such a traveling way and directed its use; and the court held that as the employer could not lawfully have directed the workman to do what he did, and the law forbade his doing it, he had committed an act of a quasi criminal nature, and his death while engaged in it could not be regarded as within the compensation act. (*Fortin v. Beaver Coal Co.*, p. 411.)

A vigorously contested question under the Ohio law has been considered in a number of cases involving the application of the compensation statute to cases in which safety appliances, etc., have been found wanting or defective. The constitution of the State reserves to an injured workman the right to sue when injured "from failure of the employer to comply with any lawful requirement for the protection" of workers. Alleging negligence in the construction of a scaffold, a workman sued for damages, securing a judgment, which was reversed on the ground that the compensation law applied. The supreme court was called upon to define the term "lawful requirement" in its relation to the law regulating the erection of scaffolds. The language of the statute was said to be too vague to charge the employer with a knowledge of his duties so as to bring it within the exception as to the right to sue where the employer was under the

compensation law (*Patten v. Aluminum Castings Co.*, p. 335). A similar finding was made by the same court on the same day in a case involving injury on account of the alleged improper guarding of a punching press (*Toledo Cooker Co. v. Sniegowski*, p. 338), and was vigorously dissented to in both cases, a minority declaring that such a construction practically did away with the safety code of the State.

DEPENDENCY.

The matter of the dependence of an aged father on a son not living with him was before the Supreme Court of Utah, the question being whether the giving of occasional gifts at the option of the giver would support a claim of dependency. The court found that for a number of years the son had given his father about \$300 annually, and ruled that it was not necessary to show gifts at the immediate time of injury or at regular intervals to support a claim of partial dependency. (*Tintic Milling Co. v. Industrial Commission*, p. 319.)

A child living with its grandmother after the death of its mother was said to be presumably dependent upon the father, who did not live in the household, but promised to make regular payments to the grandmother for the boy's care. The fact that the grandmother and a younger son both had some earnings from which the household was in part maintained was not allowed as proof of the child's lack of dependency on the father. (*Madera Sugar Pine Co. v. Industrial Accident Commission*, p. 320.)

The Michigan law classes as dependents certain relatives, also persons who are "members of the family." A deserted wife with a family of small children asked her first cousin to give her aid, and they thereafter made their home together until his death by accident. The employer contended, against her claim as a member of the family, that she was but a housekeeper under contractual relations; but the supreme court of the State ruled that this was not supported by the evidence, and that the kinship and the cooperative labor of the parties established a status of a family, so that the award made in response to her claim was affirmed. (*Holmberg v. Cleveland-Cliffs Iron Co.*, p. 323.) The phrase "member of the family" also received construction in a Connecticut case (*Passini v. Aberthaw Construction Co.*, p. 322), the claimant being the sister of a man injured in Connecticut, while her home was in New York. He had contributed regularly to her support, and the court affirmed an award in her favor, saying that the term "family" was not restricted to persons having a common residence in one household.

The child of a woman living as the unlawful wife of a workman was held entitled to benefits as a member of his family, regardless

of the fact that her father was living and that he and her mother had never been divorced, the household status being an actual fact and the child a dependent in good faith, regardless of the irregularity of the mother's relations to the deceased workman. (*Federal Mutual Liability Insurance Co. v. Industrial Accident Commission*, p. 321.)

DEATH WITHOUT DEPENDENTS.

Special funds are provided for in a few States by payments from employers in cases in which a deceased workman leaves no dependents. A law of California undertook to establish a rehabilitation fund from such a source for general administration by the State. This act was held unconstitutional by the supreme court on the ground that the power of the legislature to enact a compensation law was limited to benefits payable to employees of the employer making premium payments. To collect where no beneficiary existed and to use the funds for other purposes was levying a tax and conferring authority upon the industrial commission which the constitution did not warrant. (*Yosemite Lumber Co. v. Industrial Accident Commission*, p. 318.) The Court of Appeals of New York has upheld legislation similar to the above in that State, and the fact that there are beneficiaries is not a bar to the State's collection of the specified sum in case the potential claimant fails to make use of the benefits granted by the law. (*Cook v. West Side Trucking Co.*, p. 318.)

INSURANCE.

The laws of a number of States require insurance of the employer obliged to pay compensation obligatory. Such provision exists in the New York law, and the court of appeals held that violation of the statute by failure to insure constituted a criminal offense, reversing the lower courts in this respect and holding the employer to be subject to a criminal prosecution. (*People v. Donnelly*, p. 384.) The Minnesota Legislature of 1921 provided for the fixing of rates to be charged by insurance companies carrying compensation risks in the State. The validity of this act, not only as to future contracts but also as to those made before the law came into effect, was sustained by the supreme court of that State in *Builders' Limited Mutual Liability Insurance Co. v. Compensation Insurance Board* (p. 386).

The law of Washington relative to the exclusive State fund in force authorizes the industrial commission to require a bond covering liability under the act in the case of any employer who is in default in the matter of premiums. An injunction may further be issued forbidding the carrying on of occupations covered until such bond is furnished. An employer who undertook to proceed in utter disregard of these provisions of law and of the action of the com-

mission was held in contempt of court subject to enforcement without service of judgment, as it was apparent that he had knowingly and willfully violated the order of the court. (*State v. McCoy*, p. 387.)

Under the law of Iowa, failure of an employer under the act to provide insurance entails him to liability in damages, with the presumption of negligence against him if there is an injury to an employee arising out of and in the course of the employment. This rule was applied in the case *Martin v. Chase* (p. 385), where a hotel employee was injured by a drunken guest, and the employer carried no compensation insurance, the presumed negligence not having been disproved.

An insurance company in Colorado questioned the constitutionality of a provision of a law of that State which authorized the industrial commission to prescribe forms for insurance policies. The supreme court held the law constitutional, and that the insurance company must comply with State regulations if it wishes to do business within the State. (*Travelers' Insurance Co. v. Industrial Commission*, p. 382.)

ATTORNEYS' FEES.

The law of Massachusetts, in common with others, authorizes the State board or commission administering compensation laws to regulate legal and medical fees. An attorney in the State contested this provision as violative of his constitutional rights, but the supreme court of the State held that the act was a proper exercise of the police power and that its intention to protect the interests of parties who were on an unequal footing was justified. (*Gritta's case*, p. 388.)

MEDICAL AND SURGICAL AID.

The medical aid required by law to be furnished must be accepted, as a rule, on penalty of losing the benefits provided by the law. However, the rule is not absolute, and in *Bronson v. Harris Ice Cream Co.* (p. 393) the Supreme Court of Louisiana refused to require submission to an operation, the success of which was not very certain, and which, if unsuccessful, would increase the disability. The unwillingness of the employee to be operated upon was said not to be so unreasonable as to warrant a forfeiture of the benefits to which his injury entitled him. A similar conclusion was reached by the Supreme Court of Nebraska, where doctors were not of one mind as to the probable results of the operation suggested, and where conflicting diagnoses had been made. (*Frost v. United States Fidelity & Guaranty Co.*, p. 394.)

A temporary refusal to submit to an operation, and the subsequent acceptance of advice that one should be had, were held by the District Court of Appeal of California not to occasion delay detrimental to an employer's interest so as to warrant a withholding of benefits for any other period than the interval between the recommendation and final acceptance of the operation. The man's choice of a physician, made in the failure of the company to act, was said not to make him responsible for the fees, since the employer had not met his obligation to provide medical treatment when actually needed. (*Newhall Land & Farming Co. v. Industrial Accident Commission*, p. 395.) Where the employer acts in good faith in securing competent treatment, he will not be held liable for the charges of another physician, to whom the injured workman has gone after becoming dissatisfied with the service rendered, where the industrial commission has decided against the making of a change. (*Smith v. State Industrial Accident Commission*, p. 390.) It was said that the selection of a physician rests with the commission, whose discretion, honestly exercised, could not be appealed from. The Supreme Court of Oklahoma, on the other hand, found the commission of that State without jurisdiction in a case in which the employer had made a contract with the doctor for services, the court holding that this controlled, so that the commission had no authority to intervene. (*Associated Employers' Reciprocal v. State Industrial Commission*, p. 391.)

The Supreme Court of California found a change of physicians justifiable in a case where after four years of treatment by the employer's physicians there was no prospect of recovery, and the employee consulted other physicians, recommending a change of treatment. Securing this different treatment on his own motion resulted in complete recovery; and an award covering the costs was made and approved, the court holding that the medical and surgical services contemplated by the statute were such as would tend to secure the return of the workman to productive employment. If the treatment failed in this respect the employer could not be regarded as having discharged his duty, and the workman might justifiably secure other aid for which the employer would be responsible. (*Union Iron Works v. Industrial Accident Commission*, p. 392.)

LABOR ORGANIZATIONS.

COLLECTIVE AGREEMENTS.

An agreement entered into between an organization of garment workers and an employer in that business was the subject of an action in the Supreme Court of New York seeking to prevent the employer from disregarding the terms of the collective contract before

its expiration. (*Schlesinger v. Quinto*, p. 149.) The court issued an injunction restraining the employer from violating his obligation—an action which was sustained by the appellate division. The contention that the injunction was mandatory was met by saying that it required the employer to do nothing that he had not agreed to do and preserved his liberty of contract, subject only to limits that he had voluntarily adopted in making the original agreement.

A somewhat similar case was before the Supreme Court of Michigan, in which each party to a collective agreement sought redress against the other, the employer seeking an injunction against picketing, etc., and the workmen one against the violation by the employer of his agreement to employ only union men. The court found no precedent for enforcing the fulfillment of a labor contract by employees, and declined to attempt to compel the employer to carry out the terms of his agreement in the instant case. (*Schwartz v. Cigar Makers' International Union*, p. 148.) On the other hand, the injunction against picketing, intimidation, etc., by the union was allowed.

CONSPIRACY.

A case of great prominence and importance under this head was before the Supreme Court of the United States, involving the liability of labor organizations for damages resulting from the acts of their members. (*United Mine Workers of America v. Coronado Coal Co.*, p. 157.) Destructive acts by members of the union were fully established, but it was shown by the evidence that they and the strike and boycott against the properties affected were not the work of the national body but of the district and local unions in the vicinity. The trial court had found responsibility general and awarded damages, but this judgment was reversed, though the court laid down the general principles of liability of a union for the acts of its members in carrying out its avowed policies.

Conspiracy to prevent the carrying out of a contract was the basis of a suit for an injunction against certain unions and their members. A jurisdictional dispute lay at the foundation of the difficulty, the question being the one of whether carpenters or sheet-metal workers should install metal doors, sashes, etc. That an injunction would lie to prevent interference with the completion of the contract was the ruling of the United States district court. (*Central Metal Products Corporation v. O'Brien*, p. 153.) Unlawfulness of purpose was found, as well as unlawful means, in attempting to carry out the conspiracy.

STRIKES.

Though the right of employees to strike is generally recognized, the occasion may arise when it will be declared unlawful. Thus,

where a breach of contract is involved and the striking organization shows a lack of good faith in its failure to seek agreement without striking, an injunction would lie against activities furthering a strike. (*Rice, Barton & Fales Machine & Iron Co. v. Willard*, p. 200.) The claim that a strike was unlawful as interfering with interstate commerce was denied by the United States Circuit Court of Appeals. (*Danville Local No. 115 v. Danville Brick Co.*, p. 204.) The mere fact that part of the product of the company would be shipped across the State line did not make the interference of the strikers with production an interference with interstate commerce within the terms of the Federal antitrust act.

A Kansas statute was invoked by strikers against whom an injunction was sought to prevent the continuance of a course of conduct found by the court to be unlawful. The complainant company charged that irreparable damage would be done by the intimidation of its employees by reason of the conduct of the strikers. The law provides that a restraining order shall not be issued unless irreparable injury to property or a property right is involved; but as the court found that the right to do business was being interfered with by persons financially irresponsible the statute was held not to prevent the use of an injunction. (*Crane & Co. v. Snowden*, p. 216.)

An Oregon case also involving the construction of an anti-injunction statute was construed not to prevent the issue of an injunction against picketers who were seeking to enforce a strike against a merchant. (*Greenfield v. Central Labor Council*, p. 220.) The fact that damage was being done by parties against whom no valuable legal recovery could be had was said to render them subject to an injunction against acts of unlawful interference with the plaintiff's business, the court saying that if the statute permitted such injury without redress it would fall under the same condemnation as the Arizona law in the case, *Truax v. Corrigan*.

The Supreme Court of Oregon ruled certain acts in connection with a strike illegal and restricted the picketing of a going concern generally as well as the specific acts of pickets, particularly those involving misrepresentation and an intent to "cause moral intimidation." (*Robinson v. Hotel & Restaurant Employees*, p. 222.)

Preeminence of the public welfare was said to warrant the use of an injunction against striking drivers of milk wagons in New York City, disregarding "the right or wrong of the present wage controversy." (*Gottlieb v. Matkin*, p. 218.)

The transportation act of 1920 created a Railroad Labor Board whose activities were the subject of consideration in a case before the District Court for the Northern District of Illinois. Strikes of members of the Federal Shop Crafts followed dissatisfaction with a ruling as to wages, and an injunction was sought to restrain the

strikers from conspiring in restraint of interstate commerce. The court found that the antitrust law applied to labor in combination as well as to capital, and that the Clayton Act did not prevent the issue of an injunction in cases such as the present, in which violence and the destruction of property had endangered the lives of passengers and trainmen alike. (*United States v. Railway Employees' Department of American Federation of Labor*, p. 208.)

A similar court in Montana granted an injunction in the same situation as indicated above against conduct that "hampers and threatens to stop plaintiff's interstate transportation." The strike itself was held to be lawful, and the parties were equally free to carry on their respective contentions so long as they kept within the bounds of lawful activities as indicated by the Clayton Act; but an injunction was issued to restrain any trespass beyond those bounds. (*Great Northern R. R. Co. v. Local Great Falls Lodge*, p. 205.)

The court in the foregoing case pronounced the functions and orders of the Railroad Labor Board "advisory only, the teeth having been drawn from the bill." However, the district court of Maine took the position that where the parties to a dispute had submitted the subject to the Railroad Labor Board, they were bound to abide by its findings; so that a strike might be enjoined, not to interfere with the right to quit work, but to restrain from engaging in conduct in violation of the agreement into which they had entered. It was pointed out that the transportation act marks out no method for its enforcement, but a bill in equity appeared to be an available method so that a temporary injunction might be ordered, as was done in this case. (*Portland Terminal Co. v. Foss*, p. 213.) (Compare *Rhodes v. New Orleans Great Northern Ry. Co.*, p. 264.)

In this connection may be noted the authoritative discussion as to the jurisdiction and powers of the Railroad Labor Board as it was developed in connection with the conflict between this board and the Pennsylvania Railroad Co. as to the formation of a board of conferees to consider disputes as to wages and working conditions. (*United States Railroad Labor Board v. Pennsylvania Railroad Co.*, p. 142.) The United States Circuit Court of Appeals ruled that the board was authorized to issue directions as to the election of employees' representatives, and to publish its decisions as a mode of influencing public opinion. Jurisdiction was not dependent upon petition, nor could it be ousted by acts of the railroad disregarding it. The Supreme Court sustained this view, though emphasizing that the board was a tribunal of arbitration and not a court and that its findings had moral but not coercive sanction.

A strike involving a peculiar advantage to the strikers was one by the milk wagon drivers of New York, who were necessarily sup-

plied by their employers with route books. On entering the strike the drivers retained the books listing the names of many customers and large sums of money to be collected. Both parties were interested in the collection, but the court ruled that their retention by the drivers was unlawful and issued a mandatory injunction directing the deposit of the books in the court with right of access to both parties. (*Borden's Farm Products Co. (Inc.) v. Sterbinsky*, p. 218.)

An incidental regulation arising out of strike conditions is a law found in a few States requiring advertisements for labor to carry a statement of the existence of a strike in the plant, if such is the case. Such a law was held constitutional by the Supreme Court of Wisconsin against contentions of improper classification and class regulations. (*Biersach & Niedermeyer v. State*, p. 196.) In another case involving the same statute it was ruled that the act, being criminal, required a strict construction, so that a statement that no strike existed was held not to be incorrect even though some disruption had taken place. The statute was specific in its terms and the court held that a conviction based on general conditions must be reversed. (*Walter W Oefflein, Inc., v. State*, p. 197.)

PICKETING.

The use of banners, placards, etc., on streets and in public places is regulated by an ordinance of the city of Indianapolis, and this was invoked in a case of the picketing of a barber shop in the city. A picket wearing a shirt lettered with an inscription was arrested as violating this ordinance, and a conviction was sustained against charges of unconstitutionality as interfering with freedom of speech. (*Watters v. City of Indianapolis*, p. 183.) This decision obviously does not go to the merits of the propriety of picketing but merely sustains the ordinance forbidding this particular form of display.

INTERFERENCE WITH EMPLOYMENT.

That a mere anticipation of violence is not a sufficient ground for declaring a state of insurrection and calling for Federal troops was held in a case before the United States district court. (*Consolidated Coal & Coke Co. v. Beale*, p. 165.) Furthermore, a Federal marshal could not be ordered to police the district, and a district court is without jurisdiction to certify that the administration of justice requires the presence of such troops. An injunction had already been issued and its violation would be contempt, but no anticipation of such violation could authorize the court in taking the steps requested.

The Commission of Appeals of Texas found no ground for interfering in a case in which a single master plumber chose to stay out of an association which had an agreement with the plumbers' union of

the city, his refusal to join resulting in his workmen leaving his service. (*Sheehan v. Levy*, p. 177.) His right to remain nonunion did not involve a right to demand the services of union men, whose choice lay in other directions, no malice appearing. Similarly without redress was a publishing company in California which sought an injunction against an organization of printers and publishers which had in turn an agreement with the local working printers and pressmen. (*Overland Publishing Co. v. Union Lithograph Co.*, p. 79.) The agreement among the workmen was said not to offend against the antitrust law of the State, which excepts labor as being "not a commodity within the meaning of this act." If the employers' association established a monopoly, it was not injurious to the complainant in the absence of proof of special damage, and the restriction of competition resulting from the organization's agreement within itself was not suggestive of financial injury.

MONOPOLIES.

The last mentioned case may be referred to as one in which a charge of monopoly was raised but without avail so far as the relief sought by the complainant is concerned. A prosecution for monopoly under the New York statute was more successful, the case being one of an association of stone mason contractors charged with monopolizing the business of building stone and concrete foundations. The contract included labor and materials, and a fixed price per cubic foot was established, which had the effect of controlling the production of an "article or commodity of common use." The fact that labor was an element in the construction did not remove the case from the prohibition of the law, the price being fixed for a completed product, the result being an offense against the antitrust law of the State. (*People v. Amanna*, p. 78.) The same statute was up for consideration in a case in which a photo-engraving company sought redress against an employers' association which had agreed with a labor union, effecting a practical control of the photo-engraving business of New York City. The antitrust law forbids restraint of trade in "any article or product used in the conduct of trade," thus covering the product of the complainant. He was therefore held free to disregard the rates fixed by the union without incurring their hostility expressed in the fomenting of strikes, etc., and an injunction was issued accordingly. (*Standard Engraving Co. v. Volz*, p. 179.)

INJUNCTION.

The question of proper party under an injunction proceeding was before the West Virginia courts in *R. R. Kitchen & Co. v. Local Union No. 141* (p. 175). Employers including practically all classes of building work united, charging conspiracy by labor unions to

prevent the execution of contracts. One of the defenses was that the employers had not a sufficient unity of interest to warrant their appearing as a single party. It was found that the workers had established complete "unity and solidity" in their efforts to meet the united action of the employers, who were equally lawfully joined. Both parties being within their rights, illegality would exist only by the use of unlawful methods, as by threats, violence, procuring breach of contract, etc. The conditions were found to warrant the recognition of the parties as they had appeared and the issuing of an injunction against unlawful interference with the rights of the complainant.

Picketing was enjoined in a case in which numbers rather than actual violence furnished the principal grounds for complaint. (*Keuffel & Esser v. International Association of Machinists*, p. 181.) An appeal was taken to decide the question as to whether "peaceful picketing" was subject to injunction, and while employees were held to have the right to use peaceful and lawful means to effect their purposes, the great numbers used as pickets in the instant case were said to change what would otherwise be peaceful persuasion to an actual system of terrorism. The injunction was therefore upheld, though by a divided court.

The fact that a strike had practically terminated months before the picketing complained of was indulged in was held by the Supreme Court of New York to warrant the issuing of an injunction forbidding any picketing of the establishment of the complainant in the case *Yates Hotel Co. v. Meyers* (p. 184). Several months had elapsed since the strike had completely failed and the places of the strikers had been filled, and the court held that the affair was a "dead issue" and any further picketing amounted to a malicious interference with business.

The Supreme Court of Minnesota approved an injunction issued by the lower courts against a picketing and boycott of a moving picture house in which the owner operated his own machine. The judgment construed the State antitrust law, which it regarded essential to interpret in harmony with Federal construction, and the operators' union was found to be acting outside its rights in undertaking to force the employer to give up his method of conducting his business. (*Campbell v. Motion Picture Machine Operators' Union*, p. 185.)

CONTEMPTS.

The nature of proceedings for the punishment of contempt was discussed by the Circuit Court of Appeals of the United States in a case involving disobedience of an injunction against an organization of marine cooks and stewards. (*Forrest v. United States*, p. 201.)

Violation of the injunction was found, and the nature of the case showed that it was criminal contempt rather than civil. Among the results of this finding was a refusal to grant a jury trial asked for by the defendant, and the enforcement of a punitive sentence for the vindication of the authority of the court. A request for a jury trial was also denied in the case *Canoe Creek Coal Co. v. Christinson* (p. 169). The Clayton Act was referred to as sustaining the demands for a trial by jury, but the court ruled that it was the purpose of this act to give the right of jury trial only in a limited class of contempt cases, as otherwise it would transform the entire practice of the courts and take out of their hands the power to enforce the orders which centuries of experience had left within their control.

The nature of contempts as civil or criminal was considered in another case (*Campbell v. Motion Picture Machine Operators et al.*, p. 171) before the Supreme Court of Minnesota. Disregard of an injunction had resulted in continued damage to the plaintiff, and a fine had been imposed on the violators for his benefit. There was no accurate showing of the damages inflicted, and the court ruled that there was no authority merely to impose an arbitrary penalty for the benefit of the injured party without proof of the damage actually sustained; however, the levying of an attorney's fee was said to be valid even though it should result in the imprisonment of the parties for failure to pay, the conviction for contempt taking the case out of the prohibition of imprisonment for debt.

An unusual situation arose in a case in which the Governor of Wisconsin undertook to enforce a pardon of a man convicted of contempt and sentenced to four months' imprisonment. The sheriff of the county disregarded the pardon, retaining the offender as a prisoner. The governor thereupon removed the sheriff and appointed a successor. This action was found by the supreme court of the State to be in excess of the governor's powers, the contempt in this case being civil in its character and its punishment for the protection of civil rights with which the governor had no power to interfere. (*State ex rel. Rodd v. Verage*, p. 172.)

RULES, ETC.

The principle generally applicable in cases involving internal disputes in labor organizations is that the parties must be governed by the constitution and by-laws which they have adopted. However, where valuable rights are jeopardized by insufficient provisions the courts will intervene. Thus, in the case of the expulsion of a local from an international union, and an attempt to organize a new local to take the place of the old one, the District Court of the United States for the Southern District of Texas intervened to protect the

rights of the members of the old local, the international executive board having gone beyond its official powers, as found by the court, and was acting with a conspicuous lack of judicial fairness. (Local No. 7, Bricklayers', etc., *International Union v. Bowen*, p. 189.) Where, however, it is shown that a member has gone contrary to an applicable specific rule and has failed to avail himself of the means of redress provided by the by-laws, the courts will not intervene to prevent enforcement of the penalty provided. (*Flynn v. Brotherhood of Railroad Trainmen*, p. 192.)

The relation of a grand lodge to a local was considered in a case before the Supreme Court of Errors of Connecticut in which the charter of the local had been revoked and the possession of property was under consideration. The court ruled that the revocation of the charter, while severing the relation between the two bodies, did not deprive the local lodge of the property in its possession in the absence of a specific accepted provision in the constitution of the organization. (*Grand Lodge of International Association of Machinists v. Reba*, p. 187.)

Where a union had waived its rules as to the collection of dues and customarily received them though some weeks in arrears, it would not be heard in a claim of lapse of membership where the beneficiaries sought to recover a death benefit. (*Bruns v. Milk Wagon Drivers' Union*, p. 188.) This case also involved the question of the status of an unincorporated union in regard to actions at law, a statute providing for suits by or against the union as a legal entity the same as if incorporated.

An unusual claim was made against an incorporated union in the State of Washington, the main office being in the State of incorporation, California. A voluntary gathering of a number of members in Seattle resulted in an arrangement of a group of men to act on committees, for which one of them claimed pay under a by-law which provided for such payment where a member was appointed at a regular meeting to perform work for the union. The fact that there was an incorporated union with specific provisions governing its activities was held by the supreme court of the State to bar the claim, as the constitution and by-laws constitute the law for the union, and the claimant must abide thereby. (*Moore v. Marine Firemen's, Oilers' & Watertenders' Union*, p. 194.)

INDUSTRIAL WORKERS OF THE WORLD, ETC.

A California court, in *People v. Roe* (p. 167), construed the law of that State against criminal syndicalism to apply to members of the Industrial Workers of the World on the basis of their membership as such. The nature of the organization was held to be proved by vari-

ous testimonies as to acts committed by members other than the party in the case, and his conviction followed on account of association rather than specific offenses of his own.

The Socialist Party of America undertook to establish certain tests of membership for State and local groups. A Michigan organization, as a result, was practically expelled from the national organization, but, being incorporated, continued to function as before. The supreme court of the State held that the local group was authorized under State laws to maintain its identity, and that the restrictive terms as to membership contained in the by-laws of the national association were void. (*Workers' Educational Assn. v. Renner et al.*, p. 195.)

OPINIONS OF THE ATTORNEY GENERAL.

CHILD LABOR—CHILD LABOR TAX LAW—EFFECTIVENESS IN TERRITORIES—*Opinions of Attorney General, volume 33, page 374 (December 13, 1922).*—The child labor tax law of 1919 (40 Stat. 1057, 1138) and of 1921 (42 Stat. 227, 306) was made effective throughout the United States, which under the act included the Territories of Alaska and Hawaii and the District of Columbia. The act of 1919 was held unconstitutional in the Child Labor Tax case, 259 U. S. 20 (see p. 60). Question was raised by the Secretary of the Treasury as to whether the act, notwithstanding this decision, was effective in the Territories for which Congress had authority to legislate. The Attorney General was of the opinion that the acts were invalid and inoperative within the Territories of Alaska and Hawaii and the District of Columbia. It was pointed out in the opinion that Congress endeavored to exercise its powers in both the Territories and the States. Several cases were reviewed which tended to show that an act of Congress including both States and Territories, held unconstitutional as to the States, would not be enforced in the Territories.

The opinion reads in part as follows:

Neither of the saving clauses indicates an intention on the part of Congress to make the validity of a statute bounded by geographical subdivisions of the country, which would be the effect if such clauses were construed to save the child labor tax act as to the Territories and the District of Columbia, when it has been declared unconstitutional within the States. These saving clauses indicate an intention to retain all of a statute that can be uniformly applied as to classes of persons and circumstances. Congress, however, clearly did not intend that the act should be so interpreted, if necessary to save its constitutionality, as to restrict its operation to the Territories and the District of Columbia. It follows, therefore, that there are no persons or circumstances to which the act may properly be applied.

HOURS OF LABOR OF WOMEN—FEDERAL LAW—PUBLIC EMPLOYEES—FEMALE EMPLOYEES IN DISTRICT—*Opinions of Attorney General, volume 33, page 355 (October 30, 1922).*—By an act of February 24, 1914, Congress provided that "no female shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in the District of Columbia more than 8 hours in any one day or more than 6 days or more than 48 hours in any one week." The act further provided against night work and continuous work without a rest period. The

question was raised by the Public Printer as to whether this act was applicable to women employees of the Government Printing Office. The Attorney General in an opinion on this question held that as the act made no references to the Government of the United States it was therefore not applicable to the employment of female help by the Government. In the opinion it was stated that the familiar principle that "the king is not bound by any act of Parliament unless named therein by special and particular words" would apply, and it was accordingly held that "the Government of the United States is not affected by any act of Congress which may tend to restrain or diminish any of its rights and interests, unless it clearly appears from the context that the act is intended to apply to the Government." The act was held not applicable to female employees of the Government Printing Office.

A second question was raised as to whether the Public Printer could employ women for more than 8 hours in any calendar day or more than 6 days or more than 48 hours in any one week in cases of extraordinary emergency. The opinion referred to an act of August 1, 1892, chapter 352, 27 Stat. 340, which provided an 8-hour day for laborers and mechanics employed by the Government of the United States, by the District of Columbia; or by any contractor or subcontractor upon any of the public works of the United States or the District of Columbia. This act was amended by the act of March 3, 1913, chapter 106, 37 Stat. 726, which extended the scope of the act to include laborers and mechanics employed on river and harbor improvements. The Attorney General held that this act has no application to clerical help or laborers of the Government Printing Office, as they are not, strictly speaking, employees upon the public works of the United States. It was pointed out in the opinion that the Public Printer was directed to enforce the provisions of the then existing 8-hour law by an act of March 30, 1888, chapter 47, 25 Stat. 57. But another act of January 12, 1895, chapter 23, 28 Stat. 601, 607, section 47, provides that: "The Public Printer shall cause work to be done on the public printing in the Government Printing Office at night, as well as through the day, when the exigencies of the public service require it, but the provisions of the existing 8-hour law shall apply." The Attorney General pointed out that the law made no distinction between male and female employees. It was stated that the Public Printer may not require employees in the Government Printing Office, either male or female, to render more than 8 hours' service in any one day, except in cases of extraordinary emergency. This extraordinary emergency was made the exception so as to "excuse overtime work which must be rendered to avert some sudden, unusual emergency unexpectedly arising and calling for prompt action."

DECISIONS OF COURTS AFFECTING LABOR.

ALIENS—CONTRACT LABORERS—DRAFTSMEN—LEARNED PROFESSIONS—*Ex parte Aird, United States District Court, Eastern District of Pennsylvania (December 15, 1921), 276 Federal Reporter, page 954.*—David M. Aird was born at Edderton, Scotland, in May, 1888. He was educated in the public schools, the Tain Royal Academy, and the Glasgow Technical College. He obtained a certificate of proficiency in various engineering subjects, taught engineering at a high school, and was employed by several shipbuilding and engineering companies to design marine steam turbines. During 1920 Aird learned that men of his qualifications were needed by the Bethlehem Shipbuilding Corporation, of Bethlehem, Pa., and communicated with the London representative of that concern. He was informed that he could probably obtain employment at Bethlehem, as there were positions open for men of his class. Aird decided to come to the United States, and his fare was paid by the London representative. On arriving in the United States he was given employment as a "class A draftsman" at Bethlehem. Later he was arrested and held for deportation under a warrant issued by the Assistant Secretary of Labor upon the ground that he had been found in the United States in violation of the immigration act of February 5, 1917, paragraph 3, dealing with contract laborers. A writ of habeas corpus was issued by the District Court of the United States, and Aird was discharged. Judge Thompson stated the reasons in part as follows:

It is apparent that Aird was induced, assisted, encouraged, and solicited to migrate to this country by an offer of employment. The first question is whether he came here to perform either skilled or unskilled labor within the intent of the law, and, if that is answered in the affirmative, whether he was outside of the classification of contract labor by reason of belonging to a recognized learned profession.

The rightful exclusion of the relator from the United States depends not upon his qualifications for performing certain kind of employment but upon the kind of employment he was induced, assisted, encouraged, or solicited to migrate to this country to perform under an offer or promise of employment. It is apparent from the evidence in the case that he came here to get work of the sort which he actually did obtain; that is, as a "class A draftsman."

That the words "laborer" or "labor" have a generally adopted, accepted meaning as applying to manual labor is shown by the cases collected through the industry of counsel for the relator, and cited in his brief.

It is clear that the relator, in the employment he entered this country to perform, was not engaged in labor, skilled or unskilled, within the accepted meaning of those words. He was a "brain toiler"; his work required technical training, skill, and learning in various branches of science. What he did he did not perform with his hands or merely as a skilled mechanic would through application of mere mechanical skill. His employment, in designing marine turbine engines or auxiliary machinery connected with them, is one in which the planning and working out of the details must be originated in the mind of the designer.

Notwithstanding his designation as a draftsman, the relator, as a "class A draftsman" in the Bethlehem Shipbuilding Corporation, possessed and was required to apply learning and skill in marine engineering, and thus comes within the special exemption to persons belonging to a recognized learned profession. He should be discharged upon either ground.

It is ordered that he be discharged.

CHILD LABOR—CHILD LABOR TAX LAW—CONSTITUTIONALITY OF STATUTE—TAXATION—REGULATION—*Bailey v. Drexel Furniture Co., United States Supreme Court (May 15, 1922), 259 U. S. 20, 42 Supreme Court Reporter, page 449.*—The Drexel Furniture Co. was engaged in the manufacture of furniture in the western district of North Carolina. On September 20, 1921, it received a notice from J. W. Bailey, United States collector of internal revenue for the district, that it had been assessed \$6,312.79 for having during the taxable year 1919 employed and permitted to work in its factory a boy under 14 years of age, thus incurring the tax of 10 per cent on its profits for the year. The company paid the tax under protest and filed a claim for a refund, but the claim was rejected. They then brought suit in the United States District Court to recover the amount paid. The court being of the opinion that the statute was unconstitutional rendered judgment in favor of the company. Bailey took the case direct to the Supreme Court of the United States. The judgment of the lower court was affirmed, Mr. Justice Clarke dissenting.

This law (act of February 24, 1919, 40 Stat. 1057) provided a tax of 10 per cent on the net profits for the year of any establishment—mine, mill, factory, etc.—in which children are employed in contravention of the age and hour limits set by the act, with certain exemptions to avoid interference with canning clubs and employment apparently legal. (See Bul. No. 277, pp. 357, 358, for text of law.)

Mr. Chief Justice Taft delivered the opinion of the court. After stating the facts and reviewing the law, he continued in part as follows:

The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively State function under the Federal Constitution and within the reservations of the tenth amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by section 8, article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs 500 children for a year, or employs only 1 for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scientists are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local

self-government on the one hand and the national power on the other, our country has been able to endure and prosper for near a century and a half.

The case before us can not be distinguished from that of *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529. (See Bul. No. 258, p. 96.) Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

“In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority.”

In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.

The analogy of the *Dagenhart* case is clear. The congressional power over interstate commerce is within its proper scope just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and injury. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities unobjectionable as subjects of transportation and to deny the same to the people of a State in order to coerce them into compliance with Congress's regulation of State concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution.

Two other decisions on the same statute were delivered by the court on the same day, in both of which the question of unconstitutionality had been raised. In one (*Bailey v. George*, 42 Sup. Ct. 419) an injunction was sought restraining the collector of taxes from proceeding with the collection of the tax under the law. It was held that there was no showing of an exhaustion of legal remedies available, so that no writ of injunction would issue, and the case was dismissed. In the second (*Atherton Mills v. Johnson*, 42 Sup. Ct. 422) a father sought an injunction against the discharge of his son under the age fixed by the act, but as the son was at the time of this appeal no longer under that age the question was said to be merely moot and not subject to consideration in the court, so that this case, too, was dismissed.

CONTRACT OF EMPLOYMENT—AGREEMENT BETWEEN RELATIVES—PRESUMPTION—*Baker v. Lyell*, *St. Louis Court of Appeals, Missouri* (June 13, 1922), 242 *Southwestern Reporter*, page 703.—Mrs. Sarah E. Cochran and Mrs. Nannie Baker were sisters. Mrs. Baker and

her husband were separated about 40 years ago and Mrs. Baker, with her infant child, went to live with Mrs. Cochran. In 1913 Mrs. Baker and her daughter Sallie, on the advice of their physician, went to Montana on account of their health. In 1914 Mrs. Cochran, who was 68 years of age, wrote to them requesting them to return to Missouri, which they did. They lived with Mrs. Cochran on the farm in Missouri, as they had done prior to 1913, rendering services in the Cochran home and upon the farm. Mrs. Cochran died, without making a will, on May 6, 1919. Proceedings were taken in the probate court to settle the estate. Sallie Baker, the niece of Mrs. Cochran, filed a bill for labor and services from 1914 to 1918. The administrator of the estate of the deceased opposed the bill and a trial was held. Testimony was offered to the fact that it was understood that Sallie Baker was to receive compensation for the work done. The testimony of the physician who treated Mrs. Cochran showed that she asked him if she was competent to make a will, and that he told her that she was not physically able to do so, and that she had told him that she wanted to compensate the girl. A judgment was rendered in favor of the payment of the bill, and an appeal was taken. The higher court affirmed the judgment below on the condition that a \$165 item would be remitted. The law upon the subject as to the existence of a contract under the conditions was stated by presiding Judge Allen, speaking for the court, saying:

The law implies no promise to pay for services rendered by one member of a family to another, but, on the contrary, the presumption, *prima facie*, is that such services are rendered gratuitously, casting upon the party claiming compensation therefor the burden of rebutting such presumption; and in order to recover therefor it devolves upon the claimant to prove that there was an agreement or understanding to pay for such services, either by direct testimony or by adducing evidence from which it may be inferred that there was a mutual understanding and intention to that effect. This rule has been so often stated and applied by our courts as to make it unnecessary to do more than refer thereto.

In the instant case we think that the facts and circumstances in evidence are sufficient to take to the jury the issue as to whether or not there was a mutual understanding or agreement that the services in question were not voluntary but that compensation was to be made therefor. It is true, as contended by appellant, that the evidence in such cases should be such as to tend to establish the relation of debtor and creditor between the parties, and the assumption by the deceased of a legal obligation capable of being enforced, and that the mere expectation by the claimant of a gift or gratuity, by will or otherwise, is not sufficient to support a recovery.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—*Granow v. Adler, Supreme Court of Arizona (May 11, 1922), 206 Pacific Re-*

porter, page 590.—Harry Adler was employed by D. Granow as clerk, manager, and salesman in the latter's dry goods store, to serve for a period of one year at a wage of \$35 per week plus 2 per cent commissions on the gross sales made by Adler, amounts to be paid weekly. After about 4 months Adler was discharged and further opportunity for employment with Granow was refused. Claiming that the discharge was wrongful, Adler sued for the amount of the wages for the remainder of the year and a sum that would represent the commissions at the rate shown by experience to be the probable returns from this source.

In the superior court of Maricopa County judgment was in Adler's favor, and the employer appealed. Judge Flanigan, who delivered the opinion of the court, considered the two conflicting rules that had been held to apply by different courts in similar cases. One of these, following *Gordon v. Brewster*, 7 Wis. 355, is to the effect that a suit before the expiration of the term of the contract warrants recovery only up to the date of the trial, deducting any wages that the plaintiff might have received or might reasonably have earned in the meantime. This rule has been followed in a number of cases, several of which are noted in 6 L. R. A. (N. S.), page 111, in connection with *Howay v. Going-Northrup Co.*, 24 Wash. 88, 64 Pac. 135. In *Labatt on Master and Servant* (2d Ed., sec. 363) the reason for this rule is said to be the contingent and uncertain nature of the damages which may accrue during an unexpired residue of the term; the employee might die or secure other and more profitable employment, etc.

The opposing view is that a wrongful breach entails an immediate liability for the entire sum involved in the contract, and Judge Flanigan adopted this view as "founded upon the better reasoning and announcing the more just and equitable rule," saying:

To limit recovery to the damages accrued to the time of trial, the contractual term not having elapsed, and then to hold the employee barred by such an award from any further recovery, seems to us to be at war with the general principle which imposes liability upon the party who breaches a contract, to respond to the other party for all damages which arise naturally from the breach, or such as may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract, as a probable result of the breach.

A considerable number of cases allowing recovery to the end of the contract period were cited, the opinion concluding:

We hold that, upon the breach of the contract by his wrongful discharge, the plaintiff had a cause of action which he could assert at any time within the period of statutory limitation to recover all damages he sustained. In such action he was entitled to a verdict

in such sum as would compensate him for the injuries sustained not only to the day of the trial but to the end of the contract period. The estimation of the damages to the time of trial should ordinarily be a matter of little difficulty. For the remainder of the period the jury would properly have been instructed to consider the wages agreed to be paid, the commissions which would probably have been earned, and such other probabilities or uncertainties affecting the continuance of the contract, or growing out of the terms thereof or the plaintiff's ability to perform on his part, as might be shown by the evidence, and there should be allowed as a deduction whatever amount the plaintiff would probably earn in other suitable employment, by the use of reasonable diligence to find such employment. The object sought to be attained by the allowance of damages being to compensate the plaintiff for his actual loss, the verdict should be for the present net value of the benefits so estimated.

After disposing of some other matters, including objections to instructions, the judgment was affirmed in accordance with the reasons stated.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—*Safford v. Morris Metal Products Corp., Supreme Court of Errors of Connecticut (January 4, 1922), 118 Atlantic Reporter, page 37.*—The superior court of Fairfield County rendered judgment in favor of Ralph K. Safford on account of a breach of contract on the part of the corporation named, and the company appealed. The judgment of the court below was affirmed. The contract involved was expressed in a letter written by the then vice president of the corporation, who was employing a staff of employees for the conduct of the business. This letter bore date of May 20, 1920, and was as follows:

Pending the drawing of a more formal agreement, please accept this letter as an agreement to engage you for a term of at least three years at a salary of at least \$6,000 as secretary of the above company or some superior capacity as may arise—you to report for duty before July 1st, 1920.

Safford then moved from Springfield, Mass., where he was then employed and lived, to the city of Bridgeport, the place of the company's business, and entered upon his duties on June 1st. A salary of \$500 per month was paid for the months of June, July, and August, and no further or formal action was taken with regard to the appointment of Safford as secretary or other official of the corporation, but he was assigned duties apparently satisfactory to himself and the company. On October 5 Mr. Morris, now president of the corporation, wrote a letter to Safford making certain charges and giving notice of discharge from further employment. "The charges made in this letter in justification of the discharge, the [trial] court found not proved." Safford thereupon sued to recover

damages for the breach of the contract and salary up to the date of the bringing of the suit, which the court allowed.

It was found that Morris was acting with authority in making contracts of general employment, and that there was no claim by Safford in regard to the nature of his duties, or failure to appoint him secretary, or for any other damages than those occasioned by the breach of the contract. The company admitted certain liabilities but claimed that an excessive allowance had been made.

In passing upon this contract, and in concluding the opinion in affirmation of the action of the court below, Judge Curtis, speaking for the court, said:

The action was begun October 5, 1920, the day after his discharge. The plaintiff was not paid anything for his services after September 1, 1920. After his discharge the plaintiff made diligent search for employment but was not able to secure other employment until May 1, 1921, when he secured employment at \$200 per month, and this employment at that rate continued until the date of the judgment in this action, namely, February 5, 1922.

The court rendered judgment for damages for salary due at date of discharge and also for the breach of contract. This was proper under the complaint. (*Viall v. Lionel Mfg. Co.*, 90 Conn. 698, 98 Atl. 329.) The court arrived at the amount of its judgment by following the rule that prima facie the plaintiff was entitled to recover damages equal to the balance of the stipulated salary for the term of his employment, and that the defendant was entitled to mitigate or lessen such amount by showing what sum, if any, the plaintiff had earned or by the exercise of due diligence could have earned in some other employment. The defendant seems to claim that the court could not so proceed but must confine its estimate of damage to the period terminating at the date of judgment. This claim can not be sustained. The court followed the course established by the laws of this State. (*Grant v. New Departure Mfg. Co.*, 85 Conn. 421, 83 Atl. 212; *Viall v. Lionel Mfg. Co.*, 90 Conn. 694, 98 Atl. 329.)

CONTRACT OF EMPLOYMENT—BREACH—ENFORCEMENT BY INJUNCTION—*Sherman v. Pfefferkorn et al.*, *Supreme Judicial Court of Massachusetts (June 8, 1922)*, 135 *Northeastern Reporter*, page 568.—Arthur F. Sherman was the owner of a laundry in Weymouth, Mass., and had laundry routes in Weymouth, Hingham, and Braintree. On August 7, 1917, he entered into a contract with one Walter E. Pfefferkorn under the terms of which the latter was to act as laundry solicitor, collector, and deliveryman for the former. The term of the employment was to be at the will of the parties. Among its contract provisions was an agreement not to disclose the names, addresses, etc., of customers nor to permit anyone to accompany him on his route without the express permission of the employer; also not to do anything prejudicial to the interests of the employer for a

period of three years after the termination of employment, nor to engage in the laundry business in specified territory for a like period.

On November 17, 1919, Pfefferkorn was discharged for a justifiable cause. In the month of April, 1920, he became one of the incorporators of the South Shore Laundry (Inc.). He entered into an arrangement by which he could become half owner of the stock of the company. He gave information about customers to the company which he had acquired in the employ of Sherman, and as a result of this information and because of the friendly acquaintance between Pfefferkorn and the customers Sherman lost a large part of his former business. Suit was brought for an injunction to restrain Pfefferkorn from violating his contract and others from employing him. An injunction was granted, and the defendants appealed. In the Supreme Judicial Court the decree was modified and affirmed. Judge Jenney rendered the opinion of the court, in the course of which he said:

It long has been settled that contracts restraining freedom of employment can be enforced only when they are reasonable and not wider than is necessary for the protection to which the employer is entitled and when not injurious to the public interest.

As stated by Lord Macnaghten in *Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co.* (1894), A. C. 535, 565:

“The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.”

Considering the nature of the business and the conditions now existing, the contract here considered was reasonable in limitations as to time and space. It clearly follows that Pfefferkorn was rightly enjoined from soliciting within the towns of Weymouth, Hingham, and Braintree patronage of customers of the plaintiff, the names of whom had become known to him in the course of and by reason of his employment, and from disclosing the names or using, to the detriment of the plaintiff, information or knowledge regarding the laundry business which had been confidentially gained by him in the course of his employment. The decree, however, did much more than restrain him from doing any act or thing in derogation of his written contract. It ordered Pfefferkorn to resign such offices as he then held in the South Shore Co. and to dispose of any stock of said

company or other interest therein, either legal or equitable, which he then owned.

In these respects the decree was wrong. The master found that Pfefferkorn had ceased to hold office in the defendant company. The requirement as to the sale of stock or other interest was not necessary to give the plaintiff all that he was entitled to receive. Notwithstanding his contract, the employee had the right to engage in the same line of business or to be interested therein, but not beyond the bounds defined. The measure of relief required must be determined by the facts in each case.

CONTRACT OF EMPLOYMENT—BREACH—INJURED WORKMAN—
AGREEMENT FOR LIFE EMPLOYMENT—*Fisher v. John L. Roper Lumber Co., Supreme Court of North Carolina (May 10, 1922), 111 Southeastern Reporter, page 857.*—In 1908 Frank Fisher was a strong and vigorous young married man with one child. He was then employed by the defendant company in one of its lumber mills. In the course of his employment he received serious and permanent injuries; two of his ribs were broken and one of his arms was so injured that it had to be amputated. When Fisher returned from the hospital, after having his injuries cared for, he was preparing to bring a suit for damages against his employer when he was called into an office of the company by Mr. W. G. Roberts, the company's foreman in control of the employees and their work at the mill. Roberts told him that the company always took care of its men injured the way he was, that there was no use to see a lawyer, and if he would not sue, the company would employ him in such work as he could do about the mill in his crippled condition, and for the balance of his life give him a living wage, sufficient for the support of himself and family. Fisher agreed to the proposition, and in pursuance of the agreement he was employed and received adequate wages for his work until 1920. In that year, owing to the cost of living, the sum paid him would not keep him decently clothed nor his family from want. He interviewed the superintendent and told him all the facts, but as no increase in wages was granted as a result of the interview he quit his work, of necessity, and sought and obtained employment elsewhere. After working a few months there he was taken sick, and before he recovered, the company for which he was working went out of business. Suit was brought on the agreement made between Fisher and the company, acting through Roberts. The company denied all liability and defended on the ground that Fisher was negligent; that the statute of limitations had run; that the alleged contract was never made, and if it was, Roberts did not have the power to make it; that it was without valid consideration and was too indefinite to afford a

basis for recovery. A judgment was rendered in favor of Fisher, and the company appealed to the supreme court. Judge Hoke, speaking for that court in an opinion setting forth the reasons for affirming the judgment of the lower court, answered the contentions of the company in part as follows:

The evidence as accepted by the jury all tended to show that the contract, if made, was by way of compromise and adjustment of a bona fide claim on the part of plaintiff against the company. Such an adjustment will afford sufficient consideration for the agreement whether the claim was well grounded or not.

Defendant insists further that there is no evidence of a valid agreement by anyone having authority to bind the company. It appeared that this man having only one arm was on the employer's pay roll at the price of a full hand for 12 years, and if the management did not know of the terms of plaintiff's employment, their negligence in this respect should be imputed to them for knowledge.

Again, it is very earnestly contended by appellant that the contract is too indefinite, and for this reason no recovery can be had thereon. It will be noted that this exception assumes the existence of the contract, and the jury has established it according to plaintiff's version. This being true, there is no uncertainty as to the terms which the parties have selected in which to express their agreement that plaintiff, during his life, would be given a living wage required for the support of himself and family. The person, the purpose, and the time of the contract are clearly given, and the only objection at all possible would be as to the difficulty in fixing upon the amount to be paid or the value of the contract to plaintiff in case of breach. It is said by an intelligent writer on the subject that the law does not favor but leans against the destruction of contracts on account of uncertainty; therefore the courts will, if possible, so construe the contract as to carry into effect the reasonable intent of the parties, if it can be ascertained. (6 R. C. L., p. 648.) And by another that this intent may be determined at times by reference to extrinsic facts relevant to the inquiry. Applying these principles, and by reference to the facts in evidence, the capacity of the plaintiff to earn wages, his physical condition, the number of his family, the cost of necessaries for an ordinary livelihood, together with the mortuary tables, also in evidence, would, with other facts, afford data, in our opinion, to enable a jury to come to a reasonable estimate as to the value of the contract held by plaintiff, reduced, of course, by the amount he would be able to earn by diligent effort, and in this aspect the case was considered by the jury and the damages awarded. Contracts not dissimilar have been upheld with us and other courts of approved authority. (*Rhyne v. Rhyne*, 151 N. C. 400, 66 S. E. 348; *Lumber Co. v. Lumber Co.*, 165 Ala. 268, 51 So. 767; *Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14.)

As to the statute of limitations, the suit is on the contract, and in this instance the right of action did not accrue to plaintiff till a breach of same which occurred in 1920.

On careful consideration we find no reversible error and the judgment on the verdict is affirmed.

CONTRACT OF EMPLOYMENT—BREACH—"STRAIGHT TIME"—SICKNESS DURING EMPLOYMENT—*Red Cross Manufacturing Co. v. Stroop, Appellate Court of Indiana (May 12, 1922), 135 North-eastern Reporter, page 351.*—Jacob C. Stroop and the Red Cross Manufacturing Co. entered into an oral contract of employment by the terms of which Stroop was to work in the company's manufacturing plant at Bluffton with wages at the rate of \$1,300 per year for "straight time," payable monthly. It was agreed that either party desiring to terminate the contract should give the other 60 days' notice. Stroop undertook to carry out his part of the contract, but became sick in November, before his discharge, and again in February, March, and April. Because of this sickness he was not able to and did not work during a large part of the time. On the 14th of April he was not working because of his sickness, and was discharged without the agreed 60 days' notice. Stroop brought suit against the company for damages occasioned by reason of the breach, and a verdict was rendered in his favor. The parties disagreed as to the effect of the sickness on the contract, and the company appealed to the appellate court, contending for the general rule "that the inability of an employee by reason of sickness to perform his part of the contract absolves both parties from liability to continue performance." Judge McMahon, speaking for the court in its decision affirming the judgment of the lower court, answered the contention as follows:

But if the parties have contracted with reference to the possibility of the employee becoming sick, and agree that in case he becomes ill he shall be allowed pay for full time, the rule contended for by appellant would not control. The rule applies in case there is no agreement to the contrary. But courts can neither make, modify, change, nor add to contracts made between parties in the absence of fraud or mistake. Their duty is to interpret and enforce them as the parties themselves have made them.

The court said that the term "straight time" was ambiguous, but further said:

The evidence is sufficient, however, to justify us in saying that the parties placed their own construction upon the meaning of this expression and as to what they understood it to mean. During the six months prior to appellee's discharge he had been ill and unable for several months to perform any labor. Between February 11 and April 14, the date of his discharge, he had worked but four days. He received pay for full time, no deductions being made for time lost by reason of sickness. The inference might be drawn that appellant understood that no deductions were to be made on account of time lost by reason of sickness. It was competent for the parties to enter into an agreement, as claimed by appellee. Such an agreement is not unlawful.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—POWER OF COURTS—PRIOR RIGHTS AMONG EMPLOYEES—*Chambers v. Davis*, *Supreme Court of Mississippi* (April 17, 1922), 91 *Southern Reporter*, page 346.—C. S. Davis and others brought a suit in the equity court of Mississippi for a decree enjoining the Mobile & Ohio Railroad Co. from replacing them as brakemen on one of the regular trains of the company. The suit was based upon a contract existing between the railroad company and its employees under which it was contended that the company agreed to give preference, in assigning men to trains, to the employees longest in the employ of the company. The plaintiffs contended that, in violation of its contract, the company had displaced them from one of its regular trains in favor of the defendants, who were employees not in the employ of the company for as long a time as they were, and as a result they were transferred from the list of regular to that of extra brakemen, because of which they were given runs only when a regular brakeman failed to take his run. The railroad company alleged that it had no real interest in the controversy and that it was in fact a controversy between its employees, and that it was willing to abide by and to comply with the court's decree. A decree was entered and the defendants appealed to the supreme court of the State. Chief Justice Smith of that court delivered an opinion reversing the decree of the lower court and dismissing the bill of the plaintiffs on the grounds that the bill sought a decree for specific performance of a contract for personal services, which equity courts will not do. The court further said:

Counsel for the appellees admit that such is the general rule, and that a court of equity would not interfere should the company discharge the appellees. Their contention is that the rule should not apply here for the reason that the company has not and does not intend to discharge the appellees, and is willing to accord them their claimed right of seniority if the court should decree that they are entitled thereto. But this simply amounts to a request of the court to relieve the railroad company of an embarrassing situation by arbitrating a dispute between its employees as to their relative rights under their contract with the company, and it would seem to be unnecessary for us to say that such is not a proper function of the courts.

We have not overlooked the case of *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 [see Bul. No. 290, p. 82], cited by, and which supports the contention of the appellees, but that case is not in accord with the rule governing controversies of the character of the one here in question and, moreover, was not decided by a court of last resort, but by one of the judges of such a court on a motion for a temporary injunction.

Judge Anderson wrote a strong dissent, in which Judge Ethricle concurred. The dissent is in part as follows:

As it appears to me, a wise public policy would require the courts to entertain such suits. It would have a tendency, to say the least of it, to avoid strikes growing out of controversies between large employers of labor and their employees. If both employer and employees in such cases understood that the courts were open to redress their grievances, and were ready and willing to pass just judgment on the rights of the respective parties, it might result in great good to the country. The courts ought to keep pace with the progress and advancement of the country. Old principles should be extended and applied to new conditions; and, if necessary to the ends of justice, new principles should be developed and declared by the courts. Since under modern conditions employers and employees (especially large employers of labor and their employees) are dealing with each other collectively as to many of the important terms of employment, why should not the courts deal with them in the same manner? Sooner or later it will be done. *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459, is directly in point, and I know of no authority to the contrary; and, although that was not a decision of the Court of Appeals of Kentucky, as stated in the majority opinion, it was concurred in by a majority of the members of the court, and is entitled to such weight as its reasoning carries.

CONTRACT OF EMPLOYMENT—ENGAGING IN SIMILAR BUSINESS—
INJUNCTION—*Federal Laundry Co. v. Zimmerman, Supreme Court of Michigan (March 30, 1922), 187 Northwestern Reporter, page 335.*—The Federal Laundry Co. was organized by the consolidation of several laundry companies, and from the time of its organization until January 15, 1921, it had in its employ as a driver and solicitor one William H. Zimmerman. He worked on what was called route 8, collecting soiled clothes from customers and from agencies of the company and later returning the laundered articles. He solicited business and was given the business of all persons in his territory. He was paid a commission and a salary. On January 15, 1921, Zimmerman quit the employ of the company and accepted employment with a competitor of the company. The Federal Laundry Co. brought suit for an injunction to restrain Zimmerman from calling for or delivering laundered goods of its customers in route 8, or from soliciting new customers for his new employer in that territory, or from giving information to the new employer gained by Zimmerman from the former employer's laundry list. The case was tried and the relief requested was not granted.

An appeal was taken to the supreme court of the State. The court said that it had previously decided in the case of the Grand Union Tea Co. *v. Dodds*, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. (N. S.) 260, that an injunction would not issue in a case of this kind. The

court quoted from the case cited above to the effect that "We are of the opinion, however, that he can not be restrained from selling his commodities, for himself or for any employer, in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made."

The court said that unless they overruled the Dodds case the company was not entitled to the decree sought. The court refused to overrule the prior case because "We think it sound in principle, and that it protects the property rights of the employer without destroying the right of the employee to pursue a lawful occupation."

COST OF LIVING—PRODUCTION AND DISTRIBUTION OF COAL—PRICES—LEVER ACT—CONSTITUTIONALITY—*Ford v. United States, United States Circuit Court of Appeals, Sixth Circuit (May 4, 1922), 231 Federal Reporter, page 298.*—Criminal prosecutions were brought against B. N. Ford and the Matthew Addy Co. upon charges of violation of the provisions of the Lever Act (40 Stat. 276), an emergency war measure effective August 10, 1917, the cases being heard at the same time. On August 23, 1917, the President adopted a series of regulations under the act as to prices and margins to be in force "pending further investigations or determination thereof by the President." In the regulations a jobber buying and selling bituminous coal was forbidden to add to his purchase price a gross margin in excess of 15 cents per ton. The corporation and Ford were separately indicted for making, subsequent to August 23, 1917, various specific sales of coal at a price which included a profit of 25 cents per ton. The coal in question had been purchased previous to the time the Lever Act took effect. This last fact was set up as a defense at the trial but was held not good. Judgments of conviction were entered (265 Fed. 424) and the case was taken to the Circuit Court of Appeals. The convictions were affirmed in that court and attacks against the constitutionality of the statute were held to be of no force. Judge Knappen delivered the decision of the court, saying in part:

It seems plain that the President's order of August 23d should not be construed as excluding from its operation coal previously bought. Neither the statute nor the regulations were ordinary legislation. That they were designed to meet a real emergency is shown, not only by the title of the act, but by the preamble, which asserts that the measures provided thereby for conserving the supply of food products, fuel, etc., the establishment of Government control, and the issue of regulations and orders provided for, were by reason of the existence of a state of war essential to the national security and defense, for the successful prosecution of the war, and for the

maintenance of the Army and Navy. The act was in terms made effective only until the end of the then existing war. Even ordinary remedial laws, although penal, are not to be so strictly construed as to defeat the obvious legislative intent.

Plaintiffs in error complain that they were not allowed to show that 15 cents per ton added as commission or gross margin to its purchase price results in this case to loss or inadequate compensation. Denial is made of the President's authority to so limit the gross margin as to accomplish that result. In this connection there is a suggestion that the President's authority can only be exercised through the Federal Trade Commission. It is further urged that, even if the immediate emergency justified the President in fixing jobber's prices, he was subject to the limitations imposed by the act upon the Trade Commission, which (under paragraph 14) was required in fixing maximum producers' prices to "allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion," plus "a just and reasonable profit."

In our opinion this contention overlooks the summary nature of the power which we think was conferred on the President, to meet the emergency by making temporary orders which should, so far as possible, save the immediate situation until the commission should have time and opportunity, through its slower processes, to make more complete investigation of conditions and remedies. It should be conclusively presumed that the President gave the subject all the investigation and consideration which the emergency permitted. It was thus not open to plaintiffs in error to show that in their specific cases the margin allowed was inadequate or resulted in loss.

The constitutionality of section 25 of the act is vigorously assailed on several grounds; the first being that it deprives plaintiffs in error of their property without due process of law. The specific criticisms are that the law is not clear and definite, and that no notice and hearing upon the making of executive orders is provided for. The first criticism is plainly without merit. Nothing could well be more clear and definite than the plain inhibition against making the selling price more than 15 cents per ton higher than the purchase price. The case is obviously not within the reasoning of the Cohen Case, 255 U. S. 81, 89, 41 Sup. Ct. 298 [Bul. No. 309, p. 72], which held section 4 of the act invalid; and the instant case is not affected by that decision.

As to the second criticism: While under ordinary conditions notice and hearing would be conditions precedent to the making of an order of this kind, we agree with the court below that due process of law is not to be tested by form of procedure merely, that public danger warrants the substitution of executive processes for judicial process, and that under the war conditions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by article 1, section 8, of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated.

EMPLOYER AND EMPLOYEE—SERVICE LETTER—CONSTITUTIONALITY OF STATUTE—*Prudential Insurance Co. of America v. Cheek*, Supreme Court of the United States (June 5, 1922), 259 U. S. 530, 42 Supreme Court Reporter, page 516.—This case was before the Supreme Court on a writ of error to the St. Louis, Mo., Court of Appeals. Robert T. Cheek sued the Prudential Insurance Co. to recover damages alleged to be due on account of its failure to furnish a letter "setting forth the nature and character of the services rendered by him to said corporation and the duration thereof, and truly stating for what cause plaintiff had quit said service."

There was another count based on an alleged unlawful agreement between this company and two others which had a practical monopoly of the industrial life insurance business in St. Louis, under which no one leaving the service of one company could find employment with the others for a term of two years.

A Missouri law (sec. 3020, R. S. 1909) makes it the duty of a corporation doing business in this State to furnish its employees leaving services, either voluntarily or on discharge, with a letter stating the facts above indicated. Failure to do so is punishable by fine or imprisonment, or both.

The contention was made that this provision of law was not constitutional although it had been upheld by the Supreme Court of Missouri (192 S. W. 387; see Bul. No. 246, p. 75). The opinion of the court in this case was delivered by Justice Pitney, who quoted from the opinion of the Supreme Court of Missouri to indicate the occasion of the legislation in question.

This was, in brief, a custom among railroad and other corporations of requiring applicants for positions to furnish the name of their last employer, with whom the company would then communicate, asking for the reason for the applicant's leaving service. The statute was enacted for the purpose of regulating an established custom and protecting the workman from the evils of secret communications. The Missouri court had said that the law "was designed to protect the public interests as well as the wage earner against an injurious custom given birth to and fostered by said corporations." Justice Pitney then said:

That freedom in the making of contracts of personal employment by which labor and other services are exchanged for money or other forms of property is an elementary part of the rights of personal liberty and private property not to be struck down directly or arbitrarily interfered with consistently with the due process of law guaranteed by the fourteenth amendment, we are not disposed to question. This court has affirmed the principle in recent cases.

But the right to conduct business in the form of a corporation, and as such to enter into relations of employment with individuals, is not a natural or fundamental right. It is a creature of the law;

and a State, in authorizing its own corporations or those of other States to carry on business and employ men within its borders, may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient, in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact.

It was then pointed out that the law "does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon;" nor does it require that a commendatory letter be given, but simply a statement signed by the superintendent or manager setting forth the nature, character, and duration of the service, and for what cause, if any, it was terminated.

A number of statutes of similar tenor were then discussed and the attitude of the State courts toward them, some having been upheld and some declared unconstitutional. Concluding this discussion, Justice Pitney said:

We have examined the opinions referred to with the care called for by the importance of the case before us and are bound to say that beyond occasional manifestations of a disinclination to concede validity to acts of legislation having the general character of service letter laws, we have found nothing of material weight; no well-considered judgment, much less a formidable body of opinion, worthy to be regarded as supporting the view that a statute which, like the Missouri statute, merely requires employing corporations to furnish a dismissed employee with a certificate setting forth the nature and character of the service rendered, its duration, and for what cause, if any, the employee has left such service, amounts to an interference with freedom of contract so serious and arbitrary as properly to be regarded a deprivation of liberty or property without due process of law within the meaning of the fourteenth amendment.

As has been shown, the Missouri statute interposes no obstacle or interference as to either the making or the termination of contracts of employment, and prescribes neither terms nor conditions. The supreme court of the State, having ample knowledge of the conditions which gave rise to the particular legislation, declares with an authority not to be denied that it was required in order to protect the laboring man from conditions that had arisen out of customs respecting employment and discharge of employees introduced by the corporations themselves. It sustains the act as an exercise of the police power, but in truth it requires no extraordinary aid, being but a regulation of corporations calling for an application of the familiar precept, "*Sic utere tuo,*" etc., in a matter of general public concern.

What more reasonable than for the legislature of Missouri to deem that the public interest required it to treat corporations as having, in a peculiar degree, the reputation and well-being of their former employees in their keeping and to convert what otherwise might be but a legal privilege, or under prevailing customs a "moral duty," into a legal duty, by requiring, as this statute does, that when an employee has been discharged or has voluntarily left the service it

shall give him, on his request, a letter setting forth the nature and character of his service and its duration and truly stating what cause, if any, led him to quit such service.

It is not for us to point out the grounds upon which the State legislature acted or to indicate all the grounds that occur to us as being those upon which they may have acted. We have not attempted to do this, but merely to indicate sufficient grounds upon which they reasonably might have acted and possibly did act to show that it is not demonstrated that they acted arbitrarily, and hence that there is no sufficient reason for holding that the statute deprives the corporation of its liberty or property without due process of law.

The argument was advanced that "equal protection" was denied corporations, but this was said to be "unsubstantial." Corporations and individuals may easily be found by the legislature to belong in separate classes as employers. The act applies to all corporations doing business in the State, whether incorporated therein or in another State. The constitutionality of the act was therefore upheld, three justices dissenting.

As to the count based on the alleged unlawful agreement between the three industrial insurance companies to control the city's business, Justice Pitney pointed out that the Missouri Supreme Court had held that "the corporations had no lawful right to enter a combination or agreement the effect of which was to take from them the right to employ whomsoever they deemed proper, and at the same time deprive former employees of the constitutional right to seek employment." Justice Pitney stated that this doctrine might have been embodied in a statute without conflict with the fourteenth amendment, and that "the decision is as valid as a statute would be."

A similar statute of the State of Oklahoma was passed upon by the Supreme Court on the same day, Justice Pitney delivering the opinion in that case. (*Chicago R. I. & P. Ry. Co. v. Perry*, 259 U. S. 548, 42 Sup. Ct. 524.)

This statute had been upheld by the Supreme Court of Oklahoma (75 Okla. 25, 181 Pac. 504; see Bul. No. 290, p. 90), as in the Cheek case. Quotations were made from the law and the opinion thereon delivered by the State supreme court. Close similarity was found between this law and the Missouri statute above upheld, and the right of the legislature to exercise its judgment on the matter was declared.

It was peculiarly a matter for the legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that "they knew what they were about."

The judgment was therefore affirmed over the dissent of the same three justices as in the Cheek case.

EMPLOYERS' ASSOCIATIONS—MONOPOLIES—ANTITRUST LAW—"COMMODITY OF COMMON USE"—FOUNDATIONS FOR BUILDINGS—*People v. Amanna, Supreme Court of New York, Appellate Division (November 17, 1922), 196 New York Supplement, page 606.*—This was a criminal prosecution directed against Fiore Amanna and others, charging an unlawful agreement for the purpose of creating and maintaining a monopoly for the production of stone and concrete building foundations. Amanna and his associates formed what was known as the Stone Mason Contractors' Association, a corporation made up of contractors engaged in the business indicated. It was charged that by their agreements they had conspired unlawfully to control and monopolize foundation work in the counties of New York and Bronx, in violation of section 340 of the general business law (Consol. Laws, c. 20).

Contracts were made for the furnishing of labor and material and the furnishing of foundations at a fixed price per cubic foot. Of the methods used, Judge Greenbaum, speaking for the court, said:

The purpose and methods of the Stone Mason Contractors' Association as set forth in the indictment demonstrate beyond cavil a scheme designed to circumvent the antimonopoly of this State. The underlying idea which evidently prompted the formulation of the agreement under which the defendants operated was that, since the mason's contract with the builder includes the furnishing of materials and labor, there was no separate sale of materials to the builder, and hence, since the statute has no application to contracts for work, labor, and services, there was no violation of the law. There can be no doubt that the members of the contractor's association by their agreement intended, among other advantages, to control the price of the materials which enter into the construction of foundations by the device of a fixed sum per cubic foot.

As to the contention that foundations are not a commodity, it was said that "the very scheme of compelling the builder to pay for foundations at a given price per cubic foot indicates that the mason contractors regarded the finished product as though it were a piece of merchandise, sold by weight or measure." The judgment of the trial court had been in favor of the defendants, relieving them of the charge. This was reversed by the appellate division, as indicated by the following quotation:

The practical effect of the agreement which is assailed in the indictment is to prevent the builder from buying the stone, cement, or sand which enter into the construction of foundations from those who are engaged in the sale of those materials and to enable the mason contractors to charge the builders therefor any price they saw fit. Such a conclusion can not be affected by the fact that the price fixed for the foundations includes the supplying of labor for preparing and setting the foundations.

It seems to us, too, that the contention of the respondents on this appeal has impliedly been disposed of adversely to them in *People v.*

John T. Hettrick, in which the judgment of conviction affirmed by this court, without opinion was recently affirmed in the court of appeals without opinion.

The crime there charged was the violation of section 340-1 of the general business law on the part of the defendant, who conspired with others to promote the continuance and to extend the operation of a certain combination whereby competition in the business of furnishing, selling, and installing plumbers' supplies and materials in buildings might be prevented. One of the points raised before the appellate courts was that the phrase "article or commodity of common use" does not include the labor required in installing plumbing fixtures in buildings, and that the act merely applied to tangible articles of trade or commerce. It was claimed in that case, as it is in this, that, while plumbing fixtures themselves are "articles or commodities," labor is not a commodity, and hence the contracts with builders for plumbing to be installed in buildings, including, as they did, the labor of installation, were not within the contemplation of section 340 of the general business law. It was also argued that the commodities that were furnished under the contract were merely incidental to the main contract which was for services and labor.

In behalf of the people it was contended that the work, labor, and services were mere incidents to the installation of the plumbing materials. The court of appeals, however, affirmed the conviction.

It is difficult to discover any difference in principle between the facts here appearing and those involved in the Hettrick case, *supra*. The only difference between the cases is in the character of the materials used. In the Hettrick case the contract embraced the supplying of plumbing materials, whereas in the instant case the agreement includes the supplying of stone, cement, and sand. In both cases the contractor was also to supply the labor required for affixing the materials to the freehold.

The judgment and order appealed from are reversed, and the defendants' demurrer to the indictment is overruled. All concur.

EMPLOYERS' ASSOCIATIONS—MONOPOLIES—RELIEF—*Overland Publishing Co. v. Union Lithograph Co., District Court of Appeal of California (April 18, 1922), 207 Pacific Reporter, page 412.*—The Overland Publishing Co. sued the Union Lithograph Co. and others for injunction and damages. The Overland Co. is a corporation engaged in the business of printing and publishing. The Union Lithograph Co. and some 200 others engaged in similar lines of work formed what is known as "The Printers' Board of Trade," which had for its purpose the regulation of the printing and publishing business and "to investigate and check injurious trade practices and encourage the opposite."

Besides this association of employing printers, there were in San Francisco associations of working printers, printing pressmen, etc., three such organizations being named. These organizations had made an agreement with the employers' association for mutually

exclusive contracts of employment and service. The Overland Co. had frequently been solicited by the employers to join their association and had been told by the employees' associations that unless it did join its union workmen would be compelled to leave its service. The plaintiff company refused to join the Printers' Board of Trade, and the union employees left its employ.

The result of this situation of boycott would be, it was averred, a "very great injury of plaintiff." An injunction was therefore desired to prevent the continuance of the contract under which these measures were being carried out. Presiding Judge Langdon, having stated the facts as above, declared that "the typographical agreement, in so far as it is set forth in the complaint, is one which is perfectly legal and involves no restraint of trade." The antitrust law of the State (Acts of 1907, p. 984, amended 1909, p. 594) contains a provision that "labor, whether skilled or unskilled, is not a commodity within the meaning of this act." The portion of the typographical agreement pleaded by the plaintiff is a contract concerning labor. It is an agreement by the unions to sell their labor only to persons coming within a designated class. Decisions by the supreme court of the State announcing the right of freedom to contract or to refuse contracts of employment, whether singly or in cooperation, were cited, concluding with the following:

In the case of *Parkinson Co. v. Bldg. Trades Council*, 154 Calif. at page 599, 98 Pac. 1034, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, it is said:

"In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strikers—their acts being entirely lawful, their motives would be held immaterial."

Judge Langdon then said:

In the light of the foregoing cases, we think it clear that in so far as the allegations of the complaint so far enumerated are concerned, they state no ground for either injunctive relief or for the recovery of damages.

A second phase of the complaint was then taken up, which was to the effect that the employers' association in itself established a monopoly offensive to the antitrust law already cited. It was averred on information and belief that the Printers' Board of Trade had for more than three years maintained a system of restricting competition and fixing prices "grossly in excess of an amount that would yield to the persons making the charge and collecting said prices a fair and reasonable profit." All new contracts involving an amount in excess of \$15 were required to be reported and submitted to meetings of members held daily in the office of the board, when a price is fixed and the person designated who shall make the bid at the price named. Other members of the association are not to

bid on the same work except in an amount above the amount so fixed. This is said to be an unjust and illegal procedure, persons desiring work done or materials furnished being made to believe that the price obtained is the result of competitive bidding, whereas there is a limitation of competition between the members of the board of trade, which embraces practically 95 per cent of the concerns engaged in the printing trade in the city and county of San Francisco. As to this Judge Langdon said:

Conceding, for the purposes of this opinion, that this be true, the said association would, in consequence, be subject to forfeiture of its charter rights, franchises, and privileges, and to dissolution upon proceedings taken by the Attorney General or the district attorney. (Section 2, Stats. 1907, p. 984.) But this is not such a proceeding. This is an action by a private corporation, and, as such, is governed by the provisions of section 11 of said act. In that section it is provided that an action may be brought by "any person who shall be injured in his business or property by any other person or corporation * * * by reason of anything forbidden" in said act.

The general allegation of damages inflicted upon the Overland Co. was said to be insufficient. It does not appear in what respect the company "has been or will be damaged by the restraint of competition among the members of the Printers' Board of Trade." The loss of contracts and the inability to continue business are due to the fact that it can not secure union labor. If the employing printers have restricted competition among their members, so that only one person will submit a bid at the agreed rate, this reduces the number of competitors with which the Overland Co. must contend. "If plaintiff could secure union labor and continue to operate its business, the activities of the Printers' Board of Trade in restricting competition among its own members would not injure plaintiff in the least." In the absence of any proof of special damage to his business or property by reason of the agreement, the plaintiff is unable to maintain any action against the Printers' Board of Trade. "The statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages."

The injury resulting from the refusal of union workers to engage with the company affords no ground for injunctive relief nor for damages. Therefore the action of the court below adverse to all claims of the publishing company was affirmed.

EMPLOYER'S LIABILITY—ADMIRALTY—HYDROAEROPLANE A VESSEL WITHIN ADMIRALTY JURISDICTION—*Reinhardt v. Newport Flying Service Corp. et al.*, Court of Appeals of New York (November 22, 1921), 133 *Northeastern Reporter*, page 371.—Aksel E. Rein-

hardt was employed in the care and management of a hydroaeroplane which was moored in navigable waters at Brooklyn, N. Y. He was injured by the propeller while engaged in turning the plane about in an attempt to prevent it from being wrecked. He brought proceedings under the workmen's compensation law to recover for the injury. From an award of compensation the employer and the insurance company appealed. The award was affirmed in the appellate division of the supreme court and the defendants again appealed. In the court of appeals the order of the lower court and the award of the industrial commission were reversed and the claim dismissed. The reason for this action was because it was determined that a hydroaeroplane while on the water was a vessel. This being so, the jurisdiction of admiralty would exclude the jurisdiction of the commission as decided in the case of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438. (Bul. No. 290, p. 302.) The main question decided then was that Reinhardt was injured by a vessel. In arriving at this conclusion Judge Cardozo speaking for the court said:

Any structure used, or capable of being used, for transportation upon water, is a vessel. The conclusion might be more dubious if the word "vessel" had been interpreted grudgingly and narrowly. The fact is that it has been interpreted liberally and broadly. It includes a canal boat drawn by horses; a bathhouse upon floats; a raft; a scow; a dredge; anything upon the water where movement is predominant rather than fixity or permanence. A hydroaeroplane, while in the air, is not subject to the admiralty, or so at least we may assume, because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction. A hydroaeroplane, while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation. Such a plane is, indeed, two things—a seaplane and an aeroplane. To the extent that it is the latter, it is not a vessel, for the medium through which it travels is the air. To the extent that it is the former, it is a vessel, for the medium through which it travels is the water.

EMPLOYERS' LIABILITY—ADMIRALTY—JURISDICTION—LAKE FISHERMAN—*Foppen v. Peter J. Fase & Co., Supreme Court of Michigan (June 17, 1922), 188 Northwestern Reporter, page 541.*—Peter J. Fase & Co. were engaged in commercial fishing out of Grand Haven, Lake Michigan. On March 21, 1921, while returning from the fishing grounds and when some 15 miles offshore an employee on their boat was missed. No one saw the accident, but it was presumed that he was washed overboard as there was a considerable sea running. Compensation was awarded the dependents of the deceased, and the case was taken to the supreme court for review. The question before the court was as to whether recovery could be had

under the State workmen's compensation act or whether the case was one which was within the admiralty and maritime jurisdiction. The court, through Chief Justice Fellows, vacated the award and held that the occupation was maritime, and that therefore the court was bound by the rulings of the United States Supreme Court, which were held to decide that the decedent's contract of employment was maritime in its nature, to be performed only on the high seas, and that therefore the workmen's compensation act was not applicable.

EMPLOYERS' LIABILITY—ADMIRALTY—NEGLIGENCE—VIOLATION OF STATUTORY PROHIBITION—*Wilks v. United Marine Contracting Corp., Supreme Court of New York, Appellate Division (February 3, 1922), 192 New York Supplement, page 521.*—John Wilks was employed by the company named to paint a steamship moored to a dock in the city of New York. Through the collapse of the scaffold on which he stood he fell some 20 feet to the flooring or deck and was injured. It was in evidence that the scaffold collapsed on account of the use by the riggers of a defective timber which broke under the weight of the plaintiff and his companion. In the trial court instructions were given to the effect that the injured man must prove negligence on the part of his employer and the absence of contributory negligence on his part; and that while the law imposed the duty of furnishing a safe place the jury might consider whether or not the riggers who constructed the scaffold were fellow servants of the injured man, so that he could not recover.

Exceptions were made to these instructions, and from a verdict for the employer the case was appealed to the appellate division. Judge Kelly, who gave the opinion, regarded the appeal as bringing up a question "hitherto undecided as far as I can ascertain, whether the safety provisions [of the New York labor law] are available to a plaintiff in an action based on the common-law remedy save to suitors [by the Judicial Code] in maritime cases where the common law is competent to give it." The New York statute prohibits the furnishing of a scaffold that is unsafe, unsuitable, or improper or not so constructed as to give proper protection to workmen. This was held by the court to be only declaratory of the common law and within the grant of rights given by the provisions of the Judicial Code referred to. Cases in admiralty were cited in which the Supreme Court had held that the New York compensation law was so wide a departure from the maritime law that it could not be allowed to take effect when applied to admiralty cases. On the other hand, changes that do "not work material prejudice to the characteristic features of

the maritime law" are permitted to the States. (*Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 Sup. Ct. 89; see Bul. No. 309, p. 83.)

Judge Kelly then said:

But I have grave doubt whether the safety requirements in section 18 of the New York labor law (Consol. Laws, c. 31) come within the ban of these decisions. The plaintiff in this case is not asserting a claim against the ship or the shipowner. He is suing his immediate employer, a domestic contracting corporation, for damages occasioned by its failure to supply him with a safe scaffold. We are not considering any such novel, unusual statutory liability as that imposed by the workmen's compensation law. We are not considering any change in the liability of the master under employers' liability provisions of the State labor law. The question in the case at bar relates solely to labor law, section 18, which enlarged the duty of the master or employer and extended it to responsibility for the safety of the scaffold itself and thus to want of care in the details of its construction.

He then pointed out that neither the plaintiff nor his fellow worker had any part in the construction of the scaffold which they had been using, so that fellow service could not be inferred. The opinion concludes:

I can not see how this humane statutory requirement expressive of the public policy of the State of New York, designed for the protection of the life and limb of laborers upon scaffolds, introduces any new principle of substantive law. True, it is enforceable only in the State of New York, but in its application to an action by an employee residing in the city of New York working for the time being in painting a vessel moored to a dock in the city of New York, against his employer, a domestic contracting corporation, I can not see how it offends any of the essentials referred to by Mr. Justice McReynolds in *Western Fuel Co. v. Garcia*, supra. It does not interfere with the harmony of uniformity of the maritime law because the litigants are both residents of the State of New York. The defendant is not a shipowner whose vessel may be in one jurisdiction to-day and in another to-morrow. The plaintiff is not a sailor or one of a crew who may assert alleged causes of action in divers jurisdictions. Employers of labor in all jurisdictions are required by the common law to furnish their employees with safe tools and appliances and scaffolds. In the State of New York the statute, section 18, declares the rule, and as to work performed in that State prohibits employers from furnishing unsafe scaffolds. It takes from the employer no defense which he might plead in any court in any jurisdiction save that it makes the duty absolute and prevents him from pleading that the scaffold was built by a fellow servant of the injured employee, and that he, the master, is thus discharged from liability.

I can see nothing in the enforcement of this safety requirement between the litigants in the case at bar which "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the greater maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

The judgment of the court below was therefore reversed and a new trial granted on account of the erroneous instructions.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—*Belkin v. Skinner & Eddy Corp., Supreme Court of Washington (March 13, 1922), 204 Pacific Reporter, page 1046.*—Frank Belkin, a riveter, was an employee of the Skinner & Eddy Corporation, and was engaged in work on a vessel being constructed by it. During the course of the employment he was injured and brought a suit for damages because of the injury. The facts brought out at the trial show that three persons worked with him, one who heated the rivets to a white heat, one who inserted the hot rivets into prepared holes, and one who held a heavy bar against the rivet while he with an automatic machine did the driving. The machine was operated by compressed air and had a recoil similar to a gun. To maintain his balance the riveter must brace himself by putting one foot behind the other. On the day of the injury the company foreman directed Belkin to rivet the beading around one of the hatches. Belkin asked the foreman if the necessary staging was prepared, and he received an affirmative reply. It was customary for the staging upon which the riveter would stand to consist of three planks each about a foot wide placed side by side. Belkin commenced his work, and in the course of the duties he got in a position where the planking was only two feet wide, and when he stepped back for the purpose of bracing himself his foot went out beyond the planking and he fell several feet and was seriously injured. A verdict was returned in favor of the injured man, and from a judgment based on this verdict the company appealed, contending that Belkin fell as a result of his own carelessness, or if the staging was defective he should have known it, and consequently assumed the risk of working on it. The supreme court through Judge Bridges answered these contentions as follows:

Unquestionably the general rule is that the master must furnish his servant with a reasonably safe place in which to work; but it is equally well established that the servant may not blindly rely upon this duty of the master, for he must use some care and caution for his own welfare and protection. In other words, the servant will be held bound to observe those defects in a place where he is put to work, which are perfectly open and obvious, and which a person of ordinary care and caution, working under like circumstances, would observe. But whether in a particular instance a servant must as a matter of law observe the defects and appreciate the dangers depends to a large extent upon the particular circumstances surrounding him and the opportunity given him to make such observations.

When we take into consideration, as we must, the rapidity with which the respondent's work must be done, and that each rivet must

be driven while it is very hot, and that the instant he has completed driving one rivet his companions have placed another in position to be at once driven, and that the rivets in this particular instance were about 6 inches apart, and that the work was being done by an instrument which required the riveter to almost constantly give his attention to the work he was doing, we can not say as a matter of law that the respondent was bound to see the alleged defects in the staging.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—LATENT DANGER—DUTY OF EMPLOYER—*Hines, Director General of Railroads, v. Thurman, Court of Appeals of Kentucky (June 20, 1922), 242 South-western Reporter, page 357.*—Clarence Y. Thurman, 36 years of age, went to work for a railroad company under Federal control on November 17, 1917, and remained in its employ until April 22, 1918. He did general work and after a short time became a boiler maker's helper. It was his duty as such to assist the boiler makers and handy men in tearing down and repairing oil boilers. He was ordered to work with one Waterbury, a handy man. Shortly after beginning the work a sliver of steel flew from the hammer used by Waterbury and struck Thurman in the eye, destroying the sight. He brought an action against the Director General of Railroads to recover damages for personal injury. Evidence was introduced tending to show that Thurman had never seen slivers fly from cold stay bolts, upon which they were working at the time. He admitted having seen boiler makers and handy men wear goggles for the protection of their eyes, but he had never seen any helper wear goggles nor had he been warned of the danger or told that it was necessary for him to wear goggles. It was shown that prior to Thurman's employment there was a rule requiring helpers to wear glasses, but there was no evidence that Thurman had notice of such a rule or that such a rule was in force during the time of his employment.

A judgment was rendered in favor of Thurman amounting to \$1,600. An appeal was taken from this judgment. The court of appeals had before it the duty of employers and employees under the facts stated. Thurman contended that the railroad was negligent in not warning him of the danger so that he might take appropriate steps to protect himself. On the other hand, the railroad company contended that as the risk was one of those ordinarily incident to the business in which Thurman was employed, the company was under no duty to warn him of the danger. The judgment of the lower court was affirmed on grounds stated by the court through Judge Moorman, in part as follows:

It may be conceded that there is no duty to warn of a danger incident to a risk assumed by the servant. The doctrine of assumed

risk proceeds on the theory that the servant has actual or implied notice of the risk. Hence, if the danger is known and appreciated by the servant, or it is so obvious that a person of ordinary prudence in his situation would have known and appreciated it, he assumes the risk and no warning is required. On the other hand, if the danger is latent and unknown to the servant but is known to the master or discoverable by the exercise of ordinary care, it is the duty of the master to warn the servant of the danger so that he may take the necessary steps to protect himself against it.

The court had the question before it as to whether the danger was so obvious to a person of ordinary prudence in Thurman's situation as to charge him with knowledge and appreciation of the danger, or whether it was a latent and hidden danger within the rule requiring the master to give warning of it. The court held that the evidence was sufficient to make it a question for the jury and under the circumstances the judgment should be affirmed.

EMPLOYERS' LIABILITY — ASSUMPTION OF RISK — NEGLIGENCE — FAILURE TO PROVIDE SAFETY DEVICES — GOGGLES — *Emerson Brantingham Co. v. Grove, Supreme Court of Indiana (February 17, 1922)*, 133 *Northeastern Reporter*, page 919.—Arthur C. Grove was an employee in the factory of the Emerson Brantingham Co. During the course of his employment he was ordered by the foreman in charge to assist other employees to trim up some steel braces for gas-engine wheels. While thus employed a sliver of steel flew from the brace and struck Grove in the right eye, destroying the sight of the eye. A suit for damages was brought against the employer, which resulted in a judgment for \$4,800 in favor of the injured man. This judgment was affirmed in the appellate court. (*Emerson Brantingham Co. v. Grove*, 125 N. E. 223, Bul. No. 290, p. 112.) The case was then appealed to the supreme court of the State. The complaint of Grove stated that the foreman knew that slivers would fly and strike the workmen in the face and eyes in cutting the steel with a cold chisel and sledge hammer; that he, Grove, did not know this fact and that the foreman negligently failed to warn him of the danger; that he had never assisted in the work of trimming braces before; and that by the use of goggles the accident could have been prevented.

The supreme court found in these allegations sufficient basis for a suit at common law as against a general demurrer. However, the effort to avoid the defense of assumed risks was not successful, as it was not shown that the foreman had given instructions as to the method of doing the work. Other reasons were also found for a

reversal of the decision of the appellate court, which are, in part, as follows:

Averments that it was practicable for appellant to supply appellee "with goggles or some other device" to prevent the flying slivers from striking him in the eyes do not make out a cause of action for negligence. There is no statute which requires goggles to be furnished by the employer, the facts alleged do not show that any duty to supply them had been imposed by custom or contract, either express or implied, and no such duty was imposed by the common law in the absence of a contract.

There were some averments as to what "it was necessary" to do in trimming up the braces, and there was an averment that appellee did not know the pieces of steel would fly nor that the work was dangerous. But it was not alleged that the foreman nor anybody directed appellee how to do the work, nor that the foreman or the appellant had knowledge of his alleged ignorance of the danger. Merely giving a general order to trim up the braces, under the circumstances alleged, was not actionable negligence, either at common law or under the employers' liability act. The court erred in overruling the demurrer to the second paragraph of the complaint.

The record shows that at the trial appellee testified that when the foreman ordered the braces to be trimmed he added that "we are in a hurry for them," and in his brief on appeal appellee stressed that statement, and argued that appellant had shears for this work, but, as they were in use and the foreman was in a hurry, he called appellee to assist in trimming the braces in a manner appellee had never seen used. It is fair to infer that a similar argument was made before the jury. All this was a material variance from the allegations of the complaint, and should not have been permitted. There was no allegation that there was a safe way to do this work, and that the appellant negligently chose a dangerous method. A party can not allege one state of facts and recover upon proof of facts that are altogether different.

The case was therefore remanded for a new trial.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—SAFE PLACE—*Bingham Mines Co. v. Bianco, United States Circuit Court of Appeals, Eighth Circuit (October 18, 1921), 276 Federal Reporter, page 513.*—James Ozzello was an employee of the Bingham Mines Co., in Utah, during the month of October, 1914. His work consisted of loading ore cars with ore and waste in the underground workings of the mine. The ore cars were moved into and out of the drift by means of an electric motor. The electric power for the motor was furnished through a trolley wire which was extended at a height of 5 feet and 2 inches above the floor level at a place where Ozzello was working. On October 13 his body was found beneath the electric wire under conditions indicating that he had come into contact with the wire and had been killed by the resulting shock. The administrator of the estate,

Domenico Bianco, brought an action against the company and was awarded damages for the benefit of the widow and minor child of Ozzello. The case was taken up to the circuit court of appeals on writ of error. The company's defense was based on the theory of assumption of risk by the employee. This contention was upheld and the judgment reversed. Judge Youmans, in delivering the opinion of the court, noted that the deceased was 29 years of age; that he had worked in the mine six months; and that he had been warned of the danger from the wire. The question, said the court, "is whether in view of his age, intelligence, and experience Ozzello knew of the existence of the wire; that it transmitted a current of electricity; and that he appreciated the danger that would result from coming in contact with it." The court came to the conclusion that the employee had assumed the risk of the employment, and the judgment was reversed and the case remanded for a new trial.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—SAFE PLACE—IMPAIRMENT OF HEALTH—*Newberry v. Central of Georgia Ry. Co., United States Circuit Court of Appeals, Fifth Circuit (November 11, 1921), 276 Federal Reporter, page 337.*—M. J. Newberry was a telegraph operator in the employ of the Central of Georgia Railway Co. On March 3, 1917, he was sent to Slaughters, Ala., to take up the duties of a telegraph operator at that place to direct or assist in the direction of trains. He apparently went to the place without any knowledge of the condition of his future working place. He arrived at Slaughters after dark and immediately took up his duties there. His place of work was a box car. The weather was cold and it was raining during the night. As the roof of the car was leaking, making the floor wet, and as there was no fuel for the stove, he worked through the night in a cold and wet place, which resulted, he alleged, in the permanent impairment of his health. He brought action for damages against the railroad. The United States District Court for the district entered judgment for the railroad company upon several grounds, one of which was that the plaintiff assumed the risk involved in using a leaky, wet, and cold box car as a telegraph office. This judgment was reversed in the circuit court. In dealing with the question of whether the employee assumed the risk of the employment the court, through Judge Bryan, said:

We are of opinion that it was error to hold, as a matter of law, that plaintiff in error assumed the risk of injury to his health either by going to Slaughters or by remaining at work there in the leaky, wet, and cold box car which he used as a telegraph office. There was evidence that he went without any knowledge whatever of the condition of the box car. He had the right to assume that he would be

furnished a safe place to work. Immediately upon his arrival he proceeded to the work assigned him, as he was in duty bound to do. The duties of a telegraph operator in directing or assisting in the direction of trains are important, and the failure to perform them may, and frequently does, result in collisions of trains and the consequent destruction of property and injury and death. In the situation which confronted plaintiff in error it can not be said, as a matter of law, that he should have neglected his important duties and have concerned himself instead about his own personal comfort, nor that a reasonable man would not have done as he did. Therefore the question of assumption of risk was for the jury to decide.

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

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—SAFE PLACE AND APPLIANCES — INTERSTATE COMMERCE — COMPANY PRODUCING AND TRANSPORTING GAS—*Smith v. United Fuel Gas Co., Supreme Court of Appeals of West Virginia (April 25, 1922), 112 Southeastern Reporter, page 205.*—The United Fuel Gas Co. was engaged in West Virginia in the production of gas and its transportation within this State and to other States. Bud C. Smith, an employee of the company, was injured while at work cleaning and repairing one of the engines of the company that was used in a compressor plant in driving the gas across the State line into Ohio. The facts connected with the injury show that eight machines were used for this purpose, four being run at one time; that Smith, with another workman, was engaged in repairing one of the engines that was not in use, and in doing so it became necessary that he go beneath it; that the men were replacing nuts, and in doing so, because of an obstruction by a pull rod, a cold chisel and hammer were used instead of a wrench; while doing this a sliver of steel from the nut flew into his left eye, penetrating the ball and inflicting a severe injury. Smith brought a common-law action for damages for the personal injuries based on the alleged negligence of the company to furnish a safe place to work. The company, deeming itself not to have been within the scope of the workmen's compensation act, did not set up the act, but denied the negligence and set up the common-law defenses of assumption of risk, contributory negligence, and the fellow-servant rule. A verdict was returned in favor of Smith, but it was set aside by the court and judgment was rendered in favor of the company. The case was taken to the supreme court of appeals by writ of error, and in that court the judgment was affirmed.

The president of the court, Judge Poffenbarger, rendered the opinion. It was held that Smith was engaged in interstate commerce at the time of the injury, and that, common-law defenses applying, he assumed the risk of the employment, and therefore could not recover

damages. The court, in its opinion with reference to the interstate character of the work, said :

The engine on which the plaintiff was working when hurt was a part of the compressor plant by which the gas was driven across the State line into Ohio. It was not a mere movable instrument. On the contrary, it was a very large, permanent machine, being about 60 feet long and at least 5 feet in diameter. Its use in interstate business, when running, is admitted. It was bought and installed for such use and is never diverted to any other. Its occasional idleness is merely incidental to its operation and its use in both kinds of business at the same time. Repair of machinery is as much an incident of its operation as is its depreciation by use. In the large sense of the terms, its cleaning, repairing, and adjustment are parts of its use. Such use, however, might not suffice in itself, but it is enlarged and made conclusive by the fact that this engine while undergoing treatment still remained a part of the permanent plant, which, as a whole, was in constant use, and the cleaning, repair, and adjustment amounted to work on the plant. Hence the work in which the injury occurred was manifestly a part of the interstate business of the defendant, and the trial court properly allowed interposition of the common-law defenses invoked in the trial, assumption of risk, contributory negligence, and imputation of the negligence, if any, to fellow servants.

Referring to the application of the common-law defenses the court said in part :

There was no element of danger in the place in which the plaintiff was working when injured. Nothing above could fall upon him. Below him there was no pit into which he could fall. He was not within reach of any running machinery by which he could be struck or caught. Nowhere about him were there any operations threatening or working danger or injury to him. The unfortunate blow emanated from his own work, though he may not have negligently caused it. In this connection, no more is intended than the assertion that it did not emanate from the place of work and was not caused by it. To set or tighten a nut with a cold chisel and hammer in any other place, with a like distance between the nut and the eye, would expose the operator to a like injury. The danger, therefore, was not in the place but in the manner in which the work was done. That taken into consideration, the place was not dangerous within the meaning of the law. The master is not required to furnish the employee an absolutely safe place of work. It suffices that he furnish him a reasonably safe place.

A suggestion that a chisel or bar long enough to permit the driving of the nut from a standing position by the side of the engine was a practicable and safer instrument or appliance than the one used in the work in question, if sustained by the evidence, does not make the defendant guilty of negligence in the omission to provide it. It does not appear to have been an implement in general use for such purpose. On the contrary, the proof is that it was improvised and used by a workman or workmen of the defendant at another one of its plants. Conceding it to have been safer, and known to the defendant, it was not negligent in its failure to provide the best and safest

implement for the purpose. The measure of its duty was reasonable diligence to provide reasonably suitable and safe tools and appliances.

EMPLOYERS' LIABILITY—COURSE OF EMPLOYMENT—ACCIDENTAL DISCHARGE OF PISTOL—*American Ry. Express Co. v. Davis et al., Supreme Court of Arkansas (February 27, 1922), 238 Southwestern Reporter, page 50.*—Elmer Davis, a boy 16 years of age, was in the employ of the American Railway Express Co. acting in the capacity of platform man. He was under the direction and supervision of Glyde Garrison, the depot agent and money clerk. The company furnished Garrison with a pistol to use while on duty in the protection of valuables and it was used by the agent in meeting trains and transporting valuable matter. Printed instructions were given with respect to the careful use of the weapon. Garrison was a young man and was a good friend of Davis. On May 9, 1920, the two young men met uptown and rode down to the station and just before noon they went to a nearby restaurant and ate their midday lunch. After leaving the restaurant they engaged in play which continued after they reached the railroad station. The time for the arrival of a passenger train was approaching and as the play had been going on for some time Garrison desired to bring it to an end. He told Davis to prepare for the train and went to the office but Davis persisted in carrying on the frolic. Davis procured a rug, rolled it up and was pushing it through a window in front of Garrison. At this time Garrison attempted to end the play by frightening Davis and for this purpose took the pistol and pointed it toward the window. It was accidentally fired while in his hand. The bullet struck Davis, who cried out in pain, and on examination it was found that the bullet had struck him in the side. He lived but a few days, dying from the effects of the wound. The next of kin brought an action for damages because of the death. At the trial the court instructed the jury that if the company furnished the pistol to its agent, Garrison, for use in connection with the performance of his duties, and that Garrison, while in the express office, was guilty of negligence in handling the pistol and thereby caused the injury and death of Davis, the company was liable, even though the pistol was not used in connection with the performance of any duty for which it had been placed in the hands of the agent. A verdict for \$15,000 damages favored the plaintiffs, but the company appealed to the supreme court. That court reversed the judgment of the trial court, holding that the instruction of the judge to the jury was erroneous. Chief Justice McCulloch rendered the opinion of the court in which the law was stated to be as follows:

"The test of liability of a master for a tort committed by a servant is whether the act complained of was done in the prosecution of the master's business—not whether it was done during the existence of a servant's employment."

It is certainly not correct to state the rule to be that, merely because a substance or instrumentality is dangerous, the master is responsible for any use the servant makes of it. In order to render the master liable the substance or instrumentality must be in use by the servant while discharging his duties to the master, or the injury must result from the inherent dangers lurking in such substance or instrumentality, and not from the voluntary act of the servant in using it for his own purposes.

EMPLOYER'S LIABILITY—COURSE OF EMPLOYMENT—INJURY TO THIRD PARTY BY EMPLOYEE—DUTY OF SELECTING EMPLOYEES—*Davis v. Merrill, Supreme Court of Appeals of Virginia (June 15, 1922), 112 Southeastern Reporter, page 628.*—E. S. Merrill was administrator of the estate of Claudia Harrell, and sued the Director General of Railroads to recover damages on account of her death. The death was the result of a wound inflicted by shooting, which was the act of a gatekeeper at a road crossing in Norfolk, Va. The deceased was one of a party which arrived at the crossing about 1 o'clock in the morning and found the gate down, though no train was passing or approaching. After repeated calls and requests, the gatekeeper, one Ford, opened the gate under protest, and almost immediately thereafter fired three shots at the automobile in which Miss Harrell was riding. One of these struck her, causing death.

The suit for damages went in the plaintiff's favor in the circuit court of the city of Norfolk, from which this appeal was taken. The administrator based his claim on two grounds, one that the killing arose out of and was a part of a transaction between the injured person and the railroad company, in which the gateman, Ford, was acting for the company within the scope of his employment. The second was that in employing Ford there was not the exercise of sufficient care, as otherwise he would have been known to be an incompetent and dangerous person to entrust with duties of the character in question.

The court of appeals affirmed the judgment of the court below, Judge West delivering the opinion. The general principles involved in the first point were laid down in the following quotation therefrom:

Was Ford acting within the scope of his employment when he fired the fatal shot?

If a person, acting for himself, willfully and maliciously inflict an injury upon another, he is liable in damages for such injury. And there is no reason why a master should be permitted to turn

his business over to servants who have no regard for the public welfare and thereby escape the responsibility which he would otherwise have to bear. It is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the scope of the servants' employment and duty, and it matters not whether the act of the servant is due to a lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury; and the authorities so hold.

Numerous cases were then cited, and the conclusion reached that—

When the foregoing authorities are applied to the facts in the instant case, it is manifest that the defendant is liable for the act of its agent in inflicting the injuries complained of.

Taking up the lack of care in employing Ford, it was shown that he had been discharged from this same railroad company years before for drunkenness, and "for a number of years immediately preceding the adoption of state-wide prohibition in Virginia was widely known in police circles of Norfolk as a common drunkard." He was said also to suffer from a form of insanity superinduced by persistent drunkenness and was easily incensed and would become dangerously angry on slight provocation. On this point the court said:

We think it has been sufficiently shown supra that, whether Ford's homicidal act was due to drunkenness, ungovernable temper, or malice, he was at the time of its commission engaged in a service which was in the scope of his employment.

The record shows that Ford was employed by W. R. Crawley, who had charge of all the defendant's watchmen around Norfolk, upon the recommendation of S. A. Coleman, who held a position as watchman with the Norfolk & Western, and made no inquiry of anyone else concerning Ford's past record, habits, or general fitness for the position. Had he looked up his record with the Norfolk & Western showing his discharge for drunkenness, and made some inquiry of the members of the police force at Norfolk, he would probably not have given him the position.

For the foregoing reasons, we are of the opinion that there is ample evidence to support the verdict of the jury and that the judgment complained of is plainly right and should be affirmed.

EMPLOYERS' LIABILITY—COURSE OF EMPLOYMENT—INTENTIONAL INJURY BY FOREMAN TO EMPLOYEE—Zaitz v. Drake-Williams Mount Co., Supreme Court of Nebraska (December 1, 1921), 185 Northwestern Reporter, page 424.—John Zaitz while in the employ of the defendant company took a position in one of the tanks under construction at their manufacturing plant which the foreman thought disadvantageous. The foreman directed him to take a different position, which Zaitz appeared to resent, whereupon he was discharged

by the foreman. While putting on his coat preparatory to reporting to the company's office to be paid off he was struck by the foreman and severely injured. It was claimed that Zaitz was angered because of his discharge and called the foreman a vile name. An action for damages was brought against both the company and the foreman. It was contended as a defense that the assault was not made in connection with the work or with a view of disciplining Zaitz. The court instructed the jury to return a verdict in favor of the company after the plaintiff's evidence went in but allowed the case to proceed as against the foreman. An appeal was taken from that ruling to the supreme court of the State. Chief Justice Morrissey rendered the opinion of the court, affirming the action of the lower court and holding that the employer was not liable for the injury, as he neither directed nor authorized the assault, and there was no proof that the foreman was a person of violent temper or dangerous character, so that the employer knew, or should have known, of his infirmity. The court in part said:

Was the act of the foreman in making the assault within the scope of his employment or so connected with his duty as to make his employer responsible for his act? It is well settled that, when the act complained of is within the scope of the agent's employment, the master may be liable if the servant performed the act with a view to the service for which he was employed, and in such cases whether the servant did the act with a view to his master's service or to serve his own private ends is generally a question of fact for the jury.

The foreman had authority to direct the actions of the employees in and about the performance of their work and to discharge them either with or without explanation. As the representative of the employer, he had, of course, the right to maintain order and preserve discipline, but this did not carry with it the right to inflict corporal punishment.

The ruling as to the nonliability of the employer was therefore affirmed.

EMPLOYERS' LIABILITY—EMPLOYEE—TEMPORARY ASSISTANT OF EMPLOYEE—*Baltimore & O. S. W. R. R. Co. v. Burtch, Supreme Court of Indiana (March 14, 1922), 134 Northeastern Reporter, page 858.*—On October 24, 1917, the Baltimore & Ohio Southwestern Railroad Co. was engaged in operating a steam railroad in the State of Indiana. Ed Jackson, a conductor in the employ of the railroad, was in charge of a freight train which, on the date named, had in one of its cars a machine weighing 2,000 pounds, known as an ensilage cutter, and destined to the town of Commiskey. Jackson and the three brakemen on the train were unable to unload the machine at the station safely. Thereupon Jackson requested one Gurney O. Burtch to assist him. In compliance with the request, Burtch proceeded to assist the

men in the work. While thus engaged one of the planks used in unloading the machine broke and the machine fell upon him, seriously and permanently injuring him. Burtch brought an action against the railroad for damages for personal injuries, based upon the negligence of the railroad in failing to provide men sufficient to unload the machine, failure to furnish safe appliances with which to perform the work, and other acts of negligence. The trial court returned a verdict and judgment in favor of the injured man, and the railroad company took the case up to the supreme court of the State on a writ of error. Two of the questions before the court were: Whether or not Jackson was authorized to employ assistants, and whether Burtch was entitled to the same protection afforded other servants of the company.

The supreme court decided both questions in favor of Burtch and affirmed the judgment of the lower court. Judge Myers rendered the opinion of the court, and in his decision with reference to the questions above noted, he said:

While the facts relied on by appellee in this paragraph as a basis for recovery present, in form, a new question to this court, yet the decision thereof does not require that we invoke a new principle. Generally speaking, it is true the master is not bound nor is he under any duty to those who perform services for him at the request of a servant engaged to do a given work, other than not to willfully injure him. Obviously this rule ordinarily must obtain; for, if it were otherwise, the master might be involved in risk and responsibility imposed by the act of another without his authority or consent.

However this may be, the outstanding facts of this paragraph take this case without that rule and within the rule permitting a servant to bind his master in case of some unforeseen contingency or existing emergency. It may be conceded that Jackson had no general authority to employ or discharge assistants, but, from all the facts and circumstances here shown, Jackson, in the performance of his duty of unloading the machine, represented appellant. It also appears that appellant failed to furnish him sufficient man power and appliances reasonably necessary for him to accomplish the work safely. It may be argued with much force that an emergency employee is not in the employ of the master in a sense to create the relation of master and servant; but, when it appears that by reason of some unforeseen contingency or existing emergency reasonably requiring temporary assistance to do work safely, the servant in charge thereof as the representative of the master in that particular may employ temporary assistants, as in this case, and his action in that regard will bind the master on the principle of implied authority so to do, the person thus employed thereby, for the time, is entitled to the same protection as is the servant or agent upon whose request he rendered the assistance, even though he may not be entitled to recover wages. [Cases cited.]

At the time appellee received his alleged injuries Jackson was in charge of the train and its crew. He was seeking to accomplish an

end—the unloading of the machine--which was within the scope of his alleged employment.

When appellee accepted Jackson's request and entered upon the work, he had the right to expect that Jackson, as the representative of appellant, would use ordinary care for his safety, and certainly so in so far as he might be affected by the use of appliances furnished. The fact that there may have been other and more safe ways and means of handling the machine will not shield appellant from the negligence here charged, for it was appellant, through Jackson, and not appellee, who chose the place and adopted the appliances and the manner of doing the work.

EMPLOYERS' LIABILITY—EMPLOYEE—TEMPORARY ASSISTANT OF EMPLOYEE—VOLUNTEER—*Early v. Houser & Houser, Court of Appeals of Georgia (December 14, 1921), 109 Southeastern Reporter, page 914.*—Houser & Houser operated a public ginnery with the assistance of Jack Williams. R. M. Early brought a bale of seed cotton to the establishment to have it ginned. While unloading his cotton, a belt running from a countershaft to a pulley on the gin slipped and ran off of the pulley on the countershaft, causing the gin to stop, and the countershaft continued to revolve at a very rapid and increased speed. Williams, who was operating the gin alone, requested Early to assist him in putting the belt back on the pulley of the countershaft. This he did, but in so doing he came very near the countershaft and his clothing was caught upon an unguarded and projecting set screw on the shaft, and as a result he received an injury, on account of which he brought suit for damages. The defendant contended there was no right to recover as Early was merely a volunteer. The contention was upheld and the case was appealed. The court of appeals, speaking through Judge Hill, held that "there can not be a legal liability except upon a breach of some legal duty." It was held there was no legal duty owing Early as he was a volunteer and as such assumed the risk. In this connection the court said:

The allegations of the petition show that the plaintiff was a volunteer, and, in undertaking to render a voluntary service to the employee of the defendants who was operating the gin, he did so at his own risk. These allegations, most favorably considered, show that Williams, who was in charge of the gin, was operating it simply as an employee of the defendants, and as such employee had no authority to employ assistance.

The allegations of the petition are not sufficient to show such an emergency as would authorize the plaintiff voluntarily to interfere and undertake the risk of working with the dangerous revolving machinery. The fact that an employee in charge of the gin requested him to do so did not warrant him in doing so. Certainly his act was not one the responsibility for which he could legally impose upon the owners of the gin, who were under no obligations

whatever to him in so far as his meddling with the machinery was concerned. The relation of master and servant was not created by this unauthorized request of the employee in charge of the gin.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—INTERSTATE COMMERCE—STATE REGULATION—*St. Louis-San Francisco Ry. Co. v. Conly, Supreme Court of Arkansas (May 29, 1922), 241 South-western Reporter, page 365.*—The State of Arkansas in its regulation of child labor makes provisions governing the employment of minors under the age of 16 years. Hal Conly, a minor 15 years of age, was in the employ of the St. Louis-San Francisco Railway Co. During the course of his employment, unloading lumber that had been shipped in interstate commerce, he was injured because of the manner in which the lumber was loaded and because of the hazardous nature of the work and the inexperience of youth. He brought an action for damages against the railway company and recovered a judgment. An appeal was taken to the supreme court of the State on the ground that the trial court erred in their instruction to the jury that if they found that the boy was under 16 years of age at the time he was injured, and if they found that the injuries complained of were the direct result of such unlawful employment, then judgment should be rendered for Conly. The question before the court was as to the application of the State child labor law. The supreme court, speaking through Judge Wood, held that Conly was engaged in interstate commerce at the time of the injury and that therefore the Federal law alone would apply to this case. In reversing the judgment of the lower court, it was said:

Congress, through the Federal Employers' Liability Act, has covered the entire field of liability of interstate carriers to their employees for injuries sustained by them while engaged in such commerce. It is unquestionably within the power of Congress, under the commerce clause of the Constitution, to prohibit carriers engaged in interstate commerce from employing minors under a certain age and to make such carriers liable for any injuries sustained by such employees while engaged in interstate commerce. Congress having such power and having entered upon such field of legislation, State legislatures covering the same subject matter are as much bound by the silence of Congress as by what it has expressly declared within the scope of its power. As is pungently expressed by the Supreme Court of the United States in one of its cases: "We may not piece out this act of Congress by resorting to the local statutes." It is therefore wholly beyond the power of the State legislature to make carriers engaged in interstate commerce civilly liable in damages for injuries to their employees while engaged in such commerce for the violation of some police regulation of the State. This power of Congress, under the commerce clause of the Constitution, does not in any manner trench upon or dislodge the

police power of the States over their own local and internal affairs which are reserved to them under the tenth amendment to the Constitution.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—MISREPRESENTATION OF AGE—CONTRIBUTORY NEGLIGENCE—RECEIPT OF COMPENSATION PAYMENTS—*Volpe v. Hammersley Mfg. Co., Court of Errors and Appeals of New Jersey (November 14, 1921), 115 Atlantic Reporter, page 665.*—John Volpe, a minor under 16 years of age, was illegally employed at a cylinder printing press and suffered a fracture and crushing of an arm, for which the trial court allowed damages in the amount of \$15,000. An appeal to the supreme court of the State led to an affirmation of the judgment, but with a reduction of the amount to \$10,000. The defendant again appealed.

The plaintiff had exhibited employment papers, showing his age to be above 16, but they were not his, and were used for purposes of deception. It was said by the supreme court, quoted on this appeal:

One of the contentions upon which the defendant rests its right to have the verdict set aside is that the plaintiff is estopped by his fraud from claiming that he was under the statutory age, and that therefore his only remedy (if he has one) is that provided by the workmen's compensation act; but this contention has been settled adversely to the defendant by the cases of *Feir v. Weil*, 92 N. J. L. 610, 106 Atl. 402, and *Leskow v. Liondale Bleach, etc., Works*, 93 N. J. L. 4, 107 Atl. 275.

The defense of contributory negligence was also urged, but this was said to be settled by the cases above cited.

The legislature has by inference declared that children who are too young to be put at work in factories, upon machines like that upon which plaintiff was working, can not be guilty of contributory negligence, nor can they be held to have assumed the risks of the work.

The above statement and conclusions are quoted by Judge Swayze, who delivered the opinion of the court of errors and appeals. Then taking up the claim that the employer should be held absolved of liability because the boy had shown a properly framed certificate of age, Judge Swayze said:

This argument assumes that the defendant was justified in accepting the certificate itself as conclusive proof without any inquiry as to the identity of the plaintiff with the person named in the certificate. If the same argument were made to exculpate the paying teller of a bank for cashing a check without any further proof than the mere name of the identity of the payee with the person presenting the check, the fallacy of the argument would be obvious. If less care is required in employing children below the prohibited age in a factory, it must be because reasonably prudent men accept the certificate of

age without identification; but that is a question of fact to be decided by the jury.

It was suggested that compensation payments had been made to the boy on account of the injury, by which he would be estopped from collecting damages in an action at law. This the court "was unable to agree with."

The doctrine of estoppel, if otherwise applicable, ought not to be so applied as to make it possible for the parties to override the legislative policy. If the plaintiff has obtained money under false pretenses, the defendant can recover it in a proper action. The judgment of the supreme court in this case is affirmed with costs.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—MISREPRESENTATION OF AGE—RECOVERY FOR DEATH—*International Agricultural Corp. v. Cobble, Supreme Court of Tennessee (May 1, 1922), 240 Southwestern Reporter, page 295.*—Chapter 57 of the Acts of 1911 for the State of Tennessee is an act to regulate the employment of minor children. It was made unlawful for any "proprietor, foreman, owner, or other person to employ, permit, or suffer to work any child less than 14 years of age in, about, or in connection with any mill, factory, or workshop," and by the amendment of chapter 77 of the Acts of 1917 it was further provided that it would be unlawful for any proprietor, etc., to permit any child between the ages of 14 and 16 years to work in, about, or in connection with the places above mentioned unless the employer keep on file an employment certificate. A penalty was provided for the employer and the parent or guardian who permitted a child to be employed in violation of the law. Ligon Cobble was a boy between the ages of 14 and 16. He had been employed by the International Agricultural Corporation, but was discharged when the company was informed that he was under the age of 16 years. After working some time in a powder plant at Nashville, his father, Dock Cobble, presented him to the superintendent of the defendant corporation, stating, as the company contends and the father denies, that the boy was then over 16 years of age. The father, who was in the employ of the company, told the superintendent that if the boy was not employed he (the father) would quit and go where they both could get employment. The boy was reemployed and put to work shoveling sand in the plant. On January 29, 1919, the driving belt of an engine, which was some distance from where the boy was working, broke without any known cause. This caused the engine to be released and run away, which in turn caused the large drive wheel to fly to pieces. One of these pieces struck the boy, causing such injuries that he died shortly thereafter. The father, acting as administrator of the boy's

estate, brought a suit for damages against the employer. He obtained a verdict and judgment in the trial court for the sum of \$2,125. The company appealed to the court of civil appeals and obtained a reversal of the judgment. Cobble then took the case to the supreme court of the State, where the judgment of the appellate court was affirmed. The question decided was, whether or not the company, having failed to obtain an employment certificate, is liable to the plaintiff for the death of the boy if it was found that the company was induced to employ the boy by the representation of the plaintiff that his son was at the time of the employment 16 years of age, plaintiff being the sole beneficiary of any recovery that might be had in the action for the death of his son. In the decision of the case Judge Hall, speaking for the court, said in part:

The law forbids that one shall profit by his own misconduct, fraud, or deceit. It has been repeatedly held by this court that a person whose negligence has proximately contributed to the death or injury of another can not recover in an action for his benefit for such death or injury.

Plaintiff was guilty of a misdemeanor if he permitted or suffered his son to be employed by defendant to work in violation of the provisions of said act. If, therefore, he did do so he should not be entitled to recover, because his act was necessarily a direct, proximate, and contributing cause of his son's injury and death.

The judgment of the court of civil appeals was affirmed, and the case was remanded for a new trial.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—STREET OCCUPATIONS—EMPLOYMENT DURING SCHOOL TERM—*Cincinnati Times Star Co. v. Clay's Administrator, Court of Appeals of Kentucky (June 23, 1922), 243 Southwestern Reporter, page 16.*—The statutes of Kentucky in regard to child labor forbid the employment of "any child under 14 years of age in any business or service whatever during any part of the term during which the public schools of the district in which the child resides are in session" (sec. 331a. 1); or, under 16, in work "injurious to the health or morals of such child" (sec. 331a. 9, clause 24); or, if under 14, in street trades in cities of the first, second, or third class (sec. 331a. 15).

The Cincinnati Times Star Co. had in its employ a boy 10 years of age as a newsboy in London, Ky. The boy attended school and delivered papers outside of school hours. He contracted pneumonia and died, and the father of the boy brought an action for damages against the company because of the death of his son, claiming that the disease was due to his unlawful employment. Judgment amounting to \$3,000 was rendered in favor of the father, and the company appealed. The father contended that the employment of the de-

ceased was unlawful because of section 331a.1, because the contract for his services was entered into during a term of the public school he attended regardless of whether his services were to be performed while school was actually in session. The court granted that recovery was warranted if the employment was unlawful and the proximate cause of the death, but it did not so construe the statutes. Judge Clarke, speaking for the court, construed the section discussed as follows:

In our judgment neither the language employed nor the evident legislative purpose sustains such a construction. They are careful to say, and they must have meant, that such children must not be employed in any service during any part of the term during which school was in session.

The public school this boy attended was not in session at any time he was engaged in delivering papers for defendant, and it is not even shown that it was in session when the contract for his services was executed, if that were material, which is not true. The services were performed during the term of school which began in September and ended in May or June, but not during any part of the term while school was in session.

The contention was raised by the father that the employment of a boy under 14 years of age to sell newspapers was unlawful, and from this the court framed the question of whether forbidding it in the three larger classes of cities impliedly permitted such employment in the country and in towns and cities of other classes, which was answered in the affirmative, concluding that—

The ordinary dangers of using the streets of a city of the fourth, fifth, or sixth class in selling papers, which dangers are not materially different from those encountered by children in going to and from school or doing simple errands in such cities, are not of the kind contemplated by clause 24 of section 331a, subsection 9.

The judgment of the lower court was therefore reversed and the cause remanded for proceedings consistent with this opinion.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—VIOLATION OF STATUTE—CONTRIBUTORY NEGLIGENCE—INDEPENDENT CONTRACTOR—*Waldron v. Garland Pocahontas Coal Co., Supreme Court of Appeals of West Virginia (November 8, 1921), 109 Southeastern Reporter, page 729.*—Philip Waldron was a boy between the age of 13 and 14, who had been sent to his grandfather's home to be sent to school. The grandfather, H. F. Short, obtained employment for the boy in the defendant's mine upon representation that the boy was 16 years of age or over. A statement to that effect, apparently signed by the boy's father, was given to the manager of the mine, and the boy

was given employment as a trapper in the mine. Short later visited the boy's father and spoke of the employment. The father said that he did not sign a statement that the boy was over 16 years of age. Short notified the foreman of the mine that the boy's father advised that the boy be sent to school. The foreman notified the assistant foreman to immediately discharge the boy. This he said he did at noon, but the boy continued to work during the afternoon under his direction. The foreman paid off the boy at 5 o'clock and told him he was not to work any more. Later that night, however, he took a pony to the mine to an alleged independent contractor named Thompson. The foreman saw him going into the mine and again told him not to go, but was told by the boy that he would take the pony to Thompson and come right out. During the evening he fell and a loaded car passed over his body, causing death, and suit was brought by the boy's father for damages. The company's defense was contributory negligence on the part of the father and nonemployment of the boy. A verdict and judgment favored the plaintiff and the company appealed. In the supreme court the judgment was affirmed in an opinion written by Judge Lively. It was held that the evidence was not such that the father could be charged with contributory negligence as a conclusion of law. To the contention of the mine owners that the boy was in the employ of Thompson, an independent contractor, the court said:

Thompson employed and discharged his help, a strong index of the relation of an independent contractor, but not conclusive. Thompson, when asked if he had absolute control over driving the entry, replied that he was under the mine foreman's instructions; but that he had absolute control of hauling the slate out of the mine, employing and discharging the men, buying the explosives, and everything of that kind, until "they" gave him further orders, and "they didn't give me no further contrary orders about that." If a right of control is in the employer, it is immaterial whether he actually exercises it.

If Thompson, in charge of the work and representing defendant, hired the boy (which he denies) defendant is liable; or if Thompson permitted the boy to work in the mine (which is not disputed), the liability is not changed. The statute says:

"No child under the age of 16 years shall be employed, permitted, or suffered to work in any mine, quarry, tunnel, or excavation."

This inhibition applies to the owner of the mine, as well as to all other persons. It is his duty to see that no such child is employed or permitted to work in his mine. He can not avoid this duty by attempting to shift it upon another. This defendant had control of its mine as a whole, and was operating it. The driving of the entry was a mere incident of the operation, a detail; and when it permitted, either advertently or inadvertently, this child to work therein, it became civilly responsible for injuries resulting to him therefrom:

EMPLOYERS' LIABILITY—NEGLIGENCE—CHARITABLE CORPORATIONS—UNLAWFUL EMPLOYMENT OF MINOR—*Emery v. Jewish Hospital Assn., Court of Appeals of Kentucky (December 16, 1921), 236 Southwestern Reporter, page 577.*—Andrew Emery, 15 years of age, was employed by the Jewish Hospital Association, in violation of the child labor law, as an elevator operator. During the course of the employment the boy received an injury caused by the negligence of the association, which resulted in the loss of a toe. A suit for damages was brought, which went against the claimant, and an appeal was taken to the court of appeals. Discussing the question that arose, Chief Justice Hurt stated that in Kentucky charities created for the purpose of operating hospitals are not liable for damages for the wrongful acts of their employees to any person whatsoever. It was held, however, that an employee will be liable in damages to any person whom his negligent act, in the course of his employment, may injure. The reasons for this exemption from liability in other jurisdictions were stated to be (1) public policy; (2) their funds are held in trust and no diversion of them will be permitted; (3) they are agencies of government and entitled to the government's immunity; (4) the doctrine of respondeat superior does not apply. The reason for the exemption in the State of Kentucky was stated to be the second in the above classification. The court stated that the public policy denying the right to divert the funds donated specifically for purely charitable uses had legislative sanction. The claimant contended that the child labor law making it unlawful to employ one under 16 years of age to operate an elevator declared the public policy of the State. In answer to this contention the court said, in part:

The statute itself, however, only imposes a penalty upon the one violating it by the employment of a youth under the age of 16 years in the operation of an elevator. The courts have construed it to deprive the employer of any defense, such as contributory negligence and assumed risk, when damages are sought against him for an injury to such a servant, incurred in such an unlawful employment, and have made the fact of his unlawful employment a negligence sufficient to sustain a recovery. Neither the statute nor the courts have made any employer liable who was not theretofore liable to a servant for negligent injury. A charitable corporation was not liable before the enactment of the statute for a negligent injury inflicted by a manager, servant, or employee upon another employee or other person, and the statute has not changed the liability in that respect.

The employer, which a youth under the prohibited age and injured in a prohibited occupation, could have sued for a negligent injury before the enactment of sec. 331a, was the servant of a charitable corporation, who did him the injury and not the corporation, and against such individual he yet has a cause of action, governed by the

principles which the courts have applied to a violation of that statute, and under that statute against the person who employed him, and the servants of a charitable corporation, who set a youth to an unlawful occupation, may have imposed upon them the penal consequences of the statute, in addition to the civil liabilities incurred.

The judgment is therefore affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DUTY OF EMPLOYER—*Mackay Telegraph-Cable Co. v. Armstrong, Court of Civil Appeals of Texas (April 12, 1922), 241 Southwestern Reporter, page 795.*—Young G. Armstrong was employed by J. H. Cash, foreman in the employ of the Mackay Telegraph-Cable Co. Armstrong was an inexperienced day laborer, and with two other men was under the direction, control, and authority of Cash. In the course of their employment, unloading a car, one of the men working in the car moved the material to the door, while the other two men would lift it down and carry it to a place of deposit. After removing several boxes, Cash, who was standing near by, told the two men that the last box would be a little longer than the others but that they could handle it. Relying upon his statement, the men endeavored to lift it down, but it was too heavy for them and it fell and struck Armstrong on the leg, injuring him severely. He brought an action for damages against the company because of the injury and recovered a judgment in the trial court, whereupon an appeal was taken. The company contended that no negligence had been shown on its part, but the court of civil appeals affirmed the judgment of the lower court and said, speaking through Judge Fly:

The propositions contended for are that the work was as open to appellee as to appellant, and he knew better than appellant his strength and capability to lift heavy objects, and appellant would not be liable for his failure to comprehend a patent danger. Appellee was not charged with a knowledge of the weight of the box and had no opportunity to test its weight. He was in a position where he could not lift the box and arrive at an estimate of its weight, but he and his companion were compelled to rely upon the agent of appellant, who was their foreman, as to the weight of the box, and it was too late when they received it for them to measure its weight, because it crushed the strength of appellee and fell to the ground. Appellee knew nothing whatever about the weight of the box; the agent of appellant was charged with the knowledge of its weight, and appellee was authorized to rely upon his assurance that two men could handle the box. It is only in cases where the knowledge of the servant is equal to that of the master and the danger is open and patent that the latter will be absolved from a charge of negligence in not warning the former.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—GUARDING DANGEROUS MACHINERY—VIOLATION OF ORDINANCE—*Unrein v. Oklahoma Hide Co., Supreme Court of Missouri, Division No. 2 (August 28, 1922), 244 Southwestern Reporter, page 924.*—One Unrein was employed as a laborer by the Oklahoma Hide Co., which was engaged in the business of buying and selling hides in Kansas City. On October 15, 1918, in the course of his employment at the company's warehouse he was assisting one Tilley, the company's foreman, in moving hides from the first floor to the basement. Working together, they had taken a truck loaded with hides from the first floor of the building to the basement. Unrein proceeded to unload the truck, and Tilley left him to get another truck load of hides. After completing the unloading of the truck Unrein ran it into the elevator shaft, thinking the platform of the elevator was resting on the basement floor. The bottom of the elevator shaft was so constructed that it was 2 inches below the level of the floor, and built so that when the elevator was at the bottom of the shaft the floor of the elevator would be level with the floor of the basement. The elevator was operated by an electric motor, which was used only in lifting, as the elevator descended by gravity and was controlled by means of a brake. When the elevator was at the bottom of the shaft light was admitted down the shaft from the skylight; but when the elevator was above the basement this light was cut off. The light in the basement was very dim. The elevator shaft was fenced off on two sides only. One electric light was burning near the elevator. Two employees entered the elevator above, intending to descend into the basement. When they had descended a portion of the way a scream was heard, followed by a crash before the elevator could be stopped. On examination it was found that Unrein had been sitting on his empty truck placed in a position squarely under the elevator and that he had been crushed by it. Upon being released from the elevator he exclaimed, "My God! my back is hurt; I thought I was on the elevator." The injuries he received resulted in instant paralysis and his death four days later. His widow brought an action for damages for the death of her husband, based upon the negligence of the company. A trial resulted in a verdict for \$8,000 in favor of the widow. An appeal was taken to the supreme court. The widow contended that due to the dim light and the absence of automatic gates the deceased ran his truck into the shaft without noticing that he was not on the elevator. The company admitted that there was substantial proof of its negligence in these particulars, but contended that if the deceased had exercised due care he would have known that the elevator was not at the basement. However, had the elevator been protected by automatic gates properly operated (as were required by the building code of Kansas City), it would have been

impossible for the deceased to have pushed his truck into the space usually occupied by the elevator without discovering the elevator was not there. The court said that the question before it was "Whether the absence of light from the skylight would have warned a man of ordinary prudence, possessing the experience of the deceased and in the exercise of reasonable care for his own safety, that the elevator was not resting on the basement floor." Through Judge David E. Blair this defense of contributory negligence was decided in favor of the widow, as appears from the following quotation:

Statutes which require guarding of dangerous machinery and that automatic gates be furnished at elevator entrances are enacted for the very purpose of protecting those coming within their provisions against their own thoughtless acts in the performance of their ordinary duties. They contemplate that at times such persons will fail to observe the precautions necessary to protect them in the absence of guards, gates, etc. They can not be held to be guilty of negligence as a matter of law for the doing or the failure to do many acts which would bar recovery if such acts were done in connection with machinery or appliances not coming within the provisions of such statutes. The ordinance required automatic gates. The purpose of such requirement was to keep persons from falling into the shaft or being struck by or caught in the elevator. The only danger in the basement came from the descending elevator—the very thing which caused deceased's injuries. His act in entering the shaft while the elevator was on the first floor was therefore of the character the ordinance requiring gates was designed to protect him against, and he came within the rule above announced. The ordinance was designed to protect heedless acts on his part liable to be committed by men of ordinary prudence under a like situation.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE—*Miller v. Canadian Northern Ry. Co., United States Circuit Court of Appeals, Eighth Circuit (June 2, 1922), 281 Federal Reporter, page 664.*—Oscar O. Miller was a brakeman of many years' experience, who for four months prior to December 12, 1916, had been employed on a mixed train running between Big Valley and Vegreville, in the Province of Alberta, Canada. About 6 o'clock in the morning of that day, while it was still dark, he was engaged in making up his train to go to Big Valley. In order to make it up it was necessary to gather into it many cars located on different tracks in the railroad yards and to move other cars in order to reach them. Miller had a list of the cars his crew were to put in the train. It was his duty to find the cars, turn the switches, and by signals and orders direct the engineer when and in which direction to move his engine and when and where to stop. It became

necessary to switch the engine on a siding to get some cars to put them in the train. Miller signaled the engineer to move after he had thrown a switch. He threw the wrong switch, and in his error walked down the same track as that to which he had shunted the engine. Thinking that he was not on the same track, he did not look backward. It was customary for the engineer to ring the bell when signaled to move his engine, but this morning as the engine moved forward the bell was not rung, and Miller, not noticing how close it was, was struck and his leg broken. He brought a suit against the railroad company to recover damages for the injury. A trial was had, and after the evidence was in, the court directed the jury to return a verdict for the defendant on the ground that the evidence conclusively proved that Miller was guilty of negligence which directly contributed to his injury. The court of appeals affirmed this decision, saying even if the engineer saw him walking down the track he would be warranted in presuming that he would step aside in due time to escape injury; and that it was his own action and failure to exercise reasonable care that caused his injury.

EMPLOYERS' LIABILITY—NEGLIGENCE—DANGEROUS INSTRUMENTALITIES—VOLUNTEER—MINOR EMPLOYEE—*King v. Smart et al.*, *Supreme Judicial Court of Massachusetts (November 23, 1921)*, 133 *Northeastern Reporter*, page 562.—On September 24, 1919, Elmer King, a boy 12 years of age, was in the employ of Theodore B. Smart. Among other things it was the duty of the boy to go in and out of a shed in which the employer kept tools. In the shed there was also stored some dynamite. King was ignorant of the nature of the explosive and while in the shed he picked up a piece of the dynamite which looked like a tool and thinking it was a tool that needed polishing up he put it to the grindstone. An explosion followed which maimed the boy's hand and injured him in other ways. Suit was brought against the employer to recover damages. The employer demurred to the declaration filed by the plaintiff, claiming that the declaration showed contributory negligence, that the act causing the injury was outside the scope of the employment, and that there was no actionable negligence on his part. The demurrer was sustained and the case was appealed to the supreme court of the State. That court affirmed the action of the lower court in an opinion rendered by Justice Pierce, which states the reasoning of the court as follows:

The demurrer to the first count of the declaration was sustained rightly. While it is alleged that the plaintiff was a young boy of the age of 12, in the employ of the defendants when injured, and

that he had the duty in the course of his employment to go in and out of the shed where the defendants had stored dynamite or other explosives, it nowhere alleges that the plaintiff as a servant of the defendants had any duty to perform which required that he should touch, handle, or move the dynamite or explosive from the place where it had been stored. The count does not allege that the dynamite or explosive untouched and undisturbed was likely to explode and thereby cause harm to the plaintiff or to others unless such persons were warned of its presence in the shed and of its dangerous nature, nor does it allege that any duty of the plaintiff to the defendants brought him in such proximity to the explosive that it was reasonably probable that the plaintiff would pick up the dynamite and polish it as a tool on a grindstone. In the circumstances set out in the first count the plaintiff was injured as the result of his own trespassing misconduct without which the dynamite would have remained an innocuous thing. The defendant upon the facts and according to common experience and the usual course of events could not reasonably be expected to anticipate that a servant or licensee on the premises would mistake dynamite or an explosive for a tool of the defendants' business, and would outside his employment voluntarily undertake to improve its condition by polishing it or otherwise. As a master the defendants owed no duty to the plaintiff as a servant, while acting outside the scope of his employment, to instruct and warn him of the perils of place and instrumentalities which were incidental to the use of the premises or the conduct of the business of the master thereon; and there is no allegation of willful or wanton misconduct of the defendants in their relation to the plaintiff as an individual.

EMPLOYERS' LIABILITY—NEGLIGENCE—DANGEROUS MACHINERY—
STATUTE REQUIRING GUARDS—"OTHER ESTABLISHMENT"—*Stoll v. Frank Adam Electric Co., St. Louis Court of Appeals, Missouri (April 4, 1922), 240 Southwestern Reporter, page 245.*—A statute of the State of Missouri provides that:

The belting, shafting, machines, machinery, gearing, and drums in all manufacturing, mechanical; and other establishments in this State, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible, etc.

Meta Stoll was in the employ of the Frank Adam Electric Co. as a clerk or demonstrator of appliances sold by the company in their store in the city of St. Louis. On December 12, 1918, in the course of her employment, and after she had stooped to plug in the socket to make an electrical connection with a Thor washing machine, she rose, and as someone was attempting to pass her, she turned, and as she did so the unguarded rollers of the wringer attached to the machine caught her hand and injured it severely. She brought an action for damages against her employer, based upon the above,

statute. The evidence at the trial showed that it was possible to guard the rollers of the machine and that similar machines were guarded in laundries. As she was unsuccessful in the trial court, an appeal was taken. The question of law before the court on appeal was whether or not the employer in the retail sales business comes within the provisions of the statute above and whether the girl was guilty of contributory negligence. The appellate court decided both questions in favor of the employee, reversed the judgment of the circuit court, and remanded the case for a new trial. Commissioner Nipper, who recommended the judgment adopted by the court, states the reasons for the decision in part as follows:

Our supreme court, in *Cole v. North American Lead Co.*, 240 Mo. 397, 144 S. W. 855, stated that this section of our statute was "one of the wisest and most humane statutes to be found upon our statute books, and should be given a broad and liberal interpretation, because it is remedial and highly salutary."

Defendant contends that the phrase "and other establishments" in the connection it is used was intended to embrace places of the same general character as those enumerated, thus calling for the application of the rule of *ejusdem generis*. In view of what has been said by the courts of this State in construing this statute and the object, purposes, and intent of the legislature in its enactment we would not be justified in placing this narrow and constrained construction upon it.

As to the defense of contributory negligence it appears that plaintiff was required to use this narrow aisle while in the course of her ordinary duties, and that while she was in the aisle for the purpose of demonstrating this machine to a prospective customer some other person in the store attempted to pass her in this narrow passageway. In attempting to permit this person to pass plaintiff in some manner thrust her hand toward this machine and her fingers were caught in the rollers thereof, and she received the injuries in question; and under such facts as are disclosed in this record we would not be warranted in holding plaintiff guilty of contributory negligence as a matter of law.

EMPLOYERS' LIABILITY—NEGLIGENCE—EFFECT OF DENIAL OF COMPENSATION ON SUIT FOR DAMAGES—*Katzenmaier v. Doeren*, *Supreme Court of Minnesota (December 23, 1921)*, 185 *Northwestern Reporter*, page 938.—Fred Katzenmaier was employed at the defendant's factory in St. Paul, Minn. On February 2, 1914, he slipped and fell on a cement walk leading into defendant's factory from a public street, which had negligently been permitted to become covered with dangerous formations of ice. He brought proceedings for compensation because of injuries resulting from the fall, but it was denied because the accident did not arise out of and in the course of his employment. He then brought a suit against his employer based on negligence. The employer demurred, claiming that the prior decision in the com-

pensation proceedings was determinative. Katzenmaier contended that this defense was not good in law, and the court upheld this view. An appeal was taken to the supreme court of the State, where the judgment of the trial court was affirmed. It was held that a judgment denying a workmen's compensation claim was not a bar to an action for negligence. Judge Holt rendered the opinion of the court in which he said in part:

Where the parties in an ordinary action for damages are within the workmen's compensation act, and upon the trial facts are found which show that plaintiff is not entitled to damages, but is clearly entitled to compensation from a defendant employer the court may give that relief. But the reverse does not hold true. Negligence is the foundation for a recovery in the ordinary action for damages. It is of no consequence in a workmen's compensation proceeding. In the latter there are matters which become decisive for or against a recovery, but which may not be of much significance in the ordinary personal injury action.

The finding has no bearing on the question of defendant's alleged negligence in this action.

EMPLOYERS' LIABILITY—NEGLIGENCE—EMPLOYEE OF INDEPENDENT CONTRACTOR—LIABILITY FOR INJURIES—*Craig v. Riter-Conley Mfg. Co., Supreme Court of Pennsylvania (January 3, 1922), 116 Atlantic Reporter, page 167.*—Harry N. Craig was employed by the Hughes-Foulkrod Co. as a carpenter in the erection of an addition to the factory of the Riter-Conley Mfg. Co. While so engaged he was struck and permanently injured by a moving crane, and brought this suit in his own right and for the use of his immediate employer. Judgment was in his favor in the court below and was affirmed on this appeal. Craig was at work in a place where he would be struck by the crane in its normal operation, but the workmen had been promised protection by the manufacturing company and proper warnings had been given of the approach of the crane for the three days preceding the accident. No such warning was given at this time. The crane operator could have seen Craig but excused his failure to do so by stating that his duty required him to look down at the floor, and that he had no knowledge of Craig's presence in the place of danger.

The opinion of the court was given by Judge Walling, who made the statement summarized above, and continuing, said:

The only complaint of appellant is that the trial court should have decided the case in its favor as a matter of law, and that we can not sustain. The work being done was for the mutual benefit of all parties, and plaintiff was there by the implied invitation of the defendant company, which was therefore bound to use reasonable care for his safety. While the evidence was conflicting, it sustains a

finding of defendant's negligence, although the jury might have found the facts otherwise. The contractor's men were known to be working about the girder from time to time, and, in view of this fact, the failure of the crane operator to glance in that direction while moving along the track, or to give any warning, were circumstances for the jury to consider on the question of his neglect.

The noise of the factory and of the work upon the new building naturally prevented plaintiff from hearing the approach of the crane, as his stooped position while driving in the post prevented him from seeing it. He was bound to be vigilant for his own safety; yet, in view of the promise of protection and its fulfillment theretofore, his presence on the girder in the performance of his work can not convict him of contributory negligence as a legal conclusion.

Under the circumstances the finding of the jury as to the facts was held to control, and the judgment was affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—GUARD FOR DANGEROUS MACHINERY—INJURY TO EYE—PURPOSE OF STATUTE—*Mansfield v. Wagner Electric Manufacturing Co., Supreme Court of Missouri, Division No. 2 (June 8, 1922), 242 Southwestern Reporter, page 400.*—Section 6798 of the Revised Statutes of 1919, as amended by Laws of 1919, page 443, provides:

Every person, firm, or corporation using any polishing wheel or machine of any character which generates dust, smoke, or poisonous gases in its operation, shall provide each and every such wheel or machine with a hood, which shall be connected with a blower or suction fan of sufficient power to carry off said dust, smoke, and gases and prevent its inhalation by those employed about said wheel or machine.

While in the employ of the Wagner Electric Manufacturing Co., Louis Mansfield was engaged in polishing a large metal casting by the use of a movable emery wheel which was not protected in the manner prescribed in the statute above. Particles either from the casting or from the wheel injured one of Mansfield's eyes, whereupon an action was brought for damages, and the statute was pleaded to sustain the action. The trial court directed a verdict for the company, and an appeal was taken. The supreme court affirmed the action taken by the trial court, citing several authorities. A case in which recovery was refused under somewhat similar facts was quoted as holding that protection created by a statute intending to prevent the feet from being caught and held could not be the basis of an action in which the hands and arms had been caught. (*Rutledge v. R. Co., 110 Mo. 312, 19 S. W. 38.*)

After reviewing several other cases, the court said that even in the absence of the decisions in point, it was satisfied from the plain language of the statute that the injury received, even though it

would not have occurred but for a violation of the statute, was not one for which recovery could be had.

Judge David E. Blair said:

The plain purpose of the statute is to prevent injury to the health of operators of emery wheels and other polishing wheels, due to the necessity of breathing into their lungs fumes, smoke, dust, and poisonous gases generated by the friction between such polishing wheels and the surface to be polished. The statute was designed to promote the health of employees operating such machines by providing a means of carrying off such smoke, dust, and gas by forced drafts of air or by suction. Admit for the purposes of the case that defendant violated the express provisions of the statute requiring a hood and blower or suction fan; admit that the plaintiff's injury was received in consequence of defendant's failure to install such hood with blower or suction fan; still the legislature was not legislating to protect employees against the danger of particles flying into their eyes, but for an altogether different purpose; its object was not to regulate the duty of employers for all purposes, but only for one particular purpose, to wit, to *prevent inhalation of smoke, gas, and dust* by those employed about such wheels.

EMPLOYERS' LIABILITY—NEGLIGENCE—INJURY TO EMPLOYEE OF THIRD PARTY—JOINDER OF SUBROGATED EMPLOYER—WORKMEN'S COMPENSATION—*Gentile v. Philadelphia & R. Ry. Co., Supreme Court of Pennsylvania (May 15, 1922), 118 Atlantic Reporter, page 223.*—This was an action to recover damages for the death of one Gentile, employed by the Brooke Iron Co. Gentile's duties required him to unload cars of stone at a trestle, and while so engaged he received fatal injuries due to the alleged negligence of the defendant railway company which hauled the stone. The widow and her children had secured an award under the compensation law of the State, the widow also suing the railroad company for the negligent injuries. In view of the compensation award, which under the act gave the employer a right to subrogation, the widow joined the iron company as a party plaintiff in the present proceedings. This was objected to, but the court ruled that the railroad company "was in no manner prejudiced thereby; its liability was simply to the surviving widow and minor children, and was neither increased nor diminished by that section of the workmen's compensation act." Continuing the court said:

It is of no moment to defendant whether the amount recovered from it goes to the widow or the iron company. The suit as originally brought was by the widow, on behalf of herself and minor children, and by the E. & G. Brooke Iron Co., claiming \$10,000; later, and after the statute of limitations had run, the trial court properly allowed plaintiff to amend the record by adding "for the use of the widow and the iron company, as their interests," may appear and also, by more specifically claiming for the widow and

children for the financial loss resulting to them by the death of the deceased. The cause of action and legal plaintiff (the widow) remained the same and defendant was deprived of no right.

The railroad company claimed that the provision of the compensation act referred to was unconstitutional, but this contention was not considered, the court saying:

As defendant is not hurt by the above mentioned subrogation provision in the workmen's compensation act, it is not necessary to pass upon its constitutionality; for a statute will not be declared invalid at the instance of one not injured thereby.

A judgment in favor of the plaintiffs was therefore affirmed.

EMPLOYER'S LIABILITY—NEGLIGENCE—OCCUPATIONAL DISEASE—WORKMEN'S COMPENSATION LAW—*Trout v. Wickwire Spencer Steel Corp., Supreme Court of New York, Special Term (June 6, 1922), 195 New York Supplement, page 528.*—This was a proceeding at common law to recover damages for injuries sustained by the employee, Trout, by reason of chlorine gas poisoning. The employer contended that the workmen's compensation law of the State furnished an exclusive remedy. Trout claimed injuries by reason of the negligence of the defendant in permitting him to work for many months in its filtration plant, becoming poisoned by its failure to inform him of the dangerous condition resulting from the chlorine gas that was used. This allegation of negligence, and of the nature of the injury was said by Judge Rodenbeck to "take the case out of the category of accidental injuries due to gas poisoning, coming within the purview of the workmen's compensation law." Cases were cited in which compensation had been allowed, as *Odell v. Adirondack Electric Power Co.* (233 N. Y. 686, 119 N. E. 1063), in which an electrician working in the cellar under a boiler room became ill from the coal gas and died three months later from pulmonary tuberculosis, the evidence being that gas poisoning was the primary cause of the disease. An award of the industrial compensation commission affirmed by the appellate division (181 Appellate Div. 910, 167 N. Y. Supp. 1116), was again affirmed by the court of appeals, without opinion, over the contention that the injury was not accidental or a disease or infection resulting from accidental injury; also *Gray v. Semet Solvay Co.* (231 N. Y. 518, 132 N. E. 870), in which a night patrolman in a chemical plant became fatally ill from inhaling chemical odors and fumes "constantly emitted from the plant." The medical testimony was to the effect that "the cause of death was mineral poisoning or serous meningitis from the toxemia due to the poisonous fumes where he worked." Here again, over the contention that death was

not the result of an accidental personal injury, the court of appeals affirmed the judgment of the appellate division sustaining the award of the industrial commission.

The workmen's compensation law of New York was amended in 1920 so as to include certain occupational diseases, but chlorine gas poisoning is not enumerated. Therefore, there could be no award under the compensation law under this provision. Judge Rodenbeck concluded:

The statute is exclusive as to cases coming within its scope (secs. 2, 49-a), but the common-law remedy still exists as to cases not covered by the statute. The complaint contains allegations, which must be accepted as true on this motion, of an occupational disease not embraced in the statute, and is properly framed.

The motion to dismiss the complaint was therefore denied.

EMPLOYERS' LIABILITY — NEGLIGENCE — OVEREXERTION — RULE OF HASTE—*Jirmasek v. Great Northern Railway Co., Supreme Court of Minnesota (February 17, 1922), 186 Northwestern Reporter, page 814.*—The Great Northern Railway Co. is an interstate carrier and transports the Government mails over its lines of railroad. On April 1, 1919, and for several months prior thereto Joseph Jirmasek was in the company's employ as its transfer mail clerk at Fargo, N. Dak. It was his duty to receive mail taken from the trains and load mail on outgoing trains. His method of doing the work was to draw a truck to the door of the mail car, load it with mail bags, and move the truck. Outgoing mail which was loaded on other trucks was then pulled up to the mail car door and placed aboard the train. On April 1, 1919, he received a quantity of mail from one of the early trains and handled it in the customary manner. One bag was unusually heavy, weighing 170 pounds. Later in the day it was necessary to load this bag with others on another outgoing train. The regular stop of the train at the station was 10 minutes. The company's foreman, under whose direction Jirmasek was working, ordered him to "Hurry up so you don't hold the train." Jirmasek, in compliance with the order, worked faster and in handling the heavy bag strained his back severely. He brought an action for damages because of the injury, against the railway company. At the trial he showed he was 40 years of age, that he did all the transfer work except during the Christmas season when he had a helper, and that a rule of the postal authorities prohibited the placing of more than 125 pounds of mail in a bag. Judgment was rendered in favor of Jirmasek, and the company appealed to the supreme court of the State. It was admitted that

the employer is not liable for an injury sustained by an adult servant by overexertion in lifting heavy articles. The reason for this rule is that every man of ordinary intelligence is conclusively presumed to be the best judge of his own strength, and so, as the court said, if this case came within the scope of the above rule, Jirmasek could not recover damages. It was contended on his part that the rule did not apply because he had so little time that he had no opportunity to use his own judgment in measuring his strength or ability to lift the mail bags, particularly in view of the order of the foreman to hurry and not delay the train. The supreme court ruled against the contentions offered on behalf of Jirmasek and decided in favor of the company, saying:

This court has recognized what is known as the "rule of haste" in determining whether an employment involves a hazard peculiar to the operation of railroads, bringing the employee within the scope of the statute abolishing the fellow-servant rule. (Section 4427, G. S. 1913.) Consideration of the statute does not enter into the present case. If the "rule of haste" has any application it must be on the theory that the order to hurry created an emergency which deprived plaintiff of an opportunity to exercise his own judgment. We are unable to adopt that theory, vigorously supported as it is by the argument of plaintiff's counsel. An hour or two before plaintiff was injured he handled the heavy bag, when it was put off train No. 9. It seems clear to us that he must have discovered then and there that it was unusually heavy, if such was the fact, although his testimony as to this is not clear and contains the explicit statement that he did not ascertain the weight of the bag until the moment of his injury.

No case has been called to our attention in which it has been held that it is the master's duty to make a preliminary test of the weight of an object to ascertain whether a servant who is required to handle it hurriedly has the physical strength to do so without assistance. We therefore conclude that the "rule of haste" does not take such a case as this out of the field covered by the rule relating to injury from overexertion.

Order reversed and a new trial granted.

EMPLOYERS' LIABILITY—NEGLIGENCE—SAFE INSTRUMENTALITIES—SAFE PLACE TO WORK—YOUTHFUL WORKER—*Sutton v. Melton-Rhodes Co. (Inc.)*, Supreme Court of North Carolina (April 19, 1922), 111 Southeastern Reporter, page 630.—Bernice W. Sutton when 15 years of age was in the employ of the Melton-Rhodes Co. His employment required him to operate a molding machine in the woodworking plant. The machine was not the kind approved and in general use in similar mills, and in itself was defective and in a state of disrepair. The angled handle to the pressure bar, which originally projected from under a belt and allowed pressure to be applied by foot without coming in contact with or dangerously near to the belt,

had been broken off and negligently allowed to remain in that condition. The machine as used had but a straight bar entirely under the belt so that pressure could not be applied without bringing the foot into contact with or dangerously near to the moving belt. While working at the machine Sutton's foot was caught in the belt and carried into the pulley. His knee was held by a protruding shaft while the pulley carried the foot on around itself, breaking the bones and forcing them through the flesh. He was taken to the hospital, where he remained seven weeks, and since then has used a crutch. He brought a suit for damages because of the injury, by his next friend, against the employer. The trial court allowed him \$1,500 damages and the employer appealed to the supreme court. Judge Walker speaking for that court, in its decision affirming the action taken by the lower court, stated the law on the subject of minors and inexperienced persons using defective machinery. He said in part:

The question at last was whether the defendant had selected the machine with reasonable care and prudence so as to procure one which had been approved and was in general use, and had used ordinary care to keep it in proper repair, so as to make it reasonably safe for his employee to use it in performing his work, and, if the employer knew it was defective, or should have known it, in the exercise of ordinary care, he should have warned the employee of any danger arising therefrom. It is the duty of the master to exercise due care in furnishing his servant with a reasonably safe place to work and reasonably safe and proper machines, tools, and appliances with which to do the work, and in the case of youthful or inexperienced employees this further duty rests upon him. Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of or unable to appreciate such danger, it is his duty to give him such instruction and warning as to the dangerous character of the employment as may reasonably enable him to understand his perils.

EMPLOYERS' LIABILITY — NEGLIGENCE — UNGUARDED MACHINERY — LIABILITY OF LANDLORD FOR INJURY TO TENANT'S EMPLOYEE—*Tomlinson v. Marshall et al.*, *Kansas City Court of Appeals, Missouri* (December 5, 1921), *236 Southwestern Reporter, page 680*.—William Tomlinson, an 18-year-old boy, was an employee in a steam laundry. His duties were to oil the laundry machinery and to fire the engine. He was inexperienced in such work, having done nothing of the kind before, except to fire the engine of a threshing machine for a short time. About a week after he had been at work in the laundry he was ordered by one Fredericks, the man in charge of the laundry, to go behind one of the laundry mangles and oil a part of its machinery. After finishing the work he attempted to get by Fredericks'

wife, who was in the narrow space between the machine and the wall, by direction of her husband. In the attempt to pass each other Tomlinson lost his balance, and being about to fall, he involuntarily threw out his hand, where it was caught by the rollers of the mangle and so badly mashed and burned that it had to be amputated. He brought a suit for damages based upon negligence in the failure to guard the machine as required by State law. A verdict and judgment of \$2,000 favored the claimant, and the defendants appealed. In the higher court it was not contended that the situation was such that a guard was not required by law, but the defense was that about 10 days before the injury the defendants had leased the laundry to their former foreman, Fredericks, and therefore the latter would be liable, and not the defendants in this case. To this Tomlinson insisted that, notwithstanding a written lease between the parties, the defendants did not assume the relationship of landlord, nor did Fredericks occupy the position of mere tenant, but that the defendants retained an interest in and control over the business either as partners or employers; also, even if Fredericks could be said to be a real tenant and the defendants merely landlords, nevertheless they were liable, as they were owners of the laundry plant and, in violation of the State statutes, did "aid" and "abet" the violation of the law by leasing the business to Fredericks with the machines thereof in an unguarded condition. This contention was upheld by the appellate court, and the judgment of the lower court was affirmed in an opinion rendered by Judge Trimble. The decision is in part as follows:

In this connection it may be well to observe that the contention just stated does not mean that if the owner of a building leasing the same to the operator of a factory, establishment, or business (who in the conduct of such business violates section 6786 in failing to guard his machines), such owner or landlord is rendered liable under the aforesaid statutes. In this case the defendants did not own the building; they merely owned the laundry plant or outfit and the laundry business as a going concern. In the conduct of such business they failed to have the machine guarded, and they leased the plant, establishment, and business, a going concern then in operation, with the machines thereof in an unguarded condition. The question is whether, under these circumstances, they come within the meaning of section 6806, in that they, as owners of that going business, by leasing the same with the machines thereof unguarded, have not thereby assisted, or, as the statute puts it, aided and abetted the tenant in violating section 6786 and thus rendered themselves liable in damages to one injured by such unguarded machine. The question is an interesting one, but, so far as we have been able to find, has never been directly and specifically passed on by the courts.

Section 6786 says such machines as the one in question shall be guarded when possible, without saying who shall be required to place or maintain the guards. Section 6806 is very sweeping in its terms

and makes every one who assists, or aids, or abets the violation of the statute liable. That, it seems to me, means to include, and does include, every person who is a party to putting the unguarded machinery into operation or the maintaining of it in that condition.

The view that the parties to the so-called lease did not regard it as such, or, if they did, they mutually agreed to disregard it as a lease, and the business was carried on as before, with Fredericks receiving as his pay one-half of the net profits, is further supported by the following further facts: The so-called lease provided that the relationship between defendants and Fredericks could be terminated at the end of any month on five days' notice. So that if a tenancy was created it was practically a tenancy at will, which in itself would seem to cut the main element of a lease down to the vanishing point and to coincide with the view that the parties did not have any real intention to create a lease. Furthermore, it would rob the so-called tenant of any incentive to make repairs or put on guards and impel him to run the plant in the condition it was.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—*Outcalt v. Chicago, B. & Q. R. Co., Supreme Court of Minnesota (December 2, 1921), 185 Northwestern Reporter, page 495.*—Clarence R. Outcalt was the head brakeman on a freight train of the C., B. & Q. R. Co. On January 10, 1920, he lost his life through an accident in the freight yards at Grand Crossing, Wis. His body was found by a train inspector after his train had been placed on a siding. Suit for damages was brought by his widow under the Federal liability act, as he was engaged in interstate commerce when he was killed. At the trial of the case circumstantial evidence was offered to prove the cause of his death. It appeared that the deceased was an experienced brakeman and had run in and out of the yards many times, that the tracks in the yard where the accident occurred were so spaced that the deceased could not safely ride on the side of the tender if a car chanced to be standing on an adjoining track, and that the deceased while riding on the side of the tender was knocked off by a car on an adjoining track. The negligence charged to the railroad was attempted to be offset by the defense of the company, which was that the brakeman was not proved to be riding on the tender at the time of the accident, that he had ample opportunity to see how the tracks were located and was bound to know of his danger; and that there was no reason for riding on the tender, and if he did so he assumed the risk of the employment and the company could not be held liable for his death. A verdict and judgment were rendered in favor of the widow in the trial court and an appeal was taken to the supreme court of the State. The judgment was affirmed by that court in an opinion by Commissioner Lees. It was held

that negligence charged could be established by circumstantial evidence and the finding of the cap, lantern, and body, and the blood on the track was persuasive evidence that the accident happened in the manner alleged. With reference to the contention of the company that the deceased assumed the risk of the employment the court said that the doctrine of assumption of risk is not favored by the courts and ought to be cautiously applied.

Quoting from the language of the court:

It is uniformly held that a servant is not charged with the assumption of a risk merely because he is aware of the existence of a danger or defect. To be so charged, he must have known or appreciated, or, in the exercise of ordinary prudence, should have known and appreciated, the risks to which he was exposed. The deceased had the right to assume that the railroad company had used due care to provide a reasonably safe place for the doing of his work. The fact that tracks 5 and 6 were so near together that it was dangerous to ride where he rode was not so patent as to be readily observable, and hence it was for the jury to determine whether he had assumed the risk of the injury which caused his death.

But it is contended that in the discharge of his duties the deceased was not required to ride on the side of the engine or cars, that there was no necessity for his doing so, and that he voluntarily and unnecessarily took a position of danger when one of safety was reasonably available, and hence there can be no recovery. The general rule is that when a danger is obvious and of such a nature that it can be appreciated and a servant is permitted to do his work in his own way, he is negligent as a matter of law if he selects a dangerous way when a safe one is available and he has knowledge, actual or constructive, that the way he selects is dangerous. This rule apparently relates to the subject of contributory negligence (*Dun. Dig. 6008*), and contributory negligence does not bar a recovery in an action brought under the Federal employers' liability act; it merely diminishes damages.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—NEGLIGENT ACT OF FELLOW SERVANT—*Reed v. Director General of Railroads, Supreme Court of the United States (February 27, 1922), 258 U. S. 92, 42 Supreme Court Reporter, page 191.*—This case was before the Supreme Court on a writ of certiorari to the Supreme Court of Pennsylvania, the judgment of that court (267 Pa. 86, 110 Atl. 254) being reversed. Gertrude Reed sued as administratrix of the estate of her husband, who was, as it was alleged, negligently killed while engaged in interstate commerce by a company then under the control of the Director General. The trial court had rendered judgment in her favor, but the supreme court of the State reversed this on appeal. Several grounds were offered, but the court considered only the question of the assumption of risk; and finding that Reed had assumed the risk, entered judgment against the

widow, upon which the case was taken to the Supreme Court of the United States, where this last action was reversed.

Reed, at the time of his fatal injury, was riding at the front of a caboose being pushed by an engine for the purpose of signalling to the engineer as to open track. The view was accepted "that the engineer's negligence was the proximate cause of the fatal injury"; and the Supreme Court of Pennsylvania took the position that Reed had assumed the risk of such negligence, so that the employer was not liable, citing the case *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635 (see Bul. No. 169, p. 80). The Supreme Court held, however, that while the assumption of risk was not wholly abolished by the Federal statute, it did abolish the rule "that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff." The opinion, delivered by Mr. Justice McReynolds, concludes as follows:

In actions under the Federal act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents, or employees of such carriers.

Judgment was therefore reversed and the case remanded for further proceedings not inconsistent with the rule thus laid down.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EMPLOYEES' COMPENSATION ACT—ALTERNATIVE REMEDIES—PANAMA RAILWAY—*Panama R. R. Co. v. Minnix, United States Circuit Court of Appeals, Fifth Circuit (June 6, 1922)*, 282 *Federal Reporter*, page 47.—Warren E. Minnix was employed by the Panama Railroad Co. to act as a stevedore foreman to superintend a gang engaged in coaling vessels. A few days after the date of his employment, while he was still under the general direction of an experienced foreman, his foot was badly injured by a lump of coal falling upon it. He brought suit against the railroad company, claiming damages for the injury under the Federal employers' liability act. The facts brought out show that Minnix was working underneath a conveyor which carried coal to a chute. The railroad had other conveyors, which were guarded by upright planks within which they ran, and which prevented lumps of coal from falling from such conveyors, but the conveyor in question was not so guarded. Minnix claimed he was not warned of the danger of falling coal. The entire capital stock of the corporation was owned by the United States, but the

corporate existence and organization of the railroad were still maintained. A verdict and judgment favored Minnix, and the company took the case to the circuit court of appeals. The company's main defense was that the sole rights of an employee of the Panama Railroad Co. were under the Federal compensation act of September 7, 1916, and that Minnix could not maintain his action for damage for the negligence on the part of the railroad company.

The judgment of the district court was affirmed, Judge King saying:

It is evident that the first [liability] act declares a right of action against the Panama Railroad Co. for negligence; the second [compensation] act provides a scheme of compensation for injured employees without regard to the negligence of the person inflicting the injury. We do not think that the passage of the compensation act of September 7, 1916, had the effect of repealing the employers' liability act as to employees of the Panama Railroad Co.

While the United States is the sole stockholder of that corporation, the corporate entity of that company is maintained, and the railroad is operated by the corporation. The employees are recognized by the act itself as being those of that corporation. It took an express provision of the compensation act to extend its benefits to them.

The liability of the Panama Railroad Co. to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is the sole stockholder. (*United States v. Strand*, 254 U. S. 491, 493, 41 Sup. Ct. 165.)

Minnix had two remedies—one to sue the railroad for the tort; the other to apply for compensation under the compensation act. In the first case his action is based on the existence of, and ability to prove, actionable negligence. In the second his claim is based on injury sustained while in the line of duty, regardless of the negligence of others.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE—FRAUD—LIMITATION—*Gauthier v. Atchison T. & S. F. Ry. Co.*, Supreme Court of Wisconsin (February 7, 1922), 186 Northwestern Reporter, page 619.—Paul Gauthier received an injury while in the employ of the Atchison, Topeka & Santa Fe Railway Co., while engaged in interstate commerce in the company's baggage room at San Diego, Calif. The injury occurred February 2, 1916. Gauthier filed a claim with the Industrial Accident Board of California for an award of compensation under the State workmen's compensation act. The claim was denied on October 31, 1916, on the ground that the board was without jurisdiction, and that the remedy was solely under the act of Congress. No action was taken on the subject until November 5, 1920. On that date suit was instituted against the railway company for damages for the personal injuries sustained. Gauthier set up the fact that the company had promised

to settle with him for the injuries received, and represented to him that it would not be necessary to bring an action for the damages, and that he relied on these representations, and that the company should be estopped from setting up the statute of limitations to bar the action. The complaint was dismissed at the trial court because it did not show a legal cause of action. An appeal was taken to the supreme court of the State. The Federal statute provides that no action can be maintained unless commenced within two years from the date the cause of action accrued. The supreme court of the State affirmed the judgment of the lower court, holding that it was bound by the decisions of the Federal courts which had uniformly held that the lapse of time not only barred the remedy but destroyed the liability. It was contended also by Gauthier that recovery could be had on the grounds of fraud and deceit. The theory set up was that he had been deprived of his cause of action by fraudulent representations, and that therefore a new cause of action had been created and that the measure of damages would be the value of the claim as it existed when the fraud was practiced. The court did not uphold this view, and based its decision on the ground that no facts were stated amounting to fraudulent representations.

The court said, in part, as follows:

There was no fiduciary relation existing between plaintiff and defendant. No device or artifice which might induce plaintiff to postpone action is alleged. It is true that there are the allegations that defendant fraudulently represented and stated to plaintiff that it would pay and settle for the injuries received, and that it would be unnecessary for plaintiff to bring suit, and that plaintiff relied on such statements and neglected to commence an action for two years under the act of Congress.

The argument is made in the brief of appellant's counsel that, when defendant's agent "falsely and fraudulently represented that a debt or obligation existed on defendant's part and that the same would be settled and paid without the necessity of plaintiff exercising his legal remedies, a fraud was committed for which redress will be granted." There is no allegation that any false representation as to defendant's obligation was made, and, if there were, such an allegation would be contrary to the other allegations of the complaint and the whole theory on which the action was commenced. We feel compelled to construe the allegations as those relating to future events and not existing facts, and therefore not actionable. Mere promises to pay a debt in the future, although broken, are not fraudulent, although they may be so labeled in the complaint. It is axiomatic that in drawing a complaint charging fraud, the pleader must state facts constituting the fraud alleged, so that the court may form its own opinion as to its sufficiency.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CAR REPAIRER—*Richter v. Chicago, M. & St. P. Ry. Co., Supreme Court of Wisconsin (February 7, 1922), 186 Northwestern Reporter, page 616.*—Kasper Wulz was employed by the Chicago, Milwaukee & St. Paul Railway Co. as a car repairer, at Corliss, Wis. On the morning of July 24, 1917, he was sent to Truesdell, Wis., to repair two cars which had come from some place in Illinois. He finished the work, collected his tools, and was walking from the platform of the station toward a freight train which was slowly approaching from the south. He apparently had the intention of getting on the freight train. In attempting to do so he was hit by an approaching passenger engine and instantly killed. The administrator of his estate brought an action against the railway company for damages. Judgment was rendered in his favor and an appeal was taken to the supreme court of the State. Several questions were raised, one of which was as to whether Wulz was engaged in interstate commerce at the time of the accident. The supreme court held that the trial court was right in holding that the employee was engaged in interstate commerce at the time of the accident. The test to be applied was stated by Judge Jones, speaking for the court, in the following terms:

In the present case the return of Wulz from his work in interstate commerce was but a continuation of the task he had to perform when he started from Corliss, and not completed until he reported back at Corliss for further instructions. It is not necessary that the workman be working upon a car or siding or on a train engaged in interstate commerce when the injury is received in order to bring him within the provisions of the Federal act. If the act performed when the injury occurs is upon an indivisible task connected with interstate commerce, it is sufficient.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—GOING TO WORK—*Atlantic Coast Line Railway Co. v. Williams, United States Circuit Court of Appeals, Fifth Circuit (October 17, 1922), 284 Federal Reporter, page 262.*—C. N. Williams was a fireman on a switch engine which was used in making up and breaking up interstate railway freight trains at Savannah, Ga. His employer, the Atlantic Coast Line Railway Co., operated a shuttle train between the city of Savannah and its railway yards for the purpose of transporting its employees without charge to their work. Just as Williams was about to board the train on his way to the railway yard, one day, the brakes on the train were released and the train, which was moving slowly, suddenly increased in speed. At the rear end of the car there was a defective hand hold

which was not firm and secure, and when Williams seized it, it moved about 6 inches, got away from him, caused him to lose his hold, and he was thrown under the car and severely injured.

An action for damages was brought by Williams against the railway company because of the injuries. Judgment was rendered in his favor, and the company appealed to the circuit court of appeals. The first question before the court was whether Williams was engaged in interstate commerce at the time of his injury. The court held that he was, as "he was engaged in going to his work with the railroad company, which was clearly an employment in interstate commerce." The court said that for all practical purposes Williams was on the premises of the company "engaged in going to such work, using a means the right to use which arose solely from his employment, and that at the time his relation to his employer was that of an employee engaged in interstate commerce."

The judgment of the district court was therefore affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INSTALLING ELECTRIC TRANSFORMERS—*Halley v. Ohio Valley Electric Ry. Co., Supreme Court of Appeals of West Virginia (October 31, 1922), 114 Southeastern Reporter, page 572.*—The administrator of the estate of Calvin O. Halley sued under the Federal employers' liability act for the death of Halley, his son, recovering a judgment of \$6,000. The case was taken to the supreme court on a writ of error, the company contending that the workman was not its employee, that he was not engaged in interstate commerce so as to bring him under the statute, and that the amount recovered was excessive.

Though three corporations were involved in the ownership and management of the electric railway and the equipment and substations connected with its operation, the evidence was held to show employment. Halley was at the time of the fatal accident assisting in changing electric transformers, a new type being installed in the place of old ones. While so employed he touched a "live" transformer bushing, and received a fatal shock. The syllabus prepared by the court contains two paragraphs relating to this point, as follows:

One employed in the repair or maintenance of an instrumentality which is used by an electric railway company engaged in interstate commerce, and which is essential to the successful operation of the railway, is employed in such commerce, under the Federal employers' liability act.

A workman was injured while installing a new rotary converter and transformer in an electric substation, and connecting it with

wires to the main or conductor bus that carries the electric current to an electric railway's trolley wires. The new transformer was to take the place of an old one, which regulated the current used in the operation of the railway company's cars in interstate commerce, and was an instrumentality essential to the successful operation of the railway. Held, that the work was one of repair and maintenance, and that the workman so engaged was employed in interstate commerce, within the meaning of the Federal employers' liability act.

The suit was by the parents of young Halley, who was 19 years of age, and was for damages suffered by them. As to the claims that the verdict was excessive, the syllabus reads as follows:

Where it is shown that decedent was a vigorous young man, earning 50 cents an hour as electrical helper, not quite 20 years of age, good habits, industrious, kind, obedient, and affectionate to his parents, contributed occasionally small sums to their support, and had expressed a desire to assist them in purchasing a home, a verdict of \$6,000 for his wrongful death will not be set aside because excessive.

The judgment of the court below was therefore affirmed.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE — NEGLIGENCE — ATTEMPTED RESCUE — CONTRIBUTORY NEGLIGENCE—*Bacon v. Payne, Supreme Court of Michigan (December 5, 1922), 190 Northwestern Reporter, page 716.*—Charles W. Oliver was a section foreman employed by the Michigan Central Railroad. In 1919, while the road was under Federal control, Oliver, with his crew, was clearing ice and snow from switches at a siding in Arenac County. A "trailing switch" which diverted trains from the main track had been recently used in removing the hand car of the crew from the main track, anticipating the arrival of a fast through train. As the train approached, one of the crew, Marks, thinking that the switch was open, ran to it and threw the lever, actually opening a closed switch so as to divert the train from its proper track. Oliver seeing Marks so engaged, waved his arms and called to Marks that the switch was all right, at the same time running down alongside and close to the main track in his effort to prevent the opening of the switch. While so running he was struck and fatally injured by the approaching train.

Action by his administrator under the Federal employers' liability act of 1908 resulted in a verdict in his favor in the circuit court of Arenac County, but on a writ of error to the supreme court of the State this was reversed. The grounds for this removal are stated, after a detailed discussion of the circumstances, in the following language quoted from the opinion delivered by Judge Steers:

Oliver had worked for this railroad company since 1916, and for other railroads before that time, in employment requiring him to care for switches and become familiar with their use. He knew they were required to be kept closed when not in use, and presumptively had some knowledge of the effect of trains running through trailing switches. He knew the switch should be closed when trains passed, and, on discovering what Marks had done, impulsively ran in that direction in a hopeless effort to correct it before the train passed. He ran by the side of the track, not upon it, and in his haste negligently ran too close to the rail to avoid the overhang of the engine. The attending circumstances do not justify the claimed conclusion that he heroically rushed into danger "to snatch from it the life of a fellow creature imperiled by the negligence of another." The trial court instructed the jury:

"And if you find from the evidence that such emergency did arise, and that said Charles Oliver in good faith attempted to have the switch closed, and thus avoid damage to the defendant's property, and that he was justified in so doing, you should not find him guilty of contributory negligence."

The rule of exoneration from negligence where the injured party acted in an emergency does not apply if his conduct is rash and reckless. That by carelessly keeping too close to the track in his haste Oliver voluntarily and recklessly exposed himself to an extreme risk, which plaintiff claims was caused by another's negligence, is evident.

Conceding Marks' negligence to the full and defendant's responsibility for its consequences, his act in no sense imperiled Oliver, who was then in a place of unquestioned safety from the closely approaching train. His own subsequent reckless conduct in negligently placing himself too close to the track in front of the swiftly approaching train was the sole and proximate cause of the accident, not Marks throwing the switch. Without his independent intervening human agency no harm could have befallen him from what Marks did. No precedent or concurrent causative act of defendant placed him in jeopardy.

Judgment must therefore be reversed without a new trial.

EMPLOYERS' LIABILITY—RELEASE—INFANCY—EFFECT—*Robison v. Floesch Construction Co., Supreme Court of Missouri (December 19, 1921), 236 Southwestern Reporter, page 332.*—Dewey Robison was a minor 19 years of age, and had previously only worked on a farm. On September 9, 1918, he was employed by the defendant company to work as one of the night crew on its drag-line excavator in the construction of a levee near Greenbrier, Mo. He had had no experience in working about this kind of machinery and knew nothing of its operation except such as he had gained from passing during the time it had been operated near his home. The machine was not operated the first night he worked because it was out of order. During the following night he was instructed to tighten the jacks that steadied the framework of the machine. In order to do as

directed it was necessary for him to go from the cabin on the engine to the ground below. In the meantime the machine continued in operation. The men sometimes used a ladder to descend and sometimes climbed down the framework. Robison had been up and down twice during the night but not when the machine was running. It was very dark and as there was not enough light to enable him to locate the ladder he waited until the dipper was loaded with dirt and when it started its movement away from him he walked toward the corner where he thought the ladder was. When there he let himself down and felt along the side with his feet for the ladder, but could not find it. He looked around and saw the boom coming toward him. In his endeavor to escape his left leg was caught and crushed against the upper part of the framework, finally requiring amputation above the knee. On October 7, 1918, while still in the hospital, he was visited by one L. W. Mees, attorney for the employer. Mees told Robison he had come to make a settlement. When he was told by Robison that a settlement would have to be made with the father because of the injured boy's age, he replied that that was not necessary as the boy was over 14 years of age and could settle by means of a friendly suit by a next friend. Mees asked Robison how much he would take in settlement of any claim he might have against the company, and when the latter said \$350, he said that he did not think the company was at fault but offered \$250 with hospital fees and doctor bills anyway. Robison did not respond until Mees started to go away and then he agreed. Mees got a justice of the peace, who witnessed the transaction, conducting it as a friendly suit, and a check for \$250 was given to Robison. Suit was later brought by Robison to set aside the judgment of the justice of the peace, and asking damages for the injury. He was successful, recovering a judgment of \$10,000. The company appealed and the case went to the supreme court of the State. That court affirmed the later judgment and in a decision handed down by Commissioner Ragland stated its reasons in part as follows:

It is the generally accepted doctrine that an infant can not avoid a judgment or decree against him merely on the ground of infancy, and that he can not impeach such a judgment or decree by an original bill except upon grounds that would be available to an adult, such as fraud.

The evidence wholly fails to show that any untrue statement of fact was made by defendant's agent, either in negotiating the settlement with plaintiff, or in procuring the entry of a formal judgment by the justice of the peace, and for that reason appellant insists that plaintiff failed to make a case entitling him to the relief prayed under the first count of his petition. But plaintiff does not predicate his right to such relief solely on the ground of fraudulent representation.

There is no question but that plaintiff and defendant's agent, Mees, agreed upon a settlement whereby, in consideration of the payment of \$250, together with his hospital fees and doctor bills, plaintiff was to release defendant from further liability for the injuries he had sustained on account of its negligence. Such contract of settlement, even after it became executed, the plaintiff, being a minor, would have had the right to disaffirm and repudiate at any time during his minority, and within a reasonable time after coming of age. In order to cut off this right and make the contract absolute and final on the part of the plaintiff, Mees proceeded to cloak the transaction in the guise of a legal proceeding. This much the evidence clearly shows.

There can be no doubt, of course, but that in a suit instituted by a minor by his next friend a judgment may be rendered that will be valid and binding upon him. Such judgment, however, can not be based merely on the consent of the minor, for he is without discretion, nor on that of the next friend because he is not invested with either the power or the duty so to do.

The court in such case is charged with the duty of protecting the minor's interest, and it is only when its judgment is based upon facts judicially ascertained, upon a real, and not a perfunctory, hearing, that its judgment is binding upon him.

The judgment under consideration had no such basis. The proceeding, if it may be so called, was colorable merely from beginning to end; it did not possess a single element of a judicial hearing and determination. Its entire record was the handiwork of Mees; he prepared all the papers, and the next friend and the justice did nothing but complaisantly sign their names "on the dotted lines" pointed out by him. It should be said, however, that the two gentlemen who so obligingly signed the papers for Mees were given to understand, and they considered, that their acts in the matter were purely formal. And so they were. The "friendly suit" was not a suit in fact; it was merely a screen contrived to conceal the real transaction, the contract of settlement and release between plaintiff and defendant, and having for its purpose the foreclosure of plaintiff's right to disaffirm and repudiate his folly, upon reaching the age of discretion, or upon the receipt of mature counsel. It is considered fraudulent to take advantage of the incompetency of an infant to protect his own interests, and, as the alleged proceeding before the justice of the peace was designed for no other purpose, it should be so treated. On this ground the court was warranted, under the pleadings and evidence, in setting aside the pretended judgment.

EMPLOYERS' LIABILITY — RELEASE — INFANCY—FRAUD—QUESTION FOR JURY—*Neversweat Mining Co. v. Ramsey, Supreme Court of Oklahoma (December 13, 1921), 202 Pacific Reporter, page 787.*—Ollie Ramsey was in the employ of the Neversweat Mining Co. working in the screen room of its reduction plant. He was engaged in screening rock and ore dirt hoisted from its lead and zinc mine. His duty was to keep the screen clean by breaking up with a hammer

the large pieces of rock containing ore and causing it to pass through the screen into the hopper below. After he had been working about 30 minutes on the day in question a large can of ore dirt was dumped from the hoister upon the screen, from which several large bowlders rolled off. In backing away from the screen to escape being hit, he stumbled over other loose rocks strewn about upon the floor, and fell backwards through the door onto the unguarded tramway and from there to the waste rock pile 30 feet below. The fall resulted in serious and permanent injuries, the most serious being a fractured skull, as one of the jagged rocks upon which he fell penetrated his brain. Six weeks after the injury Ramsey signed a release in which he stated that the injury was caused by fainting, and that the company was not to blame for the accident. Later, suit was brought by Ramsey for damages and a verdict and judgment in his favor followed. The company appealed from the judgment to the supreme court of the State, but it was affirmed by that court in an opinion by Judge Kane. The company contended that the signed release was good unless fraud was proved. In answer to this contention the court said:

But it was also alleged in plaintiff's reply that if he did sign and execute the release he did not have sufficient mental capacity to understand the nature and character and contents thereof, and that he did not have sufficient mental capacity to make or enter into any contract or agreement of any kind or character respecting his person or property rights; that he has no recollection of signing or executing said release; that the defendant presented to him and requested him to sign a written instrument, which said agent stated and represented to the plaintiff to be an application for the payment of his accident insurance, and this is the instrument he thought he signed. Touching the nature of plaintiff's injuries, the evidence shows that the plaintiff sustained a grave fracture of the skull and other injuries about the head, which seriously affected his consciousness and his memory. For several days after the injury he was speechless, his eyes were crossed, his ears bled and rang with strange noises; it was only gradually that he came back to consciousness, toward the last days of his stay in the hospital. Up to and including the day the release was signed the plaintiff was constantly under the care and influence of Mr. Wills, the superintendent of the defendant company, the company doctor, and other agents and representatives of the defendant, all of whom had been very kind to him, and did not have the benefit of advice from any disinterested source as to his probable rights in the premises. While the release was signed the day the plaintiff was discharged from the hospital, the evidence shows that the injury to his head was still in an acute condition, and that the dangerous fracture did not heal until a piece of the fractured skull was removed from the wound by an operation performed some two or three months after the release was signed.

There can be no doubt of the very serious character of the injury to plaintiff's head, or that he suffered serious mental and physical

derangement therefrom for a long time after the release was signed. In these circumstances, and on account of his immature years, we are not disposed to disturb the findings of the jury on this point, which were approved by the trial court. We are unable to say, in the face of the finding of the jury and of the trial court to the contrary, that the release was fairly and honestly entered into, or that the plaintiff was mentally or physically in a condition to deal at arm's length with the parties representing the defendant.

The judgment in his favor was therefore affirmed.

EMPLOYERS' LIABILITY — RELEASE — JOINT TORT-FEASORS — *McNamara v. Eastman Kodak Co. et al.*, *Court of Appeals of New York (October 18, 1921)*, 133 *Northeastern Reporter*, page 113.—Edward B. McNamara was working as a riveter for one John L. Mullen, who had a contract for the steel work on a building in the city of Rochester, N. Y., that was being erected for the Eastman Kodak Co. McNamara was working on the roof of a building which was over the sixteenth floor; and, under orders from his foreman, he, in an attempt to lift a board which was to be placed on the sixteenth floor to protect the workmen below from falling rivets, fell through the unprotected opening or well and was killed. Suit was brought by McNamara's widow against the Eastman Kodak Co., the owner of the building, for damages because of its failure to comply with the labor law which provides that contractors or owners shall thoroughly plank over the entire tier with beams. The accident happened in 1912. In 1915 the case had been dismissed in the trial court and the appellate court had affirmed the ruling. On April 13, 1915, Mrs. McNamara wrote to Mullen, who, because of nonresidence, was not a party to this suit, calling his attention to her deplorable financial condition. The letter was never answered. In August, 1915, however, one McWade, a runner for a casualty company, paid her \$300 and got Mrs. McNamara to sign papers releasing her claim against Mullen upon the representation that it was a charitable gift, and not a settlement of any claim; that it in no way affected her rights against the kodak company; that her case against the kodak company had been finally dismissed, anyhow; that she could get nothing from it; and that the papers she was signing were simply receipts or papers in the nature of a receipt for Mullen's books. In 1917 the Court of Appeals of the State of New York reversed the judgment of the lower courts in the suit against the kodak company, holding that there was a proper case to go to the jury, and a new trial followed (*McNamara v. Eastman Kodak Co.*, 220 N. Y. 180, 115 N. E. 452). This time judgment favored the widow, and it was affirmed in the appellate division of the supreme court. The case

was again taken to the court of appeals, and the judgment of the lower courts was again reversed, but in favor of the kodak company, and again a new trial was granted. The reason for the reversal now was that Mullen and the kodak company were joint tort-feasors, and the court held that a settlement with one would be a bar to an action against the other. The appellant set up the release of Mullen obtained by the runner of the casualty company, and it was held to be a release of all claims against all the parties. Chief Justice Hiscock delivered the opinion of the court, in which it was said that "there was no suggestion that she did not understand the English language, and, unless we are to exonerate her from any obligation to understand such language and from any responsibilities which may come from indorsing and collecting the money on a draft which so specifies the purpose for which it is given, we do not see how a jury can be permitted to say that this plaintiff thought she was signing a receipt and not making a settlement." The court further said that as the surrogate court had made an order authorizing the release, "under such circumstances it seems to us that the order, so long as it stands, conclusively establishes between the widow and Mullen that the settlement was a prudent and honest one and one which the wrongdoer as well as the administratrix might safely make." Judges Hogan and Crane dissented, the latter stating in part that in his judgment "there is some evidence justifying a jury in finding that the plaintiff thought she was accepting \$300 as a gift and simply signed a receipt, and did not sign a release, knowing it to be such, and that therefore she never released her claim against the defendant here."

EMPLOYERS' LIABILITY—STATE'S LIABILITY—MORAL AND EQUITABLE OBLIGATION—RELIEF STATUTE—*Fairfield, State Auditor, v. Huntington, Supreme Court of Arizona (April 8, 1921), 205 Pacific Reporter, page 814.*—Gordon G. Huntington, while in the employ of the State engineer of Arizona sustained personal injuries arising out of and in the course of his employment which resulted in the loss of his right eye and the permanent impairment of the sight of his left eye. An act was passed for the relief of the injured man, and it was provided that he was to receive \$84.50 per month, which was 65 per cent of his average monthly wage, for the rest of his natural life. In pursuance to the provisions of this act Huntington presented claims to the State auditor and the claims were disallowed. Mandamus proceedings were brought by Huntington to compel the auditor to allow the claims. The auditor brought up the question of the constitutionality of the law, contending that the State constitution

prohibited the legislature from enacting legislation making a donation to any individual, association, or corporation, or enacting special legislation where a general law could be made applicable. The judge of the superior court ruled against this contention and judgment was entered in favor of Huntington. An appeal was taken to the supreme court of the State, but that court affirmed the judgment of the lower court in an opinion rendered by Judge McAlister, in which the contentions raised were met in part as follows:

It is true that if the act were passed solely in the exercise of gratitude and charity and did nothing more than make a gratuitous present of the public funds, the payments authorized by it would be merely donations; but, since it is clear that it was the purpose of the legislature in passing it to recognize a moral obligation then resting upon the State and founded upon equity and justice, regardless of the fact that the State was not liable therefor as a matter of law, the question presents itself whether an appropriation made out of considerations of this kind comes within the constitutional provision prohibiting donations. Parting with money or other thing of value to satisfy a moral or equitable claim, when such action could not be compelled in law, is not making a donation any more than the voluntary payment of a note barred by limitation would be; it is rather the discharge of an honest and just obligation. To hold otherwise is to say that the payment of an admitted indebtedness, not collectible by law, is merely an act of charity, when such is not the case.

It is difficult to define, with absolute accuracy, just what is included in the term "moral or equitable obligation," but in all those cases in which the appropriation of the public funds of the State has been upheld upon this ground the State has received some benefit as a State, or the claimant has suffered some direct injury "under circumstances where in fairness the State might be asked to respond—where something more than mere gratuity was involved."

It would be difficult to imagine a case calling more strongly for the discharge of this duty than that of an employee of the State seriously injured or killed in its service without fault on his part, but for whose injury or death the State, by reason of its legislature's omission to enact a law to that effect, can not be compelled to make any recompense whatsoever. Under the same circumstances an individual or corporation would be legally liable. Why then should the discharge by the State of such an obligation be regarded as a donation or as anything other than the payment of an honest debt, a thing that the State, as well as every good citizen, should do?

Unless it appear very clearly from the character of the appropriation that a general law would have been sufficient, the court would not be justified in holding that a coordinate branch of the government abused its discretion in passing a special one.

And the fact that the law was passed for the benefit of only one individual does not make it special legislation, since it was enacted to satisfy an obligation resting upon all the people who constitute the State. The discharge of such an obligation is merely the performance of a public act, and an appropriation for it is not expending the public funds for a private purpose.

Hence the judgment is affirmed.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—NEGLIGENCE—INJURY BY THIRD PERSON—PARTIES TO PROCEEDINGS—RAILROADS—*Goldsmith v. Payne, Supreme Court of Illinois (December 13, 1921), 133 Northeastern Reporter, page 52.*—Joseph Goldsmith was an employee of the Great Lakes Fruit Co. While riding in a vehicle upon a public street of Waukegan, Ill., exercising all due care for his own safety, he was injured by the negligence of the servants of the railroad company, of which appellee Payne was at the time in control. Goldsmith brought suit against the railroad company for damages. The company contended that it was engaged in both intrastate and interstate commerce, that Goldsmith was an employee of the fruit company, an Illinois corporation, that all three were subject to the provisions of the workmen's compensation act, and that as Goldsmith's injuries arose out of and in the course of his employment by the fruit company any recovery had should be under the workmen's compensation act. The lower court ruled in favor of this contention, and the case was appealed to the supreme court of the State. In that court the judgment was reversed and the case remanded to the lower court with directions. Reviewing the provisions of the act applicable to this case Judge Dunn said:

Section 6 provides that no common-law or statutory right to recover damages for injury or death sustained by an employee engaged in the line of his duty, other than the compensation provided by the act, should be available to any employee covered by the provisions of the act or his legal representative, or to anyone dependent upon him or otherwise entitled to recover damages for such injury. These provisions apply only to the right of the employee against his employer, and have no reference to the liability of third persons causing injury to the employee. By section 29, however, the rights of employees suffering injury or death in the course of or arising out of the employment, not proximately caused by the negligence of the employer, but caused under circumstances creating a legal liability for damages on the part of some person other than the employer, are dealt with, and it is declared that if the person, other than the employer who is liable for damages for the injury or death, is bound by the provision of the act, the right to recover damages shall belong to the employer, and shall be limited to the amount of compensation payable under the act; but if the person, other than the employer, so liable for damages is not bound by the provisions of the act, then legal proceedings may be brought against such other person by either the employer or the injured employee.

He then applied the law to the facts, as follows:

Being engaged in carriage by land, appellee [Payne] is subject to the provisions of the workmen's compensation act so far as the intrastate business which he transacts is concerned, and would be subject to its provisions as to all his business as a carrier but for the fact that Congress, having assumed jurisdiction to regulate his interstate business in this respect, has excluded it from the operation

of the workmen's compensation act. While the Federal employers' liability act has no application to the appellant or his injury, it does have the effect of excluding the appellee from the provisions of the workmen's compensation act as to the business in which he was engaged when the appellant was injured. Therefore, when engaged in interstate commerce the appellee and his employees so engaged are not bound by the act, and he is not entitled to the benefit of the provisions of section 29 in favor of employers who are bound by the act.

EXAMINATION, LICENSING, ETC., OF WORKMEN—BARBERS—CONSTITUTIONALITY OF STATUTE—*Cooper v. Rollins, Supreme Court of Georgia (February 14, 1922), 110 Southeastern Reporter, page 727.*—The Georgia "barber act" (Laws 1914, p. 75) as amended (Laws 1920, p. 109), regulating the occupation of barbers within the State, was brought before the courts to stand constitutional tests in this case. Plaintiffs filed an equitable petition against the members of the State board of barber examiners, seeking to have the act declared unconstitutional. Judgment was rendered in favor of the board and the case was appealed to the supreme court of the State on constitutional questions alone. The contentions of the plaintiffs were that the act was unconstitutional:

(a) Because it discriminates between barbers and those engaged in other kinds of manual labor; (b) because it does not operate uniformly throughout the State, but is applicable only to barbers in cities and towns in excess of 5,000 inhabitants; (c) because it violates article 1, section 4, of the constitution of this State, and the fourteenth amendment to the Constitution of the United States, in that section 9 of the original act exempts from its provisions barbers engaged within the State at the date of such act, and who had been practicing such occupation for a period of three years prior to its approval; (d) because it violates the same provisions of the State and Federal constitutions, for the reason that it permits barbers who had been engaged in their trade for the period of three years prior to the approval of this act to continue their occupation by making an affidavit of these facts and paying the sum of \$2, while a person who had learned to practice such occupation without the State is required to pay the sum of \$5 and to submit to an examination before said board; (e) because the classification of towns and cities into those having populations in excess of 5,000 inhabitants and those having less population, and making said act applicable to those of the former population, and not to those of the latter, is arbitrary and unreasonable.

The court, speaking through Judge Hines, affirmed the judgment of the lower court and held the law valid, answering the contentions of the plaintiffs in part as follows:

Every presumption will be made in favor of the constitutionality of an act of the legislature. Before an act of the legislature will be declared unconstitutional, the conflict between the act and the funda-

mental law must be clear and palpable. A State statute will not be set aside by the courts in a doubtful case. These elementary principles do not require any elucidation. They have become firmly imbedded in the constitutional law of the State, and should not be departed from.

The courts are generally agreed that it is competent for the legislature to prohibit persons from practicing the calling of a barber without first having obtained a license or certificate of registration. [Cases cited.] The power of the legislature to regulate this trade and to require barbers to be examined and licensed is derived from the police power of the State. This power enables the legislature to make all needful rules and regulations for the health, power, and welfare of the people of the State. The health of the citizens as affected by diseases spread from barber shops conducted by unclean and incompetent barbers is justification for such laws.

The regulation of the occupation of barbers, and leaving other occupations of like kind unregulated, is not a denial of the equal protection of laws, within the meaning of the fourteenth amendment to the Constitution of the United States. What such regulation shall be, and to what particular trade or business such regulation shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State; and, unless the regulations are so unreasonable and extravagant in their nature and purpose that the property or personal rights of the citizens are unnecessarily and in the main arbitrarily interfered with or destroyed, and without due process of law, they are not beyond the power of the State to pass.

The plaintiffs are residents of Georgia; and it does not lie in their mouths to attack the constitutionality of this statute on the ground that it discriminates against nonresident barbers. Only those whose rights are directly affected can properly question the constitutionality of a State statute.

It is next insisted that this act is unconstitutional because of the classification of the towns and cities therein provided. It is contended that such classification has no reasonable relation to the subject matter of the statute. The legislature may make classifications for the purpose of legislation. It may classify cities. The classification must have some reasonable relation to the subject matter of the statute. A State statute which, in carrying out a public purpose, is limited in its application, is not a denial of the equal protection of the laws, within the meaning of the fourteenth amendment to the Constitution of the United States and of the similar provision in our State constitution, if, within the sphere of its operation, it affects all persons similarly situated.

The spread of disease by insanitary barbers or barber shops will affect more people in large towns or cities than small ones. The character of barbers and barber shops is more generally known in villages than in large towns, and villagers can more easily protect themselves against insanitary barbers. Knowledge of the personal and professional habits of barbers and of the condition of barber shops is more easily acquired in small towns than in large cities. The business of the barber may be everybody's business in the hamlet or small town. This may not be so in large towns. In small towns

everybody knows the barber, his shop, and his personal and professional habits of cleanliness. The relation between barbers in small centers of population and their customers is closer and more intimate than in populous cities. This relation is friendlier in the small town than in the big one. If the barber in a small town has a communicable disease, knowledge of this fact spreads rapidly in a village. Knowledge of such fact travels more slowly in a city. If a customer catches a contagious disease from a village barber, this becomes common knowledge at once of all the villagers. This is not so in Atlanta, Augusta, Macon, or Savannah.

For these reasons customers of barbers in large towns need greater protection than those of barbers in small ones. Other reasons can be given to justify this classification, but we deem the above sufficient. So we reach the conclusion that this classification has a reasonable relation to the subject matter of this statute, and that the statute is not unconstitutional for any of the reasons assigned.

Judgment affirmed. All the justices concur.

EXAMINATION, LICENSING, ETC., OF WORKMEN — PLUMBERS — CONSTITUTIONALITY OF STATUTE—*Trewitt v. City of Dallas, Court of Civil Appeals of Texas (May 27, 1922), 242 Southwestern Reporter, page 1073.*—An ordinance of the city of Dallas, Tex., was enacted on March 3, 1922, which created an examining and supervising board for plumbers, in compliance with a State law which provided for the licensing of plumbers in cities of a certain size. The mayor and commissioners of the city were about to attempt to enforce the provisions of the ordinance. A. P. Trewitt was engaged in the business of a master plumber in the city of Dallas, employing a number of plumbers in the course of his business. He brought an action for an injunction to restrain the enforcement of the ordinance. It was refused, and an appeal was taken to the court of civil appeals. Trewitt contended that the business of a master plumber is not related to and does not affect the public health, comfort, or convenience so as to render such business the proper subject for police regulation, all of which the court rejected.

The court further said:

It has been held to be of the highest importance to the public that plumbing work should be "as skillfully planned and executed as the modern standard of sciences admits."

This was said with reference to the business of a master plumber. The theory that the reasonable regulation of the business of master plumbers, as well as journeyman plumbers, naturally may be expected to promote the public health, seems to have been rather generally entertained by the courts of various States of the Union.

Objection was made to the statute on the ground that it was unreasonable and arbitrary, but the court said that the ordinance explicitly required that the examination should be reasonable, and this

requirement was emphasized by repetition running throughout the ordinance.

Trewitt offered the proposition that the ordinance created an unlawful, vicious, and burdensome monopoly by requiring plumbers to pass an examination without making provision for apprentices and helpers.

The court said that "under the terms of the ordinance we think that apprentices and helpers are not excluded from the opportunity to acquire sufficient skill and experience to enable them to pass the examination and become licensed plumbers."

The constitutionality of the ordinance was questioned, but the court upheld it, saying:

It is next contended that the ordinance is in violation of both the Federal and State constitutions, in that it denies to certain persons the fundamental and inalienable right of pursuing a lawful, useful, and necessary business or calling, skill in which is of necessity acquired through actual experience as an apprentice or helper; and criticism is made that no provision is expressed by the terms of the ordinance for the use of helpers and apprentices. The right to labor in any useful occupation is a sacred and natural right which can not be disregarded. The right to follow any lawful business or occupation as a means of livelihood is recognized and protected both by the United States Constitution and the constitution of Texas, but such right is subjected to the paramount, inherent right of the State in any given instance to impose upon it such reasonable limitations and regulations as the general welfare and public good may demand. The ordinance does not violate either the United States Constitution or the constitution of Texas.

HOURS OF LABOR—DRUG CLERKS—NINE-HOUR DAY—PENAL STATUTE CONSTRUED—*Ex parte Twing, Supreme Court of California (February 23, 1922), 204 Pacific Reporter, page 1082.*—The California Statutes of 1905, page 28, as amended by Statutes of 1907, page 273, and Statutes of 1921, page 1323, limited the working hours of employees engaged in selling drugs and medicines at retail and compounding physicians' prescriptions to nine per day. The statute had a penalty provision for its violation. Jesse Twing, an employee of a drug store, with his employer, was arrested for a violation of the above act and found guilty. It was alleged that Twing worked 10 hours in a drug store on a certain day, but it was further alleged that he was actually engaged at intervals during the day in the work of selling drugs and medicines and in compounding physicians' prescriptions, amounting to only 2 hours, and during the balance of the 10 hours he was engaged in the work of selling cigars, candies, ice cream, soft drinks, and other articles of general merchandise. An application was made for a writ of

habeas corpus to secure the release of Twing. The court held that no offense was stated in the complaint, and the petitioner was ordered released. The court, speaking through Judge Waste, passed over the constitutional question of the right of the State to regulate the hours by stating that "it is now generally recognized and held that in the exercise of its police power the State may impose such regulations and restrictions upon the relation of master and servant as are conducive to the public welfare, health, and safety." The point upon which the decision turned and the opinion of the court are in part as follows:

The complaint appears to have been drawn for the purpose of squarely presenting the contention of the petitioner, which, concisely stated, is that the limitation of working hours prescribed by the statute applies only to the time the clerk is actually engaged in performing the work of selling drugs or other medicines, or compounding physicians' prescriptions, and that the time spent by him in other duties is not to be taken into account in determining whether or not the law has been violated. From this contention the petitioner argues that, as he is charged with having worked but two hours at the prescribed work on the day in question, the complaint falls short of alleging a public offense. From a careful consideration of the language of the statute we think this must be so. The act by its terms relates specifically to employees engaged in selling drugs and medicines and compounding physicians' prescriptions.

Section 2 * * * forbids the selling of drugs, or other medicines, and the compounding of physicians' prescriptions by the employee for more than 9 hours during any one day, or 54 hours a week of six days. It prohibits nothing else. The legislature might well have provided that the total working hours of any employee engaged in selling drugs and medicines or compounding physicians' prescriptions should not exceed a certain number in each day, regardless of whether he was actually and continuously engaged in such work or not. It has not done so, and we are not permitted to read into the act an interpretation that would make it a crime to do something the legislature has not prohibited. We are not unmindful of the weight of the argument of the attorney general that the employment of a drug clerk at other tasks while waiting to serve purchasers of drugs and medicines may be as fatiguing as any other kind of work, and may impair his efficiency and accuracy to as great a degree, and that it is the possible harmful results arising from the fatigue caused by long hours of continued employment from which the legislature sought to protect the public, but penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication.

HOURS OF LABOR—PUBLIC WORKS—REGULATION OF WAGES—HOURS OF SERVICE ACT—CONSTITUTIONALITY OF STATUTE—*State v. Tibbetts, Criminal Court of Appeals of Oklahoma (March 8, 1922)*, 205 *Pacific Reporter*, page 776.—By section 3757 of the Revised Laws of

Oklahoma for 1910 it was provided that eight hours should constitute a day's work for certain employees, including persons employed by or on behalf of the State or a municipality; and it was further provided that the employees covered by the act were to be paid on the basis of an eight-hour day and at the current rate of wages paid in the locality where the work was performed. A penalty of not less than \$50 nor more than \$500 or imprisonment for not less than three months nor more than six months was provided to punish persons violating the law. E. R. Tibbetts and Carl Pleasant, about December 20, 1920, were partners doing contract work for the city of Pawhuska. They had in their employ laborers whom they paid at the rate of \$5.60 per day at a time when the current rate of wages in the city of Pawhuska for the same class of labor was \$6.50 per day. They were charged with a violation of the law above noted, to which they demurred upon the ground that the facts stated were not sufficient to constitute a public offense, pleading that the act unlawfully interfered with the right to contract. The demurrer was sustained in the county court and the State appealed. The criminal court of appeals reversed the judgment of the lower court. Judge Bessey in rendering the opinion of the court said:

We think there is no merit in the claim that the State has no interest in regulating the wages of labor or the hours of labor affecting employment in the installation of a municipal sewer system in a city having a special charter form of government. The police power is an inherent attribute of State sovereignty, under which the State may establish wholesome and reasonable laws and regulations designed to promote the good order and general welfare of its subjects.

It is next urged that the act is unconstitutional, in that it impairs the obligation of contracts and interferes with the freedom of contracts between individuals. In construing a statute almost identical with our statute, the United States Supreme Court held in *Atkin v. Kansas* (191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148), that it was within the power of a State to enforce such a regulation, and that it did not impair the obligation of contracts or interfere with any constitutional right. Our own court, in *Byars v. State* (2 Okla. Cr. 481, 102 Pac. 804, Ann. Cas. 1912A, 765), has spoken in no uncertain terms, in an exhaustive opinion written by Presiding Judge Doyle holding that this statute is valid and in no way infringes upon the provisions of the constitution.

The law was therefore upheld as valid.

INTERFERENCE WITH EMPLOYMENT—CONSPIRACY—MALICE—*Beardsley v. Kilmer*, Supreme Court of New York, Appellate Division (March 17, 1922), 193 New York Supplement, page 285.—This case was before the appellate division on appeal from a decision of the trial court dismissing a complaint brought by Guy W. Beardsley against the defendant, Kilmer. Judge H. T. Kellogg, who delivered

the opinion of the court, pronounced "this action novel in character." Beardsley was editor, manager, and part owner of a newspaper, the Evening Herald, published in Binghamton, N. Y. The defendant, Kilmer, and his father were owners of the business consisting in the manufacture and sale of a medicine known as "Swamp Root." These men had become wealthy through the success of their business, but the Evening Herald had attacked them as manufacturers and dealers in "quack medicines," not only ridiculing their medicines but exploiting their domestic and business troubles and "the misfortunes of their relatives." The Kilmers had sought at various times to stop the publication of such articles but failed and threatened revenge, finally announcing and entering upon the publication of a rival newspaper, the Binghamton Press. They were able to build up such competition as to draw away a large number of the employees of the Herald and to cut off its business and circulation so as to convert a profit "as high as \$1,000 per month" into a continuing loss. This entailed a reduction in Beardsley's salary from \$100 per week to \$40 per week, and finally, on the sale of the Herald for its debts, to the loss of his position. This action was brought, charging that the loss of position and salary "was due to an unlawful conspiracy" and that the publication of the Press was begun and continued "with the sole purpose in view of causing him injury."

Having stated these facts, Judge Kellogg stated that, "It is a principle of general application that a malicious motive does not render unlawful acts which in themselves are lawful," citing a number of cases; "or, as said by Sir Frederick Pollock in his book on Torts, newly edited in the year 1920, 'Harm done without excuse can not be made more wrongful than it is by the addition of bad feeling or personal ill will, nor made lawful by its absence.'"

An exception claimed in cases where damages have been held recoverable for maliciously inducing employees to break their contracts of employment was discussed and the conclusion reached that:

In any event it remains the law that a malicious motive does not convert a right into a wrong. The plaintiff must succeed, therefore, if at all, upon the theory that the defendants have intentionally caused him injury without justification.

We think that the plaintiff must fail in the action for three reasons: First, the acts of competition complained of were not rendered unlawful by the malicious intention of the defendants to injure the plaintiff by performing them; second, the defendants by their acts interfered with no legal rights possessed by the plaintiff or his employer; third, the acts of competition complained of were not oppressive or unfair and were fully justified as an exercise of the lawful right of competition. We also consider that the acts complained of did not become unlawful or actionable because the per-

sons engaged therein "conspired" to commit them. We therefore hold that the dismissal of the plaintiff's complaint was proper.

LABOR DISPUTES—INDUSTRIAL COURT—CONSTITUTIONALITY OF STATUTE—*State ex rel. Hopkins, Atty. Gen., et al. v. Howat et al., Supreme Court of Kansas (November 12, 1921), 202 Pacific Reporter, page 72.*—Proceedings were brought by the State against Alexander Howat and others for contempt in violating a court order enjoining them from calling a strike in any of the coal mines of Crawford County. There was a conviction and an appeal. But one question was presented to the supreme court of the State for its decision, namely, the constitutionality of the statute creating the court of industrial relations. The judgment of the lower court was affirmed and the act upheld on the authority of *State v. Howat*, 109 Kans. 376, 198 Pac. 686 (Bul. No. 309, p. 168), and *Court of Industrial Relations v. Packing Co.*, 109 Kans. 629, 201 Pac. 418 (Bul. No. 309, p. 128).

LABOR DISPUTES—RAILROAD LABOR BOARD—JURISDICTION—POWERS—*United States R. R. Labor Board et al. v. Pennsylvania R. R. Co., United States Circuit Court of Appeals, Seventh Circuit (April Session, 1922), 282 Federal Reporter, page 701.*—On December 28, 1917, the President, by authority of the act of Congress of August 29, 1917, took over the railroads of the country and operated them through the Director General of Railroads until March 1, 1920. On this date the return of the roads to the companies owning them was made under the provisions of the transportation act of 1920. During the period in which the railroads were operated by the Director General, the wages had been increased, the hours had been regulated, and rules with regard to working conditions were established. At the time the railroads were returned to the owners, many disputes were pending between the employer and the employees. By title 3, the act provided for the creation of the Railroad Labor Board with jurisdiction over disputes between the railroad companies and employees and for a publication of its findings, in its own discretion. The Labor Board was organized in April, 1920. A controversy as to wages and working conditions between the railroads and their employees came before the board. Thinking that the question as to wages was the more important, it took up that question first and rendered a decision on July 20, 1920 (No. 2), and postponed the question as to rules and working conditions until April 14, 1921.

On the later date it was decided that such rules and working conditions as were fixed in the agreements under the Director General

and had been continued by the board should continue until July 1, 1921. The board called upon the individual carriers and their respective employees to confer and decide as far as possible respecting rules and working conditions for the operation of such railroads (decision No. 119). The board accompanied this decision with a statement of principles or rules of decision which it intended to follow in the settlement of disputes between carriers and employees, two sections of which are of importance here. They are:

5. The right of such lawful organization [of employees] to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.

The officers of the Federated Shop Crafts of the Pennsylvania System, a labor union of employees, met the representatives of the Pennsylvania Railroad Co. They said they represented the majority of employees in those crafts, but the representatives refused to confer with the officers of the union because of lack of proof that it represented a majority of the employees. The railroad sent out ballots to the employees over the protest of the union officers. By these ballots the employees were limited in their choice of representatives to natural persons who were employees of the company, which representatives should be selected regionally rather than from the whole system. The union officers instructed its members not to participate. Votes cast were something more than 3,000 out of more than 33,000 employees entitled to vote. The representatives thus elected agreed upon certain rules and working conditions, whereupon the union officers filed a complaint with the board and a hearing was had. The board decided (decision No. 218) that the ballots were not proper, that the representatives were not properly such, and that the rules and working conditions agreed upon by them were void. The company applied to the board to vacate this decision on the ground that there was no dispute, and therefore that the board did not have jurisdiction to render the decision. The board declined to vacate its order. A suit in equity was brought by the Pennsylvania Railroad Co. against the Railroad Labor Board and others for an injunction to restrain the board from functioning generally, and specifically from exercising its asserted right to make rules for the selection of the conferees provided for in section 301 of the transpor-

tation act and from publishing its findings. A decree was entered by the district court granting an injunction, on the ground that the board was without jurisdiction in the absence of a joint submission. (*Pennsylvania Railroad Co. v. United States Railroad Labor Board et al.* (May 4, 1922), 282 Fed. 693.) The case was appealed to the United States Circuit Court of Appeals, where the decree of the district court was reversed, with directions to dismiss the bill. The company contended that if the act made the decisions of the Labor Board binding upon the carriers and enforceable by appropriate proceedings it is unconstitutional. The court pointed out that this contention was not timely, as the action of the board complained of was in furtherance of securing an agreement, with the probable alternative that if the carriers and their employees failed to agree the board itself would decide upon and prescribe rules and working conditions. The court said that "when this stage is reached, and one or both of the parties refuse to obey the board's decision, it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties."

Judge Alschuler, speaking for the court, then took up the construction and application of the law to the case, saying in part:

Section 301, by its terms, is applicable to "any dispute between the carrier and the employees." If the concluding sentence of the section, providing that in case the dispute is not decided in conference, it shall be referred "by the parties" thereto to the board authorized to deal with the dispute, means that unless *both* parties agree so to refer it, the board can not in any event deal with the matter, title 3 might as well not have been enacted; for, if the right of the board to act depended upon the joint submission of the parties to the dispute, it lay in the power of either party to block utterly any action by the board, by simply refusing to join in the submission. Counsel for appellee [the railroad company] do not contend that title 3 is to that effect.

This brings us to appellee's contention that there was here involved no dispute of which the Labor Board could take cognizance, or of which under title 3 it had jurisdiction; and this, indeed, is the ground upon which mainly rests the asserted right of the court to interfere. It is maintained that the transportation act ended the Railroad Administration, and that thereupon jurisdiction over rules and working conditions was primarily with the carrier; that it might adopt such as it saw fit, and unless complaint was made by employees, and a dispute thus arose, the Labor Board had no right to interfere.

The transportation act changed the law, but it did not change the fact of the pendency of the serious dispute respecting wages and working conditions. The fact that the dispute existed long before the board was created made it none the less a dispute cognizable by the board, if continuing to exist after the board began to function. It is thus apparent that at the very outset this dispute as to rules and working conditions was before the board, and was so treated by both

parties to the dispute, including appellee. Under these circumstances it would be immaterial whether it got there by *ex parte* or joint submission, or on the initiative of the board itself. Title 3 is broad and remedial, and no fine jurisdictional lines should be drawn to circumscribe its scope or by procedural technicalities to limit its application. Assuming the truth of the recitals of fact in decision No. 2, if instead of dividing the controversy the board had, at the hearing of the wage dispute, also heard the dispute concerning rules and working conditions and decided it with the other, it would scarcely have been contended that it had less jurisdiction to hear the one than it did to hear that which it in fact then heard and determined.

This will answer also appellee's contention that the Labor Board had no power to order (as in decision No. 2) that existing rules and working conditions, until further order, remain as they then were under the national agreement. The whole subject matter being before it, it could make such temporary order concerning it as in its judgment the exigencies of the case required. There is also the further ground that wages and working conditions are closely interwoven, and the board in fixing the wages in its decision No. 2 predicated its findings thereon upon the basis of "the continuance in full force and effect of the rules, working conditions, and agreements in force under the authority of the United States Railroad Administration." Thus the rules and working conditions entered into the wage, and it was proper for the board to fix the wage with reference to their continuance till changed by agreement or otherwise.

But appellee insists that it did ultimately make an agreement with its employees respecting rules and working conditions, and that these were by it put into force, and no dispute concerning them has arisen, and that the Labor Board is therefore without jurisdiction.

As above stated, Federation No. 90, after vainly endeavoring to have the ballots make provision for voting for an organization as representative, conducted an election of employees, and thereupon *ex parte* submitted to the board as a dispute the question of whether the employees of a craft might designate an organization to represent them in negotiations, and whether the law had been complied with in the method pursued by appellee. Appellee answered, and the dispute was orally presented by both parties to the board. Decision No. 218 points out that the contention was made, and not disputed, that a majority of the employees did not vote for the representatives with whom appellee conducted the negotiations, but that the company maintained, since all had opportunity to vote, this made no difference. As pointed out, decision No. 218 held that the company election was void, because it restricted the choice of representatives to natural persons and to actual employees of the road, and it held the employees' election void for restricting the choice to an organization, and directed another election to be held, prescribing the form of ballot as stated.

It is urged for appellee [Pennsylvania Railroad Co.] that the matter of the election of representatives by the employees is wholly procedural and is something with which the board is in no wise concerned, and its action in this regard was wholly beyond its jurisdiction. The force of the contention is not apparent. Title 3 confers on the board important duties, and prescribes in section 308 (4) that

it "may make regulations necessary for the efficient execution of the functions vested in it by this title." This, alone, if, indeed, in the very nature of things it were not necessarily so, would empower the board to make provision for determining whether those purporting to represent disputants before the board do in fact so represent them. If it is claimed that a pending dispute has been adjusted between the parties to it, it is very essential that the body before whom the dispute is pending assure itself of the authority to so dispose of the controversy of those who purport to act for the parties. This is especially true where one side of the dispute is a body of individuals, such as employees of a great carrier. If, in a controversy pending before a court, its discontinuance is asked because of a settlement between the parties, it is necessary that the court ascertain whether those purporting to represent the parties were in fact such representatives competent to make the agreement. If this is disputed, the court must pass upon that issue; and it is not material whether such an issue is called "procedural" or otherwise. It arises and must be decided. The same situation is presented to the board where its continued jurisdiction over a pending controversy is denied on the ground of its having been settled between the parties. The representative capacity of the purported representatives was here directly challenged and constituted an issue or dispute which the board had to decide, resulting in decision No. 218 and its subsequent modification. It was eminently proper that the board, either by general rule or otherwise, indicate how in its best judgment such representation should be manifested and the election conducted.

Whether the employees may, if they so choose, be represented by an organization, as held by the board, or whether they may be represented only by individuals who were employees of the same employer, as contended by appellee, is not properly a question for a court. As abstract propositions much may be said on either side. Title 3 in several instances recognizes representation of employees by organizations (sections 302, 303, 307a, 307b, 309, 313), and that was largely the practice with many carriers before Government control, and generally so during Government control, the national agreements having been so negotiated. But in so far as it was for the board in its discretion to determine who was in fact the authorized representative of bodies of employees, that question, and the manner of its disposition, was for the board, no question here arising as to the board's good faith or its abuse of discretion. Even though the court were of the belief that more just and true representation would result through the method of appellee, it is not for the court to substitute its opinion for that of the board in matters by law committed to the board.

Decision No. 119 directed that the employees choose representatives to confer with the carriers, and decision No. 218 directed the employees to hold an election. This suggests the thought that it is not for the employer to complain of decision No. 218 directing the employees to hold this election. The directed participation of the employer was to enable it to know whether the election was fairly conducted, that all have opportunity to vote, and the ballots cast be truly counted. True it is that, if the employees select as their representatives System Federation No. 90, or some other organization,

the carrier may decline to confer. This is merely to state that when representatives are selected either of the parties may, for any cause or no cause at all, decline to enter into conference with them. As applied to this situation, it would simply mean that the board had failed in its effort to dispose of a pending dispute by affecting an agreement between the parties interested, with the result that the dispute still remains with the board, just as if it had not undertaken to bring the parties to a mutual understanding.

Appellee contends that, wholly regardless of any agreement with its employees, upon the termination of Government control it had the right on its own motion to prescribe rules and working conditions which would be effective until and unless changed pursuant to the provisions of title 3, and that the board was without power over those rules and working conditions which appellee did adopt, unless on complaint as to them and hearing on such complaint. What has been said on the subject of the dispute pending before the board as to rules and working conditions applies as well to this contention. It seems the hearing on the pending dispute began before the board right after its organization. If after this appellee could by promulgating on its own motion new rules and working conditions oust the board of its right to proceed further with the pending dispute, title 3 would be without practical effect. The carrier could in any pending dispute, whether on rules or wages, put forth its own rules or wage scale, and straightway the authority of the board over the dispute pending before it would be gone. The undertaking of the board to have the parties agree did not withdraw from it the dispute, and neither did the notice of May 3, 1920, of the chairman of the Association of Railway Executives to the labor organizations that that association had made recommendation to the member roads (which included appellee) that negotiations respecting continuance of the national agreements and interpretations thereof be handled by negotiation between the management and employees of each road.

Under the foregoing views it follows that the Labor Board did not, as to the matters involved, transcend its power and functions under title 3, and that relief under the bill should have been denied. It will not be necessary to consider the contention, earnestly pressed for appellant, that the action is in effect one against the United States, which has not given its consent thereto, and must for that reason be dismissed.

The decree of the district court is reversed, with direction to dismiss the bill.

The railroad company appealed from this decision to the Supreme Court of the United States; that court on February 9, 1923, affirmed the decree of the circuit court of appeals. The court held that the district court was wrong in enjoining the Labor Board from proceeding to entertain further jurisdiction and from publishing its opinions and that the circuit court of appeals was right in reversing the district court and in dismissing the bill. (Pennsylvania R. R. Co.

v. United States Railroad Labor Board et al. (Feb. 19, 1923), 43 Sup. Ct. 278.)

The line of argument followed by Chief Justice Taft, who delivered the opinion of the Supreme Court, closely corresponds to that set forth above. Justice Taft's observations as to the force and effect of the findings of the board were set forth in the following language:

Title 3 was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The board is to act as a board of arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for cooperation in the work of running the railroad in the public interest. The only limitation upon the board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the board decides they should do except the moral constraint, already mentioned, of publication of its decision.

The statute provides the machinery for conferences, the hearings, the decisions, and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties.

It is not for us to express any opinion upon the merits of these principles and decisions. All that we may do in this case is to hold, as we do, that they were within the lawful function of the board to render, and not being compulsory, violate no legal or equitable right of the complaining company.

For this reason we think that the district court was wrong in enjoining the Labor Board from proceeding to entertain further jurisdiction and from publishing its opinions, and that the court of appeals was right in reversing the district court and in directing a dismissal of the bill.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENT—BREACH—IN-
JUNCTION—APPLICATION AGAINST EMPLOYER AND EMPLOYEE—
*Schwartz et al. v. Cigar Makers' International Union et al., Supreme
Court of Michigan (July 20, 1922), 189 Northwestern Reporter,
page 55; Schwartz et al. v. Driscoll, Acting Circuit Judge, Supreme
Court of Michigan (February 8, 1922), 186 Northwestern Reporter,
page 522.*—A labor agreement existed between Bernard Schwartz
and the Cigar Makers' International Union, Local No. 22. A
controversy arose as to labor conditions and the union shop plan.

A strike was called and picketing was carried on. Schwartz brought proceedings in the equity court seeking an injunction against the union and others. The union filed a cross bill alleging the existence of an agreement between the parties under which Schwartz & Sons agreed, in consideration of the acceptance by the union of a reduced scale of wages, to furnish employment to their shop capacity for a year to members of the union only. The cross bill alleged a breach of this contract and sought a mandatory injunction to compel Schwartz & Sons to discharge their then employees and reemploy only members of the union. A mandatory injunction was granted by the circuit court, as sought by the union.

Proceedings were brought in the supreme court of the State against George O. Driscoll, acting circuit judge, to stay the proceedings under the decree of his court until the case could be heard and decided on its merits. A writ so doing was granted, for reasons stated by Judge Moore, quoting several authorities, including 22 Cyc., page 856, as follows:

Under ordinary circumstances an employee, whether classed as an agent or as a servant, can not enforce a contract for service by enjoining a breach on the part of his employer. So the employer will not be enjoined from dismissing an employee or from refusing to continue to employ him, even though such action is a direct violation of contract. * * * For reasons similar to those given for refusing to enjoin the dismissal of an employee, the breach of a contract to employ only members of a certain union will not be enjoined.

At the hearing on its merits, the decree of the lower court, seeking to enforce the agreement, was reversed, and an injunction was granted Schwartz & Sons against picketing, intimidation, etc., by the union and others.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENT—VIOLATION BY EMPLOYERS—INJUNCTION—*Schlesinger v. Quinto, Supreme Court of New York (January 11, 1922), 192 N. Y. Supp. 564.*—The International Ladies' Garment Workers' Union, an organization of employees, entered into an agreement with the Cloak, Suit and Skirt Manufacturers' Protective Association on May 29, 1919, with regard to wages and other conditions of employment. This agreement was to be in effect until June 1, 1922. Among other things, this agreement substituted a uniform week work system for the piecework system formerly prevailing, and reduced the hours of labor from 48 to 44 per week. Claims were made that workmen were "soldiering on the job," while, on the other hand, employees sought an increase in the wage rates on account of the increasing cost of living during the term of the collective agreement. Acrimonious discussions, both

in conversations and through the press, indicated and developed a spirit of controversy, but a supplemental agreement was at length arrived at on June 3, 1921, providing for a joint commission, representing equally employers and employees, to investigate and report upon conditions claimed to call for a readjustment of the agreement of May 29, 1919. This June agreement was regarded by the court as "being supplemental to that of May 29, 1919," so that "no recommendation under the former could override or make nugatory the fundamental benefits secured to the plaintiffs under the latter," i. e., the earlier agreement.

On October 25, 1921, during the term of the agreed activities of the joint commission, the employers' association declared that it was necessary to return to the piecework system, to increase the number of working hours, and to reduce the wages. This, of course, was a complete departure from the terms of the agreement of 1919, which had some months yet to run, and the president of the union and those associated with him sued for an injunction to restrain the manufacturers' association from its violation of the agreement. Judge Wagner, speaking for the court, stated the facts as above, reaching the conclusion that—

Out of the mass of affidavits submitted by both sides, with denials and some conflict of facts, there survives clearly a preponderance of evidence in favor of plaintiff establishing its right to the extraordinary relief sought. While this application is novel, it is novel only in the respect that for the first time an employees' organization is seeking to restrain their employers' organization from violating a contractual obligation.

On the assumption of novelty, Judge Wagner laid down the following principles as warranting the granting of the injunction even though a direct precedent was not at hand.

It is elementary, and yet sometimes requires emphasis, that the door of a court of equity is open to employer and employee alike. It is no respecter of persons—it is keen to protect the legal rights of all. Heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable illegal acts of the employee. But mutuality of obligation compels a mutuality of remedy. The fact that the employees have entered equity's threshold by a hitherto untraveled path does not lessen their right to the law's decree.

Precedent is not our only guide in deciding these disputes, for many are worn out by time, and made useless by the more enlightened and humane conception of social justice. That progressive sentiment of advanced civilization, which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, can not be ignored by the courts. Our decisions should be in harmony with that modern conception, and not in defiance of it. Some *nisi prius* adjudications rendered in these disputes, disputes in which the public is as much interested as the contending parties, have in my judgment reflected a somewhat

imperfect understanding of the trials and hardships experienced by the workers in their just struggle for better living conditions.

The question was then discussed as to the power of a court of equity to act under such circumstances, citing New York cases in which an injunction had been allowed to restrain a labor union from engaging in a strike in violation of its contract or a contract of its members with their employers, citing also "the well-known case of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65" (see Bul. No. 246, p. 145), in which a labor union was restrained from attempting to organize workmen who were under individual contracts not to join the union.

As to the point that sufficient provision for relief existed in actions at law the court said:

It can not be seriously contended that the plaintiffs have an adequate remedy at law. That the damages resulting from the alleged violation of the agreement would be irremediable at law is too patent for discussion. There are over 40,000 workers whose rights are involved, and over 300 members of defendant organization. The contract expires within six months, and a trial of the issues can hardly be had within that time. It is unthinkable that the court would force the litigants into a court of law. A court of equity looks to the substance and essence of things and disregards matters of form and technical niceties.

An injunction was therefore issued until a final determination of the case. The nature of the injunction is indicated by the opening and closing portions, as follows:

The motion is granted, enjoining pendente lite defendants herein, their and each of their agents, servants, and attorneys, and each and all of their several members, and every officer, director, and representative of every corporate member thereof, and all persons acting in aid of or in conjunction with them, or any of them, including members of the said the Cloak, Suit and Skirt Manufacturers' Protective Association, from combining and conspiring in any way to order, direct, instigate, counsel, advise or encourage the members of the Cloak, Suit and Skirt Manufacturers' Protective Association, or any of them, to cease performing or to violate the agreements of May 29, 1919, and June 3, 1921, made between the said the Cloak, Suit and Skirt Manufacturers' Protective Association and the International Ladies' Garment Workers' Union and the Joint Board of Cloakmakers' Union of the City of New York, and from doing or sanctioning any act in furtherance or support of such conspiracy; * * * and from taking any steps whatsoever to put into execution or to retain in force and effect the aforesaid resolution of the said the Cloak, Suit and Skirt Manufacturers' Protective Association, adopted on the 25th day of October, 1921; and from taking further action for the carrying out of said resolution or of any of the purposes thereof, and they are required to abrogate the same and to cease acting thereunder or under any similar resolution, or from taking or continuing in any concerted action involving the

violation or repudiation of said agreement of May 29, 1919, or of any of the terms thereof.

Following the foregoing decision, the employers' association appealed the case to the appellate division of the supreme court, which rendered its decision May 26, 1922 (194 N. Y. Supp. 401). This court discussed the history of the case at length, repeating the statement made by the trial court that "this is the first time that labor has appealed to the courts."¹ It was said, however, that the remedies of employers and employees are mutual. "The law does not have one rule for the employer and another for the employee. In a court of justice they stand on an exact equality, each case to be decided upon the same principles of law, impartially applied to the facts of the case, irrespective of the personality of the litigants."

The action of the court below was affirmed, one justice dissenting. Justice Page, who delivered the opinion of the court, having made the foregoing statement, took up the principal grounds for the appeal. The contention was made here that to enjoin the breach of contract is in effect a negative requirement of the specific performance of the contract; and that because the contracts govern personal relations and regulate personal services, equity will not enforce such contracts unless the employees' services are unique or extraordinary. The court distinguished this case from those in which there are contracts for individual employment. The present agreement was a collective one, representing a group of employers on the one hand and a group of employees on the other. Each organization proposes to discipline its constituent members by provisions established in its by-laws.

Each party knows the obligation that it has assumed and the consequences of failure or refusal to perform these requirements. Through its control of its members it can compel performance. An organization having such power to require performance by individual members can, through its officers, be compelled to exercise that power. There is in this contract a mutuality of obligation, and there is also a mutuality of remedy for its enforcement.

The employers had referred to the injunction as mandatory. As to this, the court said:

The only mandatory feature is that which required the association to meet and rescind the resolution of October 25, 1921. Inasmuch as

¹ In connection with this statement attention may be called to the case *Atkins v. W. & A. Fletcher Co.* (1904); 65 N. J. Eq. 568, 55 Atl. 1074, in which an association of machinists sought an injunction against an employers' association which was interfering with the claimed right of the former to maintain pickets; also *Bogni v. Perotti* (1916), 224 Mass. 152, 112 N. E. 853, where rival labor organizations were parties to a suit for an injunction. (See also *Mastell v. Salo* (Ark. Sup. Ct. 1919), 215 S. W. 583; *Moody v. Modern Window Glass Co.* (Ark. Sup. Ct. 1920), 224 S. W. 436; *Gulla v. Barton* (1914), 149 N. Y. Supp. 952; *Schwartz v. Driscoll*, p. 148; *Herman Leveranz v. Cleveland Home Brewing Co.*, Court of Common Pleas, Cuyahoga Co., Ohio, June, 1922.)

the court enjoined the association from putting the same into effect or proceeding under it, whether it remained on the minute book of the organization or was rescinded, made little difference.

The injunction merely required that the contract for three years be continued for the remaining six months of its duration.

The defendants were not required to do anything that they had not agreed to do, nor were they prohibited from doing anything that they had a right to do under the contract. The liberty of the employer to make agreements with his employees as to compensation was preserved, subject only to the limits voluntarily assumed by the terms of the agreement.

Another proposition advanced by the employers was that the rate of wages fixed as a minimum was now excessive and onerous, on account of industrial changes, making their business unprofitable.

This excuse for the nonperformance of a contract has, within the last few years, been frequently presented to the courts, but has never been accepted. Unless the parties have stipulated, in terms, for relief because of changed conditions, they must perform their contract as it is written.

The opinion concludes with a statement of the disastrous results of recourse to lockouts and strikes with their concomitant acts of violence and the final yielding of one side or the other under a compulsion of financial exhaustion, with the result that—

The employer and employee, instead of cooperating to promote the success of the industry, become permanently divided into hostile groups, each resentful and suspicious of the other. Therefore, when the employee, instead of resorting to force to secure his rights, an archaic method abandoned by civilized men, seeks redress in the tribunal constituted by the Government to protect its citizens in their rights and redress their wrongs, it is the duty of the court to stop all individual attempts to take the law into their own hands, and compel both parties to await an orderly judicial determination of the controversy.

LABOR ORGANIZATIONS—CONSPIRACY—INTERFERENCE WITH PERFORMANCE OF CONTRACT—INJUNCTION—BOND TO PAY DAMAGES—*Central Metal Products Corp. v. O'Brien et al., United States District Court, Northern District of Ohio (January 5, 1922), 278 Federal Reporter, page 827.*—The Central Metal Products Corporation has two factories which manufacture, erect, and install metal doors, metal frames, transoms, and sash. On June 30, 1921, it entered into a contract in writing with the city of Cleveland, through its duly authorized agents, to furnish and install certain interior metal doors, metal sash, metal frames, and casings for the city hospital of the city of Cleveland, which was under construction at the time.

The company proceeded to carry out the contract. The company sent its supervisory staff to the hospital and employed union carpenters at the union wage scale and on union terms and conditions. Representatives of the Amalgamated Sheet Metal Workers' International Alliance demanded that the work of installation should be done by the members of their sheet-metal workers' union. The company refused to comply with the request. O'Brien, acting on behalf of the metal workers, demanded of the city architect and director of public welfare that the company be required to comply with their request or to break the contract with the company and take over the work and do it itself. This was not done with sufficient promptness, and a strike was called of sheet-metal workers who were working for other contractors on the city hospital, and later the metal workers working upon an auditorium building under construction on behalf of the city were called from their work. The city architect and the director of public welfare finally acceded to the demands of the metal workers' representatives and directed the company to discontinue further erection work. This was not done, and police officers of the city interfered and excluded the company's employees from the premises and prevented further performance under threat of arrest. After procuring written assurances that the company would have to employ members of the sheet-metal workers' union or that the contract would be broken, the sympathetic strikers returned to work. A suit in equity was brought by the Metal Products Corporation against O'Brien and others. A motion for a preliminary injunction was made and granted. District Judge Westenhaver heard the cause argued and rendered the opinion of the court, stating that "Press of business prevents the preparation and filing of an extended opinion at this time, and the urgency of the matter is such that it should be disposed of without delay; hence my conclusion only will be stated briefly."

With regard to the contract between the city and the corporation he said:

That this contract was duly and legally entered into, that the city of Cleveland has not any right to cancel or terminate it, and that the plaintiff is free to select and employ any competent labor to perform this work of installation, are matters not in dispute. It follows, therefore, that plaintiff's right to this contract, to perform the same, and to reap the profits resulting to it from such performance, is a right of property standing upon the same legal basis and entitled to the same legal protection as is any person's right to full possession and ownership of his private dwelling.

The court held that the corporation was within its legal rights in refusing to comply with the request of the metal workers' representatives. The court further said:

No other conclusion therefrom can be drawn than that the defendants have entered into a conspiracy to deprive plaintiff of its property and to injure its business. A conspiracy is an agreement of two or more persons to commit an unlawful act, or to commit a lawful act by unlawful means. It is immaterial if the city or its architect and director of public welfare were induced to become members of the conspiracy under coercion or to avoid pecuniary loss or other trouble.

The conspiracy here was unlawful in its purpose. Its ultimate object was to prevent performance by plaintiff of its contract and to deprive it of its contract, unless it would comply with terms and conditions contrary to its contract rights, such as neither the city nor the other defendants had any right to impose or exact. In making this statement I am not unmindful of the contention of defendants other than those representing the city that they are members of and acting for a labor union, and were seeking only to obtain an advantage for the members of their respective unions, as to which some observations will be here made. The means resorted to to carry out the conspiracy were unlawful. In the first place, the defendants O'Brien and Nester were attempting to induce the city to break its contract with the plaintiff, and it is settled law that one may not induce or persuade, much less coerce, one to break his contract with another. This rule is so fundamental that it has been held that officers and agents of a union may not induce or persuade employees to break a contract of employment.

Defendants' contention that the action herein noted was taken solely in the interests of the union members of the Amalgamated Sheet Metal Workers' International Alliance and its Local Union No. 65, for the purpose of enforcing a jurisdictional award, made by some national board, of this class of work to the sheet-metal workers' union, does not justify or protect the defendants. Plaintiff asserts that the bodies joining in, creating, and enforcing the jurisdictional award are a conspiracy or combination in restraint of trade, having for its object the creation of a monopoly in the members of the sheet-metal workers' union in the labor of erecting and installing sheet-metal work of this kind and character. I deem it immaterial to consider this last suggestion. The simple fact is that we do not have here a controversy between employers and employees. In no legal sense is this a labor dispute. A labor dispute, as defined in section 20 of the Clayton Act (Comp. St., sec. 1243d) is one "concerning terms or conditions of employment." In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172 [Bul. No. 290, p. 174], it is held that this labor dispute, in order to be within the privileges accorded employees by the Clayton Act, must be limited to a controversy between an employer and employees. At page 471 of 254 U. S., at page 178 of 41 Sup. Ct., Mr. Justice Pitney repudiates the view that the words "employers" and "employees," as used in section 20, can be treated as referring to the business class or clan to which the parties litigant respectively belong, and declares that the controversy must be one between some specific employer and persons who stand to that employer as persons who have been in the past, or are in the present, so employed or are seeking employment. It is further held that sympathetic strikes or secondary boycotts as a means of coerc-

ing that employer are unlawful, and that an agreement lawful in itself becomes illegal when means of that character are resorted to to carry the objects of the agreement into effect. Whatever may have been held in other jurisdictions, the principles of law applicable to this case will be found in *Duplex Printing Press Co. v. Deering*, supra, and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 249, 38 Sup. Ct. 65 [Bul. No. 246, p. 145]. These cases have been cited with approval in *American Steel Foundries v. Tri-City Central Trades Council* (December 5, 1921), 257 U. S. 184, 42 Sup. Ct. 72 [Bul. No. 309, p. 181], and *Truax v. Corrigan* (December 19, 1921), 257 U. S. 312, 42 Sup. Ct. 124 [Bul. No. 309, p. 191].

There is no dispute here between any of the labor union defendants and the plaintiff concerning terms or conditions of employment. They are not seeking to compel plaintiff to employ union labor or to conduct its business on union terms and conditions. Plaintiff's employees are members of the United Brotherhood of Carpenters and Joiners of America, having a national membership of 400,000, as compared with a membership of 24,000 of the Amalgamated Sheet Metal Workers' International Alliance. Plaintiff's union employees are satisfied with the terms and conditions of their employment and the rate of pay, which the evidence shows are the same conditions and wage scale as have been adopted by Local No. 65. If plaintiff accedes to the defendants' demand and employs members of the sheet-metal workers' union, then the members of the carpenters and joiners' union might with equal legal right indulge in the same conduct as is here alleged against defendants. If they did so, their legal standing would be precisely the same. It results that all the cases cited on behalf of defendants, even if not in conflict with the decisions of the United States Supreme Court and the greater weight of authority, have no application whatever to the controversy before the court.

The union defendants have a right to obtain business in the way of employment and wages, which plaintiff has the power to dispose of on the same terms, and none other, as the plaintiff would have the right to obtain a contract which a competitor was seeking to obtain. In no event does that right include the right to induce or persuade another to break an existing contract, much less to do so by coercion, or by the calling of sympathetic strikes and the institution of secondary boycotts. If plaintiff were employing nonunion laborers and undertaking to perform this contract on an open-shop basis, the better considered cases all hold that defendants might not resort to the means to which they are now resorting, to prevent the performance by plaintiff of its contract. (See *Hitchman Coal & Coke Co. v. Mitchell*, supra.)

The remedy at law by an action for breach of contract against the city is not adequate. In the first place, it does not appear that the city, through any properly and lawfully constituted authority, is a party to the conspiracy, and no one except the city council could properly commit a legal breach of plaintiff's contract. In the second place the injury to plaintiff's business, good will, and trade could not be measured or included in determining the damages in an action at law. For this and other reasons, it is settled law that injunction is the proper remedy.

A preliminary injunction will be granted as prayed for in paragraph 1, except as to the last sentence thereof, which does not appear at this time to be justified upon the present state of the record. Bond in the penalty of \$2,000 will be required, conditioned to pay such costs and damages, if any, as the defendants or any one of them may sustain, or as may be awarded against plaintiff in the event this injunction shall be held to have been improvidently awarded.

LABOR ORGANIZATIONS—CONSPIRACY—LIABILITY FOR DAMAGES—TORTS OF MEMBERS—RELATION OF GENERAL AND LOCAL ORGANIZATIONS—*United Mine Workers of America v. Coronado Coal Co.*, Supreme Court of the United States (June 5, 1922), 42 Supreme Court Reporter, page 570.—The Coronado Coal Co. and others had sued the United Mine Workers of America and others to recover damages for the destruction of mining property. A judgment was in favor of the plaintiffs in the district court, which was affirmed by the circuit court of appeals with some modification (258 Fed. 829; see Bul. No. 290, p. 192). The United Mine Workers brought the case to the Supreme Court on a writ of error, where the judgment of the court below was reversed and the case remanded for further proceedings not inconsistent with the opinion delivered by the Supreme Court.

The plaintiffs were a group of associated corporations engaged in the mining of coal in Sebastian County, Ark. All of these were placed in the hands of a single receiver in July, 1914, and the receivership continued up to the time of the decision in this case. These mines were situated in what is known as District No. 21 of the United Mine Workers of America, in which are 27 local unions of the organization. These, with the national association and its officers, were the defendants in the suit. The charge was made that these defendants had entered into a conspiracy to restrain and monopolize interstate commerce, in violation of the Federal antitrust act, the method being the destruction of the plaintiffs' property so as to prevent the production of coal for shipment in interstate commerce.

The original complaint was filed in September, 1914, shortly after the destruction of the property complained of. A verdict of \$200,000 was awarded, and this was trebled under the law, to which were added counsel fees and interest, making a judgment of \$745,000 against the union. The amount claimed by the plaintiffs was in excess of \$2,000,000. These and other facts were set forth by Chief Justice Taft, who delivered the opinion of the court.

The Chief Justice stated the "five principal questions pressed by the plaintiffs in error here, the defendants below." The first of these was that the plaintiff companies had improperly united to bring the suit, but this was held not to be a valid contention, since the comity,

of interest of the parties involved was clear and the procedure was in accordance with the laws of Arkansas.

The second question was as to whether "the unincorporated associations, the International Union, District No. 21, and the local union, were suable in their names." The international union is so called because it embraces all of the United States and also Canada, its purpose being to unite "all workers employed in and around coal mines, coal washers, and coke ovens on the American Continent." Its purposes are the usual ones of the betterment of industrial conditions, the securing of joint agreements, and the enforcement of such demands as the organization decides upon. "The ultimate authority is a general convention to which delegates selected by the members in their local organizations are elected." Between conventions the international board has control of affairs; and when the board is not in session the president has large powers of administration and control. It was said that the machinery of the organization is "admirably framed for unit action under the direction of the national officers." A general strike may be recommended by a two-thirds vote of the board between conventions; "but under no circumstances shall it call such strike until approved by a referendum vote of the members." No district may "engage in a strike involving all or a major portion of its members without sanction of the international convention or board." The same article provides that districts may order local strikes "on their own responsibility," but if they are to be financed by the international union they must be sanctioned by the international board. Strikes in unorganized fields must be sanctioned by the convention or board, and no financial aid will be given until after the strike has lasted four weeks unless otherwise decided by the board.

The membership of the organization was about 450,000, producing a large income and expenditure, "most of all in strikes," so that "an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies." Conceding that at common law "an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done," so that it could only sue or be sued in the names of its members, liability being enforced against each member separately, it was declared that "the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary." Thus the right to strike is recognized, embezzlement of funds by officers is punishable, the union label is protected, and labor

organizations have been given specific recognition in the organization of official labor boards and statutory arbitration bodies. Chief Justice Taft then inserted as a footnote a long list of citations of laws recognizing unincorporated labor associations. Continuing, he said:

More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued; and this has had its influence upon the law side of litigation, so that out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported, in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of suing and being sued. It would be unfortunate if an organization with as great power as this international union has in the raising of large funds and in directing the conduct of 400,000 members in carrying on, in a wide territory, industrial controversies and strikes out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages, and to levy on his share of the strike would be to leave them remediless.

Though such a conclusion as to the suability of trades-unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade-unions, it is after all in essence and principle merely a procedural matter. As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-acting body with great funds to accomplish their purpose, they may not be sued as this body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose.

Our conclusion as to the suability of the defendants is confirmed in the case at bar by the words of sections 7 and 8 of the antitrust law. The persons who may be sued under section 7 include "corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any State, or the laws of any foreign country." This language is very broad, and the words given their natural signification certainly include labor unions like these. They are, as has been abundantly shown, associations existing under the laws of the United States, of the Territories thereof, and of the States of the Union.

For the reasons stated the court ruled that the international union and its subordinate elements of district and local unions "were prop-

erly made parties defendant here and properly served by process on their principal officers."

The next question was as to the responsibility of the international union for the disturbances on which the present action was based. Keeping in mind the distribution of responsibility for the declaration and conduct of strikes set forth in the provisions of the constitution already referred to, it was said that the evidence did not show that the international board ever authorized the strike which had been declared by the president and officers of district No. 21, embracing Arkansas, Oklahoma, and Texas. It was a local strike, affecting certain Arkansas mines, and the international board took no part in preparation for it or its maintenance; neither did it ratify it by paying any of the expenses.

Following this statement, the Chief Justice continued:

It came exactly within the definition of a local strike in the constitutions of both the national and the district organizations. The district made the preparations and paid the bills. It does appear that the president of the national body was in Kansas City and heard of the trouble which had taken place on April 6 at Prairie Creek and that at a meeting of the international board he reported it as something he had learned on his trip for their official information. He said that a man named Bache had demanded in a suit an accounting of the funds of the Southwestern Coal Operators' Association; that when he secured the information he "went down to Arkansas and started to run his mine nonunion. The boys simply marched in on him in a day down there and kicked his Colorado guards out of there and broke their jaws and put the flag of the United Mine Workers on top of the tippie and pulled the fires out of the boilers, and that was all there was to it, and the mines have been idle ever since. I do not say our boys did this, but I mean the people from all through that country marched in and stopped the work, and when the guards offered resistance several of them were roughly handled; but no lives were lost, as I understand it." Later in May he made a long speech at a special convention of district No. 21 held at Fort Smith for a purpose not connected with this matter, in which he referred especially to the Colorado and West Virginia strikes in which the international union was engaged with all its might, but he made no specific allusion to the Prairie Creek difficulty. It does appear that in 1916, after Stewart, the president of district 21, had been convicted of conspiracy to defeat the injunction issued to protect the Prairie Creek mines in this conflict, and had gone to the penitentiary and was pardoned, White, the national president, wrote a letter thanking the President for this, and that subsequently he appointed Stewart to a position on a district committee. It would be going very far to consider such acts of the president alone a ratification by the international board creating liability for a past tort. The president had no authority to order or ratify a local strike. Only the board could do this. White's report in an executive meeting of the board of the riot of April 6 shows sympathy with its purpose and a lack of respect for law, but

does not imply or prove on his part any prior initiation or indicate a desire to ratify the transaction as his work. The board took no action on his report. He did not request it.

Communications from outsiders and editorials published in the United Mine Workers' journal giving accounts of the occurrences at Prairie Creek, and representing that the troubles were due to the aggression of the armed guards of the mine owners, and that the action of the union men was justified because in defense of their homes against night attacks do not constitute such ratification by the board or the president after the fact as to make the international union liable for what had been done.

Counsel for the mining companies argued that, since the national body possessed power of discipline, it was required to superintend any local strike of which it had knowledge, "and prevent its becoming lawless at its peril." The court did not find that any "such responsibility is imposed on the national body." Such a rule would surpass in strictness the requirements laid upon a corporation for wrongs committed by its agents in the course of its business, and "surely no stricter rule can be enforced against an unincorporated organization like this."

Another contention and the answer thereto are stated as follows:

But it is said that the district was doing the work of the international and carrying out its policies and this circumstance makes the former an agent. We can not agree to this, in the face of the specific stipulation between them that in such a case, unless the international expressly assumed responsibility, the district must meet it alone. The subsequent events, showing that the district did meet the responsibility with its own funds, confirm our reliance upon the constitutions of the two bodies.

We conclude that the motions of the international union, the United Mine Workers of America, and of its president and its other officers, that the jury be directed to return a verdict for them, should have been granted.

The opinion then takes up the question of whether there was a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence, in the course of which the properties of the companies were destroyed, and whether district No. 21 and the individual defendants did these things in pursuance of a conspiracy to restrain and monopolize interstate commerce.

As a basis for the answers of these questions, a detailed account is given of the attempt of the companies to change their mines from a union to a nonunion basis, and the series of events that followed, leading up to assassinations, murders, and the destruction of property by fire and dynamite. There was a contract for union wages and terms with some three months yet to run, but in the attempt to reduce the cost of production an earlier change was sought. To avoid the charge of a breach of the union contract, a corporation was organized with a capital of \$100 for the purpose of taking over

and operating the business of the various mines. As the new corporation had made no contract, the manager, Bache, considered himself free from obligation to the union in regard to operations under his new corporation. The mines were shut down for a short time and preparations were made to open them on a nonunion basis a few days later. In anticipation of trouble, guards were hired from the Burns Detective Agency and elsewhere and supplied with Winchester rifles and ammunition. A cable was strung on posts around the principal mining plant, and notices issued to former employees to vacate the company's houses which they occupied. Notices warning trespassers were posted and nonunion workers, some 30 or more in number, were gathered at the mine on the day fixed for the opening. A mass meeting was called through the agency of the officers of the district and local unions, which "was given a picnic character, and women and children attended." Large numbers were present and it was addressed by various persons, following which a committee was appointed to visit the superintendent in charge of the mine. This committee was met by armed guards, but they admitted the committee to see the superintendent. "The guards had been directed not to use their guns save to defend their own lives or another's. The union miners assaulted the guards, took the guns away, and so injured a number of the employees that four or five had to be sent to the hospital." The crowd invaded the premises, pulled the fires from the engines and boilers, and hurled stones at the fleeing guards. The result was that the mines were deserted, the pumps stopped, and the mines flooded. "One of the crowd went up to the top of the coal tipple and planted a flag on which was the legend, 'This is a union man's country.'"

Following the above incident Mr. Bache secured an injunction against the union miners and such agents as he could identify, and undertook preparations to resume mining. Hostilities were incited by false rumors as to the attitude and conduct of the guards toward the women and girls of the vicinity, and the president of the district union offered guns "if the people would take them." The secretary-treasurer of district No. 21 bought some 40 or more Winchester rifles and sent them secretly to a town in the neighborhood for the purpose above stated. The district president announced "that he would not permit the Prairie Creek mine to run 'nonunion' and intended to stop it." Other guns were shipped in and the "evidence leaves no doubt that during the month of June there was a plan and movement among the union miners to make an attack upon Prairie Creek Mine No. 4." Some 70 or 80 workers had been procured and preparations to resume mining were progressing. The tenseness of feeling increased until on Sunday night, July 12, a fusillade of shots were fired into an

adjacent village, and the cry was raised that "the scabs were surrounding the town," and guards were put out to defend against an attack by the guards employed by Bache. That there should be such an attack was said by the court to be a "ridiculous improbability," as the guards were engaged in protecting themselves and the property and were themselves in constant fear of attack. There was also a statement made by one of the defendants, "an active union man," to the effect that this shooting had been done by a local constable and himself "in order to arouse the hostility of the neighborhood against the men at Prairie Creek." Hostilities continued for a number of days, ending in a direct attack upon the mine, after friends of the attackers had been warned to leave to avoid danger. The property was burned or blown up, a number of the employees were made prisoners, and several were killed while being held as captives, one at least the nominal prisoner of the constable above referred to, who was, according to the evidence, present at the killing with the men in his custody, on the way, as he said, to the grand jury. "The overwhelming weight of the evidence establishes that this was purely a union attack, under the guidance of district officers."

Testimony was offered by the defendants of "a palpably artificial character" to the effect that this "was only an uprising of the indignant citizens of the countryside." The responsibility of the various officers of the district and the union miners appeared "so clearly established that, had that been the only element needed to justify a verdict, the court properly might have directed it." The district president and the union miners, including the constable above mentioned, were present in the courtroom at the trial, but did not take the stand to deny the facts established.

Indeed, they had been previously brought to trial for conspiracy to defeat the Federal administration of justice and for contempt because of these very acts, had pleaded guilty to the charge made, and had been sentenced to imprisonment, and their expenses as defendants in and out of jail had been paid by the district out of the district treasury and the disbursements approved by the district in convention.

A restricted liability was contended for, limiting it only to those members who were shown by the evidence to have participated in the wrongful acts committed. As to this the opinion states:

There was evidence to connect all these individual defendants with the acts which were done, and in view of our finding that district No. 21 and the unions are suable, we can not yield to the argument that it would be necessary to show the guilt of every member of district No. 21 and of each union in order to hold the union and its strike funds to answer. District No. 21 and the local unions were

engaged in a work in which the strike was one of the chief instrumentalities for accomplishing the purpose for which their unions were organized.

A provision of the union constitution was then quoted to the effect that responsibility for trouble of a local character rests for its adjustment first with the mine committee and officers, and then with the officers of the district, who may, if they believe that "a strike would best subserve the interests of the localities affected," order such a strike.

Thus the authority is put by all the members of the district No. 21 in their officers to order a strike, and if in the conduct of that strike unlawful injuries are inflicted, the district organization is responsible and the fund accumulated for strike purposes may be subjected to the payment of any judgment which is recovered.

However, as the present suit was instituted under the provisions of the Federal antitrust act, it was necessary to show that there was a conspiracy "with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the union." The relation of the coal fields of district No. 21, and specifically of the Arkansas fields, to the general production of coal in union and nonunion fields was discussed at length. The proceedings of the annual conference and the proposals to secure a thorough organization in all mines are given in detail. On the basis of these events the plaintiff companies charge "a continuously operating conspiracy between union coal operators and the international union to restrain interstate commerce in coal and to monopolize it, and that the work of district No. 21 at Prairie Creek was a step in that conspiracy for which it can be held liable under the antitrust act."

Having stated these facts, Chief Justice Taft said: "Coal mining is not interstate commerce and the power of Congress does not extend to its regulation as such," citing *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (see Bul. No. 258, p. 96), in which the regulation of the manufacture of goods by child labor was held to be outside the purview of congressional action. Several other cases were cited in which the court had "had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce." There is no question that Congress "has the power to punish conspiracies in which such practices are part of the plan to hinder, restrain, or monopolize interstate commerce," but such intention "must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances."

From the evidence it was decided that efforts at unionization of nonunion mines were intended "not only as a direct means of bettering the conditions and wages of their workers, but also as a

means of lessening interstate competition for union operators," which would make it easier to maintain the union scale. If unlawful means had been found in use by the national body which affected mines of sufficient importance, actual or potential, as to affect prices in interstate commerce, "the evidence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the antitrust act." However, this was a local strike, and the case differed widely from those cases in which a restraint of commerce had been found punishable on account of the direct methods there pursued. (*Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301; *Eastern States Retail Lumber Dealers' Assn. v. U. S.*, 234 U. S. 600, 34 Sup. Ct. 951, etc.)

There was nothing in the present case to indicate a thought of interference with interstate commerce, but only the purpose of preventing the operation of the mines by nonunion men. Even the burning of a car loaded with coal and billed to a town in Louisiana "has no significance upon this head." Bache had breached his contract three months before its expiration by employing nonunion men and had attempted to avoid his obligation by "a hugger-mugger of his numerous corporations," and had anticipated violence, as was evidenced by his posting of signs, stringing of the cable, and posting guards with guns for defense. The "bitter fight," which he acknowledged in a letter was anticipated, developed locally within the meaning of the international and district constitutions; "so it was in fact a local strike, local in its origin and motive, local in its waging, and local in its felonious and murderous ending." The output of the mines affected could "have no appreciable effect upon the price of coal or nonunion competition." Assuming that there would have been a saving in price from 17 to 20 cents per ton of coal on the weekly output of some 5,000 tons, this should have no "substantial effect on prices of coal in interstate commerce." The conclusion was reached that—

The result of our consideration of the entire record is that there was no evidence submitted to the jury upon which they properly could find that the outrages, felonies, and murders of district No. 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce. The motion to direct the jury to return a verdict for the defendants should have been granted.

The judgment was therefore reversed and the case remanded to the district court for further proceedings in conformity with this opinion.

LABOR ORGANIZATIONS—HOSTILE ATTITUDE—ANTICIPATION OF VIOLENCE—INJUNCTION—USE OF ARMY—*Consolidated Coal & Coke Co.*

v. Beale et al., United States District Court, Southern District of Ohio (July 19, 1922), 282 Federal Reporter, page 934.—A great pile of slack accumulated on certain premises owned by the Consolidated Coal & Coke Co. in the mining district of Perry County, Ohio. The company wished to remove this slack, but by reason of the threats and hostile attitude of strike sympathizers and inhabitants generally of the locality, the company thought it dangerous, if not impossible, to ship the fuel or slack without incurring loss of life or bloodshed among its employees. A temporary injunction had been issued against interference by certain persons with the removal of the fuel. The company made application in the equity court for an order directing the marshal to police the vicinity in which the fuel was located and the railroad leading thereto with a sufficient force of deputies to prevent violation of the injunction and enable the company peaceably to load and haul away the fuel.

The application provided for an alternative remedy by asking for a certificate to the President of the United States that a state of insurrection, within the purview of section 5299 of the Revised Statutes of the United States, existed in the county, which the State and local officials could not or did not control and which obstructed the orderly process of law and the administration of justice and required the presence of Federal troops. The petition stated that at least three or four companies of soldiers would be necessary. District Judge Peck denied the application for the reasons that the marshal could not be ordered to police the district and the court was without jurisdiction to issue the certificate requested.

The court said:

As to the request for deputy marshals to guard the works: This is not an application for an injunction, nor for the punishment of persons charged to be guilty of contempt of court by violating an injunction, but for the policing of a district in anticipation of future violations now threatened. The primary question involved is whether the guarding of an industry under such circumstances is the function of a court of equity. Neither specific statutes nor the general statutory equity jurisdiction, as interpreted by the familiar usages of equity, confers any such power upon this court. The textbooks recognize no such right. No reported case affirms its existence.

An injunction is a judicial order or mandate requiring a party to do or refrain from doing a particular thing. It acts in personam and not in rem, and does not operate to bring the threatened property into court. The one who threatens injury is ordered to desist, on the penalties prescribed for the punishment of contempt. Should any of the defendants be shown to have violated the injunction, they will, of course, be amenable to such penalties, and it goes without saying that the court will employ all the power at its command to enforce the punishment of any who violate the order. The court, however, is now asked to undertake the custody and guarding

of the property in advance of such contempt. To do so would be to go beyond any well recognized or established jurisdiction, and to undertake a function not devolving upon the court by statute or the usages of equity, but upon the executive branch of the Government.

Therefore it is thought that this court should not undertake to make in advance a decision of that which is solely for the determination of the President of the United States; that is to say, the necessity of using troops in a State in any given emergency. Orderly administration of the affairs of the government is never more important than in difficult times. In such orderly administration the function which this court is now asked to exercise belongs exclusively to the executive, and not to the judicial, branch of the government.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—CRIMINAL SYNDICALISM—MEMBERSHIP AS VIOLATION OF LAW—*People v. Roe, District Court of Appeal of California (August 4, 1922), 209 Pacific Reporter, page 381.*—The Statutes of 1919 of the State of California, at page 281, define and provide for the punishment of “criminal syndicalism” and “sabotage.” The first section of the statute reads as follows:

The term “criminal syndicalism” as used in this act is hereby defined as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

Subdivision 4 of section 2 provides that any person who “organizes or assists in organizing, or is, or knowingly becomes a member of any organization, society, group, or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism,” is guilty of a felony.

James Roe was arrested on June 22, 1921, in the city of Sacramento while attempting to sell and distribute publications supporting and advocating the cause of the organization known as the Industrial Workers of the World. The purpose of the organization as disclosed by the publications was to secure control of the Government of the United States and of the State governments and substitute for our present form of government what the organization calls an industrial government.

He was indicted under the statute above referred to, and convicted. Due to certain evidence that was admitted tending to show the purpose of the organization he demanded a new trial, but this was denied. He appealed to the district court. The court held that

the question of the necessity of the prosecution to plead such publications as would constitute the offense of criminal syndicalism was settled, and that it was not necessary, as decided in the cases of *People v. Steelik*, 203 Pac. 78, and *People v. Taylor*, 203 Pac. 85.

Certain testimony was admitted at the trial for the purpose of showing the character of the organization of which Roe was alleged to be a member. It was not for the purpose of showing that Roe was connected with the acts.

One witness testified that during the course of his employment with several other men on a farm near the city of Stockton digging potatoes, 14 other men applied for work and were given employment. After working all of the afternoon the 14 men retired to the "bunk house" with the other men. The following morning the new employees left the farm. The other men soon afterwards felt pains in their feet. They found, upon removing their shoes, that acid in the form of powder had been deposited in their shoes. After the 14 men had left, some I. W. W. papers were found in the "bunk house." Other witnesses testified that this was one of the instrumentalities of the organization to terrorize laboring men who were not members of the organization for the purpose of causing them to refuse to take employment in the fields or fruit orchards of the country. This evidence was held properly admitted at the trial.

Roe admitted that he had been a member of the I. W. W. since the year 1918. The conviction was affirmed by the court, Judge Hart saying:

No one of sense and fairness will deny the right of the laboring classes to maintain an organization for proper self-protection. No sensible and fair person will deny that an equitable division of the profits accruing from the combined operation of capital and labor between these two essential elements of industrial progress and prosperity should be had. Nor is it a crime per se, or, for that matter, a crime at all, for a person or a class of persons to advocate a scheme according to Utopian ideals for the government of the peoples of the earth and an equal distribution among all the people of the fruits of all material or industrial activity in all its manifold forms. Yet, when in attempting to crystallize such a condition any organization resorts to criminal acts of any character, or proposes to do it by the destruction of property and vested rights, then it has clearly transcended the line of demarcation between right and wrong; and the vice of the whole scheme of the organization known as the I. W. W. is, according to the testimony in this case, in the methods which it advocates and to which its members without scruples resort for carrying out its principles, and as to this phase of the case the record before us overflows with proof of the most dastardly crimes known to the criminal law which were resorted to for the avowed purpose of terrorizing the people, in the vain hope of intimidating them into accepting the propaganda of the I. W. W. as the true faith in the

matter of government. According to the testimony of the two witnesses, who, as above stated, were former members of the Industrial Workers of the World (Coutts and Dymond by name), the members of that organization not only believe in and teach the overthrow of our present system of government, but sanction as the means of accomplishing that result the crime of arson, sabotage, which means the willful destruction of the machinery of industry and other property, and any other act which, in their judgment, will instill into the people at large a feeling of absolute terror.

While no specific action was ever taken by the organization as such, authorizing the destruction of property by the members thereof by acts of sabotage or other criminal means, it was, nevertheless, one of the rules of the organization that the members thereof in such matters should act upon their own initiative whenever they thought it necessary to accomplish a particular object or the ends of the general purposes of the organization. In a word, both he and Coutts testified that the organization and its members believed in and advocated "direct action"; that is, instead of resorting to lawful methods or pacific means for the redress of what they conceived to be the industrial wrongs inflicted upon them or for the adjustment of any grievances arising between the laboring element and the capitalistic class, they believed in and advocated the taking of such matters into their own hands and settling them according to their own methods.

There now has been presented herein a sufficient explanation or exposure of the cardinal principles, the ultimate purpose, and the methods of the Industrial Workers of the World, as the same were revealed by the testimony, documentary as well as oral, by the record before us, to show that, as maintained at and before the trial of this case they constituted an organization which comes clearly within the inhibitions of the criminal syndicalism act of this State.

The judgment of conviction was therefore affirmed.

LABOR ORGANIZATIONS—INJUNCTION—CONTEMPT—JURY TRIAL—CLAYTON ACT—*Canoe Creek Coal Co. v. Christinson, United States District Court, Western District of Kentucky (May 1, 1922), 281 Federal Reporter, page 559.*—The Canoe Creek Coal Co., a New Jersey corporation, operated coal mines in Henderson County, Ky., and transported its product in interstate commerce. On June 23, 1922, the company brought a bill of complaint in equity against certain officers and members of the United Mine Workers of America, District No. 23, to restrain them in their actions in connection with a strike that was in progress in the company's mines. After a hearing the court concluded that a temporary restraining order should be made, and the order of injunction was entered on January 27, 1922. On March 16, 1922, the company through its counsel moved the court for a rule requiring certain of the defendants to show cause why they should not be punished for disobedience of the injunction. A hearing was had and the court decided that two of the men were guilty

and should be punished for contempt of the court. The defendants had demanded a jury trial, but the court tentatively overruled the motion, but did not pass sentence until it disposed of the question of the right of the defendants to a jury trial.

In deciding the case against the right of the men to a jury trial Judge Evans said in part:

There is in the Clayton Act no specific manifestation of any purpose to repeal section 268 of the Judicial Code, and it is this situation that makes manifest the importance of the inquiry whether section 21 of the Clayton Act (Comp. St., sec. 1245a), though very general in terms, was intended to apply to or reach any and all contempt cases, or was intended to be limited to those committed in cases "within the purview" of the Clayton Act, namely, the "antitrust" laws, or was it so general as also to repeal section 268 of that code by reason of its being in different language?

In this connection the remarkable situation presents itself of the courts being required in equity cases within the purview of the Clayton Act to impanel juries to hear and determine by a unanimous vote the usually very minor questions of disobedience of the court's orders and process in such cases, though all other issues of fact raised therein, however vast their importance, must be tried by the court alone without a jury. In short, in equity cases under the antitrust laws, a jury must be impaneled to try the mere question of disobedience of the court's orders—thus leaving the court under the domination of the jury in respect to the enforcement of its orders, while the immensely greater issues, involving the most important rights, are to be settled by the court alone, in conformity with the equity practice established upon centuries of experience and recognized by the Constitution in article 3, section 2.

Such an anomaly might have been the result of the effort to meet some demand for provisions in the antitrust laws; that in great measure, if not altogether, being the occasion of the legislation. In our effort to ascertain whether it was also the intention of Congress in respect to cases outside the purview of the antitrust laws to require jury trials in the very subordinate matter of disobedience of the court's orders, or whether the requirement as to juries was intended to be limited to the narrow field of the antitrust legislation and the purview of the Clayton Act, and thereby leave section 268 of the Judicial Code in full operation outside that field or purview, we have industriously gone over what we suppose are the important factors, and have been convinced that this case, as made by the bill of complaint, is not one which is within the purview of the Clayton Act in any of its features, and therefore that the provisions of that act as embodied in sections 21 and 22 thereof do not apply to this case, but that section 268 of the Judicial Code, if not repealed, may be applicable and controlling in this instance.

Upon these grounds we have concluded that the respondents, S. C. Sandefur and Letcher Martin, were not entitled to demand a jury trial, and that the refusal of that demand conformed to the requirements of the situation. The court will therefore now impose a sentence upon each of those respondents, which will not, however, go beyond a fine.

LABOR ORGANIZATIONS—INJUNCTION—CONTEMPT—PUNISHMENT—*Campbell v. Motion Picture Machine Operators et al., Supreme Court of Minnesota (January 27, 1922), 186 Northwestern Reporter, page 737.*—This case involves the same parties and circumstances as the case having the same title, noted at page 185. Certain parties were found guilty of contempt of court for violating the injunction issued in that case and appealed.

The court below had awarded damages, in the form of a fine, and also an attorney's fee. The former was reversed, and the latter affirmed, on grounds that appear in the following quotations from the opinion of the court:

Proceedings against persons charged with contempt of court are of two classes—those prosecuted to maintain and vindicate the authority of the court; and those prosecuted to make effective the remedy given to a private party. Proceedings of the first class are purely penal in their nature and their purpose is to enforce obedience to lawful authority in the interest of the public. Those of the second class are civil in their nature and their purpose is to secure to a private party the rights to which he is entitled. Contempts prosecuted in proceedings of the first class are commonly designated as criminal contempts, and those prosecuted in proceedings of the second class as civil contempts. Both may be, and frequently are, combined in one proceeding; but in such cases the punitive part of the proceeding must conform to the law governing criminal contempts and the remedial part of it to the law governing civil contempts.

The findings of the court in the proceeding in contempt are lengthy. It is sufficient to say that they are to the effect that the defendants had willfully and persistently violated and disobeyed the judgment in the main action and the injunction issued thereunder for the purpose of injuring the plaintiff, and thereby had prejudiced plaintiff's rights and were defeating the remedy given him by the court.

The fine was imposed "for the benefit of plaintiff herein," and therefore can not be held to be a penalty imposed under section 8363 for the criminal contempt. (*Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 784.*) Consequently it rests upon the provision of section 8364 authorizing the court to award indemnity to plaintiff for "any actual loss or injury" to him caused by the contempt. While the record warrants an inference that he sustained a loss in his business on account of the acts of defendants, there is no evidence whatever tending to show the amount of such loss. The statute does not authorize the court to impose a penalty on defendants for the benefit of plaintiff. It merely authorizes the court to award to plaintiff a sum sufficient to indemnify him for the damages sustained and for his costs and expenses; and if the award be accepted it operates as a bar to an action for such damages. That the award may be designated as a fine does not change its character. It is imposed for the purpose of compelling defendants to make compensation for the loss and injury caused to plaintiff by their violation of the

order and judgment of the court; and it must be based on proof of the damage actually sustained.

As there is no proof of the amount of damage actually sustained by plaintiff, the court erred in decreeing that the defendants each pay a fine in the sum of \$125 for his benefit.

The payment of the attorney's fee of \$100 was imposed on defendants as a joint obligation arising out of a joint offense, and the judgment is valid in so far as it requires the payment of this fee and makes provision for enforcing payment thereof. [Cases cited.]

It is urged that payment of the money judgment entered by the court can not be enforced by imprisonment without violating the constitutional provision forbidding imprisonment for debt. That a person convicted of contempt, who fails to comply with the judgment imposed therefor, may be coerced to do so by imprisonment without infringing this constitutional provision, whether the judgment directs the payment of money or the doing of some other act, has been settled too long and too firmly to require further discussion or the citation of authorities.

The judgment appealed from is reversed in so far as it requires the defendants to pay a fine in the sum of \$125 each for the benefit of plaintiff, and is affirmed in so far as it requires the defendants to pay an attorney's fee of \$100 and provides for the enforcement of such requirement.

LABOR ORGANIZATIONS—INJUNCTION—CONTEMPT—PUNISHMENT—
PARDONING POWER—*State ex rel. Rodd v. Verage, County Clerk, et al., Supreme Court of Wisconsin (April 11, 1922), 187 Northwestern Reporter, page 830.*—The Rhinelander Paper Co. had labor troubles with its employees, who, as a result, left its employ. The company obtained an injunction against these former employees and others, against intimidating, threatening, menacing, or offering abuse or physical violence to the employees of the company or their families, or in any way interfering with the company in securing employees, other than by recommending, advising, or persuading persons by peaceful means not to enter into or continue in the employ of the plaintiff.

Peter Christ was subject to this injunction. On July 2, 1921, he was sentenced to imprisonment for four months in the county jail for contempt of court for a violation of the injunction. On the 26th of October, 1921, the governor pardoned Peter and ordered Hans Rodd, the sheriff, to release him. This Rodd refused to do. The governor then took proceedings to remove Rodd from office because of his alleged official misconduct. He was removed and one Charles Asmundson was appointed to fill the vacancy. Rodd then took proceedings to decide the question as to whether the order removing him from office was a valid exercise of executive power, and whether the removal was lawful so as to create a vacancy in the office of sheriff.

The supreme court, therefore, had several questions before it. The first was:

What was the power in the governor to remove the sheriff from his office? The court held that he could only be removed for cause. It was stated that a public office was regarded as a property right. In stating its reasons for its decision the court said that if it held otherwise the governor could remove those who were distasteful to him from personal, political, or other reasons. But "that idea is not only obnoxious to an inherent sense of plain and fundamental justice, but it is out of harmony with the genius and spirit of our institutions, and would seem to neutralize a fundamental principle of popular government, which was plainly intended to be entrenched in the fundamental law of the State."

The court further said that it was not customary nor consistent with the theory of the government "to vest in any person the power to arbitrarily remove any elective officer." But having decided that point, another question arose, i. e., whether the conduct on the part of the sheriff upon which the governor based his order of removal constituted legal cause. If the governor had the power to pardon the prisoner, it was the undoubted legal duty of the sheriff to recognize the pardon and release him. On the other hand, if the governor was without power or authority in the premises, the sheriff would not be complying with the court's order of commitment, nor with his legal duty in the premises, if he recognized the governor's pardon. The constitution of the State empowered the governor "to grant reprieves, commutations, and pardons after conviction for all offenses except treason and cases of impeachment."

The contention was raised on behalf of the governor that under this authority his power was similar to that exercised by the King of England. The court pointed out that even the King could not pardon "where private justice is principally concerned in the prosecution of offenders." And the King could not exercise the power of pardon in certain classes of contempt cases. The contention was then raised that the court was powerless to do more than impose criminal punishment for the wrongful act, in which punishment no one could have a private interest.

Continuing the argument, it was contended that the court having punished for a criminal contempt, the power of the governor to pardon sprang into existence. The court said that the result of this would be to make the court powerless except by sufferance of the governor to protect the individual in the enjoyment of his rights. It was held by the court that for the purpose of securing justice to all it was necessary that the courts have power to compel respect for and obedience to their orders and decrees, and "for this purpose the

power to punish for contempt, as a remedial and coercive measure, is deemed an inherent and indispensable power of the courts."

Judge Owen, speaking for the majority of the court on the power of the court in contempt cases, said further :

Should the governor disapprove of the decision of the court, and consider the relief granted to be an act of injustice, he could nullify the action of the court, and deprive a party litigant of the relief to which a court might hold him entitled, by granting in the form of a pardon a license to the contemnor to disregard the order of the court. This in effect would vest in the governor a power of review of the decision, not only of a trial court, but of this court, and, should a decision be offensive to his views of justice, he could by the exercise of his power of pardon effectually deprive a party litigant of rights belonging to him under the law of the land. It should be remembered that, if the governor has power to pardon Christ in this case, he has power to pardon any other person who may be imprisoned for violating an injunctive order. While there may be many who think as a matter of abstract principle that the governor should have the power of pardoning one who is committed for the violation of a labor injunction, it must not be forgotten that, if he be conceded power to pardon in such cases, then he may pardon in all cases where an injunctive order is violated.

But, if the doctrine for which defendants contend is to prevail, it is to prevail in spite, and not by reason, of principles obtaining at common law. By that law, punishment to compel restraint was no less private in its character than punishment to compel action. There was, of course, this difference in the result to the contemnor: Where he was imprisoned to compel action, he could secure his release by complying with the order of the court; but where he was imprisoned because of past executed wrongful conduct, it was beyond his power to secure his release, because of the impossibility of undoing that which he had done.

In considering a similar situation in *Re Debs*, 158 U. S. 564, at page 596, 15 Sup. Ct. 900 (39 L. Ed. 1092), Mr. Justice Brewer said :

"In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

So we arrive at the conclusion that where a court, in order to protect private rights, issues its order restraining the commission of certain acts, and it subsequently is made to appear to the court that one has committed the acts prohibited under circumstances which indicate a purpose on his part to disregard the order of the court, and to continue in the performance of the acts prohibited, and that such continued conduct will injuriously affect the rights of a party to the action, the court may, as a remedial measure, civil in character, and for the purpose of preventing further injury to the suitor, imprison the contemnor, and especially is that so when the court is moved to action on the application of the aggrieved party. The dominant character of the imprisonment is remedial and coercive, although a punitive effect may also result. The proceeding being

civil, it is at all times under the control of the court, and the court may release the imprisoned contemnor when, in its judgment, the exigency requiring the imprisonment no longer exists.

The contempt committed by Christ could have been punished either criminally or civilly. While there was doubt as to whether criminal or civil proceedings were instituted against him, the court had the sole power of determining whether such proceedings were civil or criminal. It unmistakably construed them to be civil proceedings. This construction was binding upon all the world, until reversed. The only person who possessed a sufficient interest to secure a review of that determination was Christ. He made no effort to secure a review or reversal of the determination, and, consequently, it remains binding upon everyone, including the governor. It being judicially determined that Christ was incarcerated in the course of civil proceedings, and for the dominant purpose of protecting civil rights, a determination which it is beyond the power of the governor to disregard or set aside, and it being conceded that the power of the governor to pardon in contempt cases exists only in cases of punishment of a criminal nature, if it exists at all, it follows that he was without any power to pardon Peter Christ. Being without such power, his pretended pardon in no manner affected the duty of the sheriff, which was to detain Christ under the order of commitment. In refusing to recognize the pardon, and in retaining the custody of Christ, the sheriff was but in the performance of his legal duty, and a removal based upon his refusal to honor or respect the pretended pardon constitutes a removal without cause, and it necessarily follows that the order of removal should be set aside.

LABOR ORGANIZATIONS—INJUNCTION—PARTIES—EQUITABLE RIGHTS AND REMEDIES—*R. R. Kitchen & Co. v. Local Union No. 141, International Brotherhood of Electrical Workers, Supreme Court of Appeals of West Virginia (April 25, 1922)*, 112 *Southeastern Reporter*, page 198.—In the city of Wheeling, W. Va., during the year 1921 there existed a controversy over wages between contracting employers on the one side and local organizations of union labor engaged in the building trades on the other. The workers had been working under an agreement which had prescribed wages, and when the contract expired the dispute began. The employers demanded that the wages be reduced and the workers resisted this demand. The employers associated together under the name of Building Construction Employers, and established an employment office in the city. This employers' association was composed of 22 corporations, 8 partnerships, and 28 individuals, engaged in the following work: Contracting for woodwork, 19; for electrical work, 10; for plumbing, 16; for bricklaying, 6; for tin and sheet-metal work, 6; and for structural-iron work, 1. They brought a suit in equity against certain labor unions, their officers, and individual members, charging conspiracy to prevent the employers from executing their construction contracts and from obtain-

ing other contracts and prosecuting their several and intimately related businesses, by misrepresentation, persuasion, and intimidation, through threats, violence, picketing, boycotting, and otherwise, and praying for an injunction.

By way of defense the defendants set up that the employers did not set forth in their bill a good cause of action. The questions brought up by this defense were decided in favor of the employers, and the defendants appealed to the supreme court of appeals. In that court the order of the lower court was affirmed, in an opinion delivered by the president, Judge Poffenbarger.

The questions settled and the reason for the conclusions arrived at are in part as follows:

Among the plaintiffs, there is complete unity and solidarity in the demand for wage reductions in the vocations followed by the defendants. And there are like and equal unity and solidarity among the defendants in their resistance of that demand. Nothing unlawful is charged or perceived in the general purpose of either group. In the question of a general wage scale affecting their business, all employers of the same class have a common interest and manifest right to contend jointly for adoption or agreement upon one deemed by them to be practicable, just, fair, and equitable, and the workmen have a like right. Ordinarily, one class of contractors might not have any interest in wage scales pertaining to the business of other classes and not directly affecting them. However that may be, this bill alleges the extraordinary case of an association of contractors to enforce a demand for reduction of wages in all vocations, and of the organized workmen in all of the building branches of labor to resist it. In the effort to maintain their position and accomplish their declared purpose, the former have jointly proclaimed inauguration of the open shop in all of their respective departments of industry and are endeavoring to maintain it, by prosecution of their businesses with labor employed at what they conceive to be reasonable and fair wages and without reference to affiliation with any labor organization. In resistance of the demand for reduction, there was either a lockout or a strike and a consequent cessation of the business of the plaintiffs. Their effort to resume under the open-shop principle is resisted by refusal of the defendants to accept employment at the wages offered and under the conditions imposed. Although there is a prayer for an injunction against the alleged strike, it is based upon the methods by which it is alleged to be maintained or prosecuted. There is no serious contention against the lawfulness of the strike un-mixed with wrongful acts as a weapon; wherefore there is no occasion to enter upon any inquiry as to its legal status. If it is such, it is not the only measure of resistance alleged to have been adopted by the defendants. The charges are that they picket the employment agency, the places of work, the lodging and boarding places of the employees, and, in some instances, by persuasion or inducement, and, in others by threats and violence, cause the employees to break their contracts and refuse performance in some cases and cease it in others, to the great injury and damage of the plaintiffs. If, by the use of

such methods, directed and applied to the business of each of the plaintiffs, all are prevented from prosecution of their respective enterprises, they are all similarly affected by the same illegal cause, wherefore they may unite in resisting it, and there is no misjoinder of parties plaintiff. [Cases cited.]

The allegations of inducement to the breaking of contracts of service, by persuasion, express and implied threats, and actual violence, and of joint perpetration or procurement thereof are as full, complete, and definite as such charges can be made, ordinarily, in cases of this kind. The wrongful acts are alleged to be of constant occurrence and unrestricted scope. They occur around the employment agency, along the streets, at the places of work, and about the lodgings and homes of the employees. They are directed against the business of the plaintiffs through their employees, wherever and whenever they can obtain any workmen. Their generality, pervasiveness, constancy, and similarity are significant of concert and direction, such as might characterize the activities of a committee of action representing all of the defendants, and the bill alleges that they are the emanations of confederacy and conspiracy on their part. In our opinion the sufficiency of these allegations is beyond doubt. Such action may be enjoined.

A proper order will be entered, recording our opinion that the demurrers were properly overruled by the court below, and certified to that court.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—REFUSAL TO WORK FOR NONUNION EMPLOYER—*Sheehan v. Levy et al., Commission of Appeals of Texas (March 22, 1922), 238 Southwestern Reporter, page 900.*—P. J. Sheehan was a plumbing contractor in the city of Dallas, Tex., in the year 1918. In his employ were members of Local Union No. 100 of the Journeymen Plumbers under a week-to-week employment agreement. Union wages and hours were effective. In August, 1918, one Royse, the business agent of the local union, advised Sheehan to join the master plumbers' association and subscribe to the working agreement then existing between the association and the union, under which the workmen received many benefits Sheehan did not grant. Sheehan refused to join. He was then given notice that after 60 days, if he still continued to refuse to join the association, the union men in his employ would be withdrawn. This was done about the middle of October, 1918. At that time he had several contracts for work to be done, and because of this and for other reasons stated below he filed a petition in the district court seeking damages for injuries already sustained and an injunction to prevent the association and the union from "pulling" his men or interfering with them in any way. The petition alleged that the association and the union had conspired and agreed that the union would "pull" the men; that the union withdrew its men with malice aforethought and for the sole purpose of

injuring him; that he could not get other competent men; and that he was about to suffer irreparable injury.

The trial court refused to enjoin either the association or the union, and its judgment was affirmed by the court of civil appeals at Dallas (215 S. W. 229; Bul. No. 290, p. 205.) The case was taken to the supreme court and the judgment was again affirmed, this court adopting the judgment recommended by the commission of appeals prepared by Judge Powell, which reads in part as follows:

The evidence was conflicting on Sheehan's allegations that the master plumbers' association had conspired with the local union to withdraw Sheehan's laborers and injure him. The district court and the court of civil appeals decided the conflict against Sheehan's contention.

When the record upon any point contains conflicting evidence, and the district court and court of civil appeals make the same determination of the conflict, the result is binding upon the supreme court.

This brings us to the determination of the contention by Sheehan, that he was entitled to an injunction against the local union preventing its members from ceasing work for him. We think the court of civil appeals also correctly decided that this injunction was properly denied by the district court.

In the very recent case of *Griffin v. Insurance Co.*, 235 S. W. 202, the commission of appeals inserted in its opinion the notation made by our supreme court in granting the writ of error therein. We quote from said notation as follows:

"A man may lawfully refuse to have business relations with another for any reason—on account of whim, caprice, prejudice, or ill will. He may lawfully induce others to refrain from having business relations with such third person, though it injuriously affects such person, provided his action be to serve some legitimate interest of his own."

In granting the writ of error in the case at bar, our supreme court says that, if the Sheehan workers were withdrawn for no other purpose than to injure his business, the withdrawal was wrongful and therefore actionable. So the law is well settled, and we now come to a consideration of the statement of facts to determine whether the local union withdrew its men from Sheehan for the sole purpose of injuring his business, or whether they did so in order that they might serve some legitimate interest of their own. What are the facts?

The court then stated that under the statute laws of Texas as well as under the common law as generally interpreted, working men may organize and take action to promote their general welfare, and that "in the case at bar the action of the local union in question was well within its rights." There was neither boycotting nor picketing. Nor was there any evidence of malice or ill will.

On the contrary, it [the evidence] is full of testimony showing that their relations were at all times of the most friendly character. In the first place, the rule of the local union requiring its members to work only for contractors who were members of the master plumbers'

association was entirely impersonal. It was not directed toward Sheehan alone. It was a general rule. It further shows that the local union did everything in its power in a friendly and proper way to induce Sheehan to join the association and come within the rule.

But counsel for Sheehan insists that the latter should not be deprived of his liberty as an American citizen. No one made any effort to so deprive him. He had the right to decide whether he would join the association and subscribe to its working agreement with this local union, and thereby continue to work the local's members, or would refuse to do so and employ other laborers. The union contained 40 or 50 members at the time. There is much evidence in the record that Dallas had many other plumbers. There were non-union plumbing firms and other plumbers not connected with any firm or union. Sheehan could have worked them and exercised his option not to join the association. We see no reason why he should be permitted to say he will not work anyone except members of Local Union No. 100 and at the same time dictate the terms of his contract with the members of that union. If he wants to work them and them only, and is unwilling to subscribe to their terms, which they can obtain from other contractors, Sheehan can blame no one but himself. Certainly men can not be censured for working where they feel that their general welfare is better subserved.

We are not prepared to say that the withdrawal of the men could have been justified had Sheehan tendered them a contract containing the 21 sections which are included in the working agreement entered into July 22, 1918, between the local union in question and the master plumbers' association. If the members of the local union could have gotten exactly the same contract with Sheehan that the master plumbers offered them, we doubt if they would have had the right to quit working for him just because he would not join the association. The local union should not be permitted to dictate membership in some outside organization as a condition precedent to their working for a given individual, where the local union would not reap any individual benefits by reason of its demand. We think, in the case at bar, the local union was not interested primarily in building up the master plumbers' association. Its increase in membership was only an incident to their chief purpose to better the working conditions of the men. The fact that Sheehan did not join the association and avoid all this litigation is strong evidence, to our minds, that he was unwilling to accede to the 21 conditions embodied in the working agreement aforesaid. That being true he has no right to complain. Certainly, no one can, in any wise, be censured for choosing to work where he fares better. Sheehan paid union wages and observed union hours, as hereinbefore stated, but there is no pretense that he was willing to accede to the 21 rules in question.

LABOR ORGANIZATIONS—MONOPOLIES—FIXING PRICE OF PRODUCTS—*Standard Engraving Co. v. Volz, Supreme Court of New York, Appellate Division (April 21, 1922), 193 New York Supplement, page 831.*—The Standard Engraving Co., with others associated in

the Photo-Engravers' Board of Trade of New York, had entered into an agreement with the New York Photo-Engravers' Union, a labor organization comprising about 90 per cent of the competent journeyman photo-engravers in the city of New York. This agreement provided among other things for the maintenance of a closed shop, and was to cover the calendar year 1921. In 1918 a decision had been rendered to the effect that the antitrust act (secs. 340, 341, ch. 20, Con. L.) was not applicable to photo-engravers, but was intended to prevent restraint of trade and the creation of a monopoly in articles or commodities for common use. Inasmuch as photo-engraving is a service and not a commodity, the agreement for a closed shop was held not in violation of this law. (*People v. Epstean*, 102 Misc. Rep. 476, 170 N. Y. Supp. 68.) Following this decision the union "had established and adopted a minimum selling base for photo-engravings," and notified the employers' association thereof, stating also that a sale below said base was a detriment to the members of the union and "would be stopped by the withdrawal of members of the union from the employment of such concerns as sell below the said so-called minimum selling base." Some employers disregarded this notice and had strikes in their shops as a consequence.

In 1921 the antitrust law was amended so as to include "any article or product used in the conduct of trade, commerce, or manufacture" (ch. 712, Acts of 1921). Up to that time the plaintiff company had conformed to the minimum selling base, but thereafter disregarded it to meet the competition of other concerns who, subsequent to the amendment, were making sales secretly below the union rates. The act came into effect on May 13, 1921, and on May 17 the company notified the union that this amendment made the price-fixing plan illegal, so that it would be necessary for the company to disregard the plan entirely. Threats of coercive measures and interference with the business of the employer followed, the members of the union claiming that they were acting within the law.

The original statute was enacted in 1897, and slightly amended in 1899. In 1918 a provision was added exempting cooperative associations of farmers, gardeners, etc., a provision that was admittedly unconstitutional and void as creating an unwarranted discrimination. (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431.) This invalidity was held by the union to destroy the entire act, both the act of 1897 and its extension of 1921. This contention the court denied, pointing out that the amendment of 1918 could by no possibility of construction be considered as an inducement to the enactment of the law of 1897; while the amendment of 1921 was for the

purpose "of extending the scope of the act and clarifying the meaning of section 340, due to the interpretation of the act in the Epstean decision." The amendment of 1918 was therefore an ineffective gesture, and in no wise impaired the validity of the principal act or its amendment of 1921. The opinion concludes:

It being our opinion that the Donnelly Act is in full force and effect, regardless of the unconstitutional amendment of 1918, it inevitably follows that any attempt on the part of the defendants to interfere with the management of the plaintiff's business with respect to the prices at which it may sell its products is unlawful, and in direct violation of the statutes.

The injunctive order granted by the trial court restraining the union from declaring a strike was therefore affirmed.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—ACTS OF UNION WORKERS—*Keuffel & Esser v. International Association of Machinists, Court of Errors and Appeals of New Jersey (January 26, 1922), 116 Atlantic Reporter, page 9.*—The company named sued the machinists' association, seeking an injunction to restrain picketing and other interference with the conduct of its business. A strike had been organized, and active in it was one Bausch, "who described himself as business agent of District No. 15 of the International Association of Machinists." The plant had not been fully organized, and Bausch undertook to extend the organization of the union, though it was in evidence that he was not active as a picket. Only 140 of the 700 employees went out on the order for the sympathetic strike involved in the case, but later, due to mass picketing, largely by imported picketers, the force was reduced to about 25. The number of picketers "reached as high as 200."

On the evidence the offense was one of picketing by numbers rather than by the use of violence. A preliminary injunction had been issued covering points of personal molestation, the annoyance of persons employed or willing to be employed, the use of violence, threats, insults, or coercive conduct, attempts to break off employment by intimidation or annoyance, going to the homes of employees for the purpose of intimidation, annoyance, or coercion, or in any manner or by any means molesting or interfering with complainant's employees in going to or returning from their daily work. As to these specific points no appeal was made. "The object of the appeal avowedly is to secure a decision as to the legality of picketing when unaccompanied with violence, molestation of others, annoying language or conduct—in short, what is sometimes called peaceful picketing."

Reference was made by Judge Swayze, who delivered the opinion of the court, to the decision of the Supreme Court in the case, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 Sup. Ct. 72 (see Bul. No. 309, p. 181). Though this case applied provisions of the Clayton Act, "Chief Justice Taft discussed the case also as a matter of common law," so that the decision was said to be practically controlling. That decision was regarded as determining the right of the employer to be protected and the right of his employees to have access to his place of business and egress therefrom without intimidation or obstruction, while "the employees, recent or expected, have the right to use peaceable and lawful means to induce present employees and would-be employees to join their ranks."

The failure of the defendants to appeal against the restrictions noted in the injunction granted was taken by the court to be a confession of the conduct complained of. "Injunctions against parading and picketing must be read in the light of such admitted conduct." Judge Swayze then said:

There can, as Chief Justice Taft said, be no such thing as peaceful picketing in such surroundings, and the evidence shows how mere picketing by overwhelming force runs into intimidation and breach of the peace. The law now recognizes the right of members of trade-unions to combine in order that they may deal with their employers on terms approaching equality. On the same principles employees must be left unmolested in order that their conduct may be controlled by their reason, unaffected by the *vis metus* of great numbers, which corresponds to the *vis major* of physical force. It might perhaps be claimed that the terms of the injunction from which an appeal was taken were unnecessary in view of the extent of the restraint, but they were necessary to present the different question of the right to restraint when the situation is such that what would otherwise be peaceful persuasion becomes in the actual fact a system of terrorism. It was in this view that the terms appealed from were added; we think properly added.

Taking up the issue of the injunction against Bausch, it was said that the proof sufficed to show that he was directing the strikers and endeavoring to secure members with a view to compelling the unionization of the shops.

He denies that he actively intervened; he admits that he accepted their invitation to aid in forming an effective organization. We think a man who takes part in forming, fomenting, or aiding an effective organization for the illegal purpose for which this organization was in fact used can not escape liability by letting others do the work of "active intervention." He aided in forming, fomented, and aided an "effective organization" which at once committed unlawful acts, for which it was properly enjoined, as it admitted by failing to appeal.

Ruling, therefore, that "in the existing situation Bausch's conduct tended immediately and directly to unlawful conduct of men associated with him in a common enterprise," the order for the injunction was affirmed with costs.

There were vigorous dissents, the conclusion for affirmance being sustained by five justices of the court of errors and appeals and four judges of the court of chancery, while opposed to it were four justices and one judge. Chief Justice Gummere based his dissent "upon what seems to me to be the unwarranted scope of the order appealed from." The particular point excepted to was the absolute prohibition of picketing, which was regarded by the chief justice and others in agreement with him to be unjustified, as "restraining the defendants in the future from the exercise of their legal rights in a peaceful and orderly manner by prohibiting further picketing, even though done in a lawful way."

LABOR ORGANIZATIONS—PICKETING—ORDINANCE AGAINST DISPLAY OF BANNER—CONSTITUTIONALITY—*Watters v. City of Indianapolis, Supreme Court of Indiana (March 14, 1922)*, 134 *Northeastern Reporter*, page 482.—Under clause 31, section 8655, Burns's Statutes of 1914, the cities of Indiana are given power "to regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or hand bills on the streets, alleys, or public places." Under this power an ordinance was passed in the city of Indianapolis, which provided that:

It shall be unlawful for any person or persons, in or upon any public street, sidewalk, alley, or other public place in the city of Indianapolis, to carry any banner, placard, advertisement, or handbill, for the purpose of displaying the same: *Provided*, That the terms of this ordinance shall not be held to apply to processions of menageries, circuses, minstrel shows, public processions, and the like exhibitions.

After this ordinance became effective, one Charles Watters, wearing a shirt bearing the inscription on the front and back: "Barber Shop Unfair to Organized Labor," walked back and forth in front of a barber shop in the city of Indianapolis. He was arrested, and the city recovered a penalty from him for violation of the ordinance. He appealed upon the ground that the city was arbitrary and unreasonable in the exercise of its power, and that he was denied the equal protection of the laws by an ordinance that granted privileges and immunities to public processions and like exhibitions, and denied him his liberty and took away his property in the same circumstances. He also contended that he was restrained from "the free interchange of thought and opinion, * * * the right to

speak, write, or print freely," etc., in violation of section 9, article 1, of the State constitution. The supreme court of the State, however, affirmed the judgment of the lower court. Judge Townsend delivered the opinion of the court, holding the ordinance in question valid and constitutional. In the course of his opinion, he said:

This court will not attempt to vie with a city council or the legislature in the expediency or wisdom of legislation.

The reason for the classification in the ordinance, which inheres in the subject matter and the circumstances, is very plain. The carrying of placards and banners may attract crowds and blockade the streets and sidewalks. By this method, too, class hatred is sometimes stirred up, and a breach of the peace caused. Cities can not afford police officers enough to watch all persons in all places at all times. These powers to regulate and prohibit are given to enable a city to encompass and control that which may attract crowds or cause trouble. By the powers given under other provisions of the statute, cities require that notice be given to the police department of public parades. By this method the officers know when and where a crowd is apt to be attracted. They may accordingly make arrangements to properly police those streets, direct the traffic, prevent congestion, and avoid danger and trouble. Appellant is not prevented from participating in these parades. He has the same privileges and immunities that all other citizens have in like circumstances.

Nor is he denied the right of "free interchange of thought and opinion," or "the right to speak, write, or print freely." He may hire a hall or print a paper. But this does not mean that he will do as he pleases on a public street, which is kept by all the people for use under such restrictions that, as near as possible, all may enjoy it.

LABOR ORGANIZATIONS—PICKETING—TERMINATION OF STRIKE—INJUNCTION—*Yates Hotel Co. v. Meyers, Supreme Court of New York, Special Term (July 15, 1922), 195 New York Supplement, page 558.*—The Yates Hotel Co. sued for an injunction against John Meyers individually and as president of the Cooks' and Waiters' Local No. 150, and others. In September, 1920, when about 15 waiters were employed by the hotel company, a request for a closed-shop contract with increased wages was refused, the company claiming that it was unable to grant the request on account of business depression. The waiters thereupon "voluntarily left plaintiff's employ," but their places were filled within a week with experienced help and the hotel continued to operate with satisfactory service to the company and its guests and patrons.

A chief engineer was discharged about this time on account of inefficiency, and a new chief put in his place at the same wages. The other engineers were told that they could keep their positions as union men at union hours and wages, but the demand was made that

the chief engineer join the union under penalty of a strike, which followed. These places were also filled, but picketing was undertaken and maintained for some time, after which it ceased for some seven or eight months, being renewed in the fall of 1921. This was said to have developed into a public nuisance, with threats, abuse, intimidation and acts of violence and interference with the use of the sidewalk and entrances to the hotel.

The suit was for a preliminary injunction until final action deciding the rights and status of the parties. This was granted by Judge Devendorf, who after stating the above charges and claims announced the general principles governing the situation, including the right of the waiters to strike and the engineers and firemen to withdraw if they did not wish to work with a nonunion chief. The right to organize was recognized, as well as of picketing within limitations. However, trespass and violations are illegal at any time, while if no strike is in existence no right whatever to picket can be established. In view of the liberty of the employer to refuse an increase of wages and to hire such help as was suited to its purpose and willing to be employed, and of the nonexistence of any strike at the present time, the injunction was granted.

The strike, if it may be termed as such, was long over. The men had walked out and their places filled with efficient help a year before; they were no longer employees. The whole affair of 1920 was a dead issue, and any picketing or interference with plaintiff's business at that time was not only malicious but unlawful. A continuance of these acts, as described by plaintiff, must necessarily bring upon it irreparable financial damage, and no possible benefit whatever can come to the defendants by giving them a free hand to repeat or continue any and all acts, on their part, of last year.

LABOR ORGANIZATIONS — RESTRAINT OF TRADE — INJUNCTION —
Campbell v. Motion Picture Machine Operators' Union of Minneapolis, Local 219, Supreme Court of Minnesota (January 27, 1922), 186 Northwestern Reporter, page 781.—The Motion Picture Operators' Union of Minneapolis, Local 219, is an unincorporated association having a large membership composed of motion picture machine operators. The Trades and Labor Assembly is an unincorporated association composed of delegates from local trade and labor unions in the city of Minneapolis. The Assembly edited and published a Labor Review. Until February 4, 1917, John J. Campbell, the owner of a moving picture theater in the city of Minneapolis employed none but members of the local union to operate the machines in this theater. However, on February 10, 1917, having decided to reduce his expenses, he terminated the contract of employ-

ment with one of his operators, and gave notice to the local union, informing them that in his effort to reduce expenses he was going to operate his own machine for the whole or a greater portion of the time, but was willing to employ one member of the local at the wage scale fixed by the union to relieve him a portion of the time each day. The union did not agree to this arrangement. Campbell then attempted to join the union, but was not taken in because of their rules against the admission of an owner or proprietor of a theater. From and after February 24, 1917, the day of the termination of the contract of employment, Campbell operated his own machine with the aid of a nonunion operator. Campbell was mentioned in the Labor Review as being unfair to organized labor, and was listed in a "We do not patronize list." A picket was stationed with a banner in front of the theater. Prior to the action taken, Campbell brought an action to restrain the union and others from continuing the course of conduct which they had pursued with reference to the controversy. An injunction was granted and an appeal was taken to the supreme court of the State. That court had before it the questions of whether the antitrust statute of the State applied to this case, and whether the acts of the defendants amounted to an unlawful boycott. The court in deciding the questions gave great weight to cases decided by the Supreme Court of the United States under the Federal antitrust laws. In affirming the action taken by the lower court, Commissioner Lees said:

It would be an anomalous situation to have the Federal courts sitting in this State administering one rule in the adjustment or control of labor troubles, while the State courts at the same time are administering another and different rule upon the same facts—a condition inviting disrespect for law and leading to confusion and disorder.

Nor have we any misgivings in construing the expression "trade," as used in the [State] statute, to include labor. In fact, that would seem the only conclusion justified under the construction given the Sherman Act by the Supreme Court. If the act was intended to apply, and does apply, to a combination of employers against employees, there is in that combination restraint of trade. For his labor the laborer has nothing which may be the subject of barter and exchange like the goods and chattels of the employer. And, if he is to have the protection of the statute against a combination of employers, his labor, as he offers it in exchange for what it may earn, must be held trade within the meaning of the statute. If this be not so, then the employee is without the protection of the statute. It would shield and protect the employers only—a conclusion not justified by the general scheme and purpose of the law or the construction given it by the Supreme Court. It would be unfair to attribute to the legislature an intent to exclude the laborer from the protection of the statute.

A contention was raised that the judgment went too far and was an infringement on the right of free speech guaranteed by the Constitution. With reference to this the court said:

If defendants' only purpose was to notify the public that there was a controversy between plaintiff and Local 219, the judgment was too broad; but if they unlawfully combined to restrain plaintiff's trade and the publications were made in furtherance of the combination and portended injury to plaintiff or his patrons, the judgment was proper.

It was found that the publications were made in furtherance of the purpose of the combination. The purpose to be accomplished was unlawful. Blows were aimed at plaintiff's business, intended to injure or destroy it, in order to subdue him to the defendants' demands, and the statement that he was unfair was one of them. The right of free speech is abused when words become verbal acts, and are then as much subject to injunction as the use of any other force whereby property is wrongfully injured.

In conclusion the court said:

The rights of labor organizations are defined by chapter 493, Laws of 1917, which enacts in the form of a statute principles theretofore announced by the courts. The rights of employers have also been defined. (Section 8890, G. S. 1913.) There should be no misunderstanding about the restrictions which the law has imposed on both parties to a labor dispute, and necessity for resort to the courts should seldom arise. Courts are not adapted to effect settlements of controversies essentially economic in their nature, but when, in the course of such a controversy, fundamental personal or property rights are invaded, the duty of the courts is plain. This is such a case. Serious injury to the personal and property rights of the plaintiff has not only been threatened, but accomplished. Since this opinion was formulated the Supreme Court of the United States has decided the cases of *American Steel Foundries v. Tri-City, etc. Council*, 257 U. S. 184, 42 Sup. Ct. 72 [see Bul. No. 309, p. 181], and *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 [see Bul. No. 309, p. 191]. Under the doctrine they announce, the result in this case would necessarily be the same.

The judgment of the district court went no farther than was justified by the facts and the law, and it is accordingly affirmed.

LABOR ORGANIZATIONS—REVOCATION OF CHARTER—PROPERTY RIGHTS—*Grand Lodge of International Association of Machinists v. Reba, Supreme Court of Errors of Connecticut (February 21, 1922)*, 116 *Atlantic Reporter*, p. 235.—A subordinate lodge of the organization named, known as Lodge No. 30, was duly chartered by the grand lodge, and was in existence at Bridgeport, Conn. In August, 1919, the grand lodge, for reasons not stated, revoked the charter of the local and claimed the right to the possession of funds and property of the subordinate body, amounting in all to about \$7,000. Frank

Reba and others associated with him, officers and trustees of the local lodge, denied the right of the grand lodge to this property and refused to deliver possession. The superior court of Fairfield County upheld the claims of the local lodge, from which the grand lodge appealed, with the result that the action of the lower court was affirmed.

Judge Curtis, who delivered the opinion of the court, said :

Primarily the right of possession of the property of a voluntary association is in the association; that is, in its members or their officers and agents.

The revocation by a grand lodge of the charter of a subordinate lodge severs the relations of the grand lodge and the subordinate lodge, but it does not necessarily extinguish the voluntary association of the members of the local lodge.

Their property continues theirs in title and possession, unless it is otherwise provided in the constitution of the parent organization, which they agreed to and accepted when they became members of the association.

It appeared that the constitution prescribed by the grand lodge provided that the trustees of each local lodge should be legally liable to the general executive board for all funds and other property under their control; also that in the case of a lodge lapsing, the trustees should turn over to the general secretary-treasurer funds and property in their possession to be held for prescribed disposition. The section containing this latter provision is entitled "Merging or disbanding." In commenting on this section, Judge Curtis said that the fact that the local lodge "accepted a provision which took the possession or title of their property from them in any event should appear without reasonable question." The provisions of the constitution referred to were said not to meet the test.

When individuals associated to form Lodge No. 30 in order to become chartered as a subordinate lodge of the grand lodge, they were not informed by any provision of the constitution of the grand lodge, nor did they agree that if the officers of the grand lodge revoked its charter, the grand lodge would then become entitled to the right of possession of the property of their voluntary association.

In the absence of such notice and agreement, the right to the possession of its property continued in the members voluntarily associated in Lodge No. 30 and in their agents, the defendants.

LABOR ORGANIZATIONS—RULES—EFFECT OF WAIVER—STATUS—*Bruns v. Milk Wagon Drivers' Union, Local 603, St. Louis Court of Appeals, Missouri (June 6, 1922), 242 Southwestern Reporter, page 419.*—Henry Bruns was a member of the Milk Wagon Drivers' Union, Local 603, a labor organization of St. Louis, Mo. The by-laws of the organization provide that dues shall be \$1.25 per month

and must be paid in advance on or before the fourth Thursday, and if not paid in accordance with the by-laws, no sick, accident, or death benefits will be allowed. Henry Bruns had been a member of this union long enough to entitle his beneficiaries to \$500. He always paid his dues from three to five weeks behind the time required by the by-laws. This money he paid to the secretary-treasurer of the union, who always accepted the payments.

He died on October 31, 1918. Demand for the benefit was made on the union by the parents of the deceased, but payment was refused. Suit was brought to recover the amount and the defense set up by the union was the fact that deceased had not paid his dues in accordance with the rules of the organization. Judgment was rendered for the beneficiaries and an appeal was taken.

In the higher court another contention was raised by the labor union, which was to the effect that being a voluntary unincorporated labor union they were not capable of suing or being sued under the laws of the State. The appellate court, however, held against the union, sustaining the judgment of the lower court. The court said that under section 1186 of the Revised Statutes of 1919, the State provided how writs were to be served upon voluntary or unincorporated associations, and "such an organization as this is a legal entity and entitled to sue and be sued the same as corporations." With regard to the other defense the court said that the union had always accepted the dues and assessments of Bruns and "never undertook to forfeit his insurance, or made any protest, and would therefore be precluded from successfully invoking such defense now."

LABOR ORGANIZATIONS—RULES—EXPULSION OF LOCAL FROM INTERNATIONAL UNION—INJUNCTION—*Bricklayers', Masons' and Plasterers' International Union of America, Local No. 7 v. Bowen, United States District Court, Southern District of Texas (January 11, 1922), 278 Federal Reporter, page 271.*—The local named and others made application for a temporary injunction against the international union and its executive board to restrain them from putting into effect a judgment issued by the executive board suspending certain members of the union. A temporary injunction was issued without notice. Later a hearing was had and the following facts were brought out: In the application of the local for a charter in the international union the members pledged themselves individually and collectively to be governed by the constitution, rules, and usages of the Bricklayers', Masons' and Plasterers' International Union. Among the rules of the order it was provided that all judicial and executive authority of the international union was to be vested in the executive board. Provision for appeal from the executive board was

provided for, and any proceedings brought in court without exhausting the remedies provided by the constitution were to subject the member to expulsion.

The local indulged in protests against the salaries of the members of the executive board, criticised their conduct, and started a movement for a referendum election under which it was hoped new officers would be elected. The executive board, in a proceeding to discipline the local, alleged that the local had violated that provision of the constitution which prohibited the sending out of circulars, etc., pertaining to official acts of the local or business affairs of the international union. The executive board suspended the local from membership in the international union and proceeded to organize a new local union to take the place of the old one. At the hearing on the application for an injunction the defense set up was that the court was without jurisdiction over the subject matter of the suit. The district court allowed the injunction, saying through Judge Hutcheson:

As to the lack of jurisdictional amount, it is clear that complainants' suit is a class or representative suit, and it is well settled that in such suits the aggregate interests of the whole class, and not the several interests of each individual, constitute the matter in dispute.

Further, it is the settled rule that the amount in controversy in injunction suits is not the sum which the plaintiff might recover in a suit for the damage already sustained, but the amount or value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill.

Nor is there any greater merit in the contention that the suit must fail because of the want of the requisite diversity of citizenship, since while it is true that the international union as such has no such citizenship as would sustain jurisdiction, the members of the executive board have all been served and have duly answered, and their citizenship is sufficient to give this court jurisdiction.

I am strongly of the opinion that the field of judicial interference with the actions of voluntary, nonpublic bodies, as to controversies between their members as to the method and manner in which the rights of membership may be maintained and continued, is, and should be, a very narrow one, and that its boundaries should be maintained with the utmost care, so that only upon the clearest kind of showing, either that the constitution and rules are violated by the decisions of the tribunals set up by them, or that the remedies provided by the parties in their agreements for appeal from or the review of the decisions of their own constituted tribunals are nonexistent or unreasonable, should the courts permit their jurisdiction to be invoked, and it is in that spirit that I approach the inquiries:

(1) Is the matter complained of in this case one which has been conducted to judgment in accordance with the constitution and by-laws of the order? And if so—

(2) Are the complainants, by the rules and constitution of the order, and the procedure extended to them under it, furnished an adequate appeal from that ruling, which they have not yet availed themselves of?

A negative answer to the first question will make an answer to the second question unnecessary, for, if the act of the executive board here complained of is void for want of authority or jurisdiction, the aggrieved parties may at once apply to the courts for relief, since such acts are in law viewed, not as the acts of the union itself, within the meaning of its rules and by-laws, but as the acts of the officers as individuals to whom the rules and by-laws of the union have no more application than if a stranger to the union was endeavoring, by force and violence, to interfere with these complainants in the enjoyment of the rights accorded to them as members of it, just as, though a suit may not be maintained against the State or its officers, when they are acting within the authority of a valid law, it is universally recognized that an injunction will lie against a State officer, when he is acting without warrant or authority of such law.

Section 2 of article 17 (constitution of the international union) contains a list of crimes, and fixes penalties therefor; but in this list there is no reference to the matters made the occasion for the judgment which is the subject of complaint here.

It follows, then, that the attempted action of the executive board is without official sanction, or color of sanction; that their judgment, and the acts done under the authority of and pursuant to that judgment, are not the acts of the union, and must be held to be the acts of intermeddlers and void; and that complainants, as citizens of a great Republic, which affords the protection of its courts against arbitrary and despotic actions to those entitled to it, whether rich or poor, union or nonunion, may therefore now apply to the court for relief against the wrongs and aggressions which they have suffered, from the illegal action of the defendants, without being obligated to take any steps within the union to relieve themselves from these undoubted wrongs.

There is another aspect of this case which is sufficient to support the view here announced that the judgment of the executive board is a nullity—the want of judicial fairness which characterized these whole proceedings. It is a fundamental principle that no judicial or quasi judicial hearing is valid where the maxim “audi alteram partem” [hear the other side] is ignored, and it is therefore of the essence of a valid judgment that the body which pronounces it shall be unbiased, shall have no interest whatever in the outcome of the issue, and shall not have in any manner prejudged or pre-terminated it.

There is authority for the position that the very nature of this controversy, involving as it did a proceeding to discipline complainants on account of protests made by them against the salaries of the executive board, a criticism of their conduct, and a movement to secure a referendum election, by which new officers could be elected, rendered the executive board disqualified as a matter of law to sit in judgment and made their judgment a nullity.

The judgment and the proceedings of the executive board in the matter of the complaint of Charles L. Wilde against subordinate Union No. 7 of the Bricklayers', Masons' and Plasterers' International Union being, for the reasons heretofore stated, of no effect, it follows that their action in attempting to institute a new local is also void and without force and effect, and complainants may have a temporary injunction protecting them in their rights secured to

them under the constitution and laws of the order, just as though the complaint of Charles L. Wilde against Local No. 7 had never been filed or determined.

LABOR ORGANIZATIONS—RULES—EXPULSION OF MEMBERS—RIGHT OF PETITION—*Flynn v. Brotherhood of Railroad Trainmen, Supreme Court of Kansas (June 10, 1922), 207 Pacific Reporter, page 829.*—The Brotherhood of Railroad Trainmen had an agreement with the Missouri Pacific Railroad Co. which provided that “any yardman refusing to accept promotion when tendered will relinquish his rights in favor of the next senior man and shall not be eligible to subsequent promotion until another vacancy occurs.” The company had made rules putting in force the agreement. There were some 7,000 employees affected by the rule, some of whom were dissatisfied with it. About 75 signed a petition asking for a hearing to press their views as to the fairness of a seniority list issued under the above agreement. A charge was made against Patrick J. Flynn for his participation in the petition, which was said to have been addressed to the Missouri Pacific superintendent. The charges were that he cooperated with others “in interfering with the working of the local grievance committee” of his lodge. The laws of the order contained the following provisions:

Whatever action may be taken by the general grievance committee or board of adjustment of any system within the meaning of the above general rules, shall be law to the lodges on that road until the next meeting of the grand lodge, and if any member refuses to abide by the action of said general grievance committee, or board of adjustment, he shall be expelled from the brotherhood for violation of obligation.

Any member considering that he has been unjustly dealt with by his employer, or that he is otherwise aggrieved, shall make a statement of the grievance in writing and present the same at a meeting of the lodge. The lodge shall then determine by a majority vote of the members present, employees of the division, whether to sustain or reject the grievance. Should the grievance be sustained, the local grievance committee shall lay the matter before the trainmaster, superintendent, or other proper officer and use every means to effect a satisfactory settlement and report their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member of a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has been presented by the general grievance committee to the officers of the company, but not thereafter.

An order was made by the lodge expelling Flynn from the brotherhood upon the written charges and after a hearing. Several years later he died. His widow brought an action against the Brotherhood

of Railroad Trainmen upon a beneficiary certificate issued by it to her husband. Payment was resisted, the defense being that he had been expelled from that organization. But judgment was rendered in favor of the widow on the ground that the expulsion proceedings were invalid. The brotherhood appealed to the supreme court of the State, contending that Flynn was bound to exhaust his remedies within the organization before invoking the aid of the courts. Under the laws of the order Flynn might have appealed from the decisions against him, first to the president, and later, if he desired, to the grand lodge, but he took no appeal. The court held that the rule was as contended by the brotherhood, subject to the exception that "if an order of expulsion is made by the tribunal of the society acting without jurisdiction or in disregard of the accused member's fundamental rights, as, for instance, where no opportunity for a hearing has been given him, relief at the hands of a court may be sought in the first instance." The court held that Flynn was guilty of such conduct as to make him subject to expulsion under the laws of the order, and that he had not been deprived of his rights. In behalf of the widow it was argued that if the laws of the order were "interpreted as justifying the expulsion of a member of the order for attempting by outside means to bring about a change on the part of the railroad company in a method of treating its employees, which had been adopted at the instance of the order, such interpretation rendered the provisions void and unenforceable, because in conflict with the constitutional guaranty of the right of petition." The State constitution provided that "the people have the right * * * to petition the Government, or any department thereof, for the redress of grievances." The court did not sustain the above contention, as the railroads were not in the hands of the Government at the time and a railroad superintendent is not a public official. The court said:

We see no sufficient reason for considering it against public policy for a group of employees to agree with one another that whatever negotiations they have with their employer with reference to privileges to be accorded them shall be conducted through their organization collectively and not individually.

In answer to the suggestion that the by-laws did not give authority to a committee to prefer charges or act upon them, the court said that "the right to expel members is clearly granted, and in the absence of express provisions any procedure resulting in a fair trial is unobjectionable." The judgment of the district court was reversed and the cause remanded, with directions to render judgment in favor of the defendant.

LABOR ORGANIZATIONS—RULES—PAYMENT FOR WORK DONE FOR UNION—*Moore v. Marine Firemen, Oilers & Watertenders' Union of the Pacific, Supreme Court of Washington (July 13, 1922), 207 Pacific Reporter, page 1055.*—The Marine Firemen, Oilers & Watertenders' Union of the Pacific is a labor union and is also a corporation organized under the laws of the State of California, having its principal office and headquarters in San Francisco and branch offices in charge of Pacific coast ports, including Seattle, Wash. The object of the corporation, among other things, is to maintain good working conditions for its members. On May 6, 1921, a lockout had occurred in Seattle, at which time the local agent of the union in Seattle, one J. Carney, was absent. The lockout involved the Marine Firemen, Oilers & Watertenders' Union of the Pacific, the Sailors' Union, and the Marine Cooks' and Stewards' Union. A meeting, apparently a voluntary one, was held by common consent and not called by any officer or after notice. At this meeting the members of the several unions were appointed as committees to organize the men for picket duty in resisting the lockout.

One J. Moore, with four or five other members of the Marine Firemen, Oilers & Watertenders' Union of the Pacific, performed services as committee men until May 26, when another meeting was informally held. The same persons were elected at this meeting to act as a lockout committee, and Moore was made chairman. The second meeting seems to have been held for the purpose of determining a controversy as to strike benefits in lieu of board at a restaurant. Moore brought an action to recover compensation for services as a member and chairman of the lockout committee during the period of the lockout, which lasted from May 6 to July 28, 1921. He based his action upon a by-law of the union which reads as follows:

Section 16. Any member appointed at a regular meeting, on any committee, to transact any necessary business or perform any work for this union shall, if such business or work requires attendance during working hours, be paid for his services. Such pay shall not exceed \$5 per day.

The trial court found that Moore was appointed or employed at a regular meeting of the union, and that under the provision of the by-law upon which his action was based he was entitled to compensation at the rate of not to exceed \$5 per day, and that he worked 12 weeks, or 84 days, making a total of \$420, from which should be deducted and was deducted the sum of \$50, which had been paid to Moore. The union appealed from the judgment of the trial court to the Supreme Court of Washington. That court reversed the judgment, holding that Moore had no right to recover, saying, through Judge Holcomb:

The trial court was in error. No regular meeting of the union was held, or could be held, in Seattle under the constitution of the union. No regular meeting could be held at any place except at San Francisco, the corporate headquarters and place of business of the union, nor could any special meeting such as might have been held in Seattle on May 26, although it was called in accordance with the constitution of the union, pass upon any monetary matter. But the special meeting was not such special meeting as was contemplated by the constitution of the union, but was merely a voluntary mass meeting.

This union is not only a labor union but is a corporation. Its constitution and by-laws constitute the law for it, by which respondent must abide.

LABOR ORGANIZATIONS—SOCIALIST PARTY—WORKERS' EDUCATIONAL ASSOCIATION—RESTRICTION OF MEMBERSHIP—*Workers' Educational Association v. Renner et al.*, *Supreme Court of Michigan (June 5, 1922)*, *188 Northwestern Reporter*, page 289.—Act No. 171 of the Public Acts of 1903 of the State of Michigan, under section 2, provides: "The certificate [of incorporation] may also contain any desired provisions prescribing the qualifications of officers and members whereby they may be required to be members in good standing of any fraternal, religious, or beneficiary order or society, which provisions shall be binding upon the members and officers." The workers' educational association was organized in April, 1918, under the above act, for the purpose of promoting "the social, intellectual, and economic welfare of its members, and all workers." The articles of incorporation provided that "All trustees and officers must have been admitted to membership in this corporation, as provided in the by-laws thereof, and must have been good standing members of the Socialist Party of America for three years, and good standing members of the Socialist Party, local, Wayne County, Mich., for six months." The organization owned a building known as the "House of the Masses," and from time to time accumulated equipment, funds, and other property. The Socialist Party of Michigan in a State convention, made a declaration of principles which, in May, 1918, resulted in the expulsion of all Michigan Socialists from the Socialist Party of America. Automatically thereby all members of the association above mentioned lost their standing as active members and the right to hold office therein, if the articles and by-laws of the association were binding. The corporation continued to function as before. Its members joined other political parties, but several were reinstated in the Socialist Party. These few held a meeting, named certain of their number as officers of the corporation, and denied the right of the existing officers to control and manage the af-

fairs of the corporation. The property of the corporation was demanded by these few. They were refused, and then brought a suit in which it was sought to recover the property and have the court decree that the reinstated members were the lawful officers and members of the corporation. The trial court refused the relief sought and an appeal was taken to the supreme court. That court held that the articles and by-laws of the association were void, saying:

The articles and by-laws restricting the membership of the board of directors and the active membership of the society to those who were members of the Socialist Party are void. Had the statute said nothing respecting qualifications of officers and members, the corporation might have made any reasonable regulation upon the subject. But if the statute is to have any effect, it must be that of limiting and restricting the provisions prescribing the qualifications of officers and members to those named in the statute, namely, "members in good standing in any fraternal, religious, or beneficiary order or society." The Socialist Party is none of these. It is a political party.

Having chosen a restriction contrary to the statutes under which the corporation was organized, the result is as though no restriction had been made. So the contention that the Socialists alone are qualified members, and hence that the persons named by them alone are the officers of plaintiff, can not be sustained.

LABOR ORGANIZATIONS—STRIKES—ADVERTISEMENT FOR NEW EMPLOYEES—CONSTITUTIONALITY OF STATUTE—*Biersach & Neidermeyer Co. v. State, Supreme Court of Wisconsin (June 6, 1922)*, 188 *Northwestern Reporter*, page 650.—Section 1729 p1 of the Statutes of 1919 provides penalties for false and deceptive statements in advertisements for labor, classifying as such the failure to mention the existence of a strike, if there is one. A strike existed at the plant of Biersach & Neidermeyer Co. The sheet-metal workers, tanners, and laborers had left their work because of a disagreement. The company advertised in the *Milwaukee Journal* for "Tanners—experienced in lining fire doors; good wages, permanent position guaranteed to good men." Information was brought against the company, and it was found guilty of violating the above statute. The constitutionality of the law under which the company was fined was questioned, and the case was taken to the supreme court of the State. That court held the law in question constitutional, one judge dissenting. Several contentions were raised by the company, one of which was that the statute provided an improper classification, and that it was class legislation. The court said that in order that the classification may be valid, it must rest upon some real difference in the subject matter, having some relation to the classification made and the

objects sought to be accomplished by the legislature, and must affect alike all persons or things within a particular class.

Continuing, the court through Judge Doerfler said :

In this connection it is said that employers of workmen are placed in one class and are required in the event of a strike or lockout, while advertising for men, to state in the advertisement the fact that such condition exists; and that employers of other workmen, such as clerks, stenographers, telephone operators, etc., are at liberty to advertise for help during the existence of a strike or lockout without being required to make reference to the fact of the existence of such labor troubles. It is a well-known fact that the labor troubles referred to in the statute contemplate the existence of such troubles in relation mainly to workmen, and by workmen are meant persons employed in manual labor in various avocations where such labor is required, and particularly to those employed in industrial labor.

Courts also can and must take notice that efforts on the part of employers to hire labor to take the place of strikers or those locked out from employment are frequently connected with acts of violence, bloodshed, and breaches of the peace. The existence of lawlessness under conditions as above stated was clearly in the mind of the legislators at the time of the enactment of the statute, and it was the evident intention of the legislature to meet such situation and to provide protection for the benefit of the public. Without the provisions of this statute employers who had labor troubles could indiscriminately advertise for help without apprising the prospective employees of actual conditions, as the result of which many would leave their homes and travel long distances only to find that a strike or lockout existed in the plant, which would make employment uncomfortable, to say the least, and in many instances dangerous. So that in the enactment of the statute it must be assumed that the legislature had a clear, well-defined policy in mind, designed to protect the interests of the public in general.

The requirement of the statute with respect to the advertisement operates equally on all within the same class and is therefore valid. This is true, as is stated in 12 C. J. 1128, 1130, even though the act confers different rights or imposes different burdens on the several classes.

The decision expressly approved of similar decisions in the case of *Commonwealth v. Libbey*, 216 Mass. 356, 103 N. E. 923 (Bul. No. 169, p. 184), and *Riter-Conley Mfg. Co. v. Wryn* (Oklahoma Supreme Court), 174 Pac. 280.

LABOR ORGANIZATIONS—STRIKES—ADVERTISEMENT FOR NEW EMPLOYEES—CONSTRUCTION OF STATUTE—*Walter W. Oeflein (Inc.) v. State, Supreme Court of Wisconsin (June 6, 1922)*, 188 *Northwestern Reporter*, page 633.—Section 1729 p1 of the statutes of the State of Wisconsin, 1919, provided certain requirements with which employers must comply in advertising for employees. Any violation of the statute was a criminal offense and punishable by a fine of not

more than \$2,000, or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

On June 1, 1920, Charles J. Ebert, the business agent of the bricklayers' union, asked one Harmon Krenzin, a union bricklayer, who was in the employ of the Walter W. Oefflein Co., to quit his job. On or about the 11th day of June two other union bricklayers left their jobs. There had been no dispute between the employer and these employees, and no demand or request had been made for a change in compensation or in labor conditions, though there seems to have been some difficulty affecting other groups of workers. The employer had conducted an open shop and did not discriminate between union and nonunion help. The employer did not know why the three men had left his employ, nor did he know that they were union men. A notice had been sent to the employer by the bricklayers' union stating that on and after June 1 union bricklayers would be permitted to work but eight hours during any given day, and that the rules of the union prohibited work on Saturday afternoons, Sundays, and holidays. The employees working for the company in this case worked nine and one-half hours daily and worked on Saturday afternoons. On June 29, 1920, the employer advertised in the Milwaukee Journal for bricklayers. In the advertisement it was said that no labor trouble existed. Criminal proceedings were brought against the employer and he was convicted of violating the statute mentioned and sentenced to pay a fine, etc. The employer took the case to the supreme court of the State. One of the questions presented to the court was whether or not a strike of the bricklayers existed on the job in question on or about the date of the advertisement. The question was answered in the negative. In deciding whether a strike existed the court, speaking through Judge Doefler, said:

Webster's New International Dictionary, on page 2058, defines the word "strike" as follows:

"An act of quitting, when done by mutual understanding by a body of workmen, as a means of enforcing compliance with demands made on their employer."

Numerous other definitions of the term "strike" appear in law dictionaries and decisions, all of which, however, substantially include the elements contained in the definition above set forth. The number of men necessary to constitute a strike in refusing to continue work, pursuant to united effort, depends in each case upon the peculiar facts in the case, and no definite rule can be laid down. The legislature did not see fit to define the term "strike," but, on the contrary, used the term in the sense that it is ordinarily used in connection with labor troubles and as defined by standard authorities upon the subject. But it would appear quite clear that before the employer can be involved in any action of a labor union, with respect to the failure to do the things required by a statutory enactment like the one under consideration, it first becomes incumbent

upon the members or representatives of such unions to make a demand upon the employer in order to lay the basis for a refusal.

We therefore arrive at the logical and inevitable conclusion that under the evidence in the record it does not appear that a strike of bricklayers actually existed at the place of business of the plaintiff in error on June 29, 1920.

The State contended that subdivision (1) of the section contemplated a strike in or about the plant or premises of the employer, and that it was not confined to the particular craft in which an effort was made to hire help by the use of advertisement. In reference to this contention the court said:

While the statute makes it an offense for an employer to advertise for help when there is a strike or lockout at the place of the proposed employment, when he fails to state in such advertisement that such strike or lockout exists, such general language is clearly modified by the subsequent language used, wherein it is stated "when in fact such strike or lockout then actually exists *in such employment at such place.*" "Such employment at such place" can not mean any employment at the employer's place of business, but the particular employment for which the employer has advertised for help. It can not be assumed, that the mere fact of the existence of a strike of electricians, carpenters, or other artisans on a given job will in any way affect a bricklayer seeking employment, when in fact no strike in this craft actually exists on the job.

The State further contended that in any case the employer had violated the statute in question by a false and deceptive advertisement, in that he stated in the advertisement that no labor troubles existed. As to this the court said:

This contention is not based upon that portion of the statute referring to strikes or lockouts, but upon the prior provisions of the statute, under which it is an offense, among other things, to induce a workman to accept employment through or by means of false advertising. Under the statute such false advertising refers to the kind and character of the work to be done, or the amount and character of the compensation to be paid for such work, or the sanitary or other conditions of the employment. Unless the phrase in the statute "or other conditions" may be construed to refer to the existence of labor troubles, the contention of counsel for the defendant in error is not well founded. Such phrase can have reference only to such other conditions as are necessarily incident to and a part of the employment itself, as, for instance, the time when work shall begin in the morning, the length of time allowed for lunch, the time when employees shall be paid for their work, etc. The legislature has seen fit to include in the statute an express provision covering the subject of labor troubles, which is included in the strike provision, and, having specifically legislated upon the subject, it must be necessarily and logically inferred that in the use of the phrase "or other conditions" labor troubles were not included.

The judgment of conviction by the lower court was therefore reversed.

LABOR ORGANIZATIONS—STRIKES—“BREACH OF GOOD FAITH”—PERSUASION TO BREAK CONTRACT—*Rice, Barton & Fales Machine & Iron Co. v. Willard, Supreme Judicial Court of Massachusetts (October 10, 1922), 136 Northeastern Reporter, page 629.*—The company named sued for an injunction against Edward A. Willard and others, members of a molders' union, to prevent certain acts in connection with a strike. The company ran its foundry as an open shop, of which fact notices were posted in the establishment. In the spring of 1921 it was found necessary to reduce wages, and the president of the company requested a committee of foundry employees to meet with him in an effort to arrive at some satisfactory agreement. Several conferences were held without reaching the desired result, and at length, after the foundrymen of Boston had had their wages reduced, the company established a scale by which about one-third of its employees should receive more than \$6.25 per day, one-third should receive \$6.25, and one-third less than \$6.25, but none less than \$6 per day. On May 23 the union met and voted to reject the scale, demanding a minimum wage of \$6.25. During the next two weeks conferences were continued between the officials of the plant and a shop committee of the union, the endeavor being to secure the adoption of the above minimum. The company declined to accept this minimum, but announced that it was willing to discharge all employees worth less than \$6.25 per day, running the plant as an open shop.

An arrangement for a presumably final determination was made at a meeting planned for June 11 at 11 o'clock, of which due notice was given; but on the evening of June 10 the molders struck at the close of their work without notice of their intention and without waiting for the conference agreed upon for the following day. The company contended, upon this showing, that the strike was unlawful. As to this Judge Crosby, speaking for the court, said:

There is much force in this contention. The failure, without excuse, of O'Neil, as the representative of the union, to meet Mr. Barton and discuss the situation for the purpose of coming to some satisfactory agreement was plainly a breach of good faith.

However, assuming “without deciding that the strike was instituted for the purpose of securing higher wages and was lawful,” it was found that the injunction was warranted for other reasons.

It is apparent that the strike was voted because the minimum wage of \$6.25 was not agreed to be paid to the foundrymen. It appears, however, from the master's report that at a conference between the shop committee and Mr. Barton he offered to discharge all employees worth less than \$6.25 a day, but that this offer was not agreed to by the committee. It can not be doubted that the employer had a lawful right to discharge any employee for inefficiency, and if the committee

had accepted his offer and all employees worth less than \$6.25 a day had been discharged, the respondents would have secured a minimum wage of \$6.25 a day.

For a few days after the strike the foundry was closed, but on June 21 it was opened and applicants for work were given employment, signing contracts for the term of 60 days at various rates per hour. Notice of these contracts was sent to the officials of the union, so that they were informed as to their nature. Picketing and persuasion, and in a number of cases threats of violence and the use of profane and vile language followed the employment of these men, urging them to violate their contracts, in some cases offering strike benefits.

The foregoing findings of the master and the proper inferences to be drawn therefrom make it plain that the methods adopted and carried out in conducting the strike were illegal, even if it be assumed that it was lawful in the beginning.

It was equally illegal for the defendants to attempt to induce workmen to break their contracts of employment, either by force and intimidation or by peaceable means of persuasion. Nearly all of the men who were approached by the defendants and urged not to work were under a written contract of employment. Such conduct is clearly unlawful whether made by an individual or by a combination of individuals.

While the contracts in the case at bar provided that the employment should be for a period of 60 days, the action of the respondents in attempting to induce the workmen to break them would have been illegal if the employment had not been for a stated term.

Reliance was placed in a statute (ch. 690, Acts of 1913, G. L. ch. 149, sec. 24) which authorizes persuasion without injury or threat of injury in connection with any undertaking not in violation of marital or other legal duty. The court held this not to apply, since no law would justify attempts to induce breach of contract. After notice of their existence, and even if no contract had been involved, the threats, intimidations, and annoyances and unlawful picketing "were sufficient in themselves to constitute an illegal carrying on of the strike."

The decree issued by the superior court was therefore affirmed.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—CONTEMPT—CIVIL OR CRIMINAL PROCEDURE—*Forrest v. United States et al., United States Circuit Court of Appeals, Ninth Circuit (January 9, 1922). (Rehearing denied February 20, 1922), 277 Federal Reporter, page 873.*—On May 26, 1921, a restraining order was issued against a number of labor unions and their officers and agents, including the Marine Cooks' and Stewards' Association of the

Pacific Coast, with headquarters at San Francisco, upon a complaint which charged that on May 1, 1921, the unions by strike orders and other ways compelled men who had theretofore been employed in operating merchant ships of the United States to leave the vessels. It was further charged in the complaint that the men conspired to injure the property and rights of the United States, that they had caused seamen and others seeking employment or employed to be intimidated, assaulted, and threatened with bodily harm. Contempt proceedings were brought against one Edwin Forrest for a violation of the restraining order. Forrest pleaded not guilty and demanded a jury trial, which was denied. Mendez, a witness for the prosecution, swore to statements to the effect that he was a waiter on the ship *Golden State*; that he went to union headquarters on June 1 to turn in his union card and was told by the collector of the card that he should not return to work on the ship *Golden State*; that two men followed him down the stairs as he left the union headquarters and he was asked why he worked on the *Golden State*; that he was seized by the men and that Forrest attempted to break his arm. Forrest admitted that he was at the union headquarters on June 1 and stated that he remained there but a few minutes and then left; that on the stairs two men were standing in his way and upon requesting them to let him pass one of the men insulted him; that he was going to ask him to take back the insult and "grabbed hold of his arm"; that the man "went to his pocket," apparently for a gun, whereupon Forrest slapped him; that he did not know Mendez or where he was working; and that he knew there was a strike going on but could not say that it was a matter of common talk around union headquarters that an injunction had been issued. After hearing the testimony the district court adjudged Forrest guilty of contempt and ordered him imprisoned for 60 days and fined \$100. Forrest appealed, contending that there was no showing that he had notice of the restraining order. No error was found by the circuit court and the judgment was affirmed. Judge Hunt handed down the decision of the court which is in part as follows:

On direct examination appellant testified in his own behalf that he had no information of the restraining order, but on cross-examination said:

"I might have heard of it, but I never paid any attention to it, because it was never called to my attention particularly."

But, in any event, the association of which Forrest was a member having been a party to the suit in which the restraining order was issued, the service upon the association was notice to him as a member. The mandate of the court was expressly addressed to various associations, including that to which Forrest belonged, and all persons associated with them. He therefore had notice, and his acts must be judged accordingly. Upon the merits the court found the

account of Mendez to be the true one, and we are satisfied that the evidence clearly sustains the finding.

Relying upon *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492 [Bul. No. 95, p. 323], appellant contends that the moving papers were insufficient, in that the papers should have disclosed knowledge that the *Golden State* belonged to one of the plaintiffs in the equity suit, knowledge that Mendez worked on the ship named, and was assaulted because he worked on that vessel, and also should have contained a prayer for punishment. The *Gompers* case is to be distinguished from this. There the contempt was expressly held to be a civil one, established in a proceeding where the complaining party sought a remedy for its benefit, and all parties adopted the theory that the proceeding was part of the original cause and any punishment would be remedial, for the benefit of the private party, rather than punitive, for the vindication of the authority of the court. The court in its conclusions said:

“* * * This was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine payable to the complainant.”

But in the case under examination the United States attorney moved for attachment in the name of the United States and certain agencies of the Government. The affidavits made part of the petition set up the disobedience of the order. They disclosed the publicity of the injunction, and made clear the fact that Forrest was a member of the association mentioned; that he assaulted Mendez, who was an employee on the *Golden State*, a vessel of the United States; and the petition prayed:

“That an attachment issue against * * * officers of the defendant Marine Cooks' and Stewards' Association of the Pacific coast and Edwin Forrest, * * * members, * * * for a violation of the temporary restraining order heretofore, to wit, on May 26, 1921, issued in the above-entitled court and cause.”

Facts essential to jurisdiction sufficiently appeared, and the defendant was furnished with detailed information of the specific charge against him. Failure to pray for any special punishment did not deprive the court of power to proceed. In *Creekmore v. United States*, 237 Fed. 743, section 268 of the Judicial Code (Comp. St. sec. 1245) is carefully examined, and the court of appeals of the eighth circuit said that, while the statute gives almost unlimited discretion as to the character and extent of punishment, no benefit would be derived from requiring special prayer for a given kind of punishment. The service performed by the prayer is simply to aid in determining whether the proceeding is as for criminal or civil contempt. *Schwartz v. United States*, 217 Fed. 866, holds that there is no fixed formula for contempt proceedings, and that it is sufficient if the offense is set out, so as to inform defendant clearly of the charge against him and whether a civil or criminal contempt is alleged, “and this is to be determined by an examination of the whole record.”

It is quite apparent from the record that this was a case of criminal rather than civil contempt, and was rightly so regarded by the district court; and the writ violated having issued in a suit by the United States in its behalf, it is not within the class of con-

tempts where trial by jury is allowed under the provisions of the Clayton Act (38 Stat. p. 738, sec. 22, act of Congress, October, 1914 [Comp. St. sec. 1245b]); and there was no error in denying a jury trial.

LABOR ORGANIZATIONS — STRIKES — INJUNCTION — INTERFERENCE WITH INTERSTATE COMMERCE—*Danville Local Union No. 115 of United Brick and Clay Workers of America et al. v. Danville Brick Co., United States Circuit Court of Appeals, Seventh Circuit (July 27, 1922), 283 Federal Reporter, page 909.*—The Danville Brick Co., an Illinois corporation, was engaged in the business of manufacturing brick at Danville, Ill. The company had an agreement with the Danville Local Union No. 115 of United Brick and Clay Workers of America under which it agreed to operate as a union shop. The agreement expired December 31, 1920. The parties failed to reach a new agreement and the factory was closed January 1, 1921. On April 7, 1921, it was reopened as a nonunion plant. A strike followed, and picketing was resorted to by the former employees, in the course of which certain acts were committed which the company used as a basis for an action for an injunction in the District Court of the United States. A preliminary injunction was granted. An appeal was taken from this order to the United States Circuit Court of Appeals. The question before the court was as to the jurisdiction of the Federal court to issue an injunction. There was no diversity of citizenship. Jurisdiction was predicated solely upon an alleged violation of the Sherman Antitrust Act, which provides that "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." The company alleged that in the course of its business it shipped its products out of the State, and directed attention to a certain contract to furnish brick in the city of Lafayette, Ind., performance of which was prevented by the acts of the union. The acts complained of by the company were the interference with the operation of the plant, that is, with the process of production, which was held to affect the distribution of the goods beyond the State only to the extent that any interference with output ultimately reduces the quantity of goods available for distribution between States.

The court of appeals reversed the court below, with directions to dismiss the bill. Judge Evans stated the reasons for this action, as follows:

The question presented, therefore, is this: Does defendants' interference with the operation of plaintiff's factory constitute "restraint of trade or commerce among the several States," either (a)

on the ground that production of goods destined for shipment out of the State constitutes interstate commerce; or (b) on the ground that the character of the course of conduct involved is such as to have a necessary and direct effect upon interstate commerce? That production as such is not a part of interstate commerce has been repeatedly decided and affirmed.

That acts which interfere with production ultimately diminish the quantity of goods moving in interstate trade is self-evident; and if the interference were sufficiently widespread, the effect upon interstate commerce would be immediate and appreciable. But interference which is purely local in character and confined to a single local industry, as in this case, is so insignificant in its effect that it obviously can not be said to have any direct or appreciable influence in restraining interstate commerce within the meaning of the anti-trust act.

These views find direct support in the decision recently announced in *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570 (p. 157). It would serve no useful purpose to restate the voluminous recital of facts in that case. It is sufficient to say that the issue upon which the judgment in that case was based is identical with the issue in the case at bar.

LABOR ORGANIZATIONS — STRIKES — INJUNCTION — INTERFERENCE WITH INTERSTATE COMMERCE—*Great Northern Railroad Co. v. Local Great Falls Lodge of International Association of Machinists, No. 287, et al., United States District Court, District of Montana (July 27, 1922, and September 8, 1922), 283 Federal Reporter, page 557.*—The Railroad Labor Board, under the authority of the transportation act of 1920 (41 Stat. 456, Bul. No. 292, p. 91), published its decision No. 1036, fixing the wages and salaries of members of what is known as the Federal Shop Crafts, which was to be effective July 1, 1922. The wage scale fixed by the decision was not acceptable to the employees, and a nation-wide strike upon the railroads of the company was called. The Great Northern Railroad Co. brought a suit in equity in the United States District Court for the District of Montana, seeking an injunction against the Local Great Falls Lodge of the International Association of Machinists No. 287 and other local lodges. No restraining order was issued, but because the situation was "fraught with possibilities of grave, irreparable injury" a hearing upon the motion for a temporary injunction was had. District Judge Bourquin granted the injunction against a part of the unions, saying in part:

Of the board's functions and orders it suffices to say they are advisory only, the teeth having been drawn from the bill for the transportation act (41 Stat. 456). Perhaps the strike may be characterized as mutual in that relations between the parties are severed because plaintiff refuses to sell its opportunities for labor to defend-

ants, save on its terms, and defendants refuse to sell their labor to plaintiff, save on their terms.

Be that as it may, as always in like struggles, the third party in interest, society, the general public, is ground between the upper and nether millstones of what it characterizes as the mutual selfishness of servitors in quasi public employment. It justly suffers, for that it fails to sufficiently control, as it rightfully can, the activities of both parties, and it will pay the price.

The strike hampers and threatens to incidentally stop plaintiff's interstate transportation. This is not unlawful and warrants no injunction, so long as but an unintended consequence of lawful exercise of defendants' right. Although in conflict in some particulars, the evidence is clear and undisputed in sufficient others to disclose that plaintiff's efforts to continue train service are virtually nullified by threats, force, and intimidation inflicted upon such employees as it secures.

If in the emergency defendants can not restrain their members, it is the duty of the court in law enforcement to do so, therein serving the best interests of defendants no less than those of plaintiff, nor overlooking those of the third party aforesaid.

All voluntary associations, including labor unions, for acts of their members are responsible to some extent on the theory of agency. In view of the finding that members of some of defendants, by threats, force, and intimidation, inflict and threaten to inflict irreparable injury within the meaning of that term upon plaintiff's property right to carry on interstate transportation, the law is settled and clear, and virtually conceded by defendants, that plaintiff is now entitled to therefrom restrain such defendants and their members.

No evidence was found to support the charges against some of the unions, and as to them the writ was dismissed. Others not present were temporarily enjoined and directed to appear at a later sitting of the court. As to the injunction, Judge Bourquin said:

In respect to the terms of the order, it is proper to observe that they must be within section 20 of the Clayton Act (Comp. St., sec. 1243d), which provides that in strikes exemployees shall not be restrained "from recommending, advising, or persuading others by peaceful means" to quit work, or to refuse to work for the employer, nor "from attending at any place where any such person or persons (exemployees) may lawfully be, for the purpose of peacefully obtaining or communicating information" or to exercise persuasion as aforesaid, nor "from peaceably assembling in a lawful manner and for lawful purposes." The order must also comply with section 19 of the act (sec. 1243c), viz, "Specific in terms, and shall describe in reasonable detail * * * the act or acts sought to be restrained."

It must be remembered the strike is lawful, and both parties thereto, if so foolish, to put it mildly, as to persist in disagreement, are to have the fullest freedom within the law, each to promote its or their success over the other—that is, plaintiff to secure employees if it lawfully can, defendants to prevent if they lawfully can. They are equally entitled to receive from the court protection against intimidation, and any order of restraint, though in terms directed to one

party alone, even as any like order in any suit, imposes correlative restraint upon the other. Its office is protection and not a shelter for aggression. If abused, a pen may unmake it as a pen hath made. The court's order is to restrain defendants from exceeding the bounds of the Clayton Act, but not to intimidate them from enjoying all within those bounds. In the exercise of the rights that the Clayton Act assures to defendants they may go to the very line between the lawful and the unlawful, carefully avoiding crossing into forbidden territory.

The principal thing is that workmen conscientiously heed the mandate of the law and its instruments (the courts) that threats and force and their intimidation must not be used to promote success in strikes, and that of necessity, their's as well as others, such methods always have been and always will be under the ban and criminal. In respect to pickets, defendants will be allowed two at any point of access to plaintiff's premises where men usually or may be expected to enter. If the entrants are numerous, perhaps more may be necessary. The Clayton Act, by "person or persons," intends that the number of agents shall be governed by circumstances. Obviously, not otherwise could the object of the act be attained.

Order accordingly, and effective on bond in the sum of \$5,000. Either party may move to modify the order as circumstances may require.

At the hearing on August 21, 1922, pursuant to the foregoing decision of July 27, 1922, two of the defendant unions sought the dissolution of the temporary order against them. The request was granted as to one, but the other had engaged in conduct found to call for restraint. In continuing the order the court said:

The right of employees, of men, to work (of which so much is heard during strikes and so little other times) is but incidental and aids plaintiff [the railroad company] none. However much that right be infringed, plaintiff can not complain, save to the extent that it is part of unlawful methods inflicting irreparable injury to plaintiff's property rights. The right itself is not absolute, but qualified—the right to sell labor if a buyer be found, to solicit a job (and often hopelessly and unavailingly), and to work if and as long as the buyer or job giver consents and no longer. Society has not yet progressed to insure work, or to recognize a substantial interest in a job had, though perhaps the spirit of the times, if not their necessity, even as the Clayton Act, tends in the direction of the latter at least.

In respect to the contention that the antitrust act (Comp. St., secs. 8820-8823, 8827-8830), in connection with section 16 of the Clayton Act (Comp. St. 8835o), warrants injunction against even peaceful persuasion of employees to cease work, if the result otherwise is interruption of plaintiff's interstate transportation, it is unmain- tainable. The interruption, an unintended consequence of lawful exercise of a right sanctioned by the law before and since the acts aforesaid, sanctioned by section 20 of the latter act aforesaid, is *damnum absque injuria*, and not within said acts, so far as injunctive relief is concerned.

In the matter of defendants' request that the order enjoin plaintiff from maintaining more guards than pickets where the latter are stationed, if and when it is made to appear that guards in any number are infringing upon defendants' rights, a corrective can be applied. The order in respect to the number of defendants' agents or pickets can be amended when necessity is made to appear as suggested in the earlier and foregoing decision. Neither that decision nor this assumes to limit the number composing any defendants' groups for persuasion only. What is reasonable and only persuasive is a safe guide.

Order accordingly, effective on bond in the sum of \$5,000.

LABOR ORGANIZATIONS — STRIKES — INJUNCTION — INTERFERENCE WITH INTERSTATE COMMERCE — SHERMAN ACT — CLAYTON ACT — *United States v. Railway Employees' Department of American Federation of Labor et al., United States District Court, Northern District of Illinois (September 23, 1922), 283 Federal Reporter, page 479.*—The Railroad Labor Board was created in 1920, for the purpose of settling disputes between railroad employers and employees (41 Stat. 469). On June 5, 1922, the board published its decision No. 1036, fixing the wages of members of what is known as the Federal Shop Crafts, to be effective July 1, 1922. The employees affected by the decision were dissatisfied with it and as a result a strike order was issued, to become effective on the same date. About 90 per cent of the 400,000 members of the Federal Shop Crafts left their employment. On September 1, 1922, application was made before Judge James H. Wilkerson in the United States District Court for the Northern District of Illinois by the United States, through the Attorney General, for an injunction against the strikers and others. A temporary restraining order was granted the same day (*Monthly Labor Review*, October, 1922, p. 176). On September 11 the order was renewed with some modifications, and the hearing was proceeded with. Evidence was presented and arguments heard for and against the issuance of an injunction, but a preliminary injunction was granted. Judge Wilkerson, in granting the injunction, reviewed the facts and decided in favor of the Government, stating reasons as follows:

In disposing of this motion it may be well at the outset to emphasize what this case is not. It is not 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. It is not a private bill to enjoin indirect injury, as one caused by a secondary boycott, to the property of the complainant. It is, to use the language of Circuit Judge Baker, speaking for the court of appeals, seventh circuit,

in *Gasaway v. Borderland Coal Corporation (C. C. A.)*, 278 Fed. 56, 63, a bill "in the public interest by the government, as *parens patriae*, to enjoin * * * an unlawful conspiracy or combination in restraint of trade." It is the conspiracy which is inflicting the public injury for which redress is sought.

The right of the United States to maintain a bill like this under its general equity jurisdiction is no longer open to debate. In the *Debs Case*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, the court held that the National Government is charged with the duty of keeping the highways of interstate commerce, including railroads, free from obstruction. Holding that such obstruction is a public nuisance, and sustaining, after an exhaustive review of the authorities, the power of a court of equity to take jurisdiction in such cases by an information filed by the Attorney General, the court said:

"Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by an injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case."

Certainly an obstruction which results from blocking the tracks or tearing up the rails does not differ in substance from an obstruction which results from preventing the maintenance of rolling stock and equipment and thereby destroying the instruments by which passengers and property are carried over the rails. Nor can the *Debs case* be differentiated because the strike was called in aid of a boycott. The ground of jurisdiction asserted in the *Debs case* was the obstruction of interstate commerce and the mails, not the motive which actuated those who created the obstruction.

That the provisions of the Sherman Act apply with particular force to attempt to interfere with and obstruct the highways of commerce and the instrumentalities by which commerce is carried on is pointed out in *Northern Securities Co. v. United States*, 193 U. S. 197, 342, 24 Sup. Ct. 436, 459.

The language of the statute makes no distinction between classes. It prohibits any combination whatever, whether of labor or capital, to secure action which essentially obstructs the free flow of commerce between the States.

The defendant union claimed that the Clayton Act, sections 6 and 20, restricted the issue of injunctions in such cases as the present. Judge Wilkerson found the essential characteristics of a labor dispute, within the meaning of this act, not to exist here, saying:

This [twentieth] section introduces an exception to the power of a Federal court of equity to give injunctive relief under general principles of equity jurisdiction. The field of that exception is hedged about with limitations of a threefold character. Those who rely on the exception must bring themselves within all three limitations in order to take advantage of its exemption and privilege. The first limitation is to the character of the parties to the suit. The second limitation is in the subject matter of the action. The third limitation of the exception is in the definition of acts that may not

be enjoined in such cases as fulfill the previous requirements. That this suit of the United States does not fall within the exception is too plain for argument. The only portion of the section which even remotely touches any question involved in this case are the concluding words:

Certainly it was not the intention of the Congress to make the acts specified in section 20 immune from punishment, even though they are done in furtherance of an unlawful or criminal conspiracy. Granting that those acts may not be punished when done under circumstances which amount to nothing more than a labor dispute, that controversy may broaden out so that the purpose of those waging it may include the accomplishment of unlawful ends. Can it be said that, merely because the element of a labor controversy remains in the situation, the actors may not be punished when their purpose is not only the accomplishment of something with respect to wages or conditions of employment, but also the destruction of property, the invasion of the rights of others, and the infliction of injury upon the public? Such an interpretation conflicts with elementary rules of statutory construction. Moreover, it must be borne in mind that the Sherman Act punishes the conspiracies at which it is aimed on the common-law footing; that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. To give to section 20 any such construction as has been here urged by the defendants would be to make, as to labor combinations, a law under which the restraint of trade could be enjoined but the means through which the restraint was accomplished could not be enjoined.

The law is clear, in my opinion, that if the dominating, primary purpose of the combination is to restrain trade, or to do things unlawful in themselves, and in which, by reason of their inherent nature operate to restrain trade, the purpose of the combination is unlawful, and that purpose may not be carried out, even by means that otherwise would be legal.

Continuing, he said:

We come, then, to a determination of the question of fact. Have we here a combination, the primary, controlling purpose of which, regardless of disputes about wages and conditions of employment, is the obstruction of interstate commerce; or, from another point of view, have we a combination of actors in a labor dispute, adopting for the accomplishment of their ends unlawful means necessarily obstructive of interstate commerce, and so interwoven with acts lawful in themselves that the whole plan must be condemned as a restraint of trade? In cases of this kind the proof is, of necessity, largely circumstantial. Acts must be taken in their relation to each other. Men must be presumed to intend the natural consequence of their acts. Proclamations of nonparticipation and exhortations to keep the peace can not relieve from responsibility for a series of acts so inter-related and interwoven that they bear on their face proof of design and plan.

None of the defendants in this case have answered the bill. Two have filed motions to dismiss, and have presented affidavits which leave a large number of averments of the bill unchallenged on the

record. The fact that the defendants have been acting in combination is not denied. On the contrary, the defendants themselves have produced evidence of the closest association and cooperation on the part of the defendant organizations. That the officers of the unions gave directions concerning the strike from the outset is likewise admitted. The only material question really in dispute on the record is the responsibility in law of the defendants for the large number of unlawful acts shown to have been committed, many of them by unknown parties.

Notwithstanding the warnings against acts of violence set out in the instructions of June 27, 1922, there began, throughout the country, a series of depredations which rapidly developed, in some portions, into a veritable reign of terror. Railroad bridges were dynamited; spikes were removed from rails; obstructions were placed upon railway tracks; bombs were exploded on tracks and in railroad yards and hurled at moving trains. Notwithstanding the admonitions of the leaders of the combination to use peaceful means only, the real situation at most of the places where the strike was in progress was that employees were insulted, assaulted, and otherwise intimidated. The word of the "peaceful" picket, spoken in the vicinity of the shops, was emphasized in the darkness of night by the club and pistol of the "unknown party." Regardless of the instructions that no injury must be inflicted upon property, there was sabotage on a large scale. Engines, cars, and equipment were tampered with, and innumerable acts of malicious mischief committed, which endangered the lives of both passengers and those operating trains.

These unlawful acts are shown to have been on such a large scale, and in point of time and place so connected with the admitted conduct of the strike, that it is impossible on the record here to view them in any other light than as done in furtherance of a common purpose and as part of a common plan. This record does not permit the conclusion that those who are at the head of this combination did not actually know that these things were being done, and that they were the direct result of the methods by which the strike was being conducted. And if they did not actually know they were charged with such knowledge.

What is legal knowledge of a fact? It seems to have been assumed by the defendants that no one is chargeable with more knowledge than he chooses to have; that he is permitted to close his eyes when he pleases upon all sources of information, and then excuse his ignorance by saying that he does not see anything. In criminal as well as civil affairs, every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry. Yet, with knowledge of this intolerable situation, nation-wide in its scope, the leaders of this combination repeatedly sent out to the members of their organizations bulletins and communications urging the men to greater activity.

These defendants will not be permitted, upon the record here, to deny responsibility for these unlawful acts. They will not be permitted to continue acts which, even though they may be peaceable and lawful in themselves, it has been demonstrated are only part

of a program of unlawful conduct and are done for the accomplishment of an unlawful purpose. It hardly need be said that this conclusion is upon the record as it now stands, and leaves the defendants free to present their contention again, if and when a different case is made by the pleadings and proof.

It is asserted by the defendants that to prohibit some of the acts against which the complainant seeks an injunction is to deprive them of fundamental rights guaranteed by the Constitution. This contention has been answered by what has been said with reference to the unlawful purpose of the conspiracy. "The cardinal error of defendants' position," to use the language of the Supreme Court in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 253, 38 Sup. Ct. 65, 73, "lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others.

The record in this case shows that the so-called peaceable and lawful acts are so interwoven with the whole plan of intimidation and obstruction that to go through the formality of enjoining the commission of assaults and other acts of violence and leave the defendants free to pursue the open and ostensibly peaceful part of their program would be an idle ceremony.

Defendants assert, as a ground against the granting of the relief sought by the complainant, that the strike was a defensive measure against a plot of the railway companies to destroy the unions. The argument seems to be that the defendants are justified in inflicting upon the public any injury which it may be proper for them to inflict upon their adversaries in this conflict. It must be remembered, however, that this is a suit brought for the benefit of the public. Restraint of trade may not be adopted as a weapon in industrial warfare. The court must act upon the case now before it, and give its aid to the removal of the obstructions to commerce which are found to exist.

It has been suggested by the defendants that, as the strike has been settled on some of the railroads, there is no need for the injunction, or at least for one of the breadth sought by the Government. The right to relief is to be determined by the status existing at the time of the filing of the bill. Rights do not ebb and flow. If they are invaded, a recourse to courts of justice is rendered necessary, and it is no defense to the invasion of right that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed.

Defendants have submitted a motion to dismiss the bill. The first two grounds challenge the sufficiency of the bill as a basis for the relief sought. The third ground is that—

"Relief was sought in said bill and was obtained in said restraining order for ulterior and unlawful purposes, upon misrepresentation and suppression of matters of fact and law, the disclosure of which was required by good faith."

During the hearing, which has lasted almost two weeks, the defendants have neither offered nor suggested a scintilla of proof tending to establish this averment in the motion to dismiss. The restrain-

ing order was entered after a hearing at which both the averments of the bill and the questions of law involved were fully and fairly presented.

It follows, therefore, that the motion to dismiss the bill must be denied. It follows, also, that the complainant is entitled to an injunction prohibiting the parties to this combination from committing the unlawful acts charged, the effect of which is to obstruct interstate transportation and the carriage of the mails or to restrain interstate commerce, as well as the acts charged which are lawful in themselves, when done in furtherance of a conspiracy to obstruct interstate transportation and the carriage of the mails or to restrain interstate commerce. The parties will be heard as to the form of order to be entered in conformity with the views here expressed.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—ORDER OF RAILROAD LABOR BOARD—*Portland Terminal Co. v. Foss et al., United States District Court, District of Maine (July 29, 1922), 283 Federal Reporter, page 204.*—The United States Railroad Labor Board was established by the transportation act of 1920 (41 Stat. 456, see Bul. No. 292, p. 91). Under this act the Portland Terminal Co. entered into an agreement with Thomas C. Foss and others, members of an organization known as the Brotherhood of Railroad Station Employees. The agreement was to be effective December 16, 1921, and with an addendum of March 8, 1922, was said to be continuing in force. On March 21, 1922, the union requested a conference with the company for the purpose of revising certain rules in the agreement. On April 5, 1922, this conference was held between representatives of both parties, but they failed to reach an agreement and decide their differences. There being no adjustment board, as provided in the transportation act, the union referred the dispute to the United States Railroad Labor Board under a provision of the transportation act. The company filed its reply, and a hearing was had thereon on June 21, 1922. In accordance with the decision of the Labor Board the wages of employees were changed from time to time following a decision effective July 1, 1922. Foss, chairman of the board of adjustment of the union, requested the railroad to restore the rates of pay that were in effect prior to this last decision of the Labor Board. The company arranged for a conference with the representatives of the brotherhood to be held on July 17, 1922, and pending such conference the secretary of the union, with the approval of the chairman, distributed to the members of the union a strike ballot. Upon obtaining information that a meeting had been held on July 14, 1922, and that a large majority of the membership of the union favored the calling of a strike, proceedings were brought in equity to obtain an injunction against the union, and a restraining order was granted. At the hearing on the motion

for a preliminary injunction the case was submitted under the act, claiming that it was the duty of the employees to remain under the wages which the Labor Board had established until those wages were changed in accordance with the terms of the transportation act. The union contended that under the circumstances a court of equity could not by injunction prevent an individual, alone or in concert with others, from quitting the personal service of another, and that these employees were not bound to follow the method of settling disputes marked out by the transportation act, but at any time could abandon their contract under the statute and pursue the strike remedy.

The questions presented to the court were whether the complainant had a right of action, and, if so, did the facts show an irreparable injury that would be protected by an injunction. These questions were settled in favor of the company, and a temporary injunction was granted. District Judge Hale stated the reasons of the court, as follows:

Many cases have been brought to my attention, decided before the transportation act was passed, where it has been held that courts may not enjoin a man from quitting the personal service of another, either individually or in concert with others; that the right to quit work and to strike is a personal privilege which can not be prevented by injunctive process, and that this is true, even when a strike is made in violation of a service contract.

The rights of these parties depend largely upon the transportation act of 1920, under which their contract was made.

This statute was passed some years after the Clayton Act, and with an evident intention to meet some questions raised by that statute. Congress clearly had public conditions in view, and took into consideration such suggestions as were made by Mr. Justice Harlan, to which I have alluded, that certain great evils "should be met and remedied by legislation restraining alike employees and employers." The act was clearly intended to cover the transportation field, and to regulate, so far as possible, the relation between common carriers engaged in interstate commerce and other parties. It sought to protect the public by conferring on the Interstate Commerce Commission a very extensive control in the matter of rates and regulations. It imposed the duty on that commission of establishing rates which would enable railroads to earn such a remuneration as the commission might deem fair upon the value of the road property and public use. The statute sought further to regulate the relations between carriers and their employees by establishing means for the adjustment of all matters of controversy; it protected carriers from extortionate demands of their employees, and employees from arbitrary conditions imposed by employers. It recognized the interest of the general public in transportation service and sought to protect it from disasters incident to an interruption of the transportation business. It undertook to establish a working means for the settlement of labor disputes without resort to strikes and other old methods.

Congress had power to pass an act of this sort regulating rates. In *Wilson v. New*, 243 U. S. 332, 352, 353, 37 Sup. Ct. 298 [Bul. No. 224, p. 144], the Supreme Court held, Mr. Chief Justice White speaking for the court, that Congress had an inherent power to take action with reference to the settlement of disputes between parties by establishing the legislative standard of rules and of wages binding as a matter of law upon the parties.

In the transportation act, Congress imposed no impossible burden upon the employees; it did not compel them to make a contract under the transportation act. Without doubt the law favors the settlement of disputes without resort to force.

In the case before me the employees made the agreement shown by the facts between the parties. It appears that these individuals did "consent to waive their right to the use of force," and to regulate their conduct by the act which was clearly intended to "settle" disputes, and not to project parties into the midst of a dispute and then leave them to adopt other methods of settlement.

It appears that, by their agreement in the case before me, the employees do expressly consent that the change in their working agreement made by the Labor Board should be made. The decision of the Labor Board appears to provide expressly that it should be incorporated in the existing agreement and become a part of said agreement. The employees, then, are under a distinct obligation, I think, to accept the decision of the Labor Board as a part of the working agreement which they have made.

I find nothing in the facts brought to my attention to lead me to the conclusion that the agreement has been terminated. The request for a conference on the part of the employees, in accordance with the provision of the agreement, indicates that the employees have not regarded the agreement as terminated, either by the decision of the Labor Board or in any other way. Of course, each employee has the right to quit the personal service of another when he chooses; but the strike ballot was a clear challenge to the method of settlement marked out by the transportation act and adopted by the employees in their contract.

In leaving parties to their remedy under the transportation act, in pursuance of a contract signed by them, the court is not imposing a burden upon the parties; it is recognizing the position in which the parties have placed themselves. There are many instances where parties elect to proceed under certain remedies and thereby waive their rights to other remedies. In cases where parties have proceeded in suits under the employers' liability act (Comp. St., secs. 8657-8665), such parties are held to have waived their common-law remedy. In the case at bar, I think it must be held that these defendants have, by their contract, elected to have their rights adjudged under the transportation act, and to have referred their case to the Labor Board, with the understanding that such board is "to hear and decide the dispute." The rights of the defendants are, then, in my opinion, to be adjudged under the transportation act of 1920, in pursuance of which their contract is made.

The Clayton Act provides that no injunction shall be granted by courts of the United States involving any dispute concerning terms

or conditions of employment, "unless necessary to prevent irreparable injury to property or to a property right."

In passing upon the question of irreparable injury, we must recognize that the legislature has attempted to "substitute processes of justice for the more primitive method." It appears by the statement of facts in the case at bar that the strike would seriously interrupt the operation of the Portland Terminal Co. An examination of the contract and of the whole case shows that a question is raised involving rights of the public. I think the court may well find that an irreparable injury would be done to the complainant and to the public by the issuing and carrying out of the strike order.

The transportation act marks out no method for its enforcement; it leaves this to the courts. No method has been brought to my attention by which the rights of the parties could be determined, except by a bill in equity, containing substantially such prayers as are found in the bill before me.

A temporary injunction is ordered as prayed for.

LABOR ORGANIZATIONS — STRIKES — INJUNCTION — PROPERTY RIGHTS—INTERFERENCE OF STRIKERS—*Crane & Co. v. Snowden, Supreme Court of Kansas (November 4, 1922), 210 Pacific Reporter, page 475.*—Crane & Co. was a corporation engaged in the business of furnishing printing, binding, stationery, and office supplies. On May 2, 1921, the printers, binders, and persons employed in various printing establishments in Topeka, including that of Crane & Co.'s, declared a strike and quit work by reason of a controversy between them and their employers involving hours of labor.

Crane & Co. continued to carry on its business and employed other workmen to take the places of the men on strike. The company, however, brought an action to enjoin certain of the strikers and others from continuing a course of unlawful conduct.

The defendants, it was alleged, "were pursuing a course of conduct which would result in serious and irreparable damage to plaintiff by attempting to intimidate and frighten its employees, causing many of them through fear and annoyance to stop work." The defendants demurred to the petition, contending that it did not state a case falling within section 7149 of the General Statutes, 1915. That section provides:

That no restraining order or injunction shall be granted by any court of the State of Kansas, or a judge or the judges thereof, in any case between an employer and employee, 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, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must

be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

The demurrer was overruled, and an appeal was taken to the supreme court. But this court affirmed the ruling of the lower court, saying:

The petition here alleges that plaintiff has no remedy at common law, for the reason that the defendants are not financially responsible; in the same connection it alleges that the injury plaintiff suffers, and will suffer, at their hands is irreparable in its character and can only be prevented by the equitable action of the court. The petition alleges that the defendants conspiring and cooperating together, as well as acting individually, have placed themselves about the premises of the plaintiff and trespassed thereon and upon the sidewalks in front of its place of business, congregating at times in numbers of more than 100, that they have attacked, annoyed, insulted, and interfered with plaintiff's employees, many of whom are in constant fear of violence and injury from the defendants, who have repeatedly called the employees of plaintiff, "scabs," "rats," and other insulting and abusive names, and have interfered physically with the ingress and egress of plaintiff's employees to and from the plaintiff's building.

It appears from the averments of the petition that some of the plaintiff's employees are former members of unions and that others are persons who have sought employment with plaintiff. The petition alleges that the defendants have assailed plaintiff's employees with covert threats implying violence, "in that they have stated in a frightening tone of voice" that if plaintiff's employees did not quit their jobs they would wish they had and would regret remaining with plaintiff as employees; that defendants are systematically, collectively, and individually engaged in such conduct; that this conduct on the part of the defendants tends to demoralize plaintiff's employees, reduce their efficiency as employees, and injures plaintiff in getting out work which its employees have been hired to perform, and to delay plaintiff in completing and making delivery under his contracts with the public. These averments are sufficient to show that the plaintiff has no adequate remedy at law.

Another contention is that the petition fails to show or allege any irreparable injury to property or to a property right. It is said that "property" as used in the statute means something both physical and tangible, something concrete, and "right," something growing out of this physical, tangible, concrete thing. This in the face of the averments of the petition that the interference and annoyance of plaintiff's employees by threats have interfered and continue to interfere with and obstruct the plaintiff's business. To assert that the only possible support for this claim of plaintiff's is that it has a proprietary interest in its employees—in other words, that plaintiff's claim in this respect can be upheld in the courts only upon the theory that plaintiff's employees are its chattels and slaves—is absurd. The plaintiff is not required to do more than state the facts upon which it bases its cause of action. Its right to conduct its own business, without interference of the defendants physically and otherwise as set

forth in the petition, is a right which the courts will recognize as a property right; and the acts and conduct of the defendants, which the demurrer admits, show that the injury to plaintiff's business is irreparable. The judgment is affirmed.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—PUBLIC WELFARE—MILK DELIVERY—*Gottlieb v. Matckin, Supreme Court of New York, Special Term (November, 1921), 191 New York Supplement, page 777.*—This case was before the supreme court on application for an injunction to restrain the drivers of milk wagons from interfering, by picketing or otherwise, with the delivery of milk in the city of New York. The opinion states no facts except by inference. It is reproduced in full as follows:

Uninterrupted delivery of the milk supply to the people of this city is so vital for the preservation of the general health of the community, and especially children and invalids, that any organized effort to interfere therewith must be regarded as an act of hostility to the public weal and such an unlawful purpose as calls for the exercise of the full authority of the courts and police authorities. Whatever may be the right or wrong of the present wage controversy, the health of this entire community can not be made subservient thereto. Picketing and other acts alleged against the defendants have been held not to be unlawful under ordinary conditions, but when linked with a purpose inimical to the welfare of the community, they become unlawful. This court would hesitate in an ordinary wage dispute to grant the relief asked for herein, but feels that it is its duty to assert the full power of the court under the circumstances to protect the lives and health of the people of New York. The motion to restrain the defendants is therefore granted, with notice to the defendants that any disobedience of the order herein will be visited with the fullest measure of punishment within the power of this court.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—SURRENDER OF ROUTE BOOKS OF DRIVERS—*Borden's Farm Products Co. (Inc.) v. Sterbinsky, Supreme Court of New York, Special Term (January 1922), 192 New York Supplement, page 757.*—This case arose out of the same industrial dispute as the Gottlieb case above, and involved the refusal of drivers of milk wagons to surrender their route books. The action was brought by the company named and others against Sterbinsky, president of the Local No. 584 of the Milk Wagon Drivers' Union, seeking a mandatory injunction. It was the custom of dealers to furnish their drivers with route books in which were the names of customers, and in which the drivers entered the amounts collected. On the basis of monthly settlements based on these entries the men were paid for their services and the company reimbursed for the milk sold. The drivers of this union

refused to return their books when they went on strike, the number of such books being about 2,200. More than 400,000 customers were said to be listed in these books, and the amount of uncollected money was in excess of \$1,500,000. "It is obvious that a serious situation arises because the plaintiff companies are powerless, by not possessing these books, to know who their customers for the month of October were, and what the amount of the individual indebtedness of each customer was."

Judge Dike, speaking for the court, stated the facts as above, and said:

It is apparent that the individual members of the unions can not be punished for contempt in case any order of the court should be made directed against them unless the court is satisfied that they have knowledge of the injunction; it being conceded that none of the individual drivers have been served, and that the president of the union alone has appeared. If, however, the court is satisfied that such defendant drivers have knowledge, it would seem that they would be amenable to punishment.

The unionization of labor has developed rapidly in the last few years, and the organizations have become more elaborate, as well as more extensive. The court must assume that in such labor unions there is complete organization, as would be expected in such elaborate associations; that members are amenable to discipline; and that members are subject to notice from their officers. It is inconceivable, after the publicity given to the injunction order of Mr. Justice Kelby, that any member of these unions is ignorant of its provisions. The injunction here runs against the president named and each and every one of its members.

Cases were then cited in which the members of unions were held to be subject to injunctions because of the fact of membership in the union against which the injunction ran, it not being necessary that each one be a party to the suit or named in the injunction, if only knowledge of the injunction appears to exist; quoting from a decision by the United States Supreme Court, *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, in which it was ruled that so long as a person "appears to have had actual notice," he need not be either a party to the suit nor be actually served with a copy of the injunction.

The concluding paragraph sets forth the nature of the complaint and the terms of the order. It is as follows:

The gist of the bill of complaint is conspiracy. It is urged that the members of Local Union No. 584 are conspiring together to withhold the route books. Another union, Local No. 147, upon direction of its president, immediately delivered the route books to the respective employers. I therefore feel that a mandatory injunction is proper, but I also feel that each of these drivers, by virtue of the entries made by each one of his October sales, has also

a property right or interest in the book issued by the respective plaintiff companies, and it is for that reason that I modify the relief demanded by the plaintiff companies, and direct that the defendant local unions, their officers, agents, and each and every member thereof who have not returned their books to the respective plaintiff companies shall deposit said books in this court, where either side may have such proper access to them, under order of the court, as may protect the interests that each may have therein.

This order was affirmed by the appellate division without opinion on February 3, 1922 (192 N. Y. Supp. 915).

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—ANTI-INJUNCTION LAW OF OREGON—CONSTITUTIONALITY—*Greenfield v. Central Labor Council of Portland and Vicinity, Supreme Court of Oregon (May 21, 1922), 207 Pacific Reporter, page 168.*—This case was before the Supreme Court of Oregon on a rehearing, an opinion therein having been previously announced October 1, 1920 (192 Pac. 783, see Bul. No. 290, p. 262). George L. Greenfield was a merchant of Portland, conducting retail stores for the sale of boots, shoes, and other footwear. The defendants were a union and its officers and members. An injunction against picketing had been allowed in the trial court, whereupon the union appealed, claiming that under the statute of the State such an injunction could not issue. The supreme court at that time upheld the law as constitutional, and modified the injunction in certain respects. In its modified form the union was permitted to employ two pickets during the business hours of each day and to station one of these on the outer edge of the sidewalk in front of each of the two stores of the plaintiff, wearing a sash bearing the words: "Unfair to organized labor, Local Union 1257." From this Greenfield appealed, asserting that all picketing was an unlawful invasion of a property right, constituting a continuous trespass, and, whether peaceful or not, "is a means employed by men acting in concert and in furtherance of a conspiracy to do an unlawful act."

The facts as found by the trial court were accepted, including the account of the nature of picketing in which misrepresentations were made as to the higher prices of goods in the plaintiff's store; the use of loud tones in addressing customers, and the interference with business inflicting "direct and intentional injury upon plaintiff's business," and a finding that "such injury was not the incidental result of defendants' lawful efforts to benefit themselves or their friends." Damage would be inflicted which was irreparable, the defendants being insolvent, and no "plain, speedy, or adequate remedy at law" being available.

Chapter 346 of the Acts of the Oregon Legislature of 1919 resemble in essential parts the Clayton Act and the Arizona statute found unconstitutional in the case of *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 (see Bul. No. 309, p. 191). This statute was said by the defendant union to authorize picketing and the other acts engaged in, of which Judge Brown, speaking for the court, said:

The language of the statute is plain. The words are to be given their ordinary meaning. It was the intention of the law-making body to pass a valid and constitutional act. It is our duty, whenever possible, so to construe a statute as to make it square with the State and Federal Constitutions. This statute, however, could not be held valid, if intended and construed as a shield of protection for persons unlawfully engaged in the destruction of plaintiff's property rights. It is a fundamental principle of law that courts are open to all on like terms.

The fact that a similar law of Massachusetts (ch. 778, Acts of 1914) had been held unconstitutional by the supreme court of that State in *Bogni v. Perotti*, 224 Mass. 152, 122 N. E. 853 (see Bul. No. 224, p. 181), was adverted to, as well as the ruling of the supreme court in the case of *Truax v. Corrigan*. In the latter, the Arizona statute was held unconstitutional "as construed by the Supreme Court of Arizona in that case." Extensive quotations were made from this and other decisions, pronouncing the *Truax* case "the most important case involving trade disputes that has been determined in years. Under that opinion construing the fourteenth amendment, no State can pass a law legalizing such picketing as took place in the *Truax* case." The opinion concludes:

In view of the teaching of the authorities, we could not hold chapter 346, Laws of 1919, valid if construed to be a justification of the manner and method of picketing in the case at issue. The patrolling was not done for the purpose of obtaining information, nor yet in order peacefully to persuade the employees to quit work. It is a case of boycotting. Had no strike existed, would it have been lawful for the pickets employed in this case to take their stand at the entrances to plaintiff's places of business, or to patrol the sidewalks in front thereof, so as to cause the entrances to such stores to be obstructed to some extent, and during all the business hours of the day, week after week, to call out in loud tones, denouncing plaintiff to his customers and others, advising them not to purchase anything from him, but to go elsewhere if they would buy, thus causing annoyance and substantial loss in business? We think not. If such conduct is not lawful in the absence of a strike, it is not legalized by a strike. A man has a right to pursue his vocation in a peaceful manner.

From the authorities we deduce the doctrine that it is as much the duty of a court of equity to protect a man's right to follow his lawful business without illegal interference as to grant injunctive relief to prevent the destruction of his physical property. The first duty of the State is so to administer its laws as to enforce order.

Intimidation and good order can not coexist in front of the entrances to plaintiff's stores.

This case is affirmed.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—GOOD WILL AS PROPERTY—*Robinson v. Hotel & Restaurant Employees, Local No. 782, Supreme Court of Idaho (April, 1922), 207 Pacific Reporter, page 132.*—W. P. Robinson and others, proprietors of certain restaurants in Boise, sought an injunction against the labor union named to prevent picketing and other interference with the conduct of business. The complaint alleged that on or about March 20, 1920, the union ordered the employees of the plaintiffs to strike, which they did. Since that date other employees have been secured, but boycotts and picketing have interfered with the conduct of the business. Placards carrying the words "This house is unfair to organized labor" have been displayed and pickets have loudly declared the same, using such remarks as "Go where they have all white help; this beanery is on the bum; why not patronize a union house, and you won't have to turn your back to the public, and you will not be ashamed; this house is unfair and will be unfair to you." As a result the daily receipts of the various restaurants affected have been reduced in large sums, as from \$180 to \$75 per day, from \$350 to \$200, from \$200 to \$85, etc. It is charged that these acts "were and are a part of a scheme to prevent persons from entering the employment of the plaintiff and continuing in their employment, and from patronizing them at their said places of business." An injunction was sought against the parties as maintaining "a nuisance and obstruction to the plaintiffs and to persons in their employ."

The complaint was demurred to, but the district court of Ada County issued an order directing the union to show cause why an injunction should not be granted, issuing at the same time a temporary restraining order. This order required the union and its members to "absolutely desist and refrain from in any manner interfering with or hindering or obstructing the plaintiffs" by the use of pickets or going upon the premises occupied by the plaintiffs, "or in any manner coercing or compelling or inducing, or attempting to coerce or induce, by any species of threat, intimidation, force, or fraud, or violence," any present or prospective employees or patrons in regard to their relations with the plaintiffs. The use of insults, gibes, or jeers, or the carrying of placards or banners containing covert or open or other threats or intimidations was also forbidden. "Engaging in what is commonly known and designated as picketing," whether singly or collectively, at the entrances to the several restaurants of the plaintiffs was enjoined.

On the return day the union filed affidavits to the effect that pickets were instructed to and did walk at least 10 feet away from the buildings wherein the business of respondents was conducted; that they were instructed to make no remarks except in an ordinary tone of voice, and that not more than two pickets were engaged at any one time or place, these being for the most part waitresses belonging to the union. The affidavits disavowed malice or any purpose to destroy the business of the plaintiffs or to damage it, but the movement "was conducted for the sole purpose of the economic benefit of the members of the organization as laborers and in pursuance and furtherance of the purposes of the strike." They claimed that there was no intimidation that would prevent the exercise of one's own free will as to patronizing or not patronizing the places picketed.

Cases recently before the Supreme Court of the United States, as well as others, were cited, after which Chief Justice Rice, speaking for the court, announced that "a right to conduct a business is property. Incident to this property right is the good will of the business, and the right to appeal to the public for patronage." In conducting one's business he may contract with his employees, and may discharge them at will, subject to the contracts made. "Those who labor for wages have certain rights equally unquestioned." These include the right to contract and the right to cease work unless restrained by contract; also the right to form unions for the purpose of improving economic and social conditions, or to refrain from joining such unions; also the right to strike and to inform the public of the existence of a strike and the causes thereof, appealing for "sympathetic aid by a request to withhold patronage." A primary boycott, "if in any degree successful, will result in damage to the business of the person boycotted; but where it is lawfully conducted this is one of the inconveniences for which the law does not afford a remedy."

Strikes for unlawful objects or using illegal means are wrongs for which the law affords a remedy. In the present case, "no question is raised as to the legality of the object for which the strike was called." As to means, speaking generally, they "must be free from falsehood, libel, or defamation, and from physical violence, coercion, or moral intimidation." To declare that "this house is unfair to organized labor," is to use a term that is well understood, and does not involve charges of fraud, breach of faith, or dishonorable conduct. To say, "Go where they have all white help," is legitimate or not "according to the truthfulness or falsity of the implication that the house is employing other than white help." The expression, "This beanery is on the bum" is such as can not be upheld. "Although it may not have been intended seriously, it carried with it an implication of deterioration of service and is not permissible."

The same is said of the expression, "Why not patronize a union house and you will not have to turn your back to the public and you will not be ashamed." This was evidently "intended to cause moral intimidation upon the patrons of the place and doubtless with many people would have that effect. Neither do we think justifiable the expression, 'This house is unfair and will be unfair to you.' This was addressed to the patrons of the restaurant, and, when addressed to the public generally, carried an implication of dishonesty or lack of integrity."

The court then came to "the most important question for consideration"; i. e., that of enjoining the stationing of pickets. The present case was said to be one "of first impression in this State." Considering the pickets as a part of the public, the streets are for their use as well as any other. The ownership of adjacent property does not give the right to control abutting sidewalks. The owner must have some other basis for his objection, "such, for instance, as the creation of a private or public nuisance." Continuing, the court said:

On behalf of appellants it is urged that having a right to acquaint the public with the facts concerning the strike and to appeal for sympathetic aid, they should be permitted to make use of this right in the most effective manner by bringing the knowledge of their dispute with respondents to the notice of intending patrons; that they should be permitted to go where the patrons are most likely to be; and that they are therefore within their rights so long as they are peaceable and their conduct is not unseemly and so long as they do not obstruct the entrance to or egress from the business houses of respondents. There is much force in this position. But in our opinion it is overcome by the fact that the act of stationing pickets in front of places of business of respondents inevitably leads to results directly opposite to appellants' intentions and protestations.

Where the principal purpose of picketing is to appeal to the intending patrons, consisting of men, women, and children, of a business house, such as a restaurant, we think the following from the opinion in the case of *Local Union No. 313 v. Stathakis*, 135 Ark. 86, 205 S. W. 450 [see *Bul. No. 258*, p. 124], is worthy of consideration:

"And can there be any real question as to the meaning of the presence of the pickets? Were they not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? Were they not saying, even though it was silently said: 'See what we are doing to this man because he has incurred our displeasure! Beware a similar fate!' And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee simply because there was a controversy in which they did not desire to even appear to be parties?"

In view of the thought suggested by this quotation, added emphasis is placed upon the allegation of the complaint that prospective patrons of the respondents were deterred by intimidation from entering respondents' places of business.

Taking into consideration the facts as presented, the court concluded "that the stationing of pickets in front of or near to respondents' places of business in this case was necessarily intimidating in character, and was properly enjoined. This does not mean, however, that appellants are to be barred from the use of the streets generally or from displaying truthful placards or banners or using other legitimate means of appealing for support." It was found that the injunction was unnecessarily broad in its terms, since no force or violence had been used or threatened, nor should there be a requirement to desist or refrain absolutely from in any manner interfering with the business of the respondents. "Neither should it include every species of expostulation or entreaty." The case was thereupon remanded with directions to modify the injunction "so as to accord with the views herein expressed."

MINE REGULATIONS—WASH ROOM—EXERCISE OF OPTION—CONSTITUTIONALITY—*Commonwealth v. Beaver Dam Coal Co., Court of Appeals of Kentucky (February 28, 1922), 237 Southwestern Reporter, page 1086.*—Section 1, chapter 20, of the acts of Kentucky for the year 1920 required certain employers to provide wash rooms for their employees after 30 per cent or more of the employees decide by a vote to ask and to notify the employer to provide a wash room.

The Beaver Dam Co. was indicted for failure to provide wash rooms for its employees, in compliance with the provisions of the act above noted, but the trial court sustained a demurrer which questioned the validity of the law upon which the indictment was founded, and the case was dismissed. The State appealed to the higher court, but the law was held unconstitutional and the judgment of the lower court affirmed. The contentions of the defendants in their attack upon the validity of the law were based on several sections of the State and Federal Constitutions, but the decision of the court as stated by Judge Clarke considered the law from only one angle—the violation of section 60 of the State constitution, which forbids the enactment of laws "to take effect upon the approval of any other authority than the general assembly," with certain exceptions.

The opinion of the court is in part as follows:

It is a familiar general rule that the legislature can not delegate its powers of legislation; and section 60 of our constitution simply adopts that rule as applicable to all laws save such as relate to the

named subjects, as to which by necessary implication the legislature may enact laws to take effect upon the approval of an authority other than the legislature, as this court has frequently held. These are laws relating to the sale, loan, or gift of spirituous, vinous, and malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, roaming at large of stock, matters pertaining to public schools, paupers and the regulation of counties, cities, towns, and other municipalities of their local affairs.

It is clear that the establishment of bathrooms in connection with private industries is not within any of these exceptions, nor is the power to enact such a law to take effect upon other than legislative authority expressly or inferentially granted by any other provision of the constitution. It is therefore clear that the enactment of this act is prohibited by this section of the constitution if, as contended by appellee, it is to take effect, not as a direct and necessary result of legislative action, but rather only upon some other than legislative authority.

This act, although enacted by the legislature, approved by the governor, and published with all the formalities of a law, very clearly provides by its unambiguous terms that it shall be of no force or effect whatever even though all the conditions upon which it could operate may exist, until and unless another tribunal than the legislature shall have decided by vote that its provisions shall become effective, not uniformly throughout the State or any subdivision thereof, but merely in the particular establishment where those empowered to decide the matter happen to be employed at the time.

It surely must be clear that the legislature has not here prescribed the conditions upon which the act will uniformly operate throughout the State or at all, or has attempted to do more than create a means whereby, within prescribed limits, a minority of a particular class of employees may or not, as they choose, accept or reject the provisions of the act regardless of existing conditions, and that therefore the legislature has not determined when or whether the act shall become effective, except as it may appear wise or desirable to a minority of the employees to be benefited thereby, and this, too, independently of the action of employees in other like enterprises and without regard to any judgment of the legislature as to whether or not the act should become effective in any particular mine or factory. The act, therefore, it seems perfectly clear to us, is not only an attempt to delegate legislative power but to delegate this power to be exercised locally and discriminatively even within a particular locality, which is a power the legislature itself does not possess.

The chief reliance of those upholding the law was a decision of the Supreme Court of Indiana, sustaining a similar law, under quite similar terms of the State constitution. Though persuasive, such a precedent is not binding, and the affirmance by the Supreme Court of the United States is not significant, since no question of Federal law is involved. (*Booth v. State*, 179 Ind. 405, 100 N. E. 563; affirmed, 237 U. S. 391, 35 Sup. Ct. 617; see Bul. No. 189, p. 171.)

MUNICIPALITY ENGAGING IN BUSINESS—COAL AND WOOD YARD—CONSTITUTIONALITY OF STATUTE—PUBLIC PURPOSE—*Central Lumber Co. v. City of Waseca et al., Supreme Court of Minnesota (May 19, 1922), 188 Northwestern Reporter, page 275.*—The charter of the city of Waseca, Minn., authorized the city council “to establish and operate a municipal coal and wood yard and to purchase coal, wood, and fuel and sell the same at retail to the inhabitants of the city.” The city was about to establish a coal and wood yard and finance the project by taxation. An action was brought by the Central Lumber Co., which sought a temporary injunction against the city. The question raised was whether the establishment of a municipal coal and wood yard is a public purpose, for which taxation may be levied. The temporary injunction was denied and the case was appealed to the supreme court of the State. The company alleged that the charter provision was unconstitutional because of a provision (section 1 of article 9) of the State constitution which provided that taxes “shall be levied and collected for public purposes.” The supreme court said that the principle that the power of taxation, though unrestrained in terms, can not be exercised for other than a public purpose, was fundamental and the question before the court was narrowed down to whether the establishment of the coal and wood yard was a public purpose. The court held that it was, and speaking through Judge Dibell, said in part:

The constitutional validity of the charter is presumed. It is to be assumed that in framing their charter the people were informed of conditions, such as the sources of supply, the ability and disposition of dealers to care for local demands, and other relevant factors affecting the situation, and found that public necessities and conveniences were such that the establishment of a municipal fuel yard was a public purpose. They have the responsibility of their finding and the wisdom or folly of the policy which they authorize. Their determination of public purpose is not final. It is accorded weight; but finally the court must determine as a judicial question whether the purpose for which taxes are exacted is public.

Economic and industrial conditions are not stable. Times change. Many municipal activities the propriety of which is not now questioned were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for public purposes remains, but conditions which go to make a purpose public change.

In our judgment the establishment of a municipal fuel yard is a public purpose.

RAILROADS—SHELTERS FOR WORKMEN—PAINT-SPRAYING MACHINES—CONSTITUTIONALITY OF STATUTE—INJUNCTION—CRIMINAL LAW—*Chicago & N. W. Ry. Co. v. Railroad and Warehouse Commis-*

sion of Minnesota, United States District Court, District of Minnesota, Third Division (May 15, 1922), 280 Federal Reporter, page 387.—The Legislature of Minnesota at the session of 1919 passed an act (chap. 514) entitled:

An act requiring railroads, car shops, and other concerns manufacturing or repairing cars, car trucks, and other equipment used as conveyances by rail, for either freight or passengers, and other equipment used in repair work or otherwise and operated by railroad companies, to provide buildings that will protect their employees from heat, rain, cold, snow, and other inclement weather.

Chapter 481 of the Laws of 1921 amended section 3 of the act, which provided certain specifications for the buildings ordered to be erected by the act. It was provided further that employees should not be required to work in the rain, heat, cold, or snow, and violation of the statute was made punishable as a misdemeanor. A suit in equity was instituted by the Chicago & N. W. Ry. Co. against the Railroad and Warehouse Commission of Minnesota to enjoin the enforcement of the statute on grounds of its alleged unconstitutionality. At the commencement of the suit a temporary restraining order was issued, and by written stipulation of the parties the restraining order was continued in force and the case was brought to final hearing on the merits of the case. The defense set up by the commission was that the court was without jurisdiction, inasmuch as equity will not undertake to enjoin the enforcement of a criminal statute, and further that the plaintiff had an adequate remedy at law. To these contentions Judge Booth said:

These contentions can not be sustained. Though a court of equity has in general no power to enjoin criminal proceedings or to prohibit the enforcement of an unconstitutional criminal law, yet where property rights are involved and are threatened with destruction by criminal proceedings under an alleged unconstitutional law, a court of equity may afford relief by injunction [citing *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, and many other cases].

In support of the contention that the plaintiff has a plain adequate remedy at law, the defendants point out that it was perfectly possible for the plaintiff to await an order made by the commission pursuant to the statute in question and then take an appeal, as provided by the statutes of the State, to the State district court, and if necessary to the supreme court of the State and thereafter to the Supreme Court of the United States. Doubtless this course of procedure might be pursued, but the remedy is not of such character as to preclude a suit in equity in the Federal court. The adequate remedy at law contemplated by section 267, Judicial Code (R. S., sec. 723 [Comp. St., sec. 1244]), must be one which is as prompt and efficient as the equitable remedy.

The remedy must be one that plaintiff may resort to of his own volition and not at the will of the defendant. It must be a legal remedy in the Federal court and not merely in the State court. The

legal remedy suggested in the case at bar does not fulfill these requisites and therefore does not prevent the maintenance of a suit in equity.

The company made the contention that, as sheds were required to be built where 6 or more men were employed at one time for a period of not less than 30 days on the work of constructing, etc., certain equipment, the law was purely arbitrary. The court held the objection was bad, saying:

It is contended that there is no relation between six men working for 30 days and the public health and welfare. This method of classification of points where sheds are required and points where they are not required may at first appear fanciful; but it is evident that some classification had to be made. It is suggested that only repair points used in the wintertime should have been included. But the legislature evidently concluded that inclement weather conditions for workmen were not confined to the winter season. The evidence shows that there are four repair points on plaintiff's railroad lines in Minnesota which come within the provisions of the statute, and several other points where repairs are made which do not come within the provisions. It was evidently the purpose of the legislature to include the more important repair points and to exclude the others, and, while the method of classification employed may not be logically perfect, it is at least practicable, and one which has not infrequently been adopted.

With reference to the invalidity of the statute because it burdens and interferes with interstate commerce, the court said that as the burden and interference were indirect and incidental only, such results were not sufficient to invalidate the law; nor could the statute be held invalid because of the cost or inconvenience to the company, nor because it applied only to certain classes of employees or of employers, nor as an arbitrary interference with the company's right to manage its own property, or a delegation of arbitrary power to the commission.

Up to this point the statute was held valid, but the further contention was made that it was void because it attempted to cover a field already occupied by Federal statutes. The court referred to the "safety appliance acts," especially section 4 of the act of April 14, 1910 (36 Stat. 298), and said:

The section of the safety appliance act above cited requires that defective cars upon the lines of carriers subject to the act be repaired at the place where they are first discovered to be defective, if feasible; otherwise, at the nearest available repair point. The provisions of the statute involved in the case at bar are in my judgment in conflict with this requirement of the Federal act. The Federal statute is, of course, paramount, and the provisions of the State statute in so far as they conflict with the Federal statute are inoperative and void. (*Penn. R. R. Co. v. Pub. Ser. Com.*, 250 U. S. 566, 40 Sup. Ct. 36.) But, though this may limit the scope of the State statute, it

does not render it wholly void; the statute still has a field of operations.

However, the court found other reasons why the statute in question should be held invalid, which are as follows:

The prohibition of paint-spraying machines within the proposed sheds is claimed to be unreasonable, purely arbitrary, and not a valid exercise of the police power of the State. The evidence shows that at one time the use of such machines was thought to be deleterious to health, on account of certain ingredients contained in the paint. But the evidence further shows that these ingredients are not found in the paint used at present, and furthermore the evidence shows that the State itself makes use, upon its own work, of these same paint-spraying machines inside buildings. Under these circumstances I am of opinion that the prohibition of the use of such machines is not a valid exercise of the police power.

It remains to consider the contention of the plaintiff that the statute is void for indefiniteness and uncertainty.

The alleged uncertainty rests in the words "rain, heat, cold, snow, or other inclement weather" [in section 4]. It is to be borne in mind that we are dealing with a criminal statute, violation of which constitutes a misdemeanor, punishable by a fine of from \$100 to \$500. In *U. S. v. Brewer*, 139 U. S. 278, 11 Sup. Ct. 538, the court, in passing upon the construction to be given criminal statutes relating to elections, said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

Cases were then cited in which the application of this principle had resulted in certain laws being declared invalid, and the court continued:

The words "rain and snow" are hardly definite enough in a criminal statute. The words "heat and cold" are so elastic in their meaning as to cover the whole range of temperature. The words "inclement weather" are equally indefinite. What is meant by "inclement weather"? Will a fog or mist come within the language? Will wind be included? It is surely necessary that limitations shall be placed upon all of these terms. But who is to supply the limitations, the employer or the employee or the court or the jury? The legislature is the only proper authority to define a statutory crime against the State. This power can not be delegated to individuals, courts, or juries. The uncertainty and indefiniteness in the present statute is in my judgment as great as was found to exist in the statutes considered in the cases above cited.

In the case at bar it is not possible, in my judgment, under the tests above given, to separate section 4 and that portion of section 1 above referred to from the remainder of the statute. These portions of the statute are vital. They embody the real ground and purpose of the passage of the statute. It is extremely improbable, in my judgment, that the legislature would have passed the statute with these portions eliminated. Under these circumstances, the whole statute must fall.

A permanent injunction against the enforcement of the law was therefore directed to be prepared.

RELIEF ASSOCIATIONS—TAXATION—“CHARITABLE PURPOSES”—*Board of County Commissioners of Chaffee County et al. v. Denver & R. G. R. Co. Employees' Relief Assn., Supreme Court of Colorado (January 9, 1922), 203 Pacific Reporter, page 850.*—The Denver & Rio Grande Railroad Co. Employees' Relief Association owned about 3 acres of land, upon which were hospital buildings, in the city of Salida, Colo. During the year 1913 taxes were assessed upon the property and paid for the year. Suit was then brought to recover back the amounts paid, on the theory that the property was exempt from taxation under the State constitution which provides that “Lots, with the buildings thereon, if said buildings are used solely and exclusively for * * * strictly charitable purposes * * * shall be exempt from taxation, unless otherwise provided by general law.” The trial court upheld the contention that the property in question was “used solely and exclusively for strictly charitable purposes,” and rendered judgment for the recovery of the taxes paid. The case was then taken to the supreme court of the State, where the decision of the trial court was reversed. The reasons of the court set forth by Judge Allen for not exempting the property in question from taxation are in part as follows:

It is clear that the primary purpose of plaintiff's incorporation was to create a common fund by the contribution of its members to secure and maintain a hospital for such members. The purpose is here mentioned because it throws light on the use made of the property. Whether it is exempt from taxation must depend on the use made of the property, rather than upon the charitable character of the owner.

In the instant case the contributions of the members of the plaintiff association “were for the advantage of the members only,” and hence did not constitute a charity. Plaintiff furnishes its members with hospital facilities. It is in no different position on that account than if it furnished its members, in case of sickness or injury, with funds with which to procure those facilities and treatment, as if it were a mutual benefit society. It is no more a charitable institution than such a society.

The judgment was therefore reversed, and the cause remanded with directions to dismiss the complaint.

STATE ENGAGING IN BUSINESS—OPERATION OF COAL MINES—EMERGENCY.—*Dakota Coal Co. v. Fraser, Adjutant General of North Dakota, United States District Court, District of North Dakota (December 4, 1919), 283 Federal Reporter, page 415.*—The western

half of the State of North Dakota uses lignite coal as its fuel. Plants have been adapted to the use of this lignite coal, and as the industry of producing this coal has been developing for a period of 25 years, the public have come to depend upon the operation of the mines for its fuel supply, and it is not practicable to substitute some other fuel, even if it could be obtained. Lignite is a peculiar kind of fuel in that if it is exposed to the weather it disintegrates and becomes unfit for fuel. This makes the continuous operation of the mines necessary to meet public needs. A strike at the mines was announced to occur on the 1st of November, 1919. A few days after that date a storm swept over the State and the mercury fell 8° to 10° below zero over the territory supplied by lignite. To meet the crisis, the governor issued his proclamation, calling upon the mine owners to operate their mines, and warned them that if they failed to do so, the State would take them over and operate them. They failed to do this. The governor called out the militia, took over the mines, and operated them. A suit in equity was instituted by certain coal companies to enjoin the adjutant general of the State from operating the mines. The injunction was denied by District Judge Amidon, who stated his reasons for denying the injunction in an opinion which is in part as follows:

Every strike in a key industry involves three rights—the rights of employer, the rights of employees, and the rights of the public. The greatest of these is the rights of the public. The firm establishment of the supremacy by law of the rights of the public is the next step in the life of the American people. Heretofore the public has been the sufferer. Private rights have been placed above public welfare. Employer and employees have been permitted to fight, while the public has acted simply as a police officer and borne most of the loss. By long suffering we have got sufficient wisdom to end that régime.

The question before the court in the present case is: May he deal with the causes which need only the ordinary course of nature to result in death by freezing and by disease, and the disturbed condition of society which would necessarily result from such consequences—I say, may he deal with the causes, rather than wait and deal as a mere police officer with the direful consequences? I answer the question in the affirmative. He may. It is his duty to do so, and it would be an abuse of judicial power, in my judgment, to define his powers in such a restricted manner as to forbid him to protect society.

The owners of the coal mines had already charged their right of private property therein with a public use. The continuance of the public service, which such use involves, can not be separated from the right of private ownership. As to compensation, that can best be fixed by negotiation between the parties. But, if this fails, the State has expressly waived its exemption from suit, and the plaintiff may recover the reasonable value of the use of its property.

We can get instruction from the experiences of the present strike. One of the outstanding facts is that the mines in North Dakota have actually been operated. The coal has been produced. The rights of private property have only been invaded to the extent that was necessary to safeguard society against a great and threatened disaster. At the same time the power of the Nation has been used, as I am asked to use the power of the district court of this district in the present application. All that can be achieved by means of writs of injunction has been tried, and it has not produced a ton of coal. Nearly a half million miners continue the strike. As the winter advances the crisis in the East deepens. It needs only the presence of North Dakota temperatures in that section to call into immediate action something besides injunctions. The reserve executive power is being held in abeyance day by day, waiting negotiations. I can not doubt that, if the actual crisis arises, the power will be used. In other words, the moment the situation becomes acute, and there is present in the East the same imperative necessity that existed when the lignite mines in the western part of the State were taken over, some power similar to the power which was exercised here will be exercised there, unless the strike is settled and production of coal is actually begun. To meet such a crisis, violent rhetoric is a poor substitute for coal. To meet the needs of the people in the western part of the State, mere declamation is no substitute for coal. The only thing that would meet the needs of the situation and safeguard society from a great disaster that was impending was the actual operation of the mines. The mines have been operated here; they have not been operated elsewhere. That is one of the outstanding facts of the present nation-wide strike.

I am asked to issue a writ of injunction which will necessarily say that the acts of the governor have been illegal and unconstitutional. If I do that, I am not simply dealing with his acts; I am defining the powers of the chief executive of an American Commonwealth to meet a crisis which threatens loss of life. I am not willing to strip the governor of his power to protect society. I do not believe it comports with good order, with wise government, with a sane and ordered life, to thus limit the agencies of the State to protect the rights of the public as against the exaggerated assertions of private rights.

The coal mines in the western part of this State, by a long course of life, have been dedicated by their owners to supplying the public with coal. While they as owners performed that duty, they were entitled to the possession of their property. But when, as the result of a quarrel between the owners and their workmen, in the dead of a North Dakota winter, they suspend that service and leave a large district destitute of the fuel upon which it has been taught to rely, I am unwilling to say that the executive officer of the State has not the power to operate the mines, when that seems to be a reasonable and probably the only method by which disaster and resultant disorder can be avoided.

The writ of injunction is not a writ of absolute right. The plaintiffs in this case are applying to a court of equity, which from of old has been called a court of conscience. When it acts it ought to take into view public as well as private rights. It ought to consider

whether, if the writ is issued, it will probably result in obstructing public officers in the performance of what they believe to be their duty, and what seems to be necessary in order to protect society against a great disaster. Viewing the situation in that light, and upon the showing that has been made here, and from that showing finding, as I do, and as I have stated in this opinion, that the acts of the governor were reasonably necessary to prevent what threatened to be a widespread disaster, I deny the application for a temporary injunction.

From the order denying the motion for a temporary injunction the companies appealed to the United States Circuit Court of Appeals. The adjutant general filed a motion to dismiss the appeal on the ground that the subject matter of the appeal had become moot, because before the case came up for hearing in the court of appeals the adjutant general had withdrawn from the mine and ceased to exercise any control over the operation of it. The court of appeals held that the possession of the mines by the State was not reviewable, as possession had been restored, but the court reversed the judgment of the district court and remanded the case, with directions to set aside and vacate the order denying the motion for a temporary injunction, on the ground that the main case had never been decided, and that the company should be allowed its day in court. Leave was therefore given it to present an amended complaint, if it desired to do so. (*Dakota Coal Co. v. Fraser*, United States Circuit Court of Appeals, 8th Circuit (Aug. 28, 1920), 267 Fed. 130).

TRADE SECRETS—RIGHT OF EMPLOYEE TO ENGAGE IN COMPETITIVE BUSINESS—INJUNCTION—*Fulton Grand Laundry Co. v. Johnson*, Court of Appeals of Maryland (January 25, 1922), 117 *Atlantic Reporter*, p. 753.—Edward Johnson had been employed by the appellant laundry company as a driver and collector on one of its routes in the city of Baltimore. After some three years of such employment Johnson decided to go into business for himself, and so advised the customers of the plaintiff company on the route which he had served. This was alleged to be without the knowledge or permission of the employer, and even in contradiction of statements made by the employee only a few days before he left his position, while he was “undermining its business by attempting to entice its customers away from it.” On September 5, 1921, it was alleged that Johnson collected laundry bundles from nearly all the customers who usually sent their work to the Fulton laundry on Monday morning and turned the work over to another laundry. To prevent the “great and irreparable damage” which would result from such action, the company sought an injunction to restrain

Johnson therefrom. The theory on which this action was brought was that the list of customers of the company was a trade secret obtained from the employer by reason of his confidential relationships, and that the use of such list should be forbidden.

Judge Adkins, speaking for the court, was unable to find such a list a "trade secret," since any person interested enough to secure the information could have followed the driver each day for a week and noticed where he stopped on his daily route. Continuing, he said:

While we do not decide that there might not be cases in which an employer should be protected from the use by an employee of a list of customers fraudulently and surreptitiously obtained, or where, in the nature of the particular case, or by reason of the care used in concealing them, the names of customers are so guarded as not to be easily obtainable by others than confidential employees, we are not willing to hold that, in any ordinary business, an employee, on going into business for himself or into the employ of another, should be enjoined from seeking to do business with friends he has made in the course of a previous employment merely because he became acquainted with them while so engaged, and as a result of such previous employment. Under such a rule a traveling salesman, every time he changed employers, if in a like business, would be compelled to give up all the friends and business acquaintances made during the previous employment. Such a rule would tend to destroy the freedom of employees and to reduce them to a condition of industrial servitude.

Recognizing the possibility of a contract which would restrain the employee from engaging in competitive business, the facts in the present case did not fall within that principle. The judgment of the court below denying the injunction was therefore affirmed, one judge dissenting.

TRADE SECRETS—USE OF LIST OF CUSTOMERS—INTERFERENCE WITH EMPLOYMENT—PROCURING BREACH OF CONTRACT—INJUNCTION—*Shevers Ice Cream Co. v. Polar Products Co.*, *Supreme Court of New York, Special Term (October, 1921)*, *194 New York Supplement, page 44*.—This was an action by the Shevers Ice Cream Co. to secure an injunction against a rival corporation, largely made up of former employees of the plaintiff, to prevent interference with existing contracts and the use of confidential records or information. For two months plans had been secretly developed, following which two of the employees of the Shevers company resigned and the Polar company engaged in business. Its trade was solicited at first principally from the plaintiff's customers. "In fact, during the first month of its existence, the Polar company had only two customers who had not been customers of the plaintiff." As the business had been man-

aged, the Shevers company had written contracts with its customers, among other considerations being the loan of refrigerators, etc., and an agreement not to buy ice cream of any other concern so long as service was satisfactory or until an opportunity might be given to adjust differences that might arise. The former employees sought this trade, telling the customers that "the agreements were of no value, and were mere scraps of paper." Other statements were to the effect that the Polar company was practically the same as the plaintiff company; that it was new in name only; that practically all the competent employees of the old company were with the new one; that the old company could not continue in business, as no one who knew the business had remained with it; that the principal men in the Polar company had been unfairly treated by the Shevers company and were forced out; that the ice cream made by the plaintiff was not good; that the plaintiff was not honest in its dealings with its customers, etc. The statements that the plaintiff could not continue in business; that Fauerbach and Rein were to be forced out, and had to leave because plaintiff insisted on making an inferior grade of cream, and that its cream was not of high grade were untruthful, as was the statement that the Polar company was practically the plaintiff concern and was new in name only.

While still in the old company's employ, but planning to organize the Polar company, these employees had made up lists of plaintiff's customers, with names, addresses, and the amount of business done. From these, sets of cards were made up, at least one of which was taken by the defendants and used in canvassing for trade. In view of these facts, and specifically in view of the deception and misrepresentation, an injunction was granted by the court restraining the employees in particular and the new company in general from specific acts of competition.

Judge Cropsey, speaking for the court, said:

The plaintiff's employees had a perfect right to leave its service and enter that of the Polar company, but they had no right to take with them a list of plaintiff's customers. This holding is not in conflict with those that are to the effect that employees leaving their services may solicit customers of their former employer. The employees may use information they have obtained so long as it was not acquired in confidence, but they have no right to make lists of customers and take them with them.

The false statements made were said to constitute unfair competition, and the interference with contracts was also condemned. The contention that the agreements were without binding effect and not enforceable was said, conceding its truth, not to give the defendants the right to solicit customers under such contracts and to endeavor to get them not to live up to them. "The defendants were wrong

in so doing, and equity will enjoin attempts such as the defendants made," citing *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (see Bul. No. 246, p. 145); *Vegeahn v. Gunther*, 167 Mass. 92, 44 N. E. 1077, etc.

It was found that no case was developed against two of the defendants, and the complaint against them was dismissed. As to the others it was found that there had been "an unlawful and unconscionable plan to appropriate and interfere with the plaintiff's trade and business and of unfair competition with plaintiff." An order was therefore issued perpetually restraining the defendant company as such, and the named defendants, former employees of the Shevers company, from using in any place or any way, directly or indirectly, "any or any part of the data and records, whether of customers' names, addresses, prices, or other information set out or contained in plaintiff's card index of customers," or other office records or lists of customers. The injunction also forbade attempts to secure transfer of patronage of the customers named in the plaintiff's list, "and in any manner, directly or indirectly, injuring or impairing or interfering with or destroying the business and custom of plaintiff upon which any of the defendants called or with which they dealt while in plaintiff's employ." The routes established by the old company were not to be traveled over to solicit trade by calling on plaintiff's customers, nor were they to take advantage of the established clientele of the plaintiff. The card index and other material in the hands of the Polar Products Co. were required to be deposited with the court until further order, and all "information and knowledge or pretended knowledge acquired or claimed to have been acquired by the other defendants" as to discriminatory rates or rebates shall not be offered or revealed to any customer. The matter of damages was to be ascertained and assessed, and judgment upon the referee's report should be entered as a judgment against the defendants.

WAGES—ASSIGNMENT—ABSOLUTE SALE—CONSTRUCTION OF STATUTE—*Tollison v. George*, *Supreme Court of Georgia (January 15, 1922)*, 112 *Southeastern Reporter*, page 896.—In company with a majority of States, Georgia has a law regulating small loans and the assignment of wages as security for loans (Acts of 1920, p. 215). O. L. Tollison was arrested for an alleged violation of this statute, and sued out a writ of habeas corpus to secure his release. The superior court of Fulton County refused the petition, and the case was carried to the supreme court, where the action of the court below was reversed.

A young man named Duke had worked for one Brockman, earning wages amounting to \$11, and offered to sell the account to Tollison

for \$10. It was in evidence that the transaction was an absolute and unconditional sale, was not a loan or advance of money, nor was Duke in debt to Tollison. He agreed to take \$10 for the account and authorized Tollison to give a full receipt, directing Brockman, his employer, to pay over to Tollison the amount of the account.

Judge Beck, who delivered the opinion of the court, recited the facts as above, following which the statute was discussed. It was said that the statute of 21 sections deals in the first 17 "with the business of making loans and the regulation of that business and with the regulation of 'assignment of wages or salaries, earned or to be earned, when taken as security for any such loan.'" Nothing was found in these sections to indicate an intention to penalize "the absolute sale of choses in action and the making of a bona fide contract for such sale." Evidently this case was one of a sale. The eighteenth section contains provisions of penalty for the violation of preceding sections. Section 19 exempts certain persons and corporations from the operation of the act. Section 20 was claimed to establish requirements applicable to the case in hand, and "there is language in section 20 which seems to indicate that the purchase of wages or salary comes within the purview of the act." The constitutionality of this section was challenged on the ground that it "contains matter different from what is expressed in the title of the act." The question of constitutionality was not considered, however, as "section 18 makes it a crime only to violate certain of the preceding sections of the act, and has no relation to section 20." For this reason any failure to comply with the requirements of section 20 would not sustain the issue of a warrant or the seizure of a person not complying with its requirements. Since the provisions of the earlier sections were not violated, and the violation of section 20 of the law, if committed, was not punishable, there was no ground for holding Tollison and he should be discharged. The judgment of the court below was therefore reversed.

WAGES—ASSIGNMENT—CONSTITUTIONALITY OF STATUTE—PRESENTATION OF VOID ASSIGNMENT CAUSING DISCHARGE—DAMAGES—*Alabama Brokerage Co. v. Boston, Court of Appeals of Alabama (April 18, 1922), 93 Southern Reporter, page 289.*—Joe Boston was an employee of the St. Louis-San Francisco Railroad Co. and had borrowed money from the brokerage company, giving an assignment of future earnings as security. The assignment did not conform to the "money lenders act" of 1901, a local statute applicable to four counties, in one of which the parties resided; it was also forbidden by an act of 1911 (p. 370) regulating the assignment of wages. In spite of these facts, the brokerage company presented the assignment

to Boston's employer and insisted upon payment, which resulted in Boston's discharge. Boston thereupon sued the brokerage company, claiming \$5,000 as damages for the "willful, wanton, and intentional" act of the company in placing before his employer this notice of assignment, which it was alleged was known to be void. Judgment was in his favor in the circuit court of Jefferson County in the sum of \$1,000, and the brokerage company appealed. The appeal was based mainly on the contention of unconstitutionality of the statutes named. Judge Bricken, who delivered the opinion of the court, did not go into the discussion of this contention to any extent, but stated that many of the objections raised to the act of 1901 had been satisfactorily answered in the opinion in the case *In re Home Discount Co.*, 147 Fed. 538, where this act was construed and its constitutionality upheld. Judge Bricken stated that the act was not, in his opinion, violative of any of the constitutional provisions referred to by the appellant company. "The business of money lending may be regulated by the legislature without doing violence to any constitutional provision, and we think this statute is not subject to any of the criticisms directed against it in the brief on file."

The judgment of the circuit court was therefore affirmed.

WAGES—ASSIGNMENT—USURY LAWS—EVASION BY FRAUD—*Tennessee Finance Co. v. Thompson*, *United States Circuit Court of Appeals, Sixth Circuit* (February 7, 1921), 278 *Federal Reporter*, page 597.—Frank G. Moseley, an employee of the Nashville Terminals Co., was accustomed to borrow money from the Tennessee Finance Co. The procedure followed was to make application in writing on a printed form, which purported to sell the applicant's wages to the company, and on another printed form the applicant consented to assign to the company a stipulated amount of his earned wages, and instructed his employer to pay to the loaning company the amount set out in the assignment. The applicant, Moseley, filled out the required papers and later became a bankrupt. Robert W. Thompson was appointed trustee, and as such brought proceedings to have determined the rights of the parties to the wages earned by the bankrupt under the assignment of the wages. The trustee obtained the wages in question from the terminal company, with notice of the assignments. In the proceedings the trustee stated that title to the wages was claimed by certain companies claiming under written instruments purporting on their face to be unconditional sales or assignments of wages or salary, but which were "merely devices to evade the usury statutes," and the so-called sales were "mere shams and frauds, intended only to cover up the loans of moneys at usurious rates of interest," both principal and interest

being thus forfeited to the borrower under the laws of Tennessee (Shannon's Code, 1917, sec. 3522a21). The Tennessee Finance Co. denied that its transaction was a loan or device to evade the usury statutes, asserting it to be a good-faith purchase of such wages to the extent of \$22 for a cash consideration of \$20 paid the bankrupt. After a hearing before the referee it was held that the assignment of wages in question was "merely a colorable scheme for the purpose of loaning money at a usurious rate of interest." The company charged \$1 for the use of \$10 and \$2 for the use of \$20 and a similar ratio for sums above that amount. The district judge held that the controlling question was one of fact, and affirmed the order of the referee, as the conclusion reached was in accord with the greater weight of the evidence. The case was taken to the circuit court of appeals, but that court affirmed the order of the lower court, and held the claim of the Tennessee Finance Co. usurious and therefore void as to all genuine creditors.

WAGES—BANKRUPTCY—"EMPLOYEE"—"MECHANIC"—"WORKINGMAN"—"LABORER"—*Van Vlaanderen v. Peyet Silk Dyeing Corp., United States District Court, Southern District of New York (October 19, 1921), 278 Federal Reporter, page 993.*—A suit was instituted by Peter Van Vlaanderen and another, copartners, doing business under the firm name and style of the Van Vlaanderen Machine Co., against the Peyet Silk Dyeing Corp., a bankrupt concern. A petition was filed by Jerome Peyet against the receiver, so as to get a preference in a wage claim which he filed over other creditors of the corporation. It appeared that the petitioner was the president and general manager of the corporation. As general manager he was required to supervise all its work, and was entitled to a salary of \$200 a week. It further appeared that he and his wife and an assistant were the sole owners of the stock of the corporation. The law under which the claim for preferred wages was filed sets forth that "The wages of the employees * * * shall be preferred." And the word "employee" is defined as a "mechanic, workingman, or laborer." The petition was denied, Judge L. Hand saying:

These three words are plain enough, and there remains no penumbra of uncertainty such as overshadowed the use of "employee" in the act of 1885. All three of them include only a man hired to contribute by manual labor to the production of goods or of plant and factory. Hence all the earlier authorities are no longer in point, nor have I found any which construed this particular section in what the petitioner is here pleased to call a broad sense. Its scope, on the contrary, is narrower, designed, no doubt, to protect only those whose weekly wage was assumed to leave them in most cases

no margin of subsistence and who were thought to need some favors in the distribution of what was left. To include a manager, a superintendent, or even a bookkeeper would be a clear disregard of its language and its purpose.

It would be a curious result if these two men, running a business in corporate form, should under the guise of their voluntary manual assistance in the business absorb the greater part of the assets and exclude those from whom they had bought or borrowed. Obviously, the statute means nothing of the sort; it is to protect such manual workers as are genuine employees, not of themselves but of the stockholders. Manual work was not what the applicant was hired to do; he did it in a very natural desire to make the business, his business, a success by every effort in his power. But if he had not been so moved he could quite legitimately have drawn his salary without touching a machine. He was general manager, with only the duty to do whatever might "reasonably be required of him in connection therewith." No general manager can reasonably be required to do the manual work of a mechanic. If he choose to, it is out of abundant good will to his employer, a good will amply accounted for in this case by his general interest.

WAGES—BONUS—RIGHTS OF DISCHARGED EMPLOYEE—*Roberts v. Mays Mills, Supreme Court of North Carolina (November 22, 1922), 114 Southeastern Reporter, page 530.*—Seth Roberts and his wife were employed in a cotton mill operated by the company named. Early in the year 1920 the company posted a notice offering a 10 per cent bonus payable at Christmas "to those who have been continuously in the company's employ since this present month of January." It was uncontradicted that Roberts saw the notice offering the bonus and was thereby induced to stay and work until he could draw the bonus. He had intended to quit "and would have done so but for its being raised to 10 per cent," the prior offer having been of a 5 per cent bonus. His wife and coplaintiff made the same statement. It was in evidence that the work of these employees was satisfactory, and their discharge was not caused by the nature of their work but was due to alleged remarks made by Seth Roberts outside the mill, criticizing an officer employed by it. This criticism he denied having made. However, it was contended that if the allegations as to this conversation were true they did not authorize the discharge of Roberts, there being no complaint as to his work. The chief executive of the mill said that he "had no other reason" than the remarks attributed to Roberts.

This action was brought to recover wages due and unpaid at the time of the discharge, the amount of the bonus to which they claimed themselves to be entitled, and wages from the date of the discharge to December 25 at the rate of pay theretofore earned, the latter as damages for the breach of contract. The company maintained that

the bonus was no part of the stipulated compensation, but admitted the claim for wages earned up to the time of discharge. In the trial court judgment was given only for this sum, holding that neither Roberts nor his wife was entitled to recover on the claim for the bonus nor for damages on the breach of contract.

On this appeal a new trial was ordered, the court saying that "it should have been left to the jury to determine whether the alleged conversation took place at all, and, if so, whether it was good and sufficient cause for the discharge." The right to the bonus covering the period of their actual employment was declared by Chief Justice Clark, who discussed the case at length. Special reference was made to the case of *Zwolenek v. Mfg. Co.*, 150 Wis. 517, 127 N. W. 769 (see Bul. No. 112, p. 178), in which the subject was "fully and clearly discussed." Stating the principles, Justice Clark said:

Until the offer is accepted by beginning performance there is no contract, executory or otherwise. When it is accepted by beginning work the obligation is fastened upon the defendant to pay what is due under it, and it is not essential that the employee should inform the employer that he relied on the offer in undertaking the work.

Mention was then made of the status of the parties as employees, and of the fact that while the wife was not herself expressly discharged, since the husband was ordered to vacate the house they occupied, "this reasonably implied that his wife should go too."

The opinion continues:

It appears in this case that the contract for employment was by the week, and hence either party could terminate it at the end of any week. The offer of a bonus and its acceptance by entering upon the work was a supplementary contract for a reward in consideration of the employee remaining in the service for the specified time. It did not change the terms of the contract of employment by the week, but by this agreement the employee, if he failed to remain the specified time, forfeited all claims to the bonus, and, on the other hand, if the employer discharged the employee without good and sufficient cause, he was liable to the employee for the bonus lost thereby. Inasmuch as the employee knew that the employment could be terminated at the end of any week, he is entitled, upon such violation of the supplementary contract for continuous service, upon a quantum meruit for the length of time he served at the rate of 10 per cent on the wages earned up to that date according to the employer's offer. The employee is not entitled to recover damages for the wages for the unexpired time, for the contract of employment was terminable at the end of any week, nor can he recover the bonus for the unexpired time, for the bonus for continuous employment was based upon the continuance of the service which under his contract the employer could terminate. He is entitled to recover if discharged without legal and sufficient cause the bonus of 10 per cent up to the time of the discharge, for that is the extent of the wrong done him by wrongful discharge.

WAGES—GARNISHMENT—PUBLIC OFFICERS—SALARIES—CONSTITUTIONALITY OF STATUTE—*Cavender v. Hewitt et al.*, *Supreme Court of Tennessee* (March 18, 1922), *239 Southwestern Reporter*, page 767.—Chapter 29 of the Public Acts of 1921 placed officers and employees of any county or municipality of the State of Tennessee on the same basis as employees of individuals with regard to making their wages subject to garnishment proceedings. Several creditors undertook by the process of garnishment to reach the wages due P. W. Cavender as policeman in the employ of the city of Nashville. Cavender filed a bill in equity to enjoin collection under judgments rendered by justices of the peace in favor of the creditors. Under the common law the wages of the policeman would be exempt from garnishment and the power of the legislature to make the salaries of the officers named subject to this process was questioned. A hearing was had and the chancellor decreed that the act was constitutional and therefore dismissed the bill. An appeal was taken to the supreme court of the State and the constitutionality of the act was questioned on the following grounds: That it was class legislation; that it granted to individuals rights, privileges, immunities, and exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of the law; and that States are prohibited by the Federal Constitution from depriving any person of his property without due process of law. The decree of the lower court was affirmed in the supreme court. Judge L. D. Smith stated the reasons for this action in part as follows:

It is argued that it is the settled policy in this State to hold immune all municipal and other government agencies, and that there is an implied restraint in our constitution against such legislation.

It is quite true that this court has universally held that the wages of an employee in the services of a municipal corporation can not be reached by the process of garnishment upon the theory and for the reason that a municipal corporation is but an arm of the government, and the duties to be performed by the officers of the municipality are incompatible with such proceedings.

There is nothing in our constitution from which it can be inferred that a policy different from that stated should never be adopted by the legislature. That being so, the legislative department of the State government has exclusive and ample power to determine the State's policy. When the legislature, acting within its constitutional powers, has spoken upon a particular subject its utterance is the public policy of the State upon that subject, and the courts are without power to read into the constitution a restraint of the legislature with respect thereto. The prohibition must be expressed or necessarily implied from that which is expressed.

The argument is further based upon the thought that the act in question is class legislation, because it subjects county and municipal

officers and employees to the burden of having their wages and salaries attached by process of garnishment, whereas the State officers and employees are exempt from this burden.

The rule of interpretation of statutes as they relate to this provision of the constitution is that the legislature has a wide range of discretion in distinguishing, selecting, and classifying objects of legislation because of the function of the legislation and the purposes to which it is addressed. It suffices if it is practical, and is not reviewable unless palpably arbitrary.

The act applies to officers and employees of the counties and municipalities. Every employee and every officer of every county and of every municipality is included in the burden—if it may be so termed—imposed by this statute, and every member of the community, on becoming an officer or employee of the county or municipality, falls within the provisions of the statute. The classification is the more natural and reasonable by reason of the fact that counties and municipalities themselves are subject to be sued in their corporate capacity, whereas the State can not be sued.

It is not necessary for us to find a good purpose on the part of the legislature for this classification. It is sufficient that the legislature has so enacted with or without reasons since the classification itself is not vicious but natural and reasonable in itself.

WAGES—MECHANICS' LIENS—MANUAL LABOR—USE OF TEAMS—
Messerall v. Dreyer, Supreme Court of Minnesota (July 7, 1922);
189 Northwestern Reporter, page 446.—The General Statutes of Minnesota, 1913, section 7058, provide for workers' liens in the following terms:

Whoever performs manual labor or other personal service for hire in or in aid of the cutting, hauling * * * any logs * * * or other timber, shall have a lien thereon for the price or value of such labor or service.

George Messerall and his son were partners engaged in the cutting and skidding of logs, and as such partners they performed certain work for Fred Dreyer and others at the request of Dreyer. The price for cutting and skidding certain logs was fixed, the partners working themselves and using teams. They were not paid. They brought an action to recover the amount. On questions being submitted to a jury the amount owed the men for their work was fixed at \$436.18. The court rendered judgment in favor of the father and son and held that they were entitled to a lien upon the logs which were the subject of the labor performed. From this judgment an appeal was taken. The contention was that the father and son were in fact contractors and performed the work as such, using the labor of others and making use of teams, and that therefore the statute above quoted did not give them any right of lien.

The supreme court affirmed the judgment below, holding that the father and son were entitled to a lien.

Speaking through Judge Hallam, the court said:

The labor performed was manual, and the work of the teams was necessary to the performance of such labor. In *Martin v. Wakefield*, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362, it was held that "manual labor," as those words were used in the statute then in force, "includes the use and earnings of all implements, instrumentalities, and agencies such as ax, canthook, team, or the like which are actually used in and necessary to the performance of such labor by the lumberman or logger," and it was held that one who furnished a team and teamster to a contractor to haul logs at a gross price for both is entitled to a lien, even though the man and the team during a great part of the time worked separately.

WAGES—MINIMUM WAGE LAW—CONSTITUTIONALITY OF STATUTE—FREEDOM OF CONTRACT—*Children's Hospital of the District of Columbia v. Adkins et al.*, *Court of Appeals of the District of Columbia* (November 6, 1922), 50 *Washington Law Reporter*, page 721; 284 *Federal Reporter*, page 613.—An act of Congress of September 19, 1918 (40 Stat. 960), established a minimum wage board for the District of Columbia, with power to determine wages for women and children in the District. The constitutionality of this statute was challenged by the Children's Hospital of the District of Columbia and a woman elevator operator, each claiming that the law interfered with satisfactory relationships and prevented the exercise of their constitutional rights of contract. The cases were joined, and in the District Supreme Court a decision was rendered on June 2, 1920, sustaining the constitutionality of the law. From the foregoing an appeal was taken to the District Court of Appeals, resulting in the affirmation of the judgment of the court below on June 6, 1921, one justice dissenting. Neither of the above opinions was reported officially. A rehearing was denied on the first motion; but following the return to the bench of a judge temporarily absent, the majority against rehearing was reversed, and it was allowed July 13, 1921, one justice dissenting. The rehearing was held in October, 1921, and a second decision rendered on November 13, 1922, holding the law unconstitutional, one justice dissenting.

The opinion of the court was delivered by Judge Van Orsdel. After stating the principles of the law and the relations of the parties, the opinion reads:

The act clearly was neither passed to meet a temporary emergency nor "to tide over a passing trouble." Its interpretation may be pursued without reference to the modern rule of emergency resorted to in support of certain so-called war legislation; nor does it appear that any situation has arisen in the District of Columbia, in respect

of woman workers, which has become so "publicly notorious" as to justify the inference of an emergency. True, Congress declared the purpose of the act to be "to protect the women and minors of the District from conditions detrimental to their health and morals resulting from wages which are inadequate to maintain decent standards of living." It then undertakes to direct the interpretation of the act and forbids appeal to the courts, except upon questions of law. While statements of fact by a legislature, as an inducement for the enactment of the law, are entitled to respect, they are by no means conclusive upon the courts; nor are the limitations upon interpretation and appeal, since the courts will have the last word in the event of any arbitrary action on the part of the board in carrying out the provisions of the act.

Another contention may be disposed of in a word. True, a number of States have enacted similar laws and they have generally been upheld by the State courts, but that by no means forecloses consideration of the present case. In *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (Bul. No. 169, p. 147), the court condemned an act making it a criminal offense for an employer to prevent, by contract, his employees joining labor unions, notwithstanding such laws existed in 13 States and the Territory of Porto Rico.

We are here called upon to weigh the subject matter of certain legislation in the balance of the Constitution, the general power of Congress to fix wage contracts between private individuals. If Congress may establish a minimum wage for women, it may establish a maximum wage, or it may name a fixed wage. If it may regulate wages for women, it may by the exercise of the same power establish the wages to be paid men. The power of Congress to fix wages between private individuals is either constitutional or unconstitutional. There is no leeway for legislative or judicial discretion. A fundamental principle is involved, and it does not lie in the courts to declare a law fixing the wages of women constitutional and a law fixing the wages of men unconstitutional. The moral stimulus in the one instance is no greater than in the other. If higher wages are essential to preserve the morals of women, they are equally essential to preserve the morals of men.

It was further argued that equitably to enforce such a law inquiry would necessarily be made into living conditions, and "the power must likewise be conceded to fix the prices of all commodities entering into the determination of an equitable wage." The fifth and fourteenth amendments protecting freedom of contract were referred to, and while certain demands of public safety and welfare might admittedly justify certain restrictive legislation, it was said that "such regulations affect only the mode of operation and do not invade the domain of prices. * * * The police power can not be employed to level inequalities of fortune. Private property can not by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price fixing."

Reference was made to the case of *Wilson v. New* (243 U. S. 332, 27 Sup. Ct. 298, see Bul. No. 224, p. 144), in which the Adamson law,

so called, was declared constitutional. This law established an eight-hour standard working day and provided for the maintenance of the then existing scale of wages until changed by agreement. It was declared that this was not a wage fixing statute; it does not intimate that Congress could legislate upon the question of wages where an agreed scale existed nor in the exercise of its delegated authority to regulate commerce.

Another case relied upon to uphold the statute was *Block v. Hirsh* (256 U. S. 135, 41 Sup. Ct. 458, Bul. No. 309, p. 135), sustaining a rent regulation act for the District of Columbia. This was said to be sustainable as applying to an existing emergency to meet a "publicly notorious situation" which was "embarrassing the Federal Government in the transaction of the public business." Neither of these was regarded as involving the principles necessary to the upholding of the statute in question.

Taking up the question of the act as a proper exercise of the police power, the court was "of the opinion that it can not be upheld."

A wage based upon competitive ability is just, and leads to frugality and honest industry, and inspires an ambition to attain the highest possible efficiency, while the equal wage paralyzes ambition and promotes prodigality and indolence. It takes away the strongest incentive to human labor, thrift, and efficiency, and works injustice to employee and employer alike, thus affecting injuriously the whole social and industrial fabric. Experience has demonstrated that a fixed minimum wage means, in the last analysis, a fixed wage; since the employer, being compelled to advance some to a wage higher than their earning capacity, will, to equalize the cost of operation, lower the wage of the more competent to the common basis.

The tendency of the times to socialize property rights under the subterfuge of police regulation is dangerous and if continued will prove destructive of our free institutions. It should be remembered that of the three fundamental principles which underlie government and for which government exists—the protection of life, liberty, and property—the chief of these is property; not that any amount of property is more valuable than the life or liberty of the citizen, but the history of civilization proves that when the citizen is deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection.

Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will command, and the laborer would be reduced to an automaton—a mere creature of the State. It is paternalism in the highest degree, and the struggle of the centuries to establish the principle that the State exists for the citizen, and not the citizen for the State, would be lost.

The judgment sustaining the act was therefore reversed and the causes remanded for further proceedings.

Chief Justice Smyth dissented, claiming, first, that proper procedure had been violated in entertaining the second motion for a rehearing after the matter had been legally finally disposed of, citing numerous authorities. Taking up then the question of constitutionality, he said:

The question presented by these cases is not one of economics. It does not call for a decision with respect to what constitutes thrift or lack of thrift. Nor is the wisdom or nonwisdom of the statute before the court. It is no part of our function to deal with such matters, and any discussion of them is quite beside the case. Our authority is limited to the single question, Had Congress the right to pass the act? When we decide that, we decide everything we have any right to touch. All else that is said, no matter how vehemently, is merely obiter.

The scope of the act was then pointed out, being the protection of "women and minors of the District from conditions detrimental to the health and morals, resulting from wages which are inadequate to maintain decent standards of living," as stated in the act. Differences of economic opinion were declared not entitled to consideration in the case, and it was said "that the high respect due from one coordinate branch of the Government to another forbids the judiciary to declare an act of Congress invalid unless it is manifestly so." The relationship of the statute to the end in view was then considered as warranting the enactment of the law as an exercise of the police power, no legislation having been enacted until Congress "had thoroughly investigated the subject involved," reaching the conclusion that "women and minor workers in the District were paid inadequate wages, and this had a tendency to affect injuriously their health and morals." Numerous cases were cited in which the restriction of the freedom of contract was held to be valid, such enactments being for the public welfare. Minimum wage statutes in various States have been assailed, but uniformly sustained.

Much was said during the argument at the bar to the effect that if this statute is sustained it will lead to sovietism, and so forth. When statutes having that effect come up for judgment we shall deal with them. It is no part of our duty to engage in speculation concerning them now.

It appears to me conclusively that a minimum wage has a real and substantial relation to the health and morals of women and minor girls who work, and that Congress by providing for the establishment of such a wage in the manner outlined in the statute, has not acted arbitrarily or spoliatively, but clearly within the limits of the police power with which it is intrusted.

After the necessary proceedings in the Supreme Court of the District, to which the case was remanded, arrangements were per-

fectured for an appeal to the Supreme Court of the United States for a final decision of the questions involved.

In accordance with the foregoing program, the cases above were argued in the Supreme Court of the United States, a decision being handed down April 9, 1923. Five justices united in declaring the law unconstitutional, Justice Brandeis taking no part, while Mr. Chief Justice Taft and Justices Holmes and Sanford dissented (*Adkins v. Children's Hospital of the District of Columbia*, 42 Sup. Ct. 394).

The majority opinion was delivered by Mr. Justice Sutherland, who, after stating the facts in the case, disposed of the question of jurisdiction by saying that the Supreme Court of the District was within its rights in entertaining the second appeals, and it was from these that the present consideration of the law arose, so that the cases were properly before the United States Supreme Court. Taking up then the substantive question involved, the rule was announced that "every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." However, this statute was attacked on the ground of authorizing "an unconstitutional interference with the freedom of contract included within the guaranties of the due-process clause of the fifth amendment." The contracts thus guaranteed include contracts of employment of labor in which, "generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."

The cases in hand were distinguished from those involving business impressed with a public interest and those relating to contracts for the performance of public work, which are admittedly subject to regulation. Statutes prescribing the character, methods, and time for payment of wages were said to have for their purpose the prevention of "unfair and perhaps fraudulent methods in the payment of wages, and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes."

Statutes fixing hours of labor were next taken up and considered at length, because "such cases approach most nearly the line of principle applicable to the statute here involved." Laws enacted for the protection of the health of workers, as in mines and smelters, are a proper exercise of the police power; but in the absence of such a basis, interference with the work time of adult males is "an unreasonable, unnecessary, and arbitrary interference with the liberty of contract, and therefore void under the Constitution." (*Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539.) In this decision a law of the State which restricted the employment of all persons in bakeries to 10 hours in one day was declared unconstitutional.

The next decision cited was *Bunting v. Oregon* (243 U. S. 426, 37 Sup. Ct. 435.) Here a law of Oregon limiting to 10 per day the hours of work of any person in mills, factories, and manufacturing establishments, but permitting overtime for not exceeding 3 hours at a rate of time and a half was sustained "on the ground that since the State legislature and State supreme court had found such a law necessary for the preservation of the health of employees in these industries this court would accept their judgment, in the absence of facts to support the contrary conclusion."

Taking up cases limited to female workers, Justice Sutherland cited *Muller v. Oregon* (208 U. S. 412, 28 Sup. Ct. 328), in which an Oregon statute limiting the hours of labor of women was sustained, though its attackers cited the *Lochner* case in support of their contention of unconstitutionality. The law was upheld "upon the theory that the difference between the sexes may justify a different rule restricting hours of labor in the case of women than in the case of men." Similar laws of California, Massachusetts, and Ohio were subsequently upheld by the Supreme Court on the authority of the *Muller* case. "But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* case, has continued 'with diminishing intensity.' In view of the great—not to say revolutionary—changes which have taken place since that utterance in the contractual, political, and civil status of women, culminating in the nineteenth amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point." Though conceding that "physical differences must be recognized in appropriate cases," as in fixing hours or conditions of work, "we can not accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances."

The opinion then proceeds to point out "the essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor." The present statute was said to be "simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render services to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee." It is said that "the price

fixed by the board need have no relation to the capacity of earning power of the employee," and while it is based on "assumed necessities" of the employee, "it takes no account of any independent resources she may have."

The standard furnished by the statute for the guidance of the board was said to be "so vague as to be impossible of practical application with any reasonable degree of accuracy." The amount needed to maintain health and protect morals was said to be so variable and incapable of standardization as to furnish no reasonable basis for making a determination. "The board probably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists."

The next point made is that—

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. * * * To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The opinion continues:

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not

concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work under it, is so clearly the product of a naked, arbitrary exercise of power that it can not be allowed to stand under the Constitution of the United States.

Noting the economic arguments in behalf of such legislation, it was said that they might be considered by legislatures, but "reflect no legitimate light upon the question of its validity." If the public welfare is invoked to justify the fixing of a minimum wage, "it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. * * * A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."

A dissenting opinion by Mr. Chief Justice Taft, concurred in by Mr. Justice Sanford, stated the basis of legislation limiting freedom of contract between employee and employer as "the assumption that employees, in the class receiving less pay, are not upon a full level of equality of choice with their employer and by their necessitous circumstances are prone to accept pretty much anything that is offered." How far statutory regulation may be a useful remedy for the evils at which it is directed was admittedly a disputable question. "But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound."

Referring to the decision in the *Lochner* case (which was handed down in 1905) and to that in the *Bunting* case (in 1917), the Chief Justice said, "It is impossible for me to reconcile the *Bunting* case and the *Lochner* case and I have always supposed that the *Lochner* case was thus overruled *sub silentio*. Yet the opinion of the court herein in support of its conclusion quotes from the opinion in the

Lochner case as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the Bunting case."¹

Assuming that "the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract," it was said that both enter equally into the consideration given and received, and that there is no essential difference in the restriction of either, as the two factors of time and rate are of the same kind. "One is the multiplier and the other the multiplicand." The conclusion that the concession of power to fix a minimum must carry with it the concession to fix a maximum wage was said not to follow.

The relation of wages to health was said to be not less direct than that of the hours of labor, on "very respectable authority from close observers, disclosed in the record and in the literature on the subject. Congress took this view and we can not say it was not warranted in so doing."

Cases were then cited in which the court had sustained legislative limitations in respect to the wage term in contracts for private employment, as the payment of miners by weight of coal, redemption of store orders in cash, and the payment of wages to seamen in advance. Without expressing an opinion as to the validity of a law fixing a wage for adult men, "it is enough to say that the case before us involves only the application of the minimum wage to women"; and in view of the evidence that "a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers" as long hours, "then I respectfully submit that *Muller v. Oregon* controls this case."

The opinion concludes:

I am not sure from a reading of the opinion whether the court thinks the authority of *Muller v. Oregon* is shaken by the adoption of the nineteenth amendment. The nineteenth amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I do not think we are warranted in varying constitutional construction based on physical differences between men and women because of the amendment.

But for my inability to agree with some general observations in the forcible opinion of Mr. Justice Holmes, who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance separately to give my reasons for dissenting.

¹ Counsel attacking the Oregon statute cited the *Lochner* case as supporting their contention, but it was not even mentioned in the opinion of the court.

Mr. Justice Holmes cited various cases in which liberty of contract had been interfered with "quite as seriously and directly as the one before us," as where interest and insurance rates and wage payments were regulated, the size of a loaf of bread established, and employers' responsibility to their employees "profoundly modified." Justice Holmes was not able to "understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for the hours of work. * * * The bargain is equally affected whichever half you regulate. *Muller v. Oregon*, I take it, is as good law to-day as it was in 1908. It will need more than the nineteenth amendment to convince me that there are no differences between men and women, or that legislation can not take those differences into account. After *Bunting v. Oregon*, I had supposed that *Lochner v. New York* would be allowed a deserved repose."

Continuing, he said:

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them or unless the employer's business can sustain the burden. In short, the law in its character and operation is like hundreds of so-called police laws that have been upheld.

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly can not be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria, and a number of the States of the Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the belief reasonably may be held.

I am of opinion that the statute is valid and that the decree should be reversed.

WAGES—MODE AND TIME OF PAYMENT—DEDUCTION FOR ADVANCE PAYMENT—*Princeton Coal Co. v. Dorth*, *Supreme Court of Indiana* (December 22, 1921), 133 *Northeastern Reporter*, page 386.—Charles L. Dorth was a laborer in the employ of the Princeton Coal Co. from October 15, 1912, until November 30, 1916. The company paid its employees on the 10th and 25th of each month for the half month ending 10 days previous to the day of payment. It was the practice of the company, known to Dorth, that there would be a 10 per cent deduction on partial payments of wages paid before the regular pay days. This suit was brought to recover \$190.70, the total amount deducted as discounts for the advance payment of wages. There were also items amounting to \$102.55 deducted from Dorth's

wages and paid to a store not owned by the company. Dorth, during the period of his employment, acquiesced in the deductions. The circuit court allowed the recovery of the \$190.70. From this judgment the company appealed. The lower court was reversed on appeal, as it was held that this was a case of accord and satisfaction and that the employee was bound by his acceptance of the lower amount. It was also held that the wage assignment law does not render illegal discounts made by an employer in making payments to employees at their request before pay day. Judge Townsend stated the opinion of the court in part as follows:

If a debtor pays his creditor at or after the due date less than the liquidated amount due, this is not satisfaction, because there is no consideration. If the debtor pays a different consideration than that in the contract, it may be satisfaction, even though what the creditor receives may seem of less value than that for which the contract calls. Courts have no practical way to fathom the mental processes of the creditor in accepting a consideration different in kind than that in the contract. The creditor is his own judge in this matter. He is deemed to have seen something more advantageous in the consideration received than the consideration in the contract, even though it may appear to the court to be of less value.

When the debtor pays his creditor before the debt is due a less sum than the contract calls for at the due date, it must be assumed by the court that the creditor deemed a lesser amount paid before the due date more advantageous to him than the whole amount on that date. This consideration moves to the creditor. The thing lost by the debtor is the right to stand on his contract and not pay until the due date. And if he, in consideration of this loss, demands and gets from his creditor a discount, courts are not required to inquire into the reasonableness or unreasonableness of the debtor's conduct in so demanding, nor of the creditor's conduct in accepting payment so reduced. Appellee is bound by his acceptance of an amount less than the face of his claim, in consideration that he got it before it was due.

It is contended, however, by counsel for appellee that the discounts for payment before due are illegal, because of a statute concerning the assignment of wages. (Acts 1909, p. 76.) This has no application. The present case is not an assignment of wages in the sense of the act, and does not come within the purview of it. What we have here is an acceptance of an employee—who is not an infant, not a person of unsound mind, not under guardianship—of an amount less than the wages earned in consideration of payment of wages before pay day. Appellee's counsel also contends that appellee had a right to have his wages paid each week, pursuant to section 7981, Burns' 1914 (Acts 1911, p. 110). It is true that this statute gives him this right, "if demanded." But he did not demand it.

The court erred in its conclusion of law allowing appellee to recover \$190.70.

In *Princeton Coal Co. v. Dorth*, 134 N. E. 275, decided February 23, 1922, a petition for a rehearing was denied, Judge Townsend, speaking for the court, stating in part as follows:

Appellee contends again in his petition for rehearing that section 7981, Burns' 1914, controls this case; that is to say, that it shall be unlawful to enter into a contract to pay an employee under the circumstances of this case in anything but lawful money of the United States, and that any contract to the contrary shall be void. The answer to this contention is that it has no application. The contract between appellant and appellee was to pay in money. Making a contract which established the relation of employer and employee is one thing; mutually settling what shall be paid after the work has been performed, before pay is due, is a very different thing.

Appellee further insists in the petition for rehearing the facts found warrant the inference that he made demand for the payment of his wages each week. On the contrary, the findings expressly show that the discounts were always 15 to 16 days apart during all of the time covered by the findings.

Statutes of the character relied on here are in derogation of common law. They give a new right to the employee. They impose a new and additional burden upon the employer. One section of the statute requires weekly payment of wages, if demanded; another authorizes the employer to pay on the 10th and 25th of each month. If appellee wants to exclude himself from the operation of one statute and invoke the operation of the other, it is his duty to do so by a clear and explicit demand. It is not for this court to become paternalistic to extend the meaning of these statutes beyond the clear legislative intent. They are not only in derogation of common law, but are also penal.

Appellant and appellee operated under section 7989a, Burns' 1914, which provides for semimonthly payments. If appellee wanted to bring himself within section 7981, which provides for weekly payment, he did not do so by asking for payments semimonthly.

Chief Justice Ewbank dissented from both opinions.

WAGES—NONPAYMENT—PENALTY—ASSIGNMENT—*Martin v. Going*, District Court of Appeal of California (May 8, 1922), 207 Pacific Reporter, page 935.—Several men performed labor upon the ranch of J. S. Going, in the State of California, during the summer months of 1920. Their wages were not paid, and they assigned their right to them to J. C. Martin. Section 955 of the Civil Code of California provides:

No assignment of, or order for, wages or salary shall be valid unless made in writing by the person by whom the said wages or salary are earned.

The Statutes of 1919, page 294, provide that as to an employee not working under a written contract for a definite period, his wages shall become due and payable not later than 72 hours after termina-

tion of the employment, and that where an employer willfully fails to pay such wages, "as a penalty for such nonpayment the wages or compensation of such employees shall continue from the due date thereof at the same rate until paid, or until an action therefor shall be commenced: *Provided*, That in no case shall such wages continue for more than 30 days. * * *

The assignee, J. C. Martin, combined the assignments, amounting to \$264.80, thereby taking the jurisdiction out of the justice's court and giving jurisdiction to the superior court, and brought an action to recover the total amount. The trial court rendered judgment, allowing besides the \$264.80 claimed an amount for penalties for 30 days, bringing the total judgment up to \$485.30. An appeal was taken to the district court of appeal. That court reversed the judgment below, stating several reasons for its action. The burden of proving the assignment to be legal was upon Martin. At the trial witnesses had testified that the claims had been assigned without stating the manner in which the assignment was made. The court of appeal held that this fell short of establishing the fact in the manner required by law. Going raised a contention as to the validity of the additional sums allowed by the trial court as penalties for nonpayment of the alleged wages. He showed that all of the amounts claimed were alleged to have accrued on August 5, 1920, and that the original complaint was filed by Martin on August 24, 1920. Judge James, of the court of appeal, in finding that the judgment of the trial court could not be sustained, said in part:

These facts suggest two questions, which may be thus answered: (1) Under the terms of the statute the "penalty wages" would stop running upon the commencement of an action to collect the same, where the action is brought by an original claimant. But 19 days elapsed between the cessation of labor and the commencement of the action; hence in no event could there be a 30-day penalty allowed. (2) An assignment of a labor claim can not carry with it and preserve in favor of the assignee the right to a penalty accruing subsequent to the date of the assignment. For aught that appears in the findings of the court, the assignment may have been made on any day subsequent to the cessation of work.

WAGES—NONPAYMENT—PENALTY—EFFECT OF TENDER—*Robinson v. St. Maries Lumber Co., Supreme Court of Idaho (December 30, 1921), 204 Pacific Reporter, page 671.*—Mike Carter, George McDonald, and several other men were in the employ of the St. Maries Lumber Co. on June 25, 1917, as laborers. On that day they stopped work and demanded their time from the foreman in charge of the work. They were each given a statement of the amount due them, payable at the Lumbermen's State Bank, St. Maries, and they thereupon left

the place of their employment and proceeded to the city of St. Maries. The Lumbermen's State Bank refused payment, and the time checks were returned to the men. Carter and McDonald, thereafter, on June 26 or 27, 1917, delivered their time checks to an attorney for collection. On July 3, 1917, the attorney was tendered the full amount of the wages due the men, but the penalties due under the statute that provided that an employee "may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default until he is paid in full, without rendering any service therefor," were not tendered. The tender of wages was refused. The matter was taken into court with the claims for wages by the other men, and the case eventually found its way by appeal into the supreme court of the State. In the opinion of that court upon the question of the amount due Carter and McDonald it was held that "upon the payment or tender of the wages, the running of the penalty provided by the Compiled Statutes, section 7381, stopped." However, it was held that the employee still had the right to bring suit for the penalty that had accrued up to the time of the tender. A tender, it was held, had the same effect as payment. The chief justice and one judge dissented from the opinion of the majority of the court because of their view that the tender should be the amount due, including the accrued penalty. The two claimants were allowed the amount of wages due on the date demanded and \$6 each per day (the wage rate), together with interest up to the time of the tender, with costs.

WAGES — RATES — BASIS — JURISDICTION OF INDUSTRIAL COURT—
ENTERPRISE OPERATED AT A LOSS—*Court of Industrial Relations v. Charles Wolff Packing Co., Supreme Court of Kansas (June 10, 1922), 207 Pacific Reporter, page 806.*¹—The court of industrial relations brought proceedings against the Charles Wolff Packing Co. to compel the acceptance of a prescribed scale of wages and the establishment of certain hours of labor in the company's plant. The constitutionality of the law authorizing the court to do this was questioned, and other contentions arose which were decided in a previous decision reported in 201 Pacific Reporter, at page 418 (Bul. No. 309, p. 128). This opinion is a part of the same action and disposes of the questions that were not disposed of in the former opinion. The Supreme Court of Kansas appointed a commissioner to take evidence and make findings of fact and conclusions of law in connection with this case. The evidence was taken, and it shows that the company was engaged in operating a packing plant in the city of Topeka for the purpose of slaughtering animals for food; that about 300 workmen were employed by the company in the operation of the plant;

¹ Reversed: 43 Supreme Court Reporter, p. 630.

that a difference arose between the company and its employees concerning wages, hours of labor, and certain working conditions; that a meeting of the employees was called for the purpose of voting on a proposition to strike on account of the controversy; that at the meeting the employees voted to present the controversy to the court of industrial relations; and that thereafter proceedings were taken before the court. The company insisted that the evidence did not show such an emergency as would give jurisdiction to the court of industrial relations to make any order in this case. The former opinion decided this question in favor of the employees, and that opinion was in this case expressly approved in this respect. On this subject Judge Marshall, speaking for the court, said:

The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this State would not greatly inconvenience the people of Kansas; yet the plant manufactures food products and supplies meat to a part of the people of this State, and if it should cease to operate that source of supply would be cut off. The plant comes within the operation of the law, and the court of industrial relations has power to make the orders provided by law under the circumstances named in the statute. The petition alleged facts which show that such an emergency as the law contemplates existed, and gave to the plaintiff authority to inquire concerning the matters alleged in the complaint. The evidence established facts sufficient to give to the court of industrial relations authority to make proper orders thereunder.

The commissioner appointed by the court reported as one of his conclusions of law that the orders contained in paragraphs 1, 5, 6, 7, 8, 10, 12, 13, and 16 of the order of the court of industrial relations were made without jurisdiction and were unenforceable. The paragraphs of the order objected to provided for certain working conditions, and the conclusion reached by the commissioner was based on the fact that the employees did not allege anything in their petition to the court that would give jurisdiction to the court to make the orders objected to. The contention of the court of industrial relations was that it had jurisdiction because the paragraphs objected to were embraced within the contract between the company and its employees and that a copy of the contract was attached to the complaint. The commissioner's conclusions were sustained, the court saying:

The notice served on the defendant was a copy of the complaint, with a copy of the contract between the defendant and its employees. Such a notice as is required by the statute was not given to the defendant concerning the subjects named in paragraphs 1, 5, 6, 7, 8, 10, 12, 13, and 16 of the order of the court of industrial relations, and the defendant did not voluntarily submit to an inquiry

into those matters. It follows that the court had no jurisdiction to make any order concerning any of them. However, it should be stated that if in the course of its investigation matters that ought to be considered should come to the knowledge of the court, it may investigate them and make orders concerning them after taking the necessary steps to acquire jurisdiction.

One of the findings of the commissioner was that for some time prior to the making of the order fixing hours and wages the company had been operating its plant at a loss, but no evidence was presented showing what was the cause of the loss. The order of the court slightly raised the wages of the employees over the wages that were in effect at the time the order was made. The question was whether this fixing of wages was a State regulation which would deprive a person of his property without due process of law and deny any person within its jurisdiction the equal protection of the laws as guaranteed by the fourteenth amendment. The court pointed out the difference between fixing rates for public utilities at an amount resulting in loss, which under the circumstances would not be good, and the fixing of wages, which was held to be a proper exercise of the State's power. The court said that "wages, for the purposes now under discussion, are that part of the cost of the finished product given to those who perform service in its production," and sustained the right to regulate such wages, even though the establishment was being operated at a loss.

In arriving at this conclusion the court said:

The operators of a packing plant can not by law be compelled to sell the finished product of their plants at a price that will not allow them a fair return upon the investment, but that does not say that those operating the packing plant can not be compelled by law to pay a living wage to their employees, notwithstanding the fact that the plant is being operated at a loss. An industry of any kind that can not be operated except at the sacrifice of its employees ought to quit business. An industry ought not be permitted to recoup its losses out of the wages of its employees, where those employees are in such a condition that they can not prevent it. It may be argued that a laboring man is not compelled to work for any particular employer, and that the laboring man can quit at any time and go elsewhere. So far as the law is concerned, this is true—he has an absolute right to go and seek work in some other place; but actually, and in fact, it is often impossible for a working man to quit the work in which he is engaged and readily find other work. Economic conditions are such that, most of the time, when a working man finds himself out of work, he must remain out of work for days, weeks, and months, during which time he and his family suffer. Many a working man can not quit when he desires so to do. He must continue to work although his wages are not sufficient to properly feed and clothe himself and his family and educate his children. Public welfare demands that all industries that provide food, clothing, fuel, and transportation shall continue to operate because without their operation

suffering must result; but public welfare likewise demands that the working man engaged in the production of the things that minister to the comfort of all, must be paid such compensation for his services as will enable him to live in the manner described in the court of industrial relations act.

A peremptory writ of mandamus, directing the company to put into force the portions of the orders found valid, was therefore authorized.

WAGES—RATES—CITY ORDINANCE—CONSTITUTIONALITY—*Jahn v. City of Seattle, Supreme Court of Washington (June 13, 1922), 207 Pacific Reporter, page 667.*—In the charter of the city of Seattle, Wash., there is a provision to the effect that every contractor and subcontractor performing any local or other improvement work for the city of Seattle shall pay or cause to be paid to his employees on such work or under such contract not less than the current rate of wages paid by the city of Seattle for work of like character, and in any event not less than \$2.75 per day. Ordinance No. 38415 provided that contractors or subcontractors performing any local or other improvement work for the city of Seattle shall pay or cause to be paid to his employees on such work or under such contract not less than the current or prevailing wage paid by the city of Seattle for work of like character. Ordinances No. 41689 and No. 42219 provided that for common labor employed in the different departments, the heads of those departments should fix the amount of the wages, provided that they should not exceed \$4.75 per day for employees just entering the city's service and \$5.25 for those who had been in such service 90 days or more.

Mr. F. T. Jahn and others, contractors with the city, instituted proceedings for an injunction against the city of Seattle to prevent further arrests because they were paying less than the amount which certain departments of the city of Seattle paid for common labor, and the constitutionality of the three ordinances mentioned was questioned. They were not successful in the lower court, and the case was appealed to the supreme court of the State. That court sustained the judgment below and upheld the constitutionality of the ordinances in question. With regard to the contention of the contractors that the going rate of wages was less than that which they were being called upon to pay and that the ordinances were therefore invalidated for the reason that they were unreasonable, the court said:

This argument is fallacious, because the validity of statutes and ordinances similar to the one here under consideration does not depend upon the exercise of the police power. The police power, of course, must be exercised in a reasonable manner, but the right of

the State and its municipalities to say upon what conditions a public work shall be or not be performed is not a right arising from the exercise of the police power, and therefore the question whether the ordinances in this case prescribe a reasonable rate of compensation does not enter into the discussion of the matter.

The contractors also contended that as the city council had not fixed by ordinances the wages which were to be paid by the city in its several departments they were, therefore, not bound to pay \$4.75 a day, for the reason that the rate had been established by the heads of some departments only and that this was an illegal attempt to delegate to those department heads the power to fix the rates of wages. The court, speaking through Judge Mackintosh, met these contentions as follows:

An examination of the ordinances shows that the minimum wage for labor such as we have under consideration has been fixed at \$2.75 per day and that the maximum to be paid is \$4.75 per day (with \$5.25 for longer service), and that the heads of departments can not pay less than the one amount nor more than the other. The provision of the charter is that the contractor upon public work shall pay the same wages as the departments pay. We can not see how it can be said to be a delegation of the legislative power for the city council to say to the heads of the departments, "You pay your laborers an amount between \$2.75 and \$4.75 per day," without fixing the exact amount between those figures.

It appears that the heads of city departments have no funds to pay laborers; the city council appropriates the money for that purpose, and in accordance with the recommendation of the department heads, if it follows recommendations, or it fixes the appropriation itself, and in either event it in reality fixes the wages which are paid.

For the reason that the fixing of the minimum wage upon public work is constitutional and for the further reason that power to fix that wage by the city of Seattle has not been delegated by the city council but is being exercised by it the lower court was correct in sustaining the demurrer to the complaint.

Judgment affirmed.

WAGES—RATES—POWER OF MUNICIPALITY—DELEGATION OF POWERS—CONSTITUTIONALITY OF ORDINANCE—*Wagner v. City of Milwaukee et al.*, *Supreme Court of Wisconsin (June 6, 1922)*, 188 *Northwestern Reporter*, page 487.—On September 26, 1921, the common council of the city of Milwaukee adopted an ordinance governing the employment of laborers on contracts for work for the city. It provided that all laborers employed in any work done by or for the city by any contractor or subcontractor performing work for the city "shall receive and be paid a sum not less than that paid by the city for such laborers by direct employment for a day's work of eight hours"; also that they "shall be paid a sum which shall not be less than the prevailing wage in this city for such skilled labor,

said prevailing wage to be determined by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor," such rate to "first be determined and approved by a majority vote of the members of the common council."

In pursuance of this ordinance a resolution was adopted by the council fixing a scale of wages of persons employed in all public work. Herman A. Wagner, a resident taxpayer of the city of Milwaukee, for himself and others, brought a suit to restrain the enforcement and the resolution passed in compliance therewith. It was alleged by him that the ordinance was unconstitutional and void as being a delegation of the legislative function of the common council to labor unions or organizations, and that it was in violation of the charter of the city of Milwaukee providing that all public contracts are to be let to the lowest bidder. It was further contended that the wage scale fixed by the resolution was 25 per cent in excess of the actual prevailing wages in the city of Milwaukee and vicinity in the trades mentioned for which work was to be done and contracts let. The trial court did not grant the relief sought, and an appeal was taken to the supreme court. That court reduced the contentions of the parties to the questions:

(1) May a common council fix and determine what shall be a minimum prevailing wage scale to be paid by the city to its own employees and also require its contractors to pay their employees such rate?

(2) If there be such a power, is there here an unwarranted delegation to some outside body of the authority to determine such wage scale?

The supreme court, four justices dissenting, reversed the action taken by the lower court, stating its reasons through Judge Eschweiler, who spoke, in part, as follows:

For the common council to fix a prevailing minimum wage scale is but a step in advance of, but nevertheless in line with, what was held to be a proper exercise of its legislative discretion and function in the case of the City of Milwaukee *v. Raulf*, 164 Wis. 172, 159 N. W. 819 [Bul. No. 224, p. 142], and we think what was said and held in that case controls on the question now discussed. As to city employees, such a provision as to hours of labor has long been recognized. (*Vogt v. Milwaukee*, 99 Wis. 258, 74 N. W. 789.)

As a general proposition, therefore, such a legislative body as the common council of Milwaukee under its charter power may fix, within a reasonable and fair compass, the rate of wages to be paid to laborers on city work as much so as it may prescribe the hours of labor as held in the *Raulf* case, *supra*, and as well as it may prescribe the quality of materials that shall go into its public buildings and works, as has been its unquestioned power and practice.

Upon the second of these questions we see no escape from the conclusion that by the terms of the ordinance in question and the

resolution passed in accordance therewith there is manifest a declaration by the common council that in fixing a minimum wage scale it will and does adopt and establish as such scale and prevailing wage the rate paid to the members of any regular and recognized organization of the skilled laborers for each particular class of labor. The only exception recognized as to such being the standard is in the case where to any particular class of labor the city itself is then paying a higher scale of wages.

This in effect declares that some body or organization outside of, and independent from, the common council, and other than a State or local administrative body, shall exercise the judgment required to fix and determine a prevailing wage scale. It amounts to nothing less than a surrender by the members of the common council of the exercise of their independent, individual judgments in the determination of a matter of legislative concern, and an agreement that if they act upon the subject at all the determination of such outside body rather than their own shall control. There is no discretion left with the common council as to the scale; if it fixes any, it must fix that scale determined by the unions. The action and judgment of determining the wage scale is that of the unions, not that of the common council. The power to exercise such legislative function is exclusively in the common council, and their duty and obligation as representatives of the people to so exercise it is coextensive with the power itself.

The language, the reason, and the logic of repeated former rulings of this court and of other courts plainly declare that any attempted vesting of the determination of such a legislative question in an outside body is an abdication, and not an exercise, of the legislative discretion that exclusively belongs to the common council itself.

The ordinance provides that neither of the various sections thereof is passed as an inducement for the enactment for either of the others. It is argued that upon this express declaration and under the general rules of law the particular portion of the ordinance which we are now compelled to hold as beyond the constitutional power of the common council to enact can be separated from the rest and the balance upheld. We can not, however, so regard it. The controlling, dominant feature of this entire ordinance is the fixing, in concrete, definite form and in express terms of dollars and cents, the prevailing wage scale for the various crafts and industries. This essential and dominant feature is by the ordinance fixed by the labor unions rather than by the common council. Such rule of action is one, we are constrained to hold, beyond the power of the common council to make. It permeates the entire measure, and when it falls the rest must fall.

WAGES—RATES—POWER OF RAILROAD LABOR BOARD—CONSTITUTIONALITY OF STATUTE—RECOVERY OF WAGES—*Rhodes v. New Orleans Great Northern Ry. Co.*, *Supreme Court of Mississippi, Division B (April 10, 1922)*, *91 Southern Reporter, page 281*.¹—The United States Labor Board was created by authority of an act of Congress known as the transportation act of 1920 (41 Stat. 456).

¹ See p. 142.

The board was authorized to establish rates of wages of employees and salaries of subordinate officials in certain cases. In pursuance of this authority the board on July 20, 1920, set the rate of pay of all labor on the New Orleans Great Northern Ry. Co. at 36½ cents per hour. The railroad company paid Edward Rhodes, a laborer in its employ, on this basis up to January 1, 1921. From January 1 to June 30, 1921, Rhodes continued in the employ of the company and during this time worked 1,449 hours, but at the rate of 20 cents per hour. According to the rate set by the board, which continued in effect, Rhodes was entitled to \$239.08 on June 30, and for this amount he brought suit against the company. The railroad company defended on the grounds that, admitting the facts, Rhodes did not have a right to recover the \$239.08, because that part of the act that attempted to give power to regulate wages of employees was unconstitutional; that the board has only a limited jurisdiction in that it can only set wages in case of a dispute and other special circumstances; that the employee had waived any rights he had by accepting 20 cents an hour; and lastly because the court of Mississippi was not given power to render judgment in any suit to enforce any order of the board. Judgment was rendered in favor of the railroad company and Rhodes appealed to the supreme court of the State. Judge Ethridge, speaking for that court in an opinion reversing the lower court, answered the contentions of the defendant in part as follows:

In reference to the fourth ground of demurrer, it does not appear from the declaration that the plaintiff waived any right he may have had to recover the 36½ cents per hour. The acceptance of part payment does not per se waive the right to demand the balance due. If there are any facts constituting estoppel or waiver, that may be raised by appropriate pleading. A demurrer does not lie to the declaration as drawn on this ground.

It will be seen from the act that the board is given power to establish rates of wages and salaries in cases therein provided for. The purpose of the act is to establish a legal tribunal with powers to fix the rate of wages between carriers and their employees and subordinate officials when they can not be settled by agreement, to the end that commerce may not be interrupted. In our view the act creates a system of compulsory arbitration with notice to the parties and a right to produce evidence, and the finding of the board in the cases provided for in the act has the effect of an award. The purpose of Congress was to prevent the possibility of tying up the transportation of the country during disputes as has been done heretofore in numerous cases, and has been threatened in cases of such magnitude as to seriously jeopardize the business and welfare of the country. The living and business conditions of the great public are dependent upon the carriers for the transportation of the necessities of life, as well as ordinary articles of utility. The legal effect of the action of the board is to fix, for the time being (a temporary

period), the wages and salaries of the employees until the parties can agree upon such wages or salaries, or can make other arrangements with other men for the carrying on of the business of the carrier. It has the effect, in our opinion, of giving a right of action against the carrier by the employee or official for the salary so fixed under the provisions of the act if services are performed thereunder, and the courts are open for the enforcement of this obligation. The courts are open to the carriers also. Of course it was within the powers of Congress to fix the conditions upon which suits could be brought, or the courts in which the obligation could be enforced. But, Congress having designated no tribunal to take cognizance of the matter, any court having jurisdiction of the parties and subject matter may enforce the obligation as in the case of any other money obligation or contractual right.

This brings us, then, to the question of the constitutionality of the act.

Congress has been given the power to regulate interstate commerce in broad and comprehensive terms. This power, being given by the Constitution, is only limited by other provisions of the Constitution. The act in question seems to us to have been drawn under the decisions of *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 [Bul. No. 224, p. 144], in which case the court considered the power of Congress under the Adamson Act (U. S. Comp. St., secs. 8680a-8680d) to legislate with reference to a grave situation involving, among other things, the right to fix wages and hours for employees, and upheld the power of Congress so to do. The applicable authorities are found in that opinion and in the elaborate briefs before the United State Supreme Court in that case as set out in 61 L. Ed. 775 et seq. The power conferred in the present act to fix wages is not a fixing of wages permanently, but a temporary fixing of wages with full power of the Labor Board to modify its orders as exigencies may arise.

We do not think the act here under review unconstitutionally abridges the freedom of contract, nor that it deprives the defendant of its property without due process of law. As pointed out in *Wilson v. New*, supra, and numerous other cases, the fact that a business is affected with the public use makes it different from, and its right of contract also different from, that of ordinary business. This is pointed out clearly in the majority opinion in *Wilson v. New*, supra. Mr. Justice McReynolds in his dissenting opinion closes his opinion with this language:

“But, considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers.”

It follows from what we have said that the judgment of the court below must be reversed, and the cause remanded.

Reversed and remanded.

WAGES—SEAMEN—CONTRACT OF EMPLOYMENT—FISHERMEN—SEAWORTHINESS OF VESSEL—LABOR CERTIFICATES ISSUED UNDER DURESS—*Heino v. Libby, McNeill & Libby, Supreme Court of Washington (June 21, 1921), 205 Pacific Reporter, page 854.*—This case was a consolidation of 10 suits by a crew of seamen and fishermen, suing for themselves and as assignees of 84 others. The action was for the recovery of wages claimed to be due under a contract to operate a ship and to engage as fishermen, going from Seattle, Wash., to Libbyville, Alaska, and return. The contract obligated the men to carry out their agreement subject to a penalty of \$5, recoverable from each member of the crew, for each day they refused to work. The fishing season is during the summer, and the vessel, a sailing ship, the *Abner Coburn*, left Seattle April 10, 1919, with cannery and fishery supplies and about 325 or 330 men. The men were divided into three groups, the first group comprising what were known as seamen, fishermen, beachmen, and trapmen; the second, monthly men, and the third, China crew. The plaintiffs in this case were members of the first group, and all belonged to the Alaska Fishermen's Union. Besides the statutory contract, complying with the provisions of the Federal law, there was a supplemental agreement known as the "fisherman's contract," specifying the duties and compensation of this group. The shipping articles and the fisherman's agreement were executed together and constituted one contract.

On the way out the ship encountered a storm which lasted about 24 hours, and began to take water at the rate of about 9 or 10 inches per hour. Some of the crew became alarmed and demanded a return to Seattle. The vessel was then about half way to its destination, and though a petition to return was signed by many of the crew and monthly men, the master went forward, being of the opinion that this was as safe as to return. The boat completed its journey safely, the water being controlled by the power pumps, and the cargo suffering no damage. After partially unloading the vessel, the leaks were discovered, the joints between the ends of the planks having opened somewhat, due to the oakum with which the joints were calked working out. While lying in harbor the vessel was completely overhauled and the leaking joints repaired.

The crew on its arrival at Libbyville met and agreed among themselves that "under no circumstances would they sail the ship on the return voyage, and so notified the superintendent of appellant's cannery." This was before the vessel was unloaded and the cause of the leakage discovered. After repair, the company's representative had it "surveyed by three disinterested master mariners from other ships, and as a result of their examination they pronounced the ship seaworthy and in all respects fit to make the return trip to Seattle."

The return trip was planned for August 12, the vessel being only partly loaded, so that the joints that had leaked on the outward trip were above water. However, the seamen refused to obey an order to go aboard, and no effort to induce them to do so availed. Recourse was had to the United States Coast Guard, and the captain in charge of a vessel of that service was directed from Washington to render assistance in the case. He instituted a second survey, and pronounced the vessel seaworthy and so informed the crew, but without effecting any change in their attitude or conduct. A dispatch from the fishermen's union at headquarters, advising the men to sail the boat home, was also ignored. The vessel finally arrived at Seattle, having been towed most of the way, developing leakage in only "an inconsequential amount," with the cargo undamaged. "The proof shows that a wooden vessel will leak more when being towed than when being sailed."

The men offered no violence at any time but were "simply stubbornly determined." However, the captain of the Coast Guard cutter had agreed to furnish safe transportation to Seattle and pay all expenses of the men until they arrived. The captain of the *Coburn* had not ratified this and it was said that the agreement was acceded to as a means of getting the men out of the region for the winter, to avoid the hardships that would have followed had they remained. The crew were returned by steamer, the master and the monthly men remaining on board the *Coburn*.

The contract was determined to be maritime, the *Coburn* being classed as a merchantman. "Being governed by maritime law, the men have no right to conspire together to abandon the ship and its enterprise before the voyage is completed." Although there had been an appearance of danger none had actually developed, and the outcome shows that the fears of the crew were unfounded. The repairs of the vessel and the finding of seaworthiness by two surveys appeared to the court to warrant the attitude of the employer in demanding the fulfilment of the contract and refusing pay to the men who had violated it. The opinion continues:

We are convinced, under the law and the facts governing this case, that the crew of the *Coburn* willfully and unreasonably acted upon their own opinion as to the seaworthiness of the vessel to make the return trip to Seattle; refused to be governed by the disinterested and independent surveys made by competent master mariners; refused to go aboard the ship in response to the master's order; demanded no survey by impartial persons competent to make such survey, and willfully refused to make the return voyage to Seattle without just cause or reason; and under such circumstances they became deserters. Such being the case, they forfeited their wages and all emoluments then earned.

As to the effect of the labor certificates issued in the circumstances above set forth, the court discussed the situation and the resultant conditions as follows:

Here the men deserted and abandoned the ship and its enterprise in a body, at a remote point where other men could not be obtained to continue the enterprise and voyage, and where, from humanitarian motives alone, it was absolutely impossible to evade the duty of returning the men from that region to the initial port; and, because they unanimously abandoned and deserted the ship and refused all efforts to persuade them to perform their duty and fulfill their contract, they compelled the appellant to give them certificates of labor performed while in Alaska or on the voyage thereto, and to furnish them maintenance and transportation out of that region—all of which constituted duress of the most forcible kind, and gives no validity to the labor certificates issued in Alaska or to recovery upon the original contract willfully forfeited and abandoned by the men themselves.

Therefore, although mindful that we "should be careful not to so construe the law as to force a crew to risk their lives on an unseaworthy ship," we are convinced by the record in this case and the law applying that appellant did everything in its power to humanely care for these men, and paid out a great deal of money in excess of their contract pay on account of their unreasonable, obstinate, and arbitrary conduct, and that the men forfeited and are not entitled to recover their wages. The jury should have been instructed to render a verdict for appellant. The judgments are reversed and the cases dismissed.

WAGES—SEAMEN—LIABILITY OF OWNER AND MASTER—*Everett v. United States, United States District Court, Western District of Washington (December 3, 1921), 277 Federal Reporter, page 256.*—The ship *Agron* was built by the United States Shipping Board through the United States Shipping Board Emergency Fleet Corporation and was included in a contract of sale between the United States, represented by the Shipping Board, and the National Oil Co., dated March 5, 1920. One provision of the contract of sale read: "It is expressly agreed that the title to the said hulls and bills of material, and any additions or improvements made thereto, shall remain in the Fleet Corporation until the same shall be completed and documented and the buyer shall have executed the mortgages and notes hereinafter provided for." One Tory Hedemark was employed by the National Oil Transport Co., operating company for the National Oil Co., as master of the vessel. Seamen were employed by the master under an agreement to work from Seattle, Wash., via port of Sydney, Australia, thence to such other ports and places in any part of the world as the master may direct, and back to a final port of discharge, to be designated by the master, in the United States, for a term not exceeding 12 calendar months. The vessel arrived at Balboa in

January, 1921. The seamen not having been paid, and the vessel being out of supplies, the seamen applied to the United States consul for relief. Provision was made for them. After leaving Balboa and being several days out the vessel, running short of fuel, got in contact with the master of the steamship *Lake Fanbush* and was assisted into port. The master of the *Lake Fanbush* libeled the *Agron* for a large sum for salvage, but the seamen intervened and sought to impress upon the vessel their unpaid wage claims. The libel for salvage was dismissed, and the case proceeded on the intervening libels, with the result that the ship was sold and the proceeds applied to the payment of the wage claims. But the proceeds of the sale were not enough to pay all the claims, so proceedings were brought against the owner and master of the ship. The defenses set up by the United States Shipping Board Emergency Fleet Corporation and Hedemark were the denial of ownership by the corporation and that the parties were estopped from proceeding against the matter in personam because of the proceedings against the vessel. The case was heard in the District Court of the United States, and Judge Neterer delivered the opinion of the court, which is in part as follows:

(1) The seamen under the shipping articles have a threefold remedy for their wages against (a) the ship; (b) the owners; and (c) the master. There is no diversity to this rule, so far as I am advised. The laws of the United States as well as those of England have provided such remedy.

The general owner is liable for seamen's wages only when privity with the master is shown.

An owner may not escape liability for wages by transfer of ownership pending fulfillment of articles, nor during a voyage, nor by abandoning the ship to underwriters, but where the owner makes a bona fide sale, and delivers possession of the ship, and surrenders control to the purchaser, he is not liable for the wages of the seamen employed by the master, who was hired by the purchaser; the vessel being navigated by such master and seamen, and voyage directed by the purchaser or his crew. And the fact that the sale was not consummated by execution of formal transfer, and the ship still documented in the name of such owner, would not change the status. Failure to take a mortgage was the hazard of the respondents, which can not affect the seamen.

A decree in rem does not of itself defeat a contractual right to seek a remedy in personam for the balance of an unliquidated claim, if the two remedies exist and the remedy in rem has been exhausted.

Under the shipping articles the master is obligated to pay the wages of the seamen. This is an extreme hardship, brought on by no fault of the master. It is a liability which was not contemplated by either the master or the seamen. The master lost his earnings on the voyage, he could not even participate in the proceeds of sale of the vessel, and now to be adjudged liable for the unpaid wages of the seamen will take from him all his savings, and the provision

made for the education of his children, and leave his family destitute, except such exemptions as are given by law to the head of a family. The form of article is provided by section 4612, R. S. "Schedule" "Table A" (Comp. St., sec. 8392). This form was adopted when the relation of the master to the ship and to the owner was very different from that of the present time. The reasons for this stipulation, it would seem, do not obtain in the modern shipping world, and a change should be made, but it can not be made by the court.

A judgment must be entered against the master for the unpaid wages and return transportation to Seattle for the officers and men, who returned immediately, as provided in the shipping articles.

WAGES—SEAMEN—RELEASE—GOOD CAUSE FOR SETTING ASIDE—*Brown et al. v. United States, United States District Court, District of California (July 22, 1922), 233 Federal Reporter, page 425.*—In January, 1921, J. Brown and others signed articles as seamen for a voyage on the *Palo Alto* from San Francisco to the Atlantic coast. They were to be paid off on the Atlantic coast and furnished with transportation back to San Francisco and wages to the time of their return. They went into the service of the ship and served five days in San Francisco Harbor preparing the ship for the contemplated voyage. In the meantime they were paying for their own support on shore as the ship was not in readiness to keep them on board. At the expiration of the five days they were discharged for the reason, they were told, that the ship was in need of repairs and it would take 20 days to complete the work. Later it appeared that the voyage was abandoned because of the uncertainty of business upon the Atlantic coast. Section 4527 of the Revised Statutes of the United States provides that: "Any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation * * *." The men claimed the month's wages in addition to the amount they had already earned. This was refused by the master and by the shipping commissioner. The employers refused to pay them the amounts that they had earned in the five days except on the condition that they sign a release for all wages between the parties, as provided by section 4552 of the Revised Statutes. They protested, contending that they were entitled to a month's wages in addition, but signed the release in order that they might be paid the amount earned by them, about which there was no dispute. They then brought a suit for the additional month's wages in the

United States District Court. The defense set up to the claim was that they could not recover because of the release. The district court decided in favor of the seamen, and entered a decree for a month's wages and costs, saying through Judge Dooling:

Section 4552 makes such release "a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement," and if this were all, the case of *The Pennsylvania* (D. C.), 98 Fed. 744, affirmed *Pettersson v. Empire Transp. Co.*, 111 Fed. 931, would be controlling. But a later statute provides that this release may be set aside by the court for good cause, and such action taken as justice may require. 38 Stats. at Large, p. 1165 (Comp. St., sec. 8322). This "good cause" must mean something other than fraud, duress, or other undue influence, because for these latter reasons the release could have been set aside before the enactment of this statute.

I am firmly convinced that, where a seaman is compelled by the master, owner, or commissioner to sign such a release before they will pay him the wages actually and concededly due him, thus taking advantage of his necessities and compelling him to abandon his claim to the very thing in dispute before he can receive that which is due him without dispute, there is presented a case of "good cause for setting aside the release and taking such action as justice may require," within the meaning of the later statute. If there were any compromise of the matter in dispute, the release would be held to be binding; but where, on such release, the seaman receives only what is undisputedly his, and can not even receive that until the release is signed, unless he recover it in court, I am, as I have said, convinced that justice requires that the ship-owner should not be permitted to plead such release in bar of a claim for the only matter in dispute, when such claim is presented in court.

WAGES — SEAMEN — "STRIKERS" — DESERTERS — FORFEITURE OF WAGES BY DESERTION—*The "M. S. Elliott," United States Circuit Court of Appeals, Fourth Circuit (December 28, 1921), 277 Federal Reporter, page 800.*—On April 28, 1921, at the port of New York, the crew of the steamship *M. S. Elliott* signed for coastwise service thereon in various capacities for a period "not exceeding 12 calendar months." Shortly afterwards the ship proceeded to Texas City, Tex., and from that port to the port of Charleston, S. C., where she arrived on the morning of the 11th of May. A seaman's strike was in progress, and while the ship was docking a motor boat came along, manned by strikers, who had some conversation with the crew, though what passed between them is not clearly known. During that day, however, at different times, most of the men left the ship, taking their belongings with them. On the following day 16 of them brought a libel suit to recover the full wages earned by them

up to that time, on the ground that they had demanded payment of one-half the wages then due them, as provided in section 4530 of the Revised Statutes, as amended June 5, 1920 (41 Stat. 1006), and that such demand had been refused. The trial court found that two of the libelants, upon arrival of the ship at Charleston, had demanded half wages and been refused and were therefore entitled to full wages, under the terms of the amended section. As to the others the court decided no sufficient demand for wages had been made. A decree was entered, and as to six of the men an appeal was taken. The question before the court was whether or not the men were guilty of desertion. This question was answered in the affirmative in an opinion handed down by Judge Knapp, in part as follows:

Without citing other authorities, we may accept the definition of desertion, quoted with approval in *The Italier*, 257 Fed. 712, 714, 168 C. C. A. 662, 664, as "a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty." The trial court found, on testimony wholly convincing, that none of the six had demanded half pay, that all of them left the ship without leave and without sufficient reason, and that they had not returned for service; and we find no evidence that they intended to return. On the contrary, the circumstances under which they left, taking their belongings with them, indicate unmistakably, as we think, that they deliberately and purposely abandoned the service which they had agreed to perform. In point of fact, none of them did return, or offer to return, or show the slightest disposition to return. Only two of the six were witnesses at the trial; both of them admitted that they left the ship with the intention of not returning, and nothing appears from which a different intention on the part of the other four can be inferred. In short, there is no testimony which disputes or discredits the statement of the master that the men told him they were leaving permanently, although he admonished them not to do so and warned them of the consequences. We are of opinion that they must be deemed deserters. (*The Nigretia*, 255 Fed. 56, 166 C. C. A. 384.)

As the penalty for desertion is the "forfeiture * * * of all or any part of the wages or emoluments which he has then earned" (Revised Statutes, sec. 4596, as amended [Comp. St., sec. 8380]), the decree will be reversed and the cause remanded, with instructions to dismiss the libel as to the six libelants named in the notice of appeal.

WORKMEN'S COMPENSATION—ACCIDENT—DEATH FROM SHOCK—WEAKENED CONDITION CAUSED BY ACID POISONING—MENTAL SHOCK—*Klein et al. v. Len H. Darling Co. et al.*, Supreme Court of Michigan (March 30, 1922), 187 Northwestern Reporter, page 400.—Otto Klein was in the employ of the Len H. Darling Co., manufacturer of separators for batteries. His duties required him to treat the wood separators. The treatment was accomplished by boiling

the wood in a solution of caustic soda and sulphuric acid. He worked for about 18 months for the company at this work. On several occasions during the course of his employment he spilled the solution on his hands, arms, and legs, causing sores on his wrists and legs. The fumes from the sulphuric acid in the vat room caused Klein to suffer from a toxic and nervous condition. On January 3, 1920, while putting a radiator in place in a hole on the second floor of the plant where he was working, he accidentally let the radiator slip through the hole and it fell, striking one Harris on the head, causing a wound and rendering him unconscious. Klein became excited because of the injury to Harris, because he at first thought he had killed Harris. He continued to work four days after the accident, but he was in a highly nervous condition. He was taken to his bed in a delirious condition which grew worse until January 15, when he died. His widow instituted proceedings under the workmen's compensation law to recover an award for the death of her husband. The industrial accident board found that the death resulted from shock brought about by an accidental happening and granted an award. The employer and its insurer took the case to the supreme court of the State to have the award annulled.

The question before the court was whether Klein came to his death by reason of an accident within the meaning of the law. The court said he did and affirmed the award. Judge Moore, speaking for the court, said:

In the instant case Mr. Klein could not anticipate that, when he removed the register, it would slip from his hand, nor could he anticipate it would hit a fellow employee, rendering him unconscious, nor could he anticipate that he himself would receive a shock which would so affect him in his weakened condition that he would, as a result thereof, pass away in less than three weeks. This, however, was just what happened in the opinion of the attending physician and the other doctors. This also was the conclusion of the industrial accident board.

Judge Wiest in a concurring opinion said:

An accident happened in which the deceased was an actor, and the shock to him was so acute and so depressed his vital forces as to kill him. We must not overlook man's nervous system and mental make-up and their intimate relation to his vital forces.

This man died because his vital forces could not meet and withstand the acute depression occasioned by what he had done in the course of his employment. The injury to him was no less real and fatal in its consequences than a mortal wound. "Accidents," within the comprehension of the workmen's compensation law, include all accidents actionable at law and all former nonactionable accidents, except in case of intentional and willful misconduct on the part of the employee.

WORKMEN'S COMPENSATION—ACCIDENT—HEART DISEASE—*Helder v. Luce Furniture Co. et al., Supreme Court of Michigan (March 30, 1922), 187 Northwestern Reporter, page 263.*—Dirk Helder, a big, strong, and apparently healthy man, 46 years of age, worked for the Luce Furniture Co. for nearly 20 years as an operator of a miter saw in the cabinet room. It was not heavy work. On January 31, 1920, he was called upon to help install three pieces of a new line shafting requiring metal hangers, weighing 70 pounds, to suspend the shafting from the ceiling of the factory. It being Saturday he worked a half day at this work. On February 2, 1920, he returned to work and lifted the hanger from the floor up over his head six feet to the scaffold, from which he again lifted it over his head against the ceiling while the carpenter bored the holes in the ceiling and put in the lag bolts. In repeating this work with the second hanger, he suddenly gave way and vomited blood profusely. He immediately left the factory and went to his home too weak to punch the time clock as he passed by. A doctor was called, but he died just as the doctor arrived. The doctor stated that death was due to acute dilation of the heart which was caused by overexertion. An award was granted. The company and its insurer took the case to the supreme court of the State for review. The contention of the company was that there was no evidence of an actual accident in the sense of a fortuitous, unforeseen mishap. This contention was not upheld by the supreme court, which held that it was an accident within the provisions of the workmen's compensation law, and therefore an award of compensation under that act as here granted would be affirmed, on the principle of an unexpected consequence of an intended act. (*La Veck v. Parke, Davis & Co., 190 Mich. 604, 157 N. W. 72; see Bul. No. 224, p. 226.*)

WORKMEN'S COMPENSATION—ACCIDENT—HEART FAILURE—FINDINGS OF FACT BY BOARD CONCLUSIVE—*Rusch v. Louisville Water Co. et al., Court of Appeals of Kentucky (February 10, 1922), 237 Southwestern Reporter, page 389.*—Allen Rusch was an employee of the Louisville Water Co. Both were subject to the workmen's compensation law of the State. On April 4, 1918, a valve connected with the steam boiler where Rusch was working blew out, and he with another employee ascended a ladder and closed the opening. After descending he walked out the door for a few steps, staggered, and fell to the ground dead. The widow of the deceased filed a claim for compensation before the workmen's compensation board. The board found that the death of Rusch was not the result of traumatic injury by accident but was due to preexisting disease of the heart, and further that excitement and hurry at the critical moment, taken in

connection with a diseased heart, caused the heart to fail. The claim was dismissed and the widow appealed. The decision of the board was affirmed in the lower court, and on another appeal the court of appeals affirmed the action taken. It was there held that the findings of the board as to questions of fact if supported by credible evidence are to be given the same force and effect as the verdict of a properly instructed jury. In view of the findings of the board, the only question before the court was the legal effect of the findings. The material part of the workmen's compensation act is the section that provides compensation for injury—

by accident arising out of and in the course of his employment or for death resulting from such accidental injury: *Provided, however,* That personal injury by accident as herein defined shall not include disease except where the disease is a natural and direct result of a traumatic injury by accident, nor shall they include the results of a preexisting disease.

The court in its decision said in part:

The legal effect of the facts found by the board brings the case directly within the clause referred to. The language of the statute is too clear to admit of doubt as to its meaning. Whatever the legislature may have intended to do, it clearly expressed the purpose of relieving the employer from liability in cases of this kind. Unfortunate as was the death of Rusch, his dependents are bound by the statute which denies to them compensation. We, therefore, concur in the view adopted by the compensation board as to the legal effect of the established facts.

WORKMEN'S COMPENSATION—ACCIDENT—HERNIA—RULES OF COMMISSION—*Staker v. Industrial Commission et al., Supreme Court of Utah (October 7, 1922), 209 Pacific Reporter, page 880.*—Hernia cases being difficult to decide by industrial accident commissions, various rules have been adopted to guide their action. The Utah commission adopted the following:

In all future hernia cases coming before the Industrial Commission of Utah for decision, the commission will pursue the following policy in the determination as to whether or not the injured would be entitled to compensation:

“(A) Real traumatic hernia is an injury to the abdominal (belly) wall of sufficient severity to puncture or tear asunder said wall, and permit the exposure or protruding of the abdominal viscera or some part thereof. Such an injury will be compensated as a temporary total disability and as a temporary partial disability, depending upon the lessening of the injured individual's earning capacity.

“(B) All other hernias whenever occurring or discovered, and whatsoever the cause, except as under (A), are considered to be diseases causing incapacitating conditions, or permanent partial disability, but the permanent partial disability and the causes of such are considered to be, as shown by medical facts, either to have existed

from birth, to have been years in formation, or both, and are not compensable, except as hereinafter provided.

"(C) All cases (B), in which it can be proved, (1) that the immediate cause which calls attention to the presence of the hernia is a sudden effort or severe strain or blow received while in the course of employment; (2) that the descent of the hernia occurred immediately following the cause; (3) that the cause was accompanied or immediately followed by a severe pain in the hernial region; (4) that the above facts were of such severity that the same were noticed by the claimant and communicated immediately to one or more persons, are considered to be aggravations of previous ailments, or diseases, and will be compensated as such for time lost only to a limited extent, depending upon the nature of the proof submitted and the result of the local medical examination, but not to exceed two months."

One E. L. Staker made an application for compensation, after these rules were adopted, claiming that while lifting a 140-pound sack of flour in the course of his employment with the Sperry Flour Co., he had accidentally slipped and strained himself, thereby immediately sustaining a hernia on his right side, by reason of which he had become disabled. A hearing was had but the commission refused to make an award. Staker appealed to the supreme court of the State.

The court assumed that the rules laid down by the commission, above noted, were both reasonable and lawful as they were not assailed or questioned by the claimant. One doctor testifying thought the hernia came within rule A, whereas another testified that he was of the opinion that it came under rule B. The court refused to reverse the commission's findings, as to do that "we would have not only to usurp the functions of an administrative body, but we would have to determine the weight of the evidence and the credibility of the witnesses who testified," and such power the court did not have; and "moreover, we think there is some substantial evidence in the record to sustain the commission's findings as made by it."

WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—
FUMES FROM MOLTEN BRASS—*General American Tank Car Corp. v. Weirick, Appellate Court of Indiana (December 23, 1921), 133 Northeastern Reporter, page 391.*—Joseph E. Weirick, on November 4, 1920, was in the employ of the General American Tank Car Corporation. On that day he became affected by poisonous gas arising from molten brass and died. Proceedings were brought before the industrial board. That board found that Weirick received a personal injury by an accident arising out of and in the course of his employment which resulted in his death the same day, and rendered an award to the claimants. An appeal was taken, but the award was

affirmed in the appellate court. The court held that the death resulted from an accident within the meaning of that term as used in the compensation act, and decided that the finding of the board in this case was justified. Judge Nichols, in stating the opinion of the court, said in part:

There was some evidence that the deceased breathed the fumes and gases arising from molten brass and was thereby accidentally injured, which injury resulted in death, and we hold that the industrial board was fully justified in its finding that the deceased came to his death by accidental means while in the due course of his employment. An accident has been repeatedly defined by this court in industrial appeals as an unlooked-for mishap, an untoward event, which is not expected or designed. An injury may be the result of accidental means though the act involving the accident was intentional.

While it appears that the decedent had been affected by the poisonous gas before, it is apparent that he did not anticipate or design the serious consequences resulting in his death. Yet the evidence abundantly justifies the inference that the immediate cause of the death was the injury by the inhalation of the noxious gas. That the deceased man was diseased at the time of his injury can not be denied, but such disease had not progressed to the point of disability. He was with substantial regularity performing the duties of his employment up to the time of his injury, and if the disease was thereby accelerated so as to produce death so soon after the injury, the injury must be regarded as the cause of the death.

WORKMEN'S COMPENSATION—ACCIDENT—OVERWORK AND STRAIN—*Young v. Melrose Granite Co., Supreme Court of Minnesota (July 14, 1922), 189 Northwestern Reporter, page 426.*—Julius J. Young was a stonemason by trade and had worked many years in the granite shops at St. Cloud, Minn. On August 9, 1920, he worked for the Melrose Granite Co., using a stone surfacing machine. The machine was a movable contrivance carrying a hammer which was operated by compressed air to dress the surface of the granite. The operator of this machine moves the hammer back and forth on the arm of the machine, which is operated by one hand while the other controls the hammer. On the day in question he was using a machine which was defective in that it would work toward the operator, and it required great effort to keep it away or keep it in the place where the operator wanted it. At the end of the day Young found himself exhausted to such an extent that he complained to the foreman that he was "all in" from working on the machine. Young complained of suffering great pain in his shoulder and back that night. He returned to work the following morning, but as the same machine worked as heavy as before, he stopped work at 10 o'clock and told the foreman that "if he stayed at it, it would kill him." That afternoon he went to work for another firm, where he continued until

December, 1920, though suffering pain in the shoulder and arm, his shoulder also becoming stiff. In February, 1921, he demanded compensation for the injuries. An award was made in his favor, and it was found that—

The muscles which control the shoulder have become atrophied through degeneration of the nerves supporting them, and that "these nerves under the heavy strain required by the work of this machine, as aforesaid, were subjected to excessive traction and became, for all practical purposes, dead."

The employer took the case to the Supreme Court of Minnesota. There was a purely legal question before the court as to whether there was any evidence to support the award in law. The court held there was not. The court reviewed some of the evidence, which showed that all machines of the type used, operated by compressed air, vibrate. No sudden or violent strain could come to the muscles in guiding the machine, even though it worked hard. The court said that—

If any effect at all could come to the operator of this machine it must be attributed to wearying the muscles from a too long continuance at a heavy work.

It was held that the injury in question could not come at any particular moment of time, "but only as the work continued until the exhaustion became too great for the ordinary recuperative forces."

Judge Holt, speaking for the court, brought out the legal questions involved, in part as follows:

Although our legislation as well as that of other States may be said to be patterned in a great measure upon the compensation legislation of England, there is a divergence in the different acts as to the injuries sought to be covered. Our act does not seek to cover occupational diseases or gradually inflicted ailments, but confines the injuries to those caused by accident [defining the term].

The compensation act was not designed to cover cases where injuries result from ordinary overwork, too long continued effort, without any sudden or violent rupture, or collapse of some physical structure or function of the body.

Judgment reversed.

WORKMEN'S COMPENSATION — ACCIDENT — POISONING — DIPPING HAND IN POISONOUS SOLUTION—*Jeffreyes v. Charles H. Sager Co. et al., Supreme Court of New York, Appellate Division (November 16, 1921), 191 New York Supplement, page 354.*—Hila Jeffreyes was employed by the defendant company, a photographer, to develop photographic plates. It was necessary in doing this work to dip plates, held in her left hand, into a poisonous chemical solution more than 500 times each day. She did this work continuously for more than a week when her fingers became red and swollen. She went

to a physician, who gave her treatment. Later the end of the little finger of her left hand became mummified, gangrene set in, which made it necessary to amputate the finger, and this was done. The pathological cause of her injuries was the contraction of the blood vessels of her finger through the gradual action of the chemical solution. Claim was made under the workmen's compensation law and an award was granted by the State industrial board. The employer and the insurer appealed to the appellate division of the supreme court, where the award was reversed and the claim dismissed by a court divided three to two. Judge H. T. Kellogg delivered the opinion of the majority of the court, in which he held that the injury was not due to an accident and therefore not compensable. The opinion is in part as follows:

In my opinion there was no accident involved for two reasons: First, the contact made by claimant between her hand and the solution was voluntary and intentional.

The coming into contact of the hand and the solution was expected, and therefore not accidental. Secondly, the injuries resulted from no occurrence which is referable to any particular moment of time which is definitive. The word "accident" is derived from the Latin verb "accidere," signifying "fall upon, befall, happen, chance" (Century Dictionary), and denotes an event which occurs upon the instant, rather than something which continues, progresses, or develops. "The accident must be something which is capable of being assigned to a particular date."

In *Steel v. Cammell, Laird & Co. (Ltd.)*, 7 W. C. C. 9, it was held that lead poisoning, being due to a gradual process, could not be accidental in its origin. One of the reasons assigned by the court for its decision was the fact that the statute required a notice of an accident to be given within a stated period after it occurred, and that from this it was to be inferred that the accident contemplated must be one having a definite moment of origin. The same conclusion can be drawn from our statute requiring a notice of an accident to be given within 30 days thereafter. It seems to me, therefore, that as the injuries in this case arose from the application of a poisonous solution during the working hours of claimant for a period of more than seven days, and as the application was voluntarily made, she received no accidental injury for which an award could properly be granted.

WORKMEN'S COMPENSATION—ADMIRALTY—CONSTRUCTION OF VESSEL—*Grant Smith-Porter Ship Co. v. Rohde*, *Supreme Court of the United States (January 3, 1922)*, 257 U. S. 469, 42 *Supreme Court Reporter*, page 157.—Herman F. Rohde was a ship carpenter, employed at the time of his injury on a vessel that had been launched and was lying in navigable waters in the Willamette River at Portland, Oreg. The vessel was not completed, and in answer to proceedings in admiralty to recover for the injuries received the employers

set up a defense that they were operating under the workmen's compensation law. In the district court Rohde had recovered a judgment in admiralty, and the company appealed to the circuit court of appeals. This court certified questions to the Supreme Court as follows:

(1) Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters? (2) Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?

Justice McReynolds delivered the opinion of the court, holding that "the contract for constructing '*The Ahala*' was nonmaritime," and though the vessel was lying in navigable waters, Rohde's duties had no direct relation to navigation or commerce. "The injury was suffered within a State whose positive enactment prescribed an exclusive remedy therefor" which both parties had accepted. Continuing, Justice McReynolds said:

Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties as between themselves by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

This case was distinguished from *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524 (see Bul. No. 246, p. 203), and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438 (see Bul. No. 290, p. 302), in which "the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to proper harmony and uniformity." The parties in this case were found to have contracted with reference to the State law, and there was nothing to affect navigation, so that the local law might well control.

The questions asked were said to be "not wholly free from uncertainty," so that they were restated so as to set forth "our view of their real intendment." The form in which they were restated and the answers are as follows:

Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State, we answer yes.

Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer yes.

The application of the State law was therefore clearly upheld.

WORKMEN'S COMPENSATION—ADMIRALTY—CONSTRUCTION OF VESSEL—COMPULSORY COMPENSATION STATUTE—*Los Angeles Shipbuilding & Drydock Co. v. Industrial Accident Commission, District Court of Appeal of California (April 15, 1922), 207 Pacific Reporter, page 410.*—M. Toutain was a marine machinist, injured while installing machinery in a vessel under construction by his employer. The vessel had been launched in the waters of California, in Los Angeles Harbor, and was at the time of the injury afloat in navigable waters. Toutain had been awarded compensation under the California law, and the employers claimed that this law was not applicable in the case, which was said by them to be based on a maritime tort.

Speaking on this point Judge Finlayson, who delivered the opinion of the court, said:

With this contention we find ourselves unable to agree. In the first place, we fail to see any ground for the assumption that the award under review here was based upon a tort, maritime or non-maritime. Nowhere in the record is there the slightest hint that the injury was the result of any negligence or fault. To entitle Toutain to the compensation provided for by our workmen's compensation act it was not necessary that there should be any wrongful act or omission. That act allows compensation for all injuries arising out of employment irrespective of negligence or fault.

However, the court did not understand that the nature of the case, whether in tort or merely contractual, was of importance. "Nor is it a matter of moment that the State compensation act be either elective or compulsory." In those cases in which the work is of a maritime nature or performed in pursuance of a maritime contract, the maritime law must be presumed to control.

But where, as in the case before us, the contract of employment is nonmaritime, and the work is not of a maritime character, the workmen's compensation law fastens upon the relation of employer and employee the obligation to compensate for injuries received in the course of employment.

WORKMEN'S COMPENSATION—ADMIRALTY—DIVER LAYING SUBMARINE CABLE—*De Gaetano v. Merritt & Chapman Derrick & Wrecking Co., Supreme Court of New York, Appellate Division (November 15, 1922), 196 New York Supplement, page 573.*—Vincenzo De Gaetano was employed by the company named under circumstances described in the following quotation from the opinion of the court, delivered by Judge Hinman:

The deceased was a member of the crew of a scow, equipped as a floating derrick with a hoisting engine, and engaged generally in the wrecking business. It was also equipped with an air compressor

for supplying air to divers operating from the vessel in subaqueous work. It was registered as a vessel with the United States custom-house, and was towed at times to various places along the coast in the vicinity of New York City. At the time of the accident it was made fast to a dock on the Harlem River and on concededly navigable waters.

The duties of the deceased were those of deck hand and diver, principally the latter. On the day in question the vessel was being used to aid in laying an electric submarine cable from shore to shore of the river. The deceased was working as a diver. He dressed for diving on the vessel, and entered the water from the boat. His diving outfit was connected by an air tube to the air compressor, which was a part of the equipment of the boat. His particular work at the time was to stand on the bottom of the river, where he guided the cables through a hole in the bulkhead as they were pulled through the dock.

He met his death while so employed, and his widow submitted a claim for compensation, which was awarded by the industrial board of the State; this was on appeal reversed and the claim dismissed on the ground that the employment was maritime. On this point the opinion reads:

The deceased was one of the crew of a vessel and at the time of his accident was engaged in the very service for which the vessel was equipped and operated. He was a "seaman," actually attached to the vessel at the time through the instrumentality of the diver's uniform, the air tube, the compressor tank, and the engine of the boat, all of which were being simultaneously operated as equipment of the boat by himself, the deck hand, and the engineer as members of the crew. The nature of the scow's employment at the time is not material, since he was a seaman of a vessel, and he was constructively on the vessel, doing the work of the vessel under a maritime contract.

The award was therefore reversed and the claim dismissed, Judge Hasbrouck dissenting.

WORKMEN'S COMPENSATION—ADMIRALTY—INSURANCE IN STATE FUND—CONTRACT—*West v. Kozar, Supreme Court of Oregon (April 27, 1922), 206 Pacific Reporter, page 542.*—The Supreme Court of Oregon had before it a number of cases in which awards had been made by the State industrial commission for injuries to persons on and about vessels. The State insurance fund is under the control of the secretary of state, and in view of certain expressions used by the Supreme Court of the United States in similar or related cases, the secretary was in doubt as to the right to make payments under the awards. The beneficiaries therefore sued for a writ of mandamus to secure payments. Further facts are set forth in the following state-

ment made by Judge McBride, who delivered the opinion of the court:

These cases all arise upon mandamus to compel the secretary of state to issue warrants for sums awarded by the State industrial accident commission, as compensation to various parties for injuries, some resulting in death, and others being of a minor character, which injuries were sustained in the course of employment upon the navigable waters of the United States and within the State of Oregon. Five different occupations are involved: (1) Shipbuilding work after launching; (2) ferry operations across the Willamette River; (3) stevedoring work on board a seagoing vessel, under contract of employment with a stevedoring company operating in Portland, Oreg.; (4) cannery work, including operation of a motor boat on the waters of the Columbia River and within the boundaries of the State of Oregon; and (5) freight transportation work, including the operation of a steamboat upon the waters of Coos Bay in Oregon.

In all of these cases the injuries were the result of accident, and no questions of maritime tort are involved. In each instance, the State industrial accident commission awarded compensation, and in every case the employer and the injured employee had accepted the provisions of the State workman's compensation act (Laws 1913, p. 188) and paid the sums required thereunder, so that there is no doubt of the existence of a contract between the employer, the employee, and the State, that, in case of injury to the employee his compensation should be adjusted and paid from the fund provided in that act.

The cases that seemed to the secretary of state to raise questions of the legality of the payments directed were *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524 (see Bul. 246, p. 203), and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438 (see Bul. 290, p. 302). It was pointed out that both these cases arose under the compulsory compensation act of New York, affecting cases of maritime cognizance, so that if the statute was enforced it "would have made every foreign vessel entering the port of New York at once liable to pay compensation under the laws of the State, without the consent of its owners, an obligation unknown to admiralty and one seriously affecting those 'rules of the sea whose uniformity is essential.'"

In the latter case, an attempted amendment of the judicial code was found invalid in its attempt to confer certain jurisdiction, the Supreme Court holding that "it was not competent for Congress to subtract from the admiralty jurisdiction conferred by the Constitution." Distinguishing the present case, Judge McBride said:

We do not understand the court as holding that an employer and an employee may not, as between themselves, contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident, and preclude the necessity of litigation in the Federal courts, which is the case here presented. The method is a beneficent one, insuring to every employee a certain

remedy and fair compensation instead of difficult litigation, a doubtful remedy and in many cases resulting in no compensation.

Reference was then made to the recent cases, *Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 Sup. Ct. 89 (see Bul. 309, p. 83), and *Grant Smith-Porter Ship Co. v. Rohde*, p. 280), in which State laws were held to be applicable under circumstances not interfering with the essential harmony and uniformity of the general maritime law. Judge McBride declared that it could not be shown that the allowance of the awards stipulated in the various employment contracts involved "would work material prejudice to the characteristic features of the general maritime law," or interfere with its uniform application.

It is not the policy of the law, international or otherwise, to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out, and, in view of the decision last quoted, this ought to terminate the present controversy in favor of the petitioners.

As in the *Rohde* case, these cases presented no question of extra-territorial jurisdiction; the contracts were made within the State, the parties were doing business within it, and the place of performance was "at or upon waters lying within the boundaries of the State." The opinion concludes:

Counsel for defendant have failed to point out any possible contingency under which an application of the compensation law might prejudicially interfere with the application of any of the rules of maritime law, which are so essential to the commerce of the country; and it is not believed that it is possible for such a contingency to arise. On the contrary, the encouragement of such agreements between employer and employee as is contemplated by our compensation laws has a tendency to prevent litigation and, in instances like the present, to relieve the already overburdened Federal courts of vexatious litigation.

The finding was therefore in favor of the petitioners, and a mandate was authorized "directing the secretary of state to issue the warrants as prayed for."

WORKMEN'S COMPENSATION—ADMIRALTY—LONGSHOREMAN UNLOADING VESSEL—*State Industrial Commission v. Nordenholt Corp.*, *Supreme Court of the United States (March 29, 1922)*, 42 *Supreme Court Reporter*, page 473.—A longshoreman, Insana by name, was killed while unloading bags of cement from a vessel lying at a dock in Brooklyn, N. Y. His death was found to be due to a fall from a pile of bags to the floor of the dock, and the industrial commission gave his mother, on proper application, an award of compensation. This was reversed by the appellate division. The

court of appeals likewise ruled adversely (232 N. Y. 507, 134, N. E. 549). The case came to the Supreme Court on a writ of certiorari, where the judgment of the courts below was reversed. Justice McReynolds delivered the opinion of the court, distinguishing this case from those in which it had been ruled that State compensation laws could not operate on account of the maritime nature of the employment. It was pointed out that the New York courts had made deductions from *Southern Pacific Co. v. Jensen* (244 U. S. 205, 37 Sup. Ct. 524; see Bul. No. 246, p. 203), and other cases decided by the Supreme Court, which were declared to be unwarranted and based on an erroneous rule of Federal law. After this Justice McReynolds said:

When an employee working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is a matter within the admiralty jurisdiction; but not so when the accident occurs on land.

The application of this principle in various cases was discussed, including *Western Fuel Co. v. Garcia* (257 U. S. 233, 42 Sup. Ct. 89; see Bul. No. 309, p. 83). In this case it was held that the death of a stevedore occurring on a ship within a State in which a right of recovery is given by statute, in the absence of an opposing Federal statute or positive maritime rule, could be compensated for under the State law:

The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

Reference was also made to the *Grant Smith-Porter Ship Co. v. Rohde* case (page 280), and in accordance with the doctrine there laid down the right of recovery under the State compensation law was asserted, Justice McReynolds saying:

Insana was injured upon the dock, an extension of the land, and certainly prior to the workmen's compensation act the employer's liability for damages would have depended upon the common law and the State statutes. Consequently, when the compensation act superseded other State laws touching the liability in question, it did not come into conflict with any superior maritime law. And this

is true whether awards under the act made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant Federal rule concerning the master's liability for personal injuries received on land. In Jensen's case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent Federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law.

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

WORKMEN'S COMPENSATION — ALIEN BENEFICIARIES — TREATY RIGHTS—*Frasca v. City Coal Co., Supreme Court of Errors of Connecticut (February 1, 1922), 116 Atlantic Reporter, page 189.*—Belma A. Frasca, a citizen and resident of Italy, claimed compensation for the death of her husband, employed at the time of his death by the company named. An award was made in her favor, from which she appealed on the ground that the treaty between the United States and Italy guaranteed to her an equivalent award to that of residents of the United States, while the Connecticut compensation law, as then in force, allowed nonresident alien dependents only one-half the amount payable to residents of the United States.¹

Judge Burpee, who gave the opinion of the court, discussed the treaty with Italy in its original form as agreed to in 1871, in which the citizens of the respective nations were guaranteed protection and security for persons and property, with "the same rights and privileges as are or should be granted to natives." It was pointed out that under this treaty the right of action for death given by a State law did not extend to relatives of a deceased workman, they being aliens resident in Italy (*Maiorano v. Baltimore & Ohio R. Co., 213 U. S. 268, 29 Sup. Ct. 424*). It was said in this opinion that the protection and security for the personal property of the plaintiff herself (the widow of the deceased workman) could not be said to be withheld from her in the territory of the United States since she has never been within that territory. "She, herself, therefore is entirely outside the scope of the article."

Apparently because of this construction the treaty was redrafted as to this article so as to give a right to "that form of protection granted by any State or national law which establishes a civil respon-

¹ The distinction between nonresident aliens and others is abolished by an amendment of 1921, except that actual dependents in the State may share with nonresident alien dependents as described by the law, the commission having jurisdiction to make an equitable apportionment. The decision is of interest, since discriminatory provisions exist in a number of the State laws.

sibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs." In commenting on this article Judge Burpee said:

By the original treaty an Italian sojourning in the United States should receive all the direct protection for person and property secured by our laws to our own people, including all rights of action for himself or his personal representatives. Among these, of course, was the right of action granted by our laws to a workman for injuries caused by negligence or fault of his employer. In the article substituted in 1913, the same right was extended in case of the death of the injured person to his relatives or heirs, and this is the right referred to in this new article by the words "which right shall not be restricted on account of the nationality of said relatives or heirs." This prohibition does not mention any restriction on account of non-residence. Nor are dependents included in its terms; for relatives and heirs are not necessarily dependents, and the use of the former words indicates plainly that the parties to the amendment of 1913 had in mind the connection of kinship rather than of dependency. The title of the original treaty and the language used in article 1, which have not been changed, and the expressed purpose and the terms of the amendment of 1913, seem to indicate clearly that the latter provision does not, and was not intended to, affect the rights of Italian subjects not residing in this country. And we find nothing in the terms of the original treaty or of the substituted provision which applies to the privileges or rights granted to an alien dependent of a deceased Italian workman by the workmen's compensation act.

We concede that these treaties should be as broadly construed as they reasonably may be construed. But, if we could admit that their provisions are applicable to the amount of compensation to be paid to this nonresident Italian claimant, it would not follow that she should receive the same amount as a resident of the United States or Canada. At most she may enjoy only the same rights and privileges as are granted to our dependent nationals. Exactly those rights and privileges are granted to her by the clause of our act which is in question. It limits the compensation to be paid to "alien dependents" unless they are also residents—that is, to dependents who themselves are nonresident aliens. Whether the workman on whom they were dependent was an alien or a citizen does not concern this limitation. If he was a citizen his nonresident alien dependents may be awarded only one-half the compensation indicated in the act for his resident dependents; if he was an alien, his nonresident alien dependents will be treated in the same manner. The restriction affects the alien dependents of nationals and Italians alike. There is no discrimination unfavorable to the subjects of Italy or of any foreign country because of nationality. The resident alien dependents of any nationality are not affected:

Relatives and heirs as such are not mentioned in our compensation act; but whenever relatives or heirs are also dependents, their rights and privileges as dependents have not been restricted by that act on

account of their nationality nor affected in any way differently from those of our native citizens.

The judgment of the court therefore was that the superior court be advised that the compensation commissioner had made a proper award of one-half the compensation available for a resident.

The claimant's counsel cited a contrary conclusion arrived at by the Supreme Court of Kansas, *Vietti v. Mackie Fuel Co.*, 109 Kans. 179, 197 Pac. 881 (see Bul. No. 309, p. 329). It was pointed out that the dependents in this case were not nonresidents, though not citizens of Kansas, and that the law of the latter discriminated "on the ground of nationality and residence," so that the decision is not a precedent, nor were the conclusions in the instant case inconsistent with those formulated by the Kansas court.

WORKMEN'S COMPENSATION—ASSAULT BY FOREMAN—WILLFUL INJURY—DAMAGES—*Perry v. Beverage, Supreme Court of Washington (October 20, 1922)*, 209 *Pacific Reporter*, page 1102.—The Webb Logging & Timber Co. operated a logging camp near Duckabush in the State of Washington during the month of December, 1920. They had in their employ as foreman or superintendent in charge of the camp one James Beverage.

On the morning of December 17, 1920, John Perry, who was employed in the camp as a bucker, gave notice to Beverage that he desired to quit his employment that evening.

One Earle McArdle was requested to scale the logs which Perry had bucked and for which Perry was entitled to compensation. Perry worked that day and about 6.30 o'clock went to the office of the company at the camp and entered into a controversy with McArdle over the scale that the latter had turned in. Perry claimed the scale was too small, but McArdle insisted that it was accurate and properly made. After listening to the discussion for some minutes, Beverage, who was in the office at the time, went over to near where Perry was standing and told him that he had said enough. Some further conversation followed, during which Beverage struck Perry a violent blow on the face with an enameled water pitcher.

Perry brought an action for damages against Beverage and the company and a judgment was rendered in his favor against both. An appeal was taken to the supreme court of the State. That court affirmed the judgment of the lower court as to Beverage, but reversed it as to the company. In disposing of the contentions raised the court, through Judge Main, held that the relation of employer and employee existed at the time of the assault; that the superintendent was acting within the scope of his employment, so that the injury

was covered by the compensation act; and that the blow was deliberately struck with the intention of injuring Perry, thereby authorizing an action under the compensation act for any excess of damages over the amount received or receivable under that act. As this was not shown as against the company the amount recoverable as excess could not be determined and the judgment as to it must be reversed; but this did not affect the judgment against the foreman.

WORKMEN'S COMPENSATION—AWARD—BASIS—LOSS OF SIGHT OF ONE EYE—EARNING CAPACITY—*Abbott v. Concord Ice Co., Supreme Court of New Hampshire (February 7, 1922), 116 Atlantic Reporter, page 751.*—William H. Abbott was at the time of his injury employed by the Concord Ice Co. During part of each year he had customarily worked as a stonemason for higher wages than paid by his present employer. The injury resulted in the loss of the sight of his right eye, which did not affect his earning capacity in the employment of the ice company, but did impair his capacity to earn as a mason. The compensation law of the State provides for a consideration of the "average weekly earnings when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a weekly payment of not exceeding one-half the average weekly earnings on full time for such less period." Compensation is to be based on the difference in the earning capacity before and after the accident "in the same employment or otherwise." The case was before the supreme court by transfer from the superior court of Merrimack County for the determination of a proper basis of computing the award. It was determined that the earnings to be considered were those able to be earned after the accident in the employment in which he was engaged. Abbott returned to work after a time loss of but 4 days, the State law providing no compensation unless the disability continues for a period of at least 2 weeks. The determination was against any award whatever, the conclusions of the court being set forth in the following quotation from the opinion by Judge Peaslee:

There are then two sufficient answers to the plaintiff's claim for compensation under the act. The accident disabled him from earning full wages at the work in which he was employed for only four days. Such injuries are excluded by the proviso in section 3, heretofore considered.

While the plaintiff's capacity to earn money in another employment, in which he worked part of the time before the accident, was decreased, his capacity after the accident was such that he could earn the same wages as the defendant paid him before the accident.

As before pointed out, this damage is not one covered by the compensation features of the act, and could not be recovered here, even if recovery were not defeated upon another ground.

WORKMEN'S COMPENSATION—AWARD—BASIS—LOSS OF USE OF RIGHT ARM—EARNING CAPACITY—*Kerwin v. American Ry. Express Co., Supreme Court of Pennsylvania (February 20, 1922), 116 Atl. Rep., page 655.*—This case was before the supreme court on appeal from the court of common pleas of Philadelphia County. The claimant, John Kerwin, was so injured while working as a "trucker" for the company named as to be unable to continue in his former employment. The scope of motion in the shoulder was but 10 per cent of normal, and Kerwin was unable to use his arm in manual labor, though he could write to some extent if the arm was supported in a particular position. The company appealed from an award as for loss of use of the right arm, claiming that the plaintiff was able to do clerical work, though it was conceded that he could not pursue his former occupation. The award in behalf of the claimant was affirmed, Judge Frazer, speaking for the court, saying in part:

Followed to its logical conclusion the argument is that, if plaintiff was able to earn, at another occupation for which he is fitted, as much as, or more than, he was earning at the time of the injury, he is not entitled to receive compensation for loss of the use of his arm. If such were the case, compensation would depend, not upon the nature and extent of the injury, but wholly upon the extent of reduction of earning power, and defendant's liability would in each case depend upon his ability to establish that a claimant, who had been engaged in manual work could, by changing his occupation, earn as much or more than he had earned in the past, notwithstanding the total loss of an arm, leg, eye, or other member of his body. In our opinion, such conclusion would entirely change the intent and purpose of the workmen's compensation act. The compensation provided for under the provisions of the act is for injury sustained. While loss of earning power may be evidence tending to show the extent of injuries, the mere fact that earning power has not decreased will not prevent recovery for injuries actually sustained. If an injury results in amputation of an arm or leg, compensation for such loss can not be avoided by showing the victim's ability to earn as much in another occupation not requiring the use of the missing member. The undisputed evidence in the case warrants the finding of the compensation board and the court below.

WORKMEN'S COMPENSATION—AWARD—BASIS OF COMPUTATION—*Georgia Casualty Co. v. Darnell, Court of Civil Appeals of Texas, San Antonio (May 10, 1922), 243 Southwestern Reporter, page 579.*—Marvin B. Darnell while employed as a mechanic by the Axtell Co.

was caught in the machinery with which he was working and so badly injured that he died on the following day as a result of the injuries he received. He lacked a month of being 21 years old at the time of his employment. Proceedings for an award of compensation were instituted. Judgment was rendered in favor of the dependents of the deceased and the company's insurer appealed. The statutes of the State provided that in fixing compensation for injuries resulting in death the daily wage received during the year shall be multiplied by 300 to determine the average annual wage. Darnell, however, had been employed only six weeks at the time of his death. The statutes of the State provided for such contingency in a provision of the employer's liability act, which reads:

If the injured employee shall not have worked in such employment during substantially the whole of the year, his average annual wages shall consist of 300 times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed.

The insurer contended that if young Darnell had continued to work through the year doing the same class, quantity, and amount of work and no better work than he did during the first six weeks, the compensation must be based on no higher rate of pay than he was receiving at the time of his death. The court of civil appeals held that this proposition was "without any merit whatever," and said:

Without undertaking to follow and analyze this somewhat finely spun theory, we will simply say that it is inapplicable here. It is based upon the assumption, indulged in alone by appellant, that the young man was a slothful dullard, who would go through the full first year of his employment without making any improvement in the class, quality, or quantity of his work. If any presumption is to be indulged it should be to the contrary.

The award was therefore affirmed, with 10 per cent damages for delay.

WORKMEN'S COMPENSATION—AWARD—DEATH OF BENEFICIARY—VESTED RIGHTS—*State Accident Fund v. Jacobs, Court of Appeals of Maryland (March 22, 1922), 118 Atlantic Reporter, page 159.*—Frank Jacobs, a son of Julia Jacobs, was killed while employed in an occupation within the provisions of the compensation act of Maryland. The mother was awarded compensation for the period of 8 years, but at the expiration of less than one-half this period she died, and the insurer, the State accident fund, contended that no further payments under the award were due. The administrator of her estate claimed that the balance of the award up to the end of the

eight-year period should be paid, amounting to \$1,039.50. The State commission ordered the balance paid according to this claim, whereupon an appeal was taken to the circuit court for Caroline County, which affirmed the order of the commission. This action was again affirmed on further appeal to the court of appeals.

The exact question had not arisen under the Maryland law prior to the instant case, and the court went fully into a discussion of the principle involved, examining the provisions of law and the decisions under laws of other States involving the question under consideration. An Ohio case (*State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 291, see Bul. No. 224, p. 258) was regarded as of much weight because of the "great similarity between the Ohio statute and ours, which was in force when the accident resulting in the death of young Jacobs occurred." In this case an award was said to be a vested right in the beneficiary, so that in case of death, "his or her personal representative is entitled to the balance, if any, remaining unpaid." In concluding, Chief Justice Boyd, who delivered the opinion of the court, said:

We have thus referred at some length to the cases cited by appellant, but, after all, it must largely depend upon the language of the statute of the particular State where the question is being considered. As we have already indicated, our statute, in force at the time of this accident, is so very similar to the Ohio statute under consideration in the Munding case, and the facts are so nearly alike, that, in so far as we should be influenced or governed by decisions of other courts, it would be difficult, if not impossible, to find a case in another jurisdiction which we would be more justified in following than that—especially as the conclusion is, in our judgment, well reasoned, and is based on the sound ground that courts should be governed by the plain language of the statute, and not by a strained construction making the legislature say something which it did not say, even if the court was inclined to differ as to the wisdom of the legislation. That is not for the court to determine; its duty is to ascertain what the legislature said, and, if it had the right to say what it did say, to be governed by it. The order of the court will be affirmed.

WORKMEN'S COMPENSATION—AWARD—DISABILITY FOLLOWED BY DEATH—DEDUCTIONS—PAYMENTS TO CHILDREN—*Nupp v. Estep Bros. Coal Mining Co.*, *Supreme Court of Pennsylvania (January 3, 1922)*, 116 *Atlantic Reporter*, page 391.—This case involved the construction of the compensation law of Pennsylvania in a case where an injured workman died as the result of injuries after having received compensation for 58 weeks. The law provides that in such case the period of compensation to dependents should be reduced by the term of such payment to the injured man. Following the death of the workman a settlement was tendered to the widow by the insur-

ance carrier, allowing her the statutory benefits for 300 weeks reduced by 58 weeks, also proposing to terminate the subsequent payments to the children 58 weeks prior to the arrival of each at its sixteenth birthday. This the widow declined to sign, and a referee ruled that the only period that should be reduced was the 300 weeks allowance to the widow, the law providing that "the compensation of each child shall continue after said period of 300 weeks until such child reach the age of 16."

This finding of the referee was approved by the compensation board and by the court of common pleas on appeal to it. This position was sustained by the supreme court, Judge Schaffer pronouncing the opinion, which concludes as follows:

Two of the children will be under 16 years of age when payments cease to the widow. The effect of giving to the section of the act under consideration the construction contended for would be to stop the payments, not when the act says they shall cease, when these children are 16 years old, but when they are 14 years and 10 months old. The answer to this contention is that the law is not so written.

The act does not provide for the double deduction from the widow and the children, but that "the period," thereby meaning in this case the 300-week period, shall be reduced "by the period" during which the deceased received compensation in his lifetime.

The judgment of the court below was correct, and we affirm it.

WORKMEN'S COMPENSATION—AWARD—LUMP SUM—JURISDICTION OF COURTS—*Employers' Indemnity Corp. v. Woods, Commission of Appeals of Texas, Section B (October 11, 1922), 243 Southwestern Reporter, page 1085.*—On November 26, 1918, Willie Woods, while in the employ of the Ineeda Laundry & Dye Works, had his right arm seriously crushed and injured in an electric wringer while in the discharge of his duties. His employer was a subscriber under the workmen's compensation act, and carried a policy of insurance with the Employers' Indemnity Corp.

The insurer paid the injured boy weekly compensation amounting to \$9 regularly from December, 1918, until the 24th of March, 1919. Woods decided he would prefer a lump sum settlement. After considerable negotiations between his attorney and the insurer, a written agreement was drawn up "subject to the approval of the industrial accident board" in which \$150 was to be paid Woods in full settlement of all claims. The agreement was forwarded to the industrial accident board, but Woods grew impatient and endeavored to get the company to pay the \$150 before the board had given its approval. The company declined to make this payment. The attorney for Woods suggested a suit for \$150 in the justice court at Houston, Tex., in which judgment could be obtained which would be

binding. To this the insurer agreed. A suit was filed and the insurer answered immediately, alleging the necessity for and a lack of the approval of the board. Judgment was given, the \$150 paid, and a release was given by Woods to the insurer; no appeal was taken. It will be noted that in less than one week from the time all parties submitted this matter to the jurisdiction of the board at Austin, they attempted to defeat the jurisdiction of the board by a proceeding in the justice court.

The accident board, however, refused to recognize the judgment of the justice court, and did not approve the lump sum settlement. On October 16, 1919, they entered an award allowing \$9 per week payable weekly for a period of 200 weeks, but allowed deductions for the amounts already paid. The indemnity company appealed from this order of the accident board, and Woods, through a new attorney, contested the appeal. The court sustained the award of the accident board. The case was appealed to the court of civil appeals, where it was again affirmed (Bul. No. 309, p. 326). The case was then taken to the Commission of Appeals of Texas.

The question before the commission was "whether or not the justice court judgment is *res adjudicata* of this controversy, and therefore a bar to the award of the accident board."

The commission called attention to the act of 1917, which amended the workmen's compensation act of 1913, and provided that all questions arising under the act should be determined by the board if not settled by agreement of the parties, which settlement must be "within the terms and provisions of the act." The commission of appeals also favored Woods and the board in its recommendation to the supreme court that judgment be rendered against the insurer. The supreme court entered as judgment the recommendations of the commission. The reasons stated by Judge Powell are, in part, as follows:

We are much impressed with the idea that there is a large element of public interest in the administration of this compensation act. The only body which can protect the public is the accident board. It would be idle to expect the employer or the insurance company to exercise any particular degree of care in behalf of the public. Their natural desire would be to get rid of the claim as economically as possible to themselves. It is also true that the injured employee is frequently tempted to accept a sum which, paid all at once, looks large to him, and thereby, in fact, "sell his birthright for a mess of pottage." The accident board alone can protect the public interest and in a large measure save these claimants from themselves. Many of them do not need this protection. If so, the supervision of the accident board, at least, does no harm. To those who do need it, this supervision is exceedingly valuable.

The legislature undoubtedly desired that, in nearly all cases, the compensation should be paid weekly. It so expressly provided. It

enacted that in certain exceptional cases the board could approve or decree a lump-sum settlement. This latter character of adjustments was not authorized, under any circumstances, without first running the gauntlet of the board at Austin. The case at bar is a splendid example of the wisdom of having the board supervise lump-sum settlements. Here a young man, desiring to take a long trip, decided to release his probable right to a recovery of some \$1,800 for the rather nominal sum of \$150, in order that he might get sufficient funds in hand at one time for his prospective trip. If this settlement had been binding, the result would have been that he would probably have speedily become a public charge, when the small payment had been improvidently spent. The public has a right to protect itself from the speeding return of such people to a position where they are likely to become charges upon public charity. In other words, the claimant and insurance company can not, just among themselves, deprive the accident board of the jurisdiction conferred upon it by the legislature and thereby ignore the rights of the public generally.

WORKMEN'S COMPENSATION—AWARD—POWER TO REVOKE—RIGHTS OF TWO WIVES—DEATH OF CLAIMANT BEFORE AWARD—*Industrial Commission of Ohio v. Dell et al., Supreme Court of Ohio (March 21, 1922), 135 Northeastern Reporter, page 669.*—Hiram J. Plumsteel was married to his wife, Sarah, in Canada sometime during the year 1875. Several children were born of this marriage and a domicile was established in the State of New York at Niagara Falls. As Plumsteel was a traveling salesman he was necessarily away from home a great part of the time. About 1904 he left on one of his trips and never returned to or even visited his family. No trouble appears to have arisen between him and his family but he had some difficulties with his creditors, which might have caused him to remain out of New York State for a while. Contributions of \$50 a month were made for the support of his family up to about the year 1912. As his wife Sarah was a helpless invalid for many years, the children wrote frequently to their father urging support for their mother, but without results. These letters were sent as late as July, 1917. In the year 1915, Hiram met one Maggie Berg, whom he married at Columbus, Ohio, after telling her and her brother that his first wife was dead. On September 28, 1917, Hiram was killed while in the course of his employment at the plant of F. O. Schoedinger at Columbus, Ohio. Immediately after his death the wife by the second marriage filed an application with the industrial commission for compensation, and about October, 1917, was awarded the full amount due to a person wholly dependent. When the first wife learned of the death, soon after the award was made, she also filed application for an award. At this stage of the case the commission on November 21, 1918, revoked their former order, and payments thereon were sus-

pende upon the ground that she was not the widow of the deceased, and the commission also refused the application of the first wife upon the grounds that she was not a dependent, that she was not living with the deceased at the time of his death and that she had not been supported by him for several years prior to his death. Both women filed an appeal from the order of the commission but both died before the case came up for trial and the case was revived as to both parties in the names of their administrators. The court of common pleas decided that the first wife was not dependent upon her husband at the time of his death, and that the second wife was not a member of Hiram's family and therefore decided against the contentions of both claimants. The case was then taken to the court of appeals, where the judgment as to the estate of the second wife was affirmed and the judgment as to the estate of the first wife reversed and remanded for further proceedings. Then the industrial commission and the administrator of the second wife took the case to the supreme court for further review. That court affirmed the judgment of the court of appeals and remanded the case with directions. Chief Justice Marshall in rendering the opinion of the court drew from the contentions three legal questions for determination and answered each in turn as follows:

For convenience the parties hereto will be referred to by their Christian names, Sarah being the wife of the first marriage and Maggie the wife of the second marriage.

This error proceeding presents three legal questions for determination:

(1) Did the industrial commission have authority to revoke the award which was made to Maggie in October, 1917, and suspend the unpaid installments of the award theretofore made?

(2) What are the respective relative rights of Maggie and Sarah as between themselves?

(3) Has the executrix of Sarah the right to prosecute her claim, no award having been made to her by the commission and no judgment having been rendered in her favor on appeal during her lifetime?

The first question depends primarily upon statutory provision. A claim was regularly made for an award by Maggie shortly after the death of Hiram Plumsteel, and the claim was allowed in October, 1917, and some installments paid thereon. The claim was allowed on the theory that Maggie was the lawful wife of Hiram Plumsteel. On this theory she was clearly a person wholly dependent, and therefore entitled to an award (1465-82, General Code). Thereafter the commission determined that she was not the lawful wife of Hiram Plumsteel, and revoked the order and discontinued the payments. Section 1465-86, General Code, provides:

"The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion may be justified."

It is impossible to find any ambiguity in the language employed, and by its terms power and jurisdiction are clearly conferred upon the commission to modify or change any findings or orders as in its opinion may be justified. It is well understood that the primary purpose of a continuing jurisdiction is to give a board or tribunal the power to modify or change a judgment or order to meet changed conditions, or to do justice in the light of newly discovered evidence, or to correct an order which was made as the result of fraud or imposition, or an order which would not have been made if certain facts later discovered had then been known to exist.

Even without the express provisions of the statute, the commission might very well be held to have inherent right to revoke an order where it was clear that the order had been obtained by imposition or upon a showing of facts which were later found not to exist.

The first question must therefore be determined in the affirmative, to the effect that the commission had the power, under section 1465-86, to revoke the award theretofore made to the wife of the second marriage.

Let us next inquire concerning the respective and relative rights of these two unfortunate women. It has been argued with much force, supported with much authority, that a presumption should be indulged of the validity of the second marriage, and that, even though conceding that there was a former valid marriage, the burden will be imposed upon the wife of the first marriage, and especially so when, as in the case at bar, it is clearly shown that the first wife is living, to overcome the presumption that a divorce was obtained before contracting the second marriage.

It is inconceivable that she would have continued to receive support up to 1912 or 1913 if a divorce had been obtained prior to that time, or that she would have made any effort, or that her daughters would have made any effort in her behalf, to obtain further support, if there had been a legal separation at the suit of the husband. Nowhere does it appear that he ever claimed to have been divorced. Even if this court should follow the rule so frequently declared in other jurisdictions, we must still reach the conclusion from this record that there is enough to overcome any such presumption and to place upon the second wife the obligation of proving that by valid divorce proceedings Hiram Plumsteel was free to contract a valid second marriage.

We therefore approve the conclusion of the court of appeals in this case that the first wife is the lawful dependent in the case.

Finally, it must be determined whether the first wife is a dependent within the true meaning of section 1465-82, and whether an award can be made to her estate, she having died before the cause was heard upon appeal in the court of common pleas.

The section above referred to provides that—

“The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

“(A) A wife upon a husband with whom she lives at the time of his death.”

“In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death

of such employee, but no person shall be considered as dependent unless a member of the family of the deceased employee, or bear to him the relation of husband, or widow, lineal descendant, ancestor, or brother or sister."

Dependency rests upon an obligation of support, and not upon the question as to whether that obligation is being discharged. To hold that a recreant husband can relieve himself of such an obligation by his mere defiant refusal to discharge the obligation would be to permit a person to take advantage of his own wrongdoing. It is not a question of how well he fulfilled his legal obligations, or how faithful he was in fact in the performance of those promises of support which are a part of the marriage contract and which are supplemented by elaborate statutory provisions clearly defining his duty to support and maintain his wife in so far as he is able to do so; the question is: Was there a duty on his part and has anything occurred to relieve him of that duty?

Under the language of section 1465-82, General Code, Sarah Plumsteel must be held to have been a partial dependent, and therefore entitled to have the question of the value of her dependency determined in accordance with the facts of this particular case existing at the time of the death of Hiram Plumsteel. Inasmuch as she has deceased before that matter has been adjudicated, it becomes a very simple proposition. Under paragraph 3 of section 1465-82 she should be awarded two-thirds of his average weekly wages, and it should continue from the time of his death to the time of her death.

The case was therefore remanded for further proceedings in accordance with the foregoing decision.

WORKMEN'S COMPENSATION—AWARD—REOPENING AND REVIEW—POWER OF COMMISSION—*Terry v. General Electric Co., Court of Appeals of New York (November 22, 1921), 133 Northeastern Reporter, page 373.*—George H. Terry while in the employ of the General Electric Co. slipped upon a sidewalk upon its premises and fractured one of his ribs. The State industrial commission allowed an award of compensation in his favor because of the injury. After he recovered, Terry returned to work, doing the same kind of labor and receiving the same pay. A few months later he voluntarily quit the employment to accept work as a janitor for another employer. Four months later, because of his physical condition, he left, returned to his home, and soon thereafter died. After his death the commission of its own motion opened the proceeding relating to the claim originally filed by him. On the day his widow was made administratrix the commission made an award of compensation based on the decreased earnings of Terry while janitor and for wages lost after giving up his position as janitor and before his death. It was found by the commission that the injuries he received "so accelerated and lighted up a preexisting tubercular condition as to cause him to

be disabled between the dates hereinbefore referred to and subsequently caused his death."

An appeal was taken from the award but it was affirmed in the appellate division. The court of appeals, however, reversed the lower court, and through Judge McLaughlin held that the commission was without power to act as it did in this case. The court stated that there was a distinction between compensation and benefits. Compensation is paid only to employees, benefits are payable only to dependents of such employees. On this subject the court said:

This award is not made to the widow or any of the persons specified in the statute, nor could it be, because nothing was due Terry on an award for compensation when he died. The award made to him had been fully paid and satisfied. To insure the payments to the persons intended, the section contains a provision that—

"Claims for compensation or benefits due under this chapter shall not be assigned, released, or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived."

Here the award for compensation was made payable, as above indicated, to the administratrix of Terry's estate, and as such becomes the property of his estate, subject, like other funds, to the payment of all claims which may be legally made against it. The right to compensation was extinguished by Terry's death. The commission therefore had no power to make the award in question.

WORKMEN'S COMPENSATION—AWARD—TOTAL WEEKLY WAGES—
TWO EMPLOYERS—*Bamberger Electric R. R. Co. v. Industrial Commission of Utah, Supreme Court of Utah (December 24, 1921), 203 Pacific Reporter, page 345.*—Walter Berg was an employee of both the Bamberger Electric Railroad Co. and the Utah Power and Light Co. on June 2, 1921. The power company paid him \$61.25 per month, and the railroad company \$59.95. His duties required him to start the machinery for the railroad company at 5.30 a. m. on the date mentioned but this he did not do. His dead body was found between 7 and 8 a. m. in the power company's building with burns upon the body, indicating that he had come into contact with an electric current while working for the power company. The Industrial Commission of Utah made an award in favor of the mother of the deceased against both companies. The case was taken to the supreme court of the State, where the award was vacated as to the railroad company, and the award against the power company, in whose employ the deceased was working when killed, was changed so that the company would be liable for the full amount of the award based upon the total amount of earnings received by deceased from both

companies. The status of the employee at the time of his fatal injury was thus defined by the court:

Without going into further details as to the evidence, it is sufficient to say that no joint contract existed between the railroad company and the power company to pay Berg's wages; that each company was liable for its share of Berg's wages, and no more; that either company could have discharged the deceased from its employ, but neither could have discharged the deceased from the employ of the other. Therefore, while doing work for the power company the condition of employer and employee existed between the deceased and the power company, but not between him and the railroad company. Moreover, at the time of his death the railroad company had no control over deceased, and he was entirely, according to the undisputed evidence, under the direction of the power company, and hence there was no joint employment, and the railroad company can not be held liable for any part of the compensation awarded to the mother of the deceased.

The power company should pay the full amount of the award, based upon the total amount of his earnings received by him from both companies.

WORKMEN'S COMPENSATION—AWARD FOR SPECIFIC INJURY—DEATH OF BENEFICIARY—VESTED RIGHTS—*Wenning et al. v. Turk et al.*, *Appellate Court of Indiana (June 8, 1922)*, 135 *Northeastern Reporter*, page 665.—Robert Turk was an employee of William Wenning and others at a weekly wage of \$18.42. In the course of his employment he received an injury which resulted in the loss of an eye. An agreement was entered into between the employers and employee in which it was agreed that Turk would be paid \$5.80 for 150 weeks. Compensation was paid under this agreement, without the approval of the industrial board, from August 18, 1918, to February 22, 1921, a period of 79 weeks. On March 20, 1921, Turk died from causes other than the injury for which compensation had been paid. The only surviving heirs were his widow, Bettie Turk, and his child, Lola, 5 years of age. They made application for an award of compensation to the industrial board under the provisions of the workmen's compensation act. The board found that a mistake had been made in the previous agreement, and that Mr. Turk was entitled to \$10.13 per week instead of \$5.80, and therefore awarded the claimants a weekly compensation of \$4.33 for 79 weeks beginning August 18, 1918, and also 71 weeks additional compensation at the rate of \$10.13. The employers conceded that the claimants were entitled to be paid all the compensation that was due at the death of the employee, but contended that the right to compensation ended with the death of Turk. From the ruling against them, the employers appealed to the appellate division, but in that court the

award of the board was affirmed. The decision of the court, rendered by Judge McMahon, is in part as follows:

Section 36 of the workmen's compensation act, section 8020t, 1 Burns' Supp. 1921, reads as follows:

"When an employee receives or is entitled to compensation under this act for an injury and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support."

The right of an injured employee to compensation is not such a vested right that in the absence of statute survives upon the death of the employee. Such right does not on the death of the employee pass to his heirs or personal representatives.

In the absence of a statute to the contrary, the employer is only required to pay compensation up to the death of the injured employee.

Appellees base their claim to the unpaid balance of the compensation accruing after the death of the injured employee on section 36. Appellants, however, insist that the "unpaid balance of compensation" must be construed to mean the unpaid balance due when the injured employee dies, and that it has no reference to the installments that would have become due and payable to the employee had he not died.

There is nothing ambiguous about section 36. There is nothing in it that calls for judicial construction. We are not at liberty to read into the statute the words "due at the time of the death of such employee," as we would have to do in order to have it read as appellants contend.

We hold that where an injured employee dies from causes other than the one for which he has been allowed compensation, the next of kin are entitled to an award directing that the unpaid balance of the compensation accruing after the death of the employee be paid to them.

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—FINDING OF COURT—*Ex parte Sloss-Sheffield Steel & Iron Co. (Steagall Case)*, Supreme Court of Alabama (April 20, 1922), 93 Southern Reporter, page 425.—Alpha Steagall was killed on March 26, 1920, while employed by the above-named company, under circumstances warranting a compensation award. His widow petitioned the circuit court of Jefferson County, asking for a settlement under the compensation law of the State. This was on September 14, 1920, and the complaint was found lacking as to form. On October 23, 1920, an amended complaint in proper form was submitted by leave of the court. To this the company answered that there was no dispute as to the claim, and that it had been ready and willing to settle with the petitioner according to the provisions of the law, and on the basis of the facts set forth in her petition, which it did not contest. A proposed settlement was filed with the answer, which it was

ready to make with the petitioner, subject to the approval of the court. The court made an order dismissing the cause on the ground that there was no controversy in the case either as to liability or the amount due, "or any other matter of controversy requiring an adjustment in this court as contemplated by the compensation act."

On November 5, 1921, more than one and one-half years after the accident, the widow again petitioned for a settlement, referring to the previous petition and answer. To this the company demurred, pleading that as claims were outlawed after one year there was no liability on its part, also making other pleas in demurrer. Judge Sayre, who delivered the opinion of the court, announced that, on the facts having been admitted, as they were in the court below, judgment should have been entered for the petitioner; but as the "petition was dismissed and not renewed within one year of the death of petitioner's husband," the question of defeat by limitation arises. A dismissal by the court did not operate as a bar; but as the case was disposed of, that petition "became as if it had never been." This "left the parties the same rights of prosecution as if the subsequent new petition constituted petitioner's first effort to prosecute her claim." The law specifically provides that claims "shall be forever barred unless within one year after death" agreement is made or a verified complaint filed. Though stating that "the act should be liberally construed in favor of the workman or his dependents," the court has "no legally sufficient reason" for varying "the plain language of the statute" and a judgment of the lower court in favor of the widow was reversed.

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT—SECOND INJURY—TOTAL DISABILITY—*Guderian v. Sterling Sugar & Ry. Co. (Ltd)*, *Supreme Court of Louisiana (March 27, 1922)*, *91 Southern Reporter, page 546*.—August Guderian was in the employ of the defendant company in the capacity of foreman of laborers. On January 9, 1919, he told one Porter, a laborer under his charge, that he had absented himself from his work for too long a period. An altercation followed, as a result of which, Porter was discharged. More angry words were exchanged and Porter struck Guderian over the left eye with his naked fist. Guderian had but one good eye at the time, as some years before he had lost his right eye. In the early part of the following April he observed dark spots before his eye. He was alarmed and consulted a local physician, who informed him that the condition was due to a probable derangement of the kidneys or indigestion. He returned to his work but about April 23 he noticed that his eyesight was failing and he immediately consulted

the same physician. This time he was advised to consult a specialist in New Orleans, which he did and was treated in that city on April 29. During the month of May he lost his left eye completely and became totally blind. On April 22, 1920, more than a year after the blow had been struck he brought suit for compensation for his injuries. The employer defended on the ground that the limitation of one year, provided for by statute, had run, that the accident did not rise out of and in the course of the employment, and that, in the event it did, the incapacity is not total but partial. There was an award made and the employer appealed. But in the upper court the judgment allowing compensation was affirmed and the contentions of the employee upheld in an opinion rendered by Judge Overton, which is in part as follows:

Undoubtedly the blow injured the optic nerve at the time it was given, but plaintiff did not know that, and had no means of ascertaining it. His eyesight was not perceptibly affected. He continued his work, stopping only long enough to have the wound on the forehead dressed. He had no cause of action at that time under the employers' liability act. His cause of action was in process of development, but without knowledge of this fact on his part, or means of knowledge. The first symptom that arose suggesting the possibility that his eye was injured was not sufficient to excite the slightest alarm in his physician, whose opinion dissipated plaintiff's fears. He had no knowledge of even what might happen until April 23, 1919, which was within one year prior to this suit, unless the symptom above mentioned be deemed knowledge, but we think it should not.

Plaintiff's cause of action did not arise until he lost his eye. It is self-evident that one can not sue until his cause of action arises. This court, in *South Arkansas Lumber Co. v. Tremont Lumber Co.*, 146 La. 61, 83 South. 378, said:

"A person can not bring suit until his cause of action has accrued, and until a cause of action has accrued, prescription can not run against it."

The prescription is suspended if it be made to appear that there was good legal reason for not bringing the action earlier. We, therefore, overrule the plea of prescription.

When a foreman, in the performance of his duty, is assaulted by a laborer under him, and is injured as a consequence, the injury is considered as caused by an accident within the meaning of employers' liability acts.

The above rule also applied if, as in this case, the foreman is assaulted and injured immediately after the discharge when the assault is caused by the discharge, and when the foreman, as in this case, pursuant to his duty, is in the act of settling with the laborer.

Defendant also urges that plaintiff's disability to do work of any reasonable nature is not total, but only partial. Under section 8 of act 38 of 1918 the loss of both eyes is classified as total disability, and properly so. Where one loses his only eye, and it does not appear that he is able to do remunerative work of any reasonable character, the disability will be considered total, and he will be awarded compensation as for permanent total disability.

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—MENTAL INCAPACITY—*Lough v. State Industrial Accident Commission, Supreme Court of Oregon (June 6, 1922), 207 Pacific Reporter, page 354.*—Fred V. Lough claimed to have been injured October 1, 1919, while at work in Multnomah County, Oreg., and presented his claim for compensation on April 3, 1921. The commission refused compensation, under the provision of the law which requires claims to be filed within three months after the date of the injury, except in fatal cases, when one year is allowed. The case was taken to the circuit court of the county, which sustained the finding of the commission. Further appeal to the supreme court of the State led to the same result.

The claim was based on an injury to Lough's head, caused by a bolt falling upon it. The disabling effects were not immediately apparent, but subsequently a partial insanity affected the claimant, disabling him, as he claimed, from taking the necessary action to protect his rights.

Judge Burnett, speaking for the court, found precedents in a number of States for holding that the occurrence of the injury dates, not from the time of the accident, but from the disabling results thereof, which may occur some weeks or months later. He found, however, that these cases arose "under statutes differing largely from our own." The Oregon law contains no such provisions, and "without equivocation it is said that the notice must be given within three months after the date upon which the injury occurred."

The opinion concludes:

Without making any exception in favor of the insane, the disabled, or the infant, the legislature has seen fit to prescribe the terms upon which the bounty of the State may be enjoyed. Those who would avail themselves of the privilege thus extended must comply with its terms, and it does not lie within the power of any judicial tribunal, however beneficial it may be, to add terms that have not been put there by the law-making power. We may well regard this case as one of great misfortune, and yet we are powerless to extend relief where none is awarded by the statute. The judgment of the circuit court must be affirmed.

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—SETTLEMENT—*Hopper v. Wilson & Co., Supreme Court of Kansas (June 10, 1922), 207 Pacific Reporter, page 757.*—J. N. Hopper was injured on April 18, 1918, while in the employ of Wilson & Co. He executed a statutory release in consideration of the payment of \$25, May 7, 1918. He died on September 28, 1918, from pneumonia (lobar) and contributory valvular heart disease. More than 10 months later his widow made a demand for arbitration under the workmen's compen-

sation law. This was the first notice given to the company of a claim that Hopper's death was due to the injury referred to. The State statute provided that proceedings for the recovery of compensation would not be maintainable unless written notice of the accident had been given in the case of death within six months from the date thereof. The widow was unsuccessful in the lower court, and an appeal was taken to the supreme court of the State. That court decided against her, saying:

Whatever may be the rule under other circumstances, we think in the situation here presented the statute is to be interpreted as requiring the making of a claim by the plaintiff after her husband's death and within six months of its occurrence. Such a requirement is in keeping with the spirit and policy of the law because the defendant, having settled with her husband during his lifetime, had no reason to anticipate the making of a further demand, and the assertion of one after the lapse of six months (in this instance over 10 months) might well find it disabled from obtaining the information and preserving the evidence necessary for a defense. It does not appear that any claim for compensation was made upon the defendant by the injured employee, but the settlement made with him would render that fact immaterial as between them. But this settlement having been effected, the defendant was justified in assuming, in the absence of any notice to the contrary, that the whole affair was ended, and in treating it as a closed incident.

Whatever considerations make it desirable that a claim for compensation shall be made upon the employer within six months after the death of the employee in any case apply fully here.

The steps that had been taken—the settlement and release—so far from warning the employer of the prospect of a further demand, tended to lull him into security in the belief that the whole affair had been finally disposed of.

WORKMEN'S COMPENSATION — CLAIM — NOTICE — ABSENCE OF PREJUDICE—*In re Troutman, In re Kirk, Appellate Court of Indiana (December 9, 1921), 133 Northeastern Reporter, page 150.*—Helen Troutman and Lorenzo Kirk were employees who received personal injuries by accidents arising out of and in the course of their employment. In neither case was the employer notified of the injury within 30 days as required by the statute. The act provided that "Unless such notice is given or knowledge acquired within 30 days from the date of the injury or death, no compensation shall be paid until and from the date such notice is given or knowledge obtained." It was provided further that "No lack of knowledge by the employer or his representative and no want, failure, defect, or inaccuracy of the notice shall bar compensation, unless the employer shall show that he is prejudiced by such want, failure, defect, or inaccuracy of the notice, and then only to the extent of such prejudice." In neither

case was the employer prejudiced by lack of notice of the injury. The industrial board certified to the appellate court the question of whether the failure to give notice merely postpones the time when the payment of compensation begins or bars the claimants of their rights to part of the compensation. The court held, through Judge Enloe, that the former was the correct interpretation of the law and further said that, "even if there were doubts as to whether the claimants, under the facts stated, were entitled to compensation for the full periods claimed, we would be compelled to resolve all reasonable doubts in favor of such claimants."

WORKMEN'S COMPENSATION—CLAIM—NOTICE—ACTUAL KNOWLEDGE—REASONABLE EXCUSE—*Patton Hotel Co. v. Milner*, *Supreme Court of Tennessee* (December 17, 1921), 238 *Southwestern Reporter*, page 75.—Wilson Milner was a cook in the employ of the Patton Hotel Co. on May 24, 1920. On that day it was very warm in the kitchen and Milner became too hot and was stricken with a feeling of faintness. He went out into the alley to get fresh air. While standing there he fainted and fell and his arm was run over by the rear wheel of an automobile truck that was passing along the alley. The arm was severely bruised and lacerated and after he was removed to the hospital in an unconscious condition lockjaw set in. He died soon thereafter, leaving a widow and a minor son by a former marriage who was 5 years of age. The deceased's brother, James Milner, qualified as administrator of the deceased's estate and on August 16, 1920, filed a petition seeking compensation. The company resisted the claim on the grounds that they had not been given written notice of the claim for compensation in writing within 30 days, as required by the compensation act. After a hearing a judgment was rendered in favor of the claimants but the case was appealed to the supreme court, where the judgment of the lower court was overruled. Judge Hall wrote the opinion, giving reasons for this action of the court, in part as follows:

The deceased's overheated and fainty condition arose out of his employment, and it was on account of this condition that he became exposed to the danger which produced the injury. We, therefore, think the necessary causal connection between the employment and the injury appears.

The question of notice presents a more serious question.

It is conceded by claimants that no notice whatsoever was given to the hotel company of the injury within 30 days after its occurrence, and no excuse was offered for their failure to give notice.

The accident happened on May 24, 1920. The first and only notice that was ever given the hotel company of said accident is contained

in a letter from Messrs. Crutchfield & Chamlee, attorneys for appellees, of date of August 9, 1920, which was more than two months after the accident.

This court held that sections 22 and 23 of the workmen's compensation statute mean just what they say, and that written notice must be given within 30 days after the injury, or else a reasonable excuse for failing to give the notice must be made to the satisfaction of the tribunal trying the case.

It is said in the instant case that notice was unnecessary because the hotel company was shown to have had actual knowledge of the accident and injury to the deceased.

In *Black Diamond Collieries v. Deal* (Tenn.), 234 S. W. 322, this court said:

"Unless the employer has actual knowledge of the accident, the employee shall not be entitled to any compensation which may have accrued prior to written notice to the employer. Unless such written notice is given within 30 days after the occurrence of the accident no compensation shall be payable under the provisions of the act, except a reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal trying the case. Such is the effect of section 22."

It is next said that it appears that Wilson Milner, jr., the minor son of the deceased, was only 5 years of age at the time of his father's injury and death, and was without a regular guardian until March 26, 1921, and that this fact itself was sufficient to excuse him from giving the employer notice of the injury required by sections 22 and 23 of the workmen's compensation act.

By subsection 6 of section 30 of said act it is provided that if the deceased employee leave a widow and dependent child the compensation provided by said act shall be paid to the widow for the benefit of herself and such child. The right, therefore, was in the widow to make claim for the compensation due in the instant case, and it was her duty to give the notice required by sections 22 and 23 of said act and, not having done so and having offered no reasonable excuse for not giving said notice, she can not recover in this action.

It, therefore, results that, for the want of notice as required by sections 22 and 23 of the statute, and the widow's failure to show a sufficient excuse for not giving such notice, the judgment of the court below will be reversed, and the petitions of appellees will be dismissed, with costs.

WORKMEN'S COMPENSATION—CLAIM—NOTICE—PREJUDICE—MEDICAL SERVICE—*Lawson v. Wallace & Keeney, Supreme Court at New York, Appellate Division (July 6, 1922), 195 New York Supplement, page 673.*—James Lawson was employed as salesman by a wholesale fish merchant, and while at his work received a sharp blow from a falling box, which struck him between the knee and hip. The accident caused pain and "a red spot," but suggested no serious injury. A coemployee witnessed it, and the injured man used liniment for two or three days. Some two months later "the leg began to bother," and Lawson went to see his family physician, a lady,

Doctor Peebles. "Owing to his apparent recovery from the bruise received a couple of months before, it did not occur to him to mention the accident, nor did his physician question him as to whether he had sustained an injury to the leg." She had formerly treated him for rheumatism following an attack of typhoid fever, and continued to treat for rheumatism for two or three months; but as the leg kept getting worse, the doctor finally sent Lawson to a specialist, who found "an abscess deep in his thigh, which had worked its way to the top slowly." The abscess was at the point where the box struck the leg, and the surgeon asked Lawson whether he could remember when he had been hurt. This for the first time reminded Lawson of the falling of the box, of which he told the surgeon. This was about six months after the injury, and claimant then immediately notified his employer, making a report of the injury. On the date of the mailing of this report the surgeon operated, draining the abscess, but did not recognize any immediate communication with the bone. Three months later another operation was performed for chronic osteomyelitis. This condition of the bone had probably continued latent since the typhoid fever, but the actual situation, including the existence of the blood clot formed by the bruise, could not be known without the use of the X ray and was not definitely disclosed until the second operation.

The foregoing testimony as to the nature of the injury and the latent disease which it excited into a cause of disability was supported by the opinion of the surgeon of the board, and both doctors agreed that there was nothing in the history of the case or of the accident to indicate the necessity of any other treatment than that which had been given, so that it could not be claimed that the failure to give notice had cut off the rendering of suitable medical service. Indeed, there was nothing in the development of the disability prior to the diagnosis by the specialist to indicate a connection between the accident and the disability.

The claim was at first disallowed on the employee's statement that he had not notified his employer until after the expiration of 30 days after the accident, this being the time for notice fixed by the law. The case was subsequently reopened upon application of the employer, who wrote a letter strenuously urging a disregard of the strict letter of the law, and a recognition of the equities as they appeared to him. "As soon as the diagnosis showed the cause of his trouble, a report was at once made to us, and we in turn reported to the insurance company. We have been paying compensation insurance for a long while and have never had a claim before. It does seem outrageous that nothing has been done for this man, as this is one of the cases that, obviously, the compensation insurance is meant to cover."

This letter was written by the president of the employer company, who also appeared as attorney for the injured man. Judge Hinman, who delivered the opinion of the court, in commenting on this fact, said: "Upon the question of notice, we have an attitude on the part of the employer which is unusual, if not unique." On the basis of the employer's statement that there were bruises and scratches nearly every day which it would be impossible to report and the expression of the employer's opinion that the claim was made in good faith, and that the accident had occurred as narrated, the case was reconsidered, setting forth that "the purpose of notice is to permit an early investigation of the circumstances of the accident by the employer and to give opportunity to furnish prompt medical service to claimant to prevent serious disability." Attention was called to the 30 days' limitation established by the law. This was said to be a "fair provision," but "is not inflexible," the law providing that it may be waived where employer has not been prejudiced by the failure to give notice.

Despite the desire of the employer that the claim be favorably acted upon, the insurance company raised the question of the limitation, but the court decided that "it was not necessary for the commission to find facts tending to indicate lack of prejudice on the part of the insurance company." As the law was enacted, the company might have made such a claim, but by an amendment of 1918 only the employer's interests are safeguarded by this provision as to "lack of prejudice." "Strange as it may seem, the legislature has taken away from the insurance company, directly chargeable with the payment of the compensation, any right to object on the ground of its own prejudice. The insurance company may only raise the point that the employer has been prejudiced."

Another point involved was the claim for medical bills, the insurance carrier contending that no recovery could be had since the employer and insurance carrier had not authorized the medical treatment in this case. It was shown, however, that before the surgeon, Doctor Jennings, operated upon Lawson, the latter communicated with his employer, who went to the hospital and talked over the possibilities of the treatment. From this Judge Hinman reached the conclusion that the employer had consented to the employment of the physicians selected by the employee, and that he had the right so to do. As to the amount of the bills, the only question raised by the carrier was whether they were reasonable and fair. "There was sufficient testimony to justify the hospital bills as reasonable in amount." The doctor called by the insurance carrier testified that the operating surgeon's "reputation is of the very highest," and that his charges in this case were "reasonable for a man in good circumstances." However, for one in the circumstances and station

in life of the claimant they were too high. Section 13 of the workmen's compensation law requires that limitation be placed upon allowances for medical services. The bill of the family physician was found not to be supported by the necessary testimony, and for such services as were rendered prior to the notice to the employer of the fact of the injury could not be accepted as a proper charge. For services rendered after the operation, when the case was turned over to her for dressing, a reasonable allowance could be made; while the bills of the surgeon himself must be submitted to the commission for further consideration in view of the requirement that the station in life controls.

The amount awarded for disability was therefore affirmed, and that for medical treatment reversed and remanded to the State industrial board for further consideration.

WORKMEN'S COMPENSATION—CLAIM—RELIANCE ON PROMISE TO SETTLE—LIBERAL CONSTRUCTION—ESTOPPEL—*Mulhall v. Nashua Mfg. Co.*, *Supreme Court of New Hampshire (November 1, 1921)*, *115 Atlantic Reporter*, page 449.—Jane Mulhall was injured while in the employ of the defendant company, on August 8, 1919. The accident arose out of and in the course of employment and was not caused by her willful misconduct. She received emergency treatment from the mill doctor and nurse on the day of the accident and the mill doctor, who was employed by the defendant company, attended her every day for a year from the date of the accident. The defendant company held a policy of insurance by the terms of which the insurance company contracted to pay promptly any sum due under the workmen's compensation law. The insurance company, through an agent, about eight weeks after the accident called on and took the statement of Miss Mulhall and then told her to wait until she saw how she got along, but not to bring in a lawyer and that the insurance company would pay her for six years. After waiting for three or four months from the date of the accident and not hearing from the agent she employed counsel. The agent failed to keep an appointment with her attorney. A day or two before the expiration of the six months, the time within which the act required notice to be filed, the attorney called the agent on the phone in regard to filing notice. The agent told him that the company waived the filing of notice as they knew all about the accident. Relying on this assurance no notice of claim for compensation was filed until March 20, 1920. Proceedings were brought under the act and the defendant made a motion to dismiss the proceedings because no claim for compensation was made within six months from the occurrence of the accident. The motion was denied, and the court awarded compensation for the full term of

300 weeks from the date of the accident. The case was then taken to the supreme court of the State. Judge Snow rendered an elaborate decision on the interpretation of the compensation act and held that in view of the uncertainty of the meaning of the finding, justice required a further hearing and the case was discharged. The court reviewed many decisions stating the object, policy, theory and method of construction of the workmen's compensation acts. It was held that a compensation claim was not barred by the failure to make claim within six months unless the employer is prejudiced by the delay; that a sufficient notice of the accident is a sufficient claim for compensation; and that the workmen's compensation act, although in derogation of the common law, should be construed liberally in order to effectuate the purpose for which it was enacted. Applying these conclusions to the facts in this case it was held that a statutory provision enacted for the benefit of the employer may be so far waived by him as to estop him from insisting on the protection afforded by it, and that a claimant may assume that agents of the insurer of the employer have the usual and ordinary means of investigating and settling claims and where a claimant relied on the agent's assurances and did not present a claim for compensation the employer is estopped to plead the six months' limitation as a defense. The court in the course of its opinion said:

The plaintiff and her attorney had a right to assume that these agents were clothed with authority to employ the usual and ordinary means of accomplishing that for which the agency was created. The suspension of technical requirements is, not infrequently, a means employed to prolong negotiations in order to secure amicable settlements.

The plaintiff relying and acting upon the assurances of defendant's agent, having deferred the presentation of her claim for compensation, the defendant is estopped to set up such limitation as a defense.

WORKMEN'S COMPENSATION—COVERAGE—BUSINESS FOR GAIN—RELIGIOUS CORPORATION—GRAVE DIGGING—*Dillon v. Trustees of St. Patrick's Cathedral, Court of Appeals of New York (November 21, 1922), 137 Northeastern Reporter, page 311.*—This case was before the court on appeal from the appellate division of the supreme court, where James Dillon, a laborer, was allowed an award of compensation against the corporation named. The employer was a religious corporation under the laws of New York, the trustees having control of the property of the corporation and of its revenues. However, the revenues must be applied to the maintenance of the corporation or to some religious, charitable, benevolent, or educational object conducted by the corporation, or in connection with it or with the denomination to which it belongs. Dillon was engaged in excavating

the foundation for a monument, the nature of his employment being hazardous under the compensation law. The responsibility of the employer turned on the question of whether or not the business was for pecuniary gain. Judgment in the court below was affirmed (189 N. Y. Supp. 594, see Bul. No. 309, p. 278) on the ground that there was a measure of gain in certain of the activities of the corporation, and it did not matter to the claimant to what purpose that gain was devoted. The court of appeals, however, took a contrary view, reversing the judgment of the courts below and granting a new trial. The law permits compensation only in trades and occupations "carried on by the employer for pecuniary gain." Judge Andrews, speaking for the court, having stated the foregoing facts, asks, "Was the appellant [board of trustees] carrying on business for pecuniary gain?" The conclusion of the court and its grounds are set forth in the following paragraphs:

In our opinion it was not. It owned a cemetery. In it it sold burial privileges. For them it received money. But the one fact that money is received by the employer for property sold or privileges granted is not sufficient to bring him within the definition of carrying on business for pecuniary gain. We may concede that the regular sale of burial rights in a large cemetery to an applicant who agrees to comply with conditions imposed is a business. That is not enough. The purpose of the business must be profit. "'Pecuniary gain' as used in the statute merely means that the employer must be carrying on a trade, business, or occupation for gain."

The rule is illustrated in *Uhl v. Hartwood Club*, 221 N. Y. 588, 116 N. E. 1000. The club was a membership corporation owning a large tract of forest land, used by its members as a pleasure resort. On these lands it engaged in forestry and logging, selling the timber so cut by it. The proceeds of these sales might under its by-laws be divided among the members as dividends, or might be paid into the club treasury and used to diminish assessments and dues. Under those circumstances we held that it was engaged in business for pecuniary gain.

Here no such situation exists. There are no salaries, no dividends, no division of profits, directly or indirectly. Substantially all sums received are used for the maintenance of the cemetery. If incidentally there is any surplus, it is used for the charitable objects of the corporation. To say it is engaged in business for profit is an abuse of language.

WORKMEN'S COMPENSATION—COVERAGE—FARMERS AS MINERS—*Hanna et al v. Warren*, Appellate Court of Indiana (November 29, 1921), 133 *Northeastern Reporter*, page 9.—Louis Warren was in the employ of Newton and Lemuel Hanna. The Hannas operated a farm in Indiana and had been doing this kind of work all their lives. They contracted with one Roy Price to engage in mining and loading coal from an outcrop on their farm. With the assistance of Warren and

others, but without making any investment in new machinery or mining tools, they proceeded to mine coal under the contract. Warren, while engaged in the work of mining, received an injury which resulted in the loss of sight of his right eye. The industrial board found that the accident arose out of and in the course of his employment and made an award of compensation in his favor. The Hannas contended that they were farmers and as such were not subject to the workmen's compensation law. An appeal was taken to the appellate court, when the question was disposed of in favor of the injured man.

Judge McMahan, who delivered the opinion of the court, said as to the point of occupation:

Appellants while engaged in this work were not engaged in farm labor as that term is generally understood. They were at the time of the accident and injury to appellee engaged in the mining business, and subject to the provisions of the workmen's compensation laws.

WORKMEN'S COMPENSATION—COVERAGE—"FOUR OR MORE WORKMEN"—EMPLOYEE WORKING SEPARATELY—*Ward & Gow v. Krinsky*, Supreme Court of the United States (June 5, 1922), 259 U. S. 503, 42 Supreme Court Reporter, page 529.—Himan Krinsky was employed by Ward & Gow as a salesman at a booth in a subway station in the Bronx, the employer being a company maintaining a large number of such booths at which were sold newspapers and other periodicals, candies, etc. There were 307 employees, including truck drivers, porters, and office employees, besides the 125 newspaper salesmen who worked alone at their different stands.

Krinsky was furnished with a pail for water to keep his hands clean while handling merchandise in the dusty air of the subway, and while emptying this pail for the purpose of securing a fresh supply he was struck by an approaching train and severely injured. On application he was awarded compensation by the State industrial commission, and this award was affirmed by the appellate division of the supreme court (193 App. Div. 557, 184 N. Y. Supp. 443), and again by the court of appeals without opinion.

The employer contended that the declaration made by the legislature that the employment was hazardous because four or more workmen were employed therein was not conclusive, and that the "validity of compulsory workmen's compensation acts depends upon the inherently hazardous character of the occupations covered."

As to this, Justice Pitney, who delivered the opinion of the court, said:

The argument rests upon the curious misconception that the legislature regarded the workmen or operatives as the sole source of danger to those engaged in the same business with them, and upon

the assumption, equally untenable, that the occupation of a salesman at a subway station, protected ordinarily by the comparative security of a steel booth, but called upon at times, in the line of duty, to go into the moving throngs of passengers and into close proximity to the rails upon which locomotives and trains are moving, is free from inherent hazard to the salesman.

It had been sufficiently determined that Krinsky's injury arose out of and in the course of his employment. Whatever alternative methods of accomplishing his purpose might have been used it could not be said that his action in the case was a violation of or departure from his line of duty.

A sufficient vindication of compulsory legislation in this field was said to exist in the "public interest of the State in the lives and personal security of those who are under the protection of its laws." This warrants the placing of the responsibility for pecuniary losses by injury to employees on the employer—the one "who organizes and directs the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs and the losses, and takes for his reward the net profits, if any."

It was said to be conclusively shown by the fact of the serious injury that there was inherent hazard in Krinsky's occupation. The claim that by extending the law to every employee simply because four or more workmen were employed by the same employer was unreasonable, was said to be disproved by Krinsky's experience. In any case, if employment is entirely free from hazard, no responsibility is entailed; if there is a reasonable regulation the obligation is not increased, as "presumably the premiums will not exceed a reasonable estimate of the risk."

Other contentions were raised involving a consideration of unconstitutionality, as denying the equal protection of the laws, improper classification, etc. It was found that this classification, based on the number of workmen, had been incorporated after some years of practical experience. Various reasons were considered as possible supports for the action taken, and the conclusion was reached that there was no violation of the fourteenth amendment by establishing a general liability for all employees of an employer who came under the act, even though some of them might be isolated and remote from the "four or more workmen" who brought him primarily within the law.

The provision of law in controversy was therefore sustained, and the judgment of the court below affirmed, two justices dissenting.

WORKMEN'S COMPENSATION — COVERAGE — POLICEMEN — PUBLIC OFFICERS—*Marlow v. Mayor and Aldermen of City of Savannah, Court of Appeals of Georgia (March 9, 1922), 110 Southeastern Re-*

porter, page 923.—Walter H. Marlow was appointed a policeman of the city of Savannah, on March 10, 1921. On March 27, 1921, while on duty and in the discharge of his duty, he was killed by an unknown person. It was agreed and understood when Marlow was employed that the policeman could be discharged at any time by the mayor of the city of Savannah with or without cause. The widow brought proceedings under the workmen's compensation act and was granted an award, but on appeal to the superior court the award was set aside. The claimant took the case up to the court of appeals. The sole question was whether the policeman was an employee of the city or a public officer. The court decided against the claimant and held that a policeman is a public officer. The court held that the policeman was not an employee under contract, express or implied. As the relationship of employer and employee must exist under the act in order to sustain an award, the judgment of the lower court dismissing the award was affirmed.

WORKMEN'S COMPENSATION—COVERAGE—SPECIAL OFFICER—OFFICIAL—*Walker v. City of Port Huron, Supreme Court of Michigan (December 21, 1921), 185 Northwestern Reporter, page 754.*—The charter of the city of Port Huron required all officers to take the constitutional oath of office before entering upon their duties. William R. Walker was hired by the commissioner of parks and public property to perform certain duties in a park in the city during the summer of 1920. His duties were of the same nature as that of a park policeman or watchman. Walker took the constitutional oath, in which he was designated as a "special officer." A few days later he was injured. He presented a claim for compensation and an award was made in his favor under the workmen's compensation law. The employer brought the case up to the supreme court of the State for a decision as to whether Walker was within that part of the act that excepted "any official of * * * any city" from its provisions. In deciding this question Judge Sharpe said that the fact that he took the oath of office was persuasive but not controlling. On the authority of an older case it was held that an officer was one who holds an office, place, or position created for him either by general or local legislation. The position here filled was not that of a regular policeman created by charter or ordinance but the employment was one created by contract. Walker was held to be a mere employee of the city and therefore entitled to the award.

WORKMEN'S COMPENSATION—COVERAGE—WORKMEN REGULARLY EMPLOYED—*Jurman v. Hebrew National Sausage Factory et al., Supreme Court, Appellate Division (November 16, 1921), 191 New*

York Supplement, page 339.—Samuel Jurman, while in the employ of the Hebrew National Sausage Factory, received personal injuries for which he brought proceedings under the workmen's compensation law. There was an award of compensation by the State industrial commission, from which the employer and insurance carrier appealed. The question was whether or not "four or more workmen or operatives" were "regularly" employed, so that the employment could be considered hazardous and therefore within the provisions of the workmen's compensation act. The facts showed that the employer conducted a combination delicatessen and lunch-room business. Five persons were regularly employed—a cook, a cashier, a waiter, a counterman, and a general helper. In the case of *Europe v. Addison Amusements, 133 N. E. 750 (Bul. No. 309, p. 285)*, it was held that:

Generally speaking, a workman is a man employed in manual labor, whether skilled or unskilled, an artificer, mechanic, or artisan, and an operative is a factory hand, one who operates machinery.

The court arrived at the conclusion that there were four workmen employed and that therefore the employer and employee were subject to the workmen's compensation act. The reasoning of the court, as stated by Judge H. T. Kellogg, is as follows:

Employments are there made hazardous where there are engaged "four or more workmen or operatives regularly, in the same business or in or about the same establishment, * * * except farm laborers and domestic servants." This express exception of domestic servants out of the workmen class shows that the legislature regarded the service of all such persons to be that of "workmen," for it is self-evident that none can be taken from a class who do not, without such taking, belong to it. It is true that the work of this cook and waiter, because not performed in a private home, was not domestic. However, it was identical in character with that of domestic cooks and waiters. Consequently the legislature has clearly indicated that the nature of their service is that of "workmen." The helper was also described as "a general utility man." Apparently he helped the waiter, the cook, and the counterman. He was a man of all work, and therefore a "workman."

The counterman presents a more difficult question. We know that he cut meats at the counter and sold articles from it to customers. If his work was simply that of cutting and handing over food, together with charge checks to be delivered to the cashier, his work was, perhaps, more manual than it was clerical. However, it is a proven fact that for an hour every day he acted as waiter at the lunch tables. This was not as if he were a clerk, who incidentally and intermittently did waiter's work. Rather was he a clerk at one time (if ever such) and a waiter at another. It is just as clear that he was thus employed "regularly" as a waiter as that lunch was "regularly" served in the room each day. It seems to us, therefore, that this employee may be counted, so that it can justly

be said that in this employment there were four "workmen" "regularly" employed, and that the employment was within the workmen's compensation law.

The award should be affirmed.

WORKMEN'S COMPENSATION—DECEDENT WITHOUT BENEFICIARIES—
PAYMENT TO STATE—*Cook v. West Side Trucking Co., Supreme Court of New York, Appellate Division (November 16, 1921), 191 New York Supplement, page 346.*—Richard Cook died of injuries received while in the employ of the defendant company. The deceased left a widow, but she was not dependent. After a year was up, which time was set by the statute within which all claims had to be filed, the State industrial board had an informal hearing at which no evidence was taken. The board ordered the employer and insurance carrier to pay \$100 to the State treasurer as provided by law in cases of death with no dependents surviving. The employer and insurance carrier appealed on the ground that no claim had been filed within a year by any person entitled to compensation. The appellate division affirmed the award and overruled the contention of the appellants in an opinion by J. M. Kellogg, in part as follows:

The direction by the commission to pay the treasurer is not an award of compensation, but it is the direction to the carrier to pay the amount which the statute directs it to pay. The treasurer's right to the money, and the power of the commission to grant it, is not barred by the failure to file a claim under section 28. The allowance is not compensation, or death benefits (State Industrial Commission *v. Newman*, 222 N. Y. 363, 118 N. E. 794 [Bul. No. 258, p. 223]). It can not be known with certainty whether there is a party entitled to compensation until the lapse of the year during which a claimant may file a claim.

WORKMEN'S COMPENSATION—DECEDENT WITHOUT BENEFICIARIES—
PAYMENT TO STATE—CONSTITUTIONALITY OF STATUTE—POWERS OF COMMISSION—*Yosemite Lumber Co. v. Industrial Accident Commission of California, Supreme Court of California (January 27, 1922), 204 Pacific Reporter, page 226.*—The Legislature of California, at its session of 1919, passed a statute, chapter 183, which provided that when an employee received a fatal injury that would be compensable under the provisions of the workmen's compensation insurance and safety act, if no one survived who was entitled to the benefits of the act, the employer was to pay \$350 into the treasury of the State, which amount was to be added to a fund known as the "Industrial Rehabilitation Fund." One John Moore was killed while in the employ of the Yosemite Lumber Co. and left surviving

him no person entitled to a death benefit under the compensation act. Proceedings were brought on behalf of the State to recover the amount allowed by the act noted. This was awarded and the defendants took the case to the supreme court of the State. That court ordered the award of the industrial accident commission annulled in an opinion by Chief Justice Shaw. In the course of the opinion holding certain provisions of chapter 183 unconstitutional, the court ruled that the constitution only authorized the creation of a liability on the part of the employer to compensate his own workmen and their dependents, and further said:

In so far as the act purports to exact from employers a sum to be used by the State for disabled workmen in general, it is in reality a taxing law, a revenue measure. It requires any employer to pay to the State the sum of \$350 whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and the fund thus raised is to be used for vocational reeducation of workmen not connected in any way with such employer, and the surplus, if any, to go to pay the expenses of the State in carrying on the department or bureau administered by the industrial accident commission, all of which are public purposes. This is purely a tax. "A tax is a charge upon persons or property to raise money for public purposes."

Our conclusion is that section 21 of article 20, as amended in 1918, did not authorize the legislature to impose a liability on an employer to pay money to the State for the purposes specified in the act of 1919. It follows by necessity that said section gives no authority to the legislature to confer on the industrial accident commission jurisdiction to determine any dispute that may arise concerning the liability of employers sought to be imposed by said act of 1919. It may be conceded that under its general powers the legislature might provide a fund for the benefit of persons disabled in industry in this State and commit the administration of the fund to the industrial accident commission, and might also levy a tax in some form to raise such fund. But any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article 6 of the constitution, since no section of the constitution gives the legislature power to confer jurisdiction thereof upon the industrial accident commission.

WORKMEN'S COMPENSATION—DEPENDENCY—AGED FATHER—TRUSTEE—*Tintic Milling Co. v. Industrial Commission of Utah, Supreme Court of Utah (June 19, 1922), 207 Pacific Reporter, page 1114.*—Peter Christensen, a man 80 years of age, could do little work and had practically no means of support except what he received from his son, Soren Christensen. His son usually contributed about \$300 per year to his father's support. He had been doing this over a period of years and the father depended upon this money for maintenance and support. On January 27, 1922, Soren died as the result of an

accidental injury sustained by him two days before, while working as a miner for the Tintic Milling Co. An application for an award of compensation was made to the industrial commission by the father. Upon hearing the evidence the commission made an award to Peter, payable in installments of \$13.85 per week for a period of 90 weeks less \$55.40 already paid. The weekly payments, with the consent of Peter, were ordered to be made to the Tracy Loan & Trust Co., as trustee for the use and benefit of the father, the trust company to pay the sum of \$20 per month to Peter from the trust fund thus created. The employer and its insurance carrier petitioned the supreme court for review. One of the contentions raised was that the case came within the doctrine laid down in previous cases in which it was held that occasional gifts or contributions made at the pleasure of the donor do not establish dependency within the workmen's compensation act. In answering this contention the supreme court said:

Certainly it was never the legislative intent that contributions for maintenance and support of a dependent father must have been made at the very time of the injury to establish dependency. Such a narrow construction would in many cases defeat the plain intent of the law. In cases of partial dependency the question is not whether the contributions were made at regular intervals, but whether they were made for the purpose of continued support, whether at the time of the injury resulting in the death of the contributor there was actual dependency, and whether the facts in the particular case indicate that the contributions for maintenance and support would have continued had the death of the employee not occurred. The workmen's compensation act of this State does not limit the period of time preceding the injury during which the fact of contribution made for support must be shown. That subject is wisely left to the discretion of the commission, whose conclusions, when based upon some substantial evidence, are not assailable on review.

The arrangement made by the commission in appointing a trustee to disburse the money to Peter was complained of as being beyond its power. The court disposed of this contention by stating:

As long as the beneficiary has no objection to having the money handled by the trustee, as long as he is satisfied, the plaintiffs have no cause for complaint.

The court said that the commission was prudent in making the order relating to the payment of the compensation and "unreservedly approve its course of action." The award was affirmed.

WORKMEN'S COMPENSATION—DEPENDENCY—CHILD LIVING WITH GRANDMOTHER—STATUTORY PRESUMPTION AS TO DEPENDENCY—*Madera Sugar Pine Co. v. Industrial Accident Commission of California, Supreme Court of California. (July 31, 1922), 208 Pacific Reporter,*

page 278:—Lilburn Mankin had a son whom he named Lilburn Milton Mankin. When the child was but 2 years of age its mother died, and the father placed the boy in the care of Mrs. Kate Manley, mother of Mankin's deceased wife. Mankin made an arrangement with Mrs. Manley under which he was to pay \$15 per month for the support of the boy, and supply necessary clothing. This arrangement was being faithfully carried out. While in the employ of the Madera Sugar Pine Co. as a laborer, Mankin sustained injuries occurring in the course of and arising out of his employment, which resulted in his death. Proceedings were had before the industrial accident commission, and an award was made in favor of the child amounting to \$4,900, based upon the finding that the deceased employee left surviving, alone, and wholly dependent upon him the 5-year-old boy. The company took the case to the supreme court of the State to review the award, raising the question of the correctness of the award predicated on the total dependency of the child. Because of the fact that Mrs. Manley's 18-year-old boy earned \$18 a week, lived with her and contributed to the household expenses, and because Mrs. Manley did washing as a means of supporting herself, the company contended that they contributed to the support of the boy and that therefore the boy was not wholly dependent upon the father for support. The supreme court did not discuss the contention made as to the constitutionality of the statutory provision that certain persons are conclusively presumed to have been wholly dependent for support upon a deceased parent; but said as to that concerning the child's dependency on his father that it was "scarcely worth the consideration here given to it," adding that "irrespective of the 'conclusive presumption' declared by the statute, it otherwise satisfactorily appears that the claimant before the industrial accident commission was wholly dependent upon the deceased employee of the petitioner for his support."

WORKMEN'S COMPENSATION—DEPENDENCY—MEMBER OF FAMILY—
ABSENCE OF MARRIAGE RELATIONSHIP—*Federal Mutual Liability In-*
surance Co. v. Industrial Accident Commission, Supreme Court of
California (December 5, 1921), 202 Pacific Reporter, page 664.—
Cassander K. Gnash and George Gnash, parents of Bertha Fern
Gnash, were married in Kansas in 1896 and later moved to Cali-
fornia. Mr. Gnash was a poor provider and was in the habit of
leaving his family for weeks at a time and finally left them perma-
nently. Mrs. Gnash thereafter supported herself by various kinds
of work until October, 1917, when she was employed as a cook by
William G. Thompson at Yermo. Bertha was then 6 years of age.

Later the three moved to a mine near Baxter, and at about this time the relationship between Thompson and Mrs. Gnash changed. He stopped paying her wages and began paying the expenses of herself and Bertha. In May, 1918, Mrs. Gnash started proceedings to secure a divorce from her husband, which suit was never determined. From that time on Thompson and Mrs. Gnash lived together openly as husband and wife. Thompson entirely supported Mrs. Gnash and Bertha and they used his name. On February 19, 1920, while this relationship existed, the three living in Redlands, Thompson fell from a scaffold, sustaining injuries from which he died. A compensation award was made in favor of Bertha, as the industrial accident commission found that she was a member of Thompson's family in good faith and wholly supported by him. The decision was appealed to the supreme court of the State, the insurer contending that Mrs. Gnash was an employee of Thompson in domestic service and therefore neither she nor Bertha were members of his family within the meaning of the workmen's compensation act, and as Bertha Gnash was a legal dependent of her father she could not be a total dependent of Thompson. The supreme court, speaking through Judge Lawlor, held that the three were living together and were members of one household, and as Bertha was in fact a dependent of Thompson, she was entitled to the award whether or not her father was living.

WORKMEN'S COMPENSATION—DEPENDENCY—MEMBER OF FAMILY—ALIENS—*Passini v. Aberthaw Construction Co., Supreme Court of Errors of Connecticut (December 23, 1921), 115 Atlantic Reporter, page 689.*—The claimant in this case was the sister of a deceased employee of the company named, not residing with him. Her home was in New York City, while he, a single man, boarded and lodged at the place of his employment in Connecticut. His average weekly wage was in excess of \$36 per week, which permitted the maximum allowance under the State compensation act of \$18 on a 50 per cent basis. The deceased had contributed to the support of his sister and also to the support of his parents, aliens residing in Italy. Upon the application of the latter the commissioner awarded them compensation at the rate of \$5 per week for 312 weeks, reduced one-half on account of alienage. The contributions to the sister had been \$13 per week, and this amount was awarded in full for the term of 312 weeks. From this award the company appealed to the superior court, which asked the advice of the supreme court of errors. The advice given was to dismiss the appeal and affirm the award of the commissioner.

Under the State compensation law the word "family" is not defined, and in the absence of such definition it was said that the word should be held to have such meaning recognized by the common law of the State as is consistent with the remedial purpose of the act. "Its meaning in our law is not limited to that of all members of a collective body of persons living in one household and under one head and domestic government. Individuals related through descent, without regard to unity of residence, also constitute a family." It was held therefore not error to consider the sister, though resident in another locality, as a member of the family of the deceased workman.

Under the law benefits to partial dependents may not exceed the sum contributed, if more than \$5 weekly; if less, \$5 is paid as a minimum. In the case of alien beneficiaries, however, benefits were reduced one-half by the law as it stood at the time of the accident. The claim was made that this limitation barred any benefits to the sister in excess of the sum of \$2.50 per week, but the court held that the statutory provision as to nonresident aliens in no wise affected her rights; the award as a whole, therefore, was approved.

WORKMEN'S COMPENSATION—DEPENDENCY—MEMBER OF FAMILY—
COUSINS—*Holmberg v. Cleveland-Cliffs Iron Co., Supreme Court of Michigan (July 20, 1922), 189 Northwestern Reporter, page 26:*—
In March, 1893, Matilda Holmberg's husband deserted her, leaving her with five small children and so destitute that she had to apply to the county for aid. The husband was never thereafter heard from. In the fall of 1894 she appealed to Alfred Franzen, her first cousin, a single man, to come to her aid. He did, and made the Holmberg home his home. He helped her rear her five children to maturity and maintained a home with Mrs. Holmberg until September, 1921. During this time he acted as head of the family, making the family his family as far as he could by living in the home and assuming and performing the obligation of maintaining the domestic body. On September 8, 1921, Mr. Franzen, while in the employ of the Cleveland-Cliffs Iron Co., was accidentally killed. Matilda Holmberg made application for an award of compensation under the State workmen's compensation act. She based her claim on the fact of her being a dependent member of his family. An award was made in her favor, based upon the compiled laws of 1915, section 436, which provided that "No person shall be considered a dependent unless a member of the family of the deceased employee or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister." The case was taken to the supreme court of the

State on the contention that the relation between the parties was at all times contractual, that Mrs. Holmberg was a housekeeper, and that dependency did not exist within the provisions of the law. This contention was not upheld, and the award was affirmed.

The court said:

We think this too narrow a view of the testimony and wholly inconsistent with the demonstrated purpose of Mr. Franzen. It is true Mr. Franzen was under no legal obligation to make a home for plaintiff; his moral obligation, however, to do so rested with him to determine, and the evidence discloses that he assumed such duty in a most comprehensive and worthy manner and carried the burden to the day of his death. He not only made it possible for plaintiff and her children to have a home and their needs supplied, but as well established a family circle, with himself as the head, and when the children departed from the roof tree he continued to maintain the family relation for the comfort, security, and society it afforded him as well as plaintiff. Not only that, but in recognition of the dependence of plaintiff and her assistance in maintaining his home and his solicitude about her future he purchased their last home in their joint names and by will left her his whole estate.

We hold that their blood relationship; his recognition and acceptance of the moral duty to provide her with a home; the devotion of his earnings for over a quarter of a century to their needs in the home; the negation of any sordid motive on the part of either; their joint efforts and labors for their common comfort in such home life; their community management of financial matters and his provision for her needs for 27 years—constituted her in fact and under the statute a dependent member of his family at the time of his death.

WORKMEN'S COMPENSATION — DISABILITY — DEATH — STATUS OF CLAIMS—NOTICE—*Hill v. Ancram Paper Mills, Supreme Court of New York, Appellate Division (July 6, 1922), 195 New York Supplement, page 522.*—Walter B. Hill was employed as a machinist by the defendant company and, as was alleged, received an injury on January 24, 1920, which for the first time disabled him on November 26 of that year, finally resulting in his death on May 14, 1921. The injury was claimed to be due to the fall of an icicle, which fell and hit him on the head as he went out of the building to get some oil. There was no statement by Mr. Hill when he claimed compensation for disability as to the distance which the icicle fell nor as to the severity of the blow nor whether it left any mark other than a cut on his head. His work was not interrupted and he gave no notice of injury, though he told of the incident in conversation with his superintendent and assistant superintendent. He continued his work with the company for about two weeks and then went to another employer without loss of time. However, on November 26, 10 months after the accident, he experienced a spasm

which was followed by others, and he was thereafter unable to work. On January 5, 1921, there was an operation performed on his skull "to remove the pressure." Compensation for disability was awarded from November 26, 1920, to February 11, 1921, and on the testimony of the physician who operated on Hill a second award was made carrying compensation to April 15, 1921.

The employer and insurance carrier appealed, and the appellate division reversed the award as to disability, Judge Cochrane, speaking for the court, saying:

In my opinion no causal relation was established between the injury on January 24 and the malady which first asserted itself on November 26, 1920. Although the icicle as described by the claimant was sufficiently large to kill him, if it had fallen a sufficient distance, it may not have fallen more than an inch, as far as the evidence discloses. He may very easily have received, after the icicle incident, many injuries more serious than that as described by himself. He regarded it as a mere incident and as a matter of no importance. There was no effort on the part of the physician to connect the fractured skull with the fall of the icicle. Claimant himself did not testify that he had not received a blow on the head at or shortly prior to the time when the epilepsy made its appearance. He testified to no symptoms, nor premonitions, nor any unusual or unnatural feelings which might be deemed to herald the approach of epilepsy.

Much weight was attached to the failure of the physician to testify that a fracture might have caused a pressure on the brain for 10 months without noticeable effect and then suddenly and without warning frequent spasms of epilepsy should develop. The burden of proof had not been met at the time, and as "a disability award is personal to the injured employee," the defects in evidence could not be supplied by evidence produced after the claimant's death. The awards for disability were therefore reversed.

There was also a claim for death submitted by the dependents, which the industrial commission allowed, and this was affirmed by the appellate division, being found to rest "on a surer foundation." So far as the testimony of the deceased employee was apt, it was held to be competent, and entitled, in the consideration of the death claim, to "the probative effect to which it was entitled on the disability claim." Continuing the court said:

Unsupplemented by other testimony, as we have seen, it is insufficient. In addition, however, at the hearings on the death claim, the superintendent and assistant superintendent of the employer testified that Mr. Hill, shortly after the accident, showed them his head, and that they saw contusions and blood thereon. His wife testified that she at different times washed his head where it was injured and endeavored to cleanse it. It is also a fair inference from her testimony that he had no other serious injury prior to his convulsions on November 26. Other physicians, not called as wit-

nesses on the disability claim, testified in effect that the condition which developed on November 26, 1920, might have resulted from a fractured skull occasioned by the fall of the icicle on the preceding January 24. There is also evidence of a fractured skull, independently of the testimony of Doctor Dingman given on the disability claim, and who did not testify on the death claim. Thus the deficiency in the evidence which existed in respect to the disability claim was supplied in respect to the death claim.

Notice of the death had not been given within the time fixed by the compensation law, and the waiver of this requirement by the industrial commission was challenged by the defendants. Though the reasons for not giving the notice earlier were said to be not beyond criticism, it was found that the agents of the employer had all the knowledge which the employee possessed, in regard to the accident and his injury. They had participated in the proceedings in regard to the claim for disability, and also had prompt knowledge of the death of the employee. They knew that disability awards had been made and had every reason to expect that a claim for death would be submitted. "It is clear beyond peradventure that they had not been prejudiced by the failure to give the statutory notice." The claim for disability awards was dismissed and the award for death affirmed, both without costs.

WORKMEN'S COMPENSATION—DISABILITY AFTER RETURN TO WORK—BUSINESS DEPRESSION—*Johnson's Case, Supreme Judicial Court of Massachusetts (September 14, 1922), 136 Northeastern Reporter, page 563.*—John Johnson was a blacksmith employed by the Bethlehem Shipbuilding Corporation, who received injuries in the course of his employment on May 14, 1917. After about seven months, during which he received compensation, he returned to work with the same employer, remaining until July, 1921, "earning as much or more than before." The ability to earn wages was therefore found not to have been affected by his injury, but any differences arising would be attributable to industrial conditions. On account of slack work he lost his position in July, 1921, and since then he has been able to secure employment only at less wages. The industrial board found that "his physical disability arising out of the injury has adversely affected his ability to earn wages, and that he is able to do work in his regular calling of a blacksmith only within restricted limits."

The injury was a fracture in the region of the elbow joint, impairing the movement of the elbow, making him unable to close the hand, and producing pain. The insurer contended that the facts did not warrant a renewal of compensation. The statute provides for benefits where incapacity is partial, the law as it stood at the

time of the injury providing for payments for 500 weeks from the time of the injury. Admitting that the employee, in common with others, must bear the loss resulting from business depression "this does not mean that when the earning capacity is reduced by reason of the injury there may not be recovery even though business conditions may have become contemporaneously less favorable. * * * The circumstance that nearly four years intervened between the return to work and the appearance of reduced ability to earn resulting directly from the injury is no bar to the recovery of compensation."

The finding of the industrial accident board was therefore sustained, and compensation allowed accordingly at the rate of \$10 per week.

WORKMEN'S COMPENSATION—ELECTION—NOTICE TO EMPLOYEES—*Producers' Oil Co. v. Daniels, Commission of Appeals of Texas, Section A (October 18, 1922), 244 Southwestern Reporter, page 117.*—Clyde Daniels was employed by the Producers' Oil Co. in Texas. During the course of his employment he sustained personal injury, for which he brought an action for damages. He contended that the injuries were caused through the negligence of his employer in permitting a ladder leading from an upper platform of an oil derrick to become defective. The company pleaded its nonliability on the ground that at the time of the injury it had complied with the requirements of the workmen's compensation law and had contracted with the Texas Employers' Association for the payment of indemnities to its injured employees. They stated that the facts were well known to Daniels at the time of his employment and that the employer had given him notice in writing of these facts and that proper notice in writing had been given the State industrial board. Judgment was rendered in favor of Daniels, but this was reversed by the court of civil appeals. A motion was made for a rehearing, and pending the consideration of the motion the court certified a question to the supreme court of the State. The evidence showed that the company through signs or posters had given notice to its employees that the employer had provided insurance with the Texas Employers' Insurance Association. The question before the court was, "What was notice by employers to employees within the meaning of the act?"

The commission said that the act did not prescribe how such notice should be given, and held that:

When a statute directs that notice in writing shall be given, but is silent with reference to the manner of giving the same, personal service of such notice or a copy thereof upon the person to whom it is to be given is necessary.

The commission further said:

The giving of the notice required by the statute by a subscribing employer to his employee vitally affects them both. The employer is thereby relieved of liability to his employee receiving the same for damages for personal injuries suffered by such employee in the course of his employment, notwithstanding such injuries may have been caused by the negligence of such employer or his servants. The employee who continues in the service of a subscribing employer after such notice waives or surrenders his cause of action against such employer for such damages, and is required to look alone to the insuring association for compensation therefor.

We think the legislature, in failing to prescribe the manner of service of a notice of such importance to all the parties concerned, intended that the general rules of law respecting the giving of notice should apply. There is nothing anywhere in the act to justify an inference to the contrary.

WORKMEN'S COMPENSATION—ELECTION—ORIGINAL ACCEPTANCE BINDING ON SUBSEQUENT EMPLOYMENT—*Sizemore v. Beattyville Co., Court of Appeals of Kentucky (June 20, 1922), 243 Southwestern Reporter, page 1010.*¹—Guy Sizemore was employed by the Beattyville Co. as a driver in its coal mine in Kentucky, and went to work on April 4, 1921. He accepted the provisions of the workmen's compensation act by signing the register kept by the company. He continued to work until May 20, 1921, when a disagreement arose because of an order of the assistant mine foreman to do a particular kind of work. Whether he voluntarily left the employment or was discharged was a subject the two men could not later agree on. He went to work for the Biggs Coal Co. and worked for that company until June 15, 1921. On that date he returned to work for the Beattyville Co., but worked only half a day. He again went to work for the Biggs Co., working there until July 22, when for a third time he was employed by the Beattyville Co. On the 25th of July while in the coal mine as a driver he was injured. He brought a suit against the company to recover damages for personal injuries. The defense to the suit set up by the company was that the workmen's compensation act would apply and that therefore the suit for damages should be dismissed.

The record showed that the register was signed only at the time of his original employment. The suit was dismissed and the case appealed. The question before the court was whether the original acceptance of the workmen's compensation act was binding on Sizemore at the time of his third employment, during which employ-

¹ Compare with this decision another by the same court, *McCune v. Wm. B. Pell & Bro.*, 232 S. W. 43, Bul. No. 309, p. 261.

ment he was injured. The court of appeals affirmed the lower court, holding that it was.

The reasoning of the court is in part as follows:

Doubtless there are some employments where the relation of master and servant continues, although the employee is not working at the time. In other instances, men are employed and paid by the day or by the hour, and when that time ends, they are no longer in the service of the master. There are also cases where employees become sick and ask for and receive their time, or the plant is shut down and the employees are paid off, and the relation of master and servant no more exists than if the employees had been discharged or quit the service of the master. It is apparent, therefore, that the mere severance of the relation of master and servant can not be regarded as controlling, and that there is no sound basis for a distinction between a case where the employee voluntarily quits or is discharged and a case where he is compelled to stop work on account of sickness or because the plant is shut down. Indeed, it would be going far afield to say that the legislature intended that a prior acceptance of the workmen's compensation act should not be binding on an employee who returned to work the morning after he quit or was discharged. In a sense it is a new employment, but the statute nevertheless applies, since it provides in terms that the original acceptance of the employee shall continue effective in subsequent employment under the same employer. If the statute applies where the employee returns the day after he quits or is discharged, there is no reason why an interval of a week or a month or any reasonable time should change the rule. We therefore conclude that in every case where an employee stops work for any cause whatever, and thereafter returns to work for the same employer at the same place within a reasonable time, the statute applies and his original acceptance of the workmen's compensation act continues effective, unless he files with his employer a written notice withdrawing his election, as provided by section 4959, Kentucky Statutes.

WORKMEN'S COMPENSATION — EMPLOYEE — DOMESTIC EMPLOYMENT—HOTEL SERVICE—*Barres v. Watterson Hotel Co., Court of Appeals of Kentucky (October 17, 1922), 244 Southwestern Reporter, page 308.*—Edith A. Barres was regularly employed as a maid at the Watterson Hotel in Louisville, Ky. At the close of a day's work she put on her street attire for the purpose of leaving the hotel to go to her home. She entered an elevator operated by the hotel for carrying its employees and for other needs of the establishment, and had started for the ground floor. In transit a large piece of metal fell from the top of the elevator shaft and struck the girl on the head, causing severe injuries. She brought an action for damages against the hotel company because of the injuries received. The action was based on the negligence of the company. The company denied the allegations with reference to its

negligence, and set up the defense that the girl had accepted the provisions of the workmen's compensation law and that as she was injured in the course of her employment the workmen's compensation law would apply.

Judgment favored the company, and the girl appealed to the court of appeals. In affirming the judgment of the court below, the court of appeals held that it was necessary for the girl to enter on and leave the premises of the hotel company, in the performance of her duties, and that her duties did not cease until she was off the premises of the employer. The court said that it was clear that at the time of her injury she was in the course of her employment within the meaning of the compensation act.

The contention was raised in the appellate court that the girl was not subject to the provisions of the workmen's compensation act because that act made exceptions in the case of domestic employment, agriculture, etc. In deciding against the girl on this contention, the court said:

She was, to be sure, engaged in an employment or occupation similar in many of its aspects to that generally pursued by domestics in the home. We apprehend, however, that the business of running a hotel is industrial in its nature, and not domestic in the general meaning of that word. A large hotel like the Watterson employs a great number of persons under one management, all forces being directed to the accomplishment of one purpose—the accommodation of the traveling public by supplying rooms and entertainment. This is a business. It is not a mere incident to a business. The home is an institution, not an industry. In such an institution the service of a domestic is a mere incident. A hotel is a business or industrial undertaking where persons pursue a gainful occupation in itself complete and independent and not an incident to another business.

WORKMEN'S COMPENSATION—EMPLOYEE—OFFICER OF CORPORATION—STOCKHOLDER—*Southern Surety Co. v. Childers, Supreme Court of Oklahoma (September 26, 1922), 209 Pacific Reporter, page 927.*—One B. T. Childers was president and majority stockholder in the Childers Motor Co., owning 80 per cent of the stock. A portion of his time was spent in manual or mechanical labor in the garage owned by the company, but his duties also included selling cars and conducting the business of the corporation. The corporation owned a racing car which was used only for racing purposes and as an advertisement. While Childers was testing out this car on the race track at McAlester, Okla., the car was run into by another racing car and he was injured. The employees of the corporation were protected under the workmen's compensation law by an insurance policy issued by the Southern Surety Co. The State industrial com-

mission awarded Childers compensation for the injury, amounting to \$288. The insurer brought original proceedings in the supreme court of the State to review the award, but the court held that Childers was an employee within the meaning of the compensation act and therefore entitled to the award.

Employee as defined by the statute means "any person engaged in manual or mechanical work, in the employment of any person, firm, or corporation carrying on a business covered by the terms of this act."

In reaching the conclusion that the claimant was entitled to compensation, Judge Nicholson, speaking for the court, said:

The claimant performed manual and mechanical work for the Childers Motor Co. as a part of his duties; therefore, if he is prevented from recovering, it must be by reason of the fact that he was the majority stockholder and president of the company.

It appears to us that the better reason dictates that compensation should not be denied one because he happens to be a stockholder and president or other executive or managing officer of the corporation that employs him, and that that fact alone is not sufficient to eliminate him from those regarded as employees within the meaning of such act. Obviously, where the claimant was the chief executive officer of a large corporation and his duties did not require that he perform manual or mechanical labor, he could not be regarded as the employee within the meaning of the act or the terms of the policy, and if he sustained injuries while performing manual or mechanical labor, which was no part of his duties, but in which he acted as a mere volunteer, he would not be entitled to compensation. On the other hand, although the claimant was the owner of the majority of the stock and was the chief executive officer of a corporation, yet if he performed manual or mechanical labor as a part of his duties, such an official in his capacity as a workman might measure up in all respects to the conception of an employee within the meaning of the act.

WORKMEN'S COMPENSATION—EMPLOYEE—PARTNER—ESTOPPEL BY CONTRACT—*Employers' Liability Assurance Corp. (Ltd.) v. Industrial Accident Commission et al., Supreme Court of California (December 21, 1921), 203 Pacific Reporter, page 95.*—W. L. Williams was a partner in the firm of Green & Williams, copartners, engaged in the rock crushing business and employing several men. Green and Williams were equal partners, neither receiving any wages, the profits being divided equally. Green attended to the selling and collecting and Williams worked with the men in the general pit. The employers took out a policy of insurance to protect the workmen under the provisions of the workmen's compensation act, and under the terms of the policy Williams was specifically covered. During the life of the policy Williams was injured while

at work in the gravel pit and he made application for an award of compensation. The insurance carrier denied liability on the grounds that the industrial accident commission was without jurisdiction and that Williams was not in the employ of the firm. A hearing was had and an award made in favor of the claimant. The case was taken to the supreme court of the State where the matter was reviewed and the award annulled. It was there held that the legislature did not have the power "to create and enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of employee." The court said that it must be concluded from the facts in the case that Williams was not an employee of the firm of which he was an equal partner. With regard to the contention of the claimant that because the insurer issued the policy naming Williams and received the consideration, it is therefore estopped to deny that Williams is an employee, the court said that, "Upon principle it must be held that jurisdiction of the subject matter of a controversy can not be conferred upon a tribunal of limited powers either by the direct agreement of the parties or by an estoppel growing out of such agreement."

WORKMEN'S COMPENSATION—EMPLOYEE—VOLUNTEERS—Hogan v. State Industrial Commission, Supreme Court of Oklahoma (May 16, 1922), 207 Pacific Reporter, page 303.—J. O. Cherry was a farmer living near Wilburton, Okla., at which point T. R. Hogan operated a cotton gin. Cherry, on December 15, 1919, took a load of cotton to be ginned and while waiting for service was asked by one Green, a ginner, to help him with a clogged pin. While doing so Cherry's hand and arm were pressed down by an unexpected weight, and were so mutilated by the saws as to make it necessary to amputate his arm. Application for compensation as for injury to an employee was followed by an award by the industrial commission, whereupon this action was brought to procure a reversal. Cherry had never worked around a gin and had no expectation of pay for the service rendered, nor had Green any authority to employ help.

In view of the terms of the law providing compensation to be paid by employers to employees on the basis of wages earned, Judge Johnson said:

It seems to us that it obviously follows from the above provisions of the workmen's compensation law that compensation is payable only where the claimant is an employee under the quoted provisions, and that the commission erred in concluding that the claimant was such employee.

Various citations were then made as to the formation of the relation of employer and employee, the opinion continuing:

There is no evidence in this record upon which to base the conclusion that the relation of master and servant existed between the respondent, Hogan, and the claimant, Cherry, at the time of the injury, and, that being true, there can be no award justified under the workmen's compensation law, and the award made by the State industrial commission should be vacated, and the cause is reversed and remanded to the commission, with directions to dismiss the claim; and it is so ordered.

WORKMEN'S COMPENSATION — EMPLOYEE — WHEN RELATIONSHIP BEGINS AND ENDS—"UPON THE PREMISES"—*Ross v. Howieson et al., Supreme Court of New York, Appellate Division, Third Department (November 16, 1921), 191 New York Supplement, page 276.*—Winifred Ross was employed by one Howieson, who maintained a dressmaking plant on one of the upper floors of a building situated in the city of New York. The employer did not own the building, nor was he in possession of any portion of its rooms, hallways, or staircases, other than those upon the floor where his plant was located. Miss Ross was employed as a seamstress. On the day in question, while on her way to her employer's place of business, she entered the lower hall of the building, stepped upon a piece of coal, slipped, and fell to the floor. The fall caused various injuries for which she made claim under the workmen's compensation act. An award was granted by the State industrial board, but on the appeal of the employer and his insurer to the appellate division the award was reversed and the claim dismissed. Judge H. T. Kellogg stated the reasons for the decision of the court to be that Miss Ross was not an employee entitled to compensation at the time of the injury, as she was not a "person engaged in one of the occupations enumerated * * * upon the premises or at the plant * * * of the employer." The court after reviewing several cases said:

The doctrine of all the cases is to the effect that, in the case of a laborer engaged to work at a factory or upon certain fixed premises, he is not an employee, within the meaning of the workmen's compensation law, until he is at the plant or upon the premises of his employer, and that an accidental injury, sustained before he has arrived or after he has departed from such plant or premises, is not compensable. At the time of the accident in the case at bar the claimant had not arrived at a plant or upon premises owned, operated, possessed, or in anywise controlled by her employer. It would be grossly unfair to employers to cast upon them the burden of protecting employees from all the perils attendant upon walking to or from their work through the innumerable hallways and over the many stairways of a great city building, commonly traversed daily by hundreds, if not thousands, of others than their employees, when such ways are not under their control, and the perils arising therefrom can by them in nowise be obviated or lessened. There must be a definite line, the crossing of which begins or ends the liability of an

employer for arriving or departing employees. That line has been fixed by subdivision 4 of section 3 of the workmen's compensation law at a point which bounds the plant or premises controlled by the employer for the purposes of the employment. In this view the claimant must fail in her case.

Judge J. M. Kellogg wrote a dissenting opinion.

² WORKMEN'S COMPENSATION—EMPLOYEE—WORKING DIRECTOR OF COMPANY—DUAL STATUS—*Millers' Mutual Casualty Co. v. Hoover, Commission of Appeals of Texas, Section B (December 21, 1921), 235 Southwestern Reporter, page 863.*—Guy Frank Hoover was one of a board of seven directors of the G. B. Smith Milling Co. He was also its superintendent and head miller. His duties were to direct the operation of the plant machinery, the making of flour, and at times do the actual work in connection with the running of the mill. The ultimate authority to direct the mill and its operation was reposed in G. B. R. Smith, the president and general manager of the company. Hoover was accidentally killed at the mill while engaged in the performance of his duties as head miller. Proceedings were brought under the workmen's compensation act and an award was made by the industrial accident board. The employer and insurer took the decision of the board to the court of civil appeals, where the award was affirmed (216 S. W. 475; Bul. No. 290, p. 379). The case was then taken to the supreme court of the State on the question of whether Hoover was an employee within the meaning of the act. That court, through Chief Justice Cureton, adopted the opinion of Presiding Judge McClendon of the commission of appeals as the decision of the court. This judgment was in favor of affirming the award. The decision reviewed section 1a of part 4 of the act, which provides that officers and directors of any corporation shall not be held to be employees within the act. The employer contended that the language of the act referred to the person and not to the office. The claimants contended that only the officers named as such were excluded from the benefits of the act and where they occupy the dual position of officer and employee they were entitled to the benefits of the act if injured while engaged in the performance of their duties as employees. This latter contention was the one that was held to be the law. The opinion was in part as follows:

It is readily conceivable that one might occupy the dual relation of an ordinary employee coming within the benefits of the act, and of an employee coming within one of the excepted employments enumerated in the act. As, for example, a person operating a small manufacturing plant might have one in his employ in the plant who also performed services for him as a domestic servant. Under such circumstances, we think it would be held that the fact that he performed duties which were not within the protection of the act would

not preclude him from receiving the benefits of the act if injured while performing the duties of an employee within the protection of the act. Why should not the same course of reasoning apply to one who is both officer and employee of a corporation? The only necessary construction to be placed upon section 1a is that officers and directors as such are precluded from the benefits of the act. Beyond that the express language is silent.

The underlying reason for excluding the officers and directors of a corporation as such from the provisions of the act is apparent. The officers and directors of a corporation do not come within the ordinarily accepted meaning of the terms "workmen" and "employees," for whose benefit the legislation is primarily enacted. Their duties toward the corporation and its business are those of managing and directing heads, and they do not, as a rule, perform the ordinary tasks, nor are they subjected to the ordinary risks, of employees or workmen engaged in the service of the corporation. Nor, as a general rule, is their compensation affected by their temporary disability caused by injury while engaged in their employment. On the other hand, where, although occupying an official position with the corporation, they are employed as workmen or employees in the ordinary sense of those terms, and come clearly within the provisions of the act, there would appear to be no substantial reason for excluding them from those benefits merely because they also hold official positions with the corporation; and the legislature should not be presumed to have intended so to exclude them unless the language employed be clearly not susceptible of any other construction.

It is clear, and in fact conceded, that Hoover was head miller of the corporation; that his employment was bona fide; that he lost his life in the discharge of his duties as head miller; that in such employment he was not acting as officer or director of the corporation; and that he clearly came within the provisions of the act, unless precluded by section 1a.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—"LAWFUL REQUIREMENT"—CONSTRUCTION OF STATUTE—*Patten v. Aluminum Castings Co., Supreme Court of Ohio (June 14, 1921), 136 North-eastern Reporter, page 426.*—Albert Patten was employed by the company named at the work of painting a building belonging to it, for which scaffolding had been erected and furnished by the company. Due to the alleged negligent construction of the scaffolding Patten fell and was injured, and brought suit for damages. The defendant had complied fully with the provisions of the workmen's compensation law, but the injured man sued on the ground that the right of action was given by a provision of the constitution which declares that the right to sue shall not be taken away when an employee is injured "from failure of the employer to comply with any lawful requirement for the protection of the lives, health, and safety of employees."

The court of common pleas awarded damages in the amount of \$8,750, which was reversed by the court of appeals, but this court

finding its judgment in conflict with the judgment of another court of appeals, certified the case to the supreme court. The question in issue was whether or not the term "lawful requirement" was such a definite and specific designation of a standard of conduct as would advise an employer of his legal obligations, taking into view the provision of the general code relating to the erection of scaffolds. The language here used provides a penalty for furnishing "unsuitable or improper scaffolding, * * * which will not give proper protection to life and limb" of employees. The first question to be determined therefore was as to the effect of the language used. The company claimed that the words of the statute, directly imposing a criminal liability, and also giving basis for a civil action, are "general, vague, and indefinite; that to constitute a 'legal requirement' they should be sufficiently specific to advise the employer of his exact duty." Patten's counsel, on the other hand, argued that while the language is general in terms it is sufficiently comprehensive to constitute a "lawful requirement" within the meaning of the workmen's compensation act, which excepts from its coverage injuries due to willful acts of the employer and failure to comply with any lawful requirement, following the language of the constitution.

Having made the foregoing statement, Judge Jones, who delivered the opinion of the court, said as to the effect of the statute:

We are entirely unable to agree with the view of the plaintiff in error. Its application in cases of this character would produce great uncertainty and create doubtful results. How would the defendant in error be able to ascertain the exact requirement made of him as an employer in order to escape civil and criminal liability? Manifestly, it would be impossible for him to ascertain the extent of his duty until after a jury, by its verdict, had determined that the employer had failed to provide a suitable scaffolding. What would be an "unsuitable or improper" scaffolding? The employer might endeavor honestly to conform to the provisions of the statute relating to suitability, only to find later that a jury declared otherwise, and that he had not performed his duty in that regard. Even different juries, in similar cases and upon the same facts, might not agree in their conclusion as to what would be suitable. No criterion of specific conduct is exacted by the law. No definite requirement is made. It prescribes merely a general course of conduct on the part of the employer in requiring him not to furnish scaffolding that is unsuitable and improper, and which will not give proper protection to the life and limb of the employee.

Furthermore, if the argument of counsel for plaintiff below be sound, it must be conceded that the legislature could destroy the usefulness of the workmen's compensation law by enacting a blanket section providing that employers must furnish suitable and safe places, or suitable and safe mechanical devices, in the operation of the various industries.

The opinion continued with a consideration of the effect of allowing suits for damages in cases other than those specifically provided for by the act, taking the ground that those interested in promoting suits for damages have organized an attack calculated to break down the entire workmen's compensation law.

It is submitted that, if a petition in an ordinary action should merely allege that a defendant had negligently erected unsuitable or improper scaffolding, the court would require the plaintiff to state specifically wherein such scaffolding was unsuitable or improper. This statute is a penal statute. If a jury found that a civil liability arose from its violation, the same or another jury might determine from the same evidence that the defendant had criminally violated the section; the only difference being that the criminal violation must be found beyond a reasonable doubt. Considering the statute from its penal side, can it be argued that its terms are sufficiently definite and certain to advise the defendant whether he has committed a criminal act? Does its criminality not depend upon the jury's view whether such scaffolding would be unsuitable or improper?

The court of appeals reversed the instant case, and entered final judgment for the defendant in error, upon the authority of *American Woodenware Mfg. Co. v. Schorling* (96 Ohio St. 305, 117 N. E. 366). There is no distinction in principle between this case and the *Schorling* case. In the latter, sections 15 and 16 of the industrial commission act (103 O. L. p. 99) were under consideration, and the allegations of the petition were predicated upon the failure to observe a "lawful requirement" as named in those sections. Briefly stated, the petition alleged that the defendant failed to provide a safe place to work. This court, confining itself to these two sections of the industrial commission act, and to the case made in the petition, stated in proposition 2 of its syllabus:

"The provisions of sections 15 and 16 are not the lawful requirements referred to by, and within the meaning of, section 35, article II, of the constitution."

The court held that these sections of the statute could be redeemed within the scheme of the industrial commission act by imposing upon employers the obligation to obey "particular orders and requirements" made by the industrial commission. However, that feature of the case was not drawn into question by the allegations of the petition, since the petition was founded wholly upon the fact that the employer had not complied with the lawful requirement by reason of his failure to furnish a safe place to work. These sections, as does the scaffolding section in controversy, employed general terms and not specific requirements. In the third proposition of the syllabus of the *Schorling* case this court held:

"The term 'lawful requirement,' as used in section 35, article II, of the constitution, and section 29 of the workmen's compensation act (103 O. L. 84), does not include a general course of conduct or those general duties and obligations of care and caution which rest upon employers and employees, and all other members of the community, for the protection of life, health, and safety."

Even orders of the commission, if made in the broad and general terms of the statute, might be ineffectual; but, as stated in the opin-

ion in that case (96 Ohio St. at p. 321, 117 N. E. at p. 366), if the order required "certain specific precautions to be taken and safeguards to be provided," it would be held to be a "lawful requirement," within the meaning of section 1465-76, general code.

In accordance with these conclusions, the supreme court rendered judgment in favor of the defendant company, denying the right of the injured employee to sue in view of the coverage by the compensation law.

There were dissents by three of the judges in extensive and vigorous opinions, the claim being made that with the abrogation of liability in a suit for damages there was a breaking down of the protective legislation of the State, which would expose the employee to the risks of an indifferent safety regulation.

The foregoing case was originally decided June 14, 1921, but rehearing was allowed, the final decision being rendered May 16, 1922. On the same date the court handed down its opinion in another case (*Toledo Cooker Co. v. Sniegowski*, 136 N. E. 904), in which the court ruled that no suit for damages could lie for an injury received by the plaintiff in operating a heavy punching press. In the trial court judgment had been for the defendant, but in the court of appeals, Lucas County, this judgment was reversed and the cause remanded for a new trial. From this decision the company brought the case to the supreme court on a writ of error. This in turn reversed the court of appeals on the authority of the Patten case. A dissent was voiced by Judge Wanamaker on the ground that the machine inflicting the injury was not properly guarded, in violation of the general statute as to the safeguarding of dangerous machinery, the court holding that this "merely prescribes a common-law liability," which must be satisfied out of the workmen's compensation fund; while the dissent was based on the contention that a "lawful requirement" of the State law had been disregarded.

WORKMEN'S COMPENSATION — EMPLOYER'S LIABILITY — RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIR OF LOCOMOTIVE—*Industrial Accident Commission v. Payne, Supreme Court of the United States (May 29, 1922), 42 Supreme Court Reporter, page 489.*—O. J. Burton was injured while repairing a locomotive in the repair shop of the Los Angeles & Salt Lake Railway Co. The road was at the time under Federal control, so that John Barton Payne, Federal agent, was a defendant in the action.

Burton had applied for compensation under the State law, and an award had been made in his favor. This was set aside by the District Court of Appeal of California (195 Pac. 81) and the case was

brought before the Supreme Court on certiorari, where the decision of the court of appeal was reversed, and the case remanded for further proceedings in accordance with his opinion.

Burton suffered an injury while repairing a locomotive which had been used in interstate commerce, so that the sole question was whether "the engine at the time of the accident was engaged in interstate commerce within the meaning of the Federal employer's liability act (35 Stat. 65). The industrial commission regarded the accident as occurring in an establishment of the State, unaffected by the question of the prior use of the instrumentality in interstate commerce; while the court of appeal regarded the previous use of the locomotive in interstate commerce as giving it a continuing quality, so that it was under the Federal and not the State law.

Justice McKenna delivered the opinion of the court, having stated the facts as above. He spoke first of the grounds for the conclusion arrived at by the California court. This court had reviewed a considerable number of decisions of the Supreme Court, "and considered that the principle they established was simple, that its application had been rendered difficult by diversity of decisions in the Federal and State courts, and that this [Supreme] court had fixed no rule by which the conflict could be resolved, but had remitted the decision of each case to its particular facts." This attitude was said not to be unusual, nor was the difficulty presented easy of solution.

Referring to the various cases bearing on the point, Justice McKenna said:

We may say of them at once that a precise ruling, one that enables an instant and undisputed application, has not been attempted to be laid down. The test of the employment and the application of the Federal Employer's Liability Act (in determining its application we determine between it and the California act) is:

"Was the employee at the time of the injury engaged in interstate transportation or any work so closely related to it as to be practically a part of it?" *Shanks v. D., L. & W. R. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188 [Bul. No. 224, page 97].

This test had been followed in a number of cases; however, it could not be claimed that uniformity of application had been attained either in Federal or State courts. As to the decisions by the Supreme Court, it was said:

We refrain from a review of our cases. They pronounce a test and illustrate it. We are called upon to apply it to the present controversy. The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them are accessories to that move-

ment, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared that the employee at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace State jurisdiction and make applicable the Federal act. And there is a difference in the instrumentalities. In some, the tracks, bridges, and roadbed and equipment in actual use, may be said to have definite character and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character, according to circumstances, and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying length of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations; the relations of a workshop, its employments and employees having cause in the movements that constitute commerce but are not immediate to it.

And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case.

It was found that the engine in the present case was placed in the shop on December 19, 1918, the injury occurring February 1, 1919, and the engine going back to service on March 4, following. This contrasts with a case in which movement was interrupted in an interstate haul for brief repairs and a continuance of movement. With the extended withdrawal from service the interstate quality was lost. The opinion concluded:

Further discussion is unnecessary though we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take estimation from degrees, and of this life and law are replete with examples.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

WORKMEN'S COMPENSATION — EMPLOYERS' LIABILITY — RAILROAD COMPANIES—FEDERAL STATUTE—OPTION OF REMEDIES—*Dahn v. Davis*, Supreme Court of the United States (April 10, 1922), 42 Supreme Court Reporter, page 320.—Arthur Dahn was a railway mail clerk, an employee of the United States, and was injured in

May, 1918, by the wrecking of a car in which he was working. The railroad at the time was operated by the Director General of Railroads under the Federal control act of March 21, 1918. He sued to recover damages from the Illinois Central Railroad Co. and the Director General, but the case against the company was dismissed on demurrer.

The Attorney General offered as a defense the fact that Dahn had applied for and received compensation under the Federal employees' compensation act of 1916 (39 Stat. 742), the claim being made that the present action against the United States was barred by such application and award. The decision had already been made that the United States could be sued through its Director General of Railroads in case of injuries negligently caused on any line of railway in his custody. (*Mo. Pac. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593; see Bul. No. 309, p. 216.) However, Mr. Justice Clarke examined the provisions of the Federal employees' compensation act and found them to be exclusive of any other claim against the United States, after acceptance of an award, though the employee was entitled to exercise his option as to proceeding under this act or the Federal liability statute. Having made his choice, the other remedy could not be pursued, so that the judgment of the circuit court of appeals reversing the judgment of the trial court in favor of Dahn was affirmed.

WORKMEN'S COMPENSATION — EMPLOYERS' LIABILITY — RAILROAD COMPANIES—INTERSTATE AND INTRASTATE COMMERCE—CONCLUSIVE-NESS OF AWARD—*Williams v. Southern Pac. Co.*, *District Court of Appeal, Third District, California (October 17, 1921)*, 202 *Pacific Reporter*, page 356.—Harry Williams received injuries on November 25, 1917, from which he died, due to the alleged negligence of the defendant company while he was in the discharge of his duties as a brakeman on one of its interstate trains. Ruth Williams, widow of deceased, acting as administratrix, brought suit for damages under the Federal employers' liability act because of the death of her husband. While the action was pending trial, in order to avoid the bar of the statute of limitations to a recovery under the workmen's compensation law in case it was determined that deceased met his death while engaged in intrastate commerce, the widow in her individual capacity just prior to the expiration of one year from the time of her husband's death made application to the industrial accident commission for adjustment of her claim for damages. The application set forth the facts as to the pending suit and prayed that the proceeding before the commission be held in abeyance until final determination of the suit. A motion to that effect was made by

counsel for the widow and was opposed by counsel for the company and the motion was denied by the commission. Application for a writ of prohibition restraining the commission from proceeding in the matter pending the court's action was denied. As the employer admitted all the facts stated in the application for compensation and did not resist the award prayed for in the application an award of \$5,000 was made to Mrs. Williams. Later a judgment for damages amounting to \$25,000 was entered in the suit under the Federal employers' liability act. An appeal was made from this judgment by the employer who contended that the deceased was not engaged in interstate commerce at the time of the injury that resulted in death. This contention was based upon evidence offered and upon the proceedings had before the industrial accident commission. Mrs. Williams contended that the doctrine of *res adjudicata* had no application to the findings and award of the industrial accident commission; that since the superior court first acquired jurisdiction, its determination of any issue before it is conclusive, notwithstanding a prior inconsistent determination of the same issue by the commission; and that the parties to the proceedings were not identical, in that she sued as an individual in the one case and as administratrix in the other. The court upheld the contentions of the employer in an opinion by the presiding judge, Judge Finch, which is in part as follows:

A material issue in both proceedings was the character of Williams' employment; if intrastate, the commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The commission determined that the employment was in intrastate commerce, and the fact "so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject matter, without any change in his relation to that subject matter, a judgment in the one case is conclusive of his rights in the other.

Having recovered judgment for compensation in the proceeding before the commission by establishing the fact that the deceased was employed in intrastate commerce, and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based.

Not knowing what the determination of the trial court would be as to the character of employment of the deceased, and naturally desirous of avoiding an entire failure of compensation, the plaintiff felt the necessity of making the application to the commission, even though recovery in that tribunal is limited in amount. In States

which provide but one tribunal for the trial of such actions, that tribunal determines in the one action whether the employment was interstate or intrastate, and renders judgment accordingly under the Federal act or the State law, as the case may warrant, and the predicament in which the plaintiff herein found herself can not arise.

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF REMEDY—RIGHTS OF PARENTS—*Wall v. Studebaker Corp., Supreme Court of Michigan (July 20, 1922), 189 Northwestern Reporter, page 58.*—Harry C. Wall, a minor, was lawfully employed by the Studebaker Corp. He was injured on July 3, 1918, during the course of his employment, while working at a punch press which was operated by electricity. The boy and the employer were covered by the workmen's compensation act, and an award under the act was granted. The father, Fred C. Wall, brought a suit for damages to recover loss of wages by his son because of the injury. The suit was based on the common-law right of the father. The trial court directed a verdict in favor of the company on the ground that the workmen's compensation act has abolished the father's right to recover for loss of services of his minor child while legally employed under the State law.

The case was taken to the supreme court. Part 1, section 8, of the compensation act (section 5429 C. L. 1915) provides that an employee within the meaning of the act was every person in the service of another under any contract of hire, "including minors who are legally permitted to work under the laws of the State who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employees." The court said that the meaning of this provision was clear, and under the facts of this case the boy had the same power to contract as an adult.

Judge McDonald, speaking for the court, said:

It removed his minority for the purposes of the act, and invested him with the right to contract for employment and to recover in his own name all the damages resulting from injuries. By putting him in the adult class, it removed the only basis on which the parent's right of action could be founded, and gave to the minor the right to do for himself all of the things which the parent could do for him.

The remedy by compensation was therefore held exclusive, and constitutional, and the judgment of the lower court was affirmed.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—WHAT LAW CONTROLS—PLACE OF MAKING CONTRACT—*Darsch v. Thearle Duffield Fire Works Display Co., Appellate Court of Indiana (January 11, 1922), 133 Northeastern Reporter, page 525.*—Arnold Darsch was

an employee of the Thearle Duffield Fire Works Display Co. Both were residents of the State of Illinois and the contract of employment was made in that State. Darsch, while temporarily employed in Indiana, was injured and proceedings under the Indiana Workmen's Compensation Law were brought before the industrial board. An award was made by one member of the board who heard the cause, and the employer asked for a review of the proceedings by the full board, based on its contention that the board was without jurisdiction to grant an award. A new hearing was granted and the claim for compensation was dismissed. An appeal was prosecuted to the appellate court. It was argued that as sections two and four of the workmen's compensation act provide that every employer and employee, with certain exceptions, should be presumed to have accepted the act, and that every contract of employment should be presumed to have been made subject to the act, Darsch was entitled to recover under the law. But the court upheld the action of the board in dismissing the claim as the above provisions were intended only to apply to residents of the State and contracts made within the State. The court speaking through Judge Enloe said that, "The State of Indiana can not regulate the conduct of citizens of foreign States," and that, "Its laws are of binding force and effect only upon persons within this State, and the language of said section as to employers and employees who shall be deemed to have accepted its provisions manifestly was intended only to apply to such persons as were residents of this State and made their contracts of employment here, or maintained an office and place for doing business within this State."

WORKMEN'S COMPENSATION — EXTRATERRITORIALITY — WHAT LAW CONTROLS—PLACE OF MAKING CONTRACT—*Hulswit v. Escanaba Mfg. Co., Supreme Court of Michigan (June 5, 1922), 188 Northwestern Reporter, page 411.*—The Escanaba Manufacturing Co. was engaged in the manufacture of wooden wares in the city of Escanaba. Fred Hulswit was employed by the company in the fall of 1918 to sell its wares in Michigan and Indiana. In 1919 he made a new contract with the company to go to the west coast and represent the company in the States of California, Oregon, and Washington. In pursuance of this contract he went to those States and began his work. He used an automobile upon a portion of his territory. In November, 1920, while traveling in his automobile, he met with an accident and lost his life. An award of compensation was made in favor of his widow and two children. The company took the case to the supreme court of the State, raising the question as to whether the award was valid because of the fact that Hulswit did not perform any services in the State of Michigan, his contract of employment not contem-

plating any services to be performed within the State. The supreme court affirmed the award and said that it had previously held in the case of *Crane v. Leonard*, 214 Mich. 218, 183 N. W. 204 (see Bul. No. 309, p. 283), that the compensation act of the State was voluntary, that the relation of the parties was one of contract, and that the provisions of the act must be read into the contract between the employer and the employee. The court therefore held that as this was the ground upon which they reached their conclusions in the previous case, it must follow that the relations of the parties in this case must rest upon contract, and that therefore the act would cover a case where none of the services were performed within the State. The court further said that there were no provisions in the act which would oppose the view taken, and that as the contracting parties were both residents of Michigan and the contract they made was a Michigan contract, it could see no reason why the contract should not be enforced by a Michigan tribunal.

WORKMEN'S COMPENSATION — HAZARDOUS EMPLOYMENT — EMPLOYEE AT LOGGING CAMP—*Dewey v. Lutchter-Moore Lumber Co.*, *Supreme Court of Louisiana (May 15, 1922)*, 92 *Southern Reporter*, page 273.—The Louisiana compensation law is limited in its application to hazardous occupations, which are enumerated, among them being "logging and lumbering." Henry Dewey was employed by the lumber company as a workman about a logging camp, his duties being to remove refuse and keep the camp clean and sanitary. While so employed he suffered an accidental injury, resulting in a "strain of his right hip, which has left it in a sore, stiff, and paralyzed condition." Under proceedings for an award under the compensation law he was given benefits running through a period of 300 weeks. The company appealed from this decision, claiming that though it, as a company, was engaged in a hazardous occupation under the statute, the employee himself was not engaged in any hazardous work, nor was he employed to do so. The supreme court adopted this view, the opinion, delivered by Judge Overton, being as follows:

The conducting of a logging camp (the camp being nothing more than the quarters for those engaged in logging), although part of the logging business, is not hazardous, and therefore one employed to perform and engaged in performing services in such a camp is not performing them in a hazardous occupation. It can not even be said that the work of a scavenger is hazardous, although performed in such a place, but we think that it is the occupation in which the person is employed to perform the service, rather than his particular duties, that determines the question.

The judgment appealed from was therefore set aside and Dewey's suit was dismissed.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—JANITOR IN PRINTING ESTABLISHMENT—NOTICE—COMMUTATION TO LUMP SUM—*Okmulgee Democrat Pub. Co. v. State Industrial Commission of Oklahoma (March 14, 1922)*, 206 *Pacific Reporter*, page 249.—E. C. Colbert was employed by the company named, as janitor in its printing plant, and a part of his duties was cleaning up under the linotype machines. While so doing he pricked the first finger of his right hand on a lead shaving or slug, from which blood poisoning developed within a few days. He suffered greatly, had the finger amputated and his hand lanced, with the result that it became practically useless. Compensation was allowed on application, at the rate of \$6 per week for 200 weeks. This was commuted to a lump sum of \$1,200, besides hospital and doctor bills covering a period of 15 days.

The company contended that Colbert's occupation was not one of those covered by the act, which is limited to hazardous employments. Printing establishments where machinery is used are included, but the contention was that his occupation was not connected with or incident to such an establishment. The law is said to define a hazardous employment, as applicable to the present case, as manual or mechanical work or labor connected with or incident to a printing plant where machinery is used. The commission found that the work of removing the accumulated slugs and shavings, which are melted up and used to make new type, was a service which clearly belongs to the class of work necessary for the continued operation of the plant. "Obviously, some employee of the establishment would be required to do this class of work, not only to prevent the machines from being clogged up and stopped, but to keep on hand an adequate supply of new type." The statute being a remedial measure, calling for liberal construction, the conclusion was reached that "the respondent is entitled to compensation under any reasonable construction of the provisions of the compensation act."

There was a contention that notice had not been properly given of the injury. It appeared that a few days after Colbert had pricked his finger and it had become sore, he brought a substitute to the plant and told the business manager that this man would do his work while he was absent. Shortly thereafter he took to bed from the blood poisoning, remaining there for some months in great suffering. Early in his sickness Colbert wrote to the general manager of the company, telling him of his condition and asking for aid. "This letter was ignored as an appeal to charity, the company not deeming itself liable to Colbert under the compensation law in these circumstances." The presumptions of the act were construed by the commission in Colbert's favor, concluding both that sufficient notice had

been given and that the serious condition of the claimant during his painful illness would excuse him from acting at that time. As to this the court found that the commission was warranted in excusing the formal notice both on the ground that there was sufficient reason in view of Colbert's physical condition, and that the insurance carrier or employer had not been prejudiced thereby. Before one-third of the time for the giving of the notice had elapsed the claimant "was compelled to take to his bed and remain in this helpless condition suffering great pain and agony for four or five months thereafter." Reference was also made to the disregard by the company of the appeal for charity. "This has been the attitude of the employer and the insurance carrier up to this good day. Under these circumstances it is not at all likely that, even if it was shown that notice was given in strict compliance with the statute, they would have taken any other course than the one they have followed; that is, dispute their liability to the respondent under the compensation law until the question was finally passed upon by the court of last resort having jurisdiction over such proceedings."

The final proposition discussed was as to the commutation of the weekly payments to a lump sum without reduction. This the commission was said by the company to be without authority to do. However, Judge Kane stated that:

This court has frequently upheld the action of the commission in requiring employers to pay in gross instead of part by part, and the fact that the gross sum was not lighter or less in amount than the sum of the periodical payments does not seem to have made any difference.

The order of the commission was therefore affirmed, with some modifications as to medical benefits, which it appeared the plaintiff had not requested the employer to furnish, so that no award could properly be made with regard to them.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—POWER OF COMMISSION TO DECLARE WORK EXTRAHAZARDOUS—DELEGATION OF LEGISLATIVE AUTHORITY—*State v. Bayles et al.*, *Supreme Court of Washington* (September 8, 1922), *209 Pacific Reporter*, page 20.—The Legislature of the State of Washington made several attempts to authorize the department of labor to declare occupations which are not mentioned or included in the workmen's compensation act to be extrahazardous, and thus come under the provisions of that act. The first attempt was unsuccessful. A case came up under section 6604-2, Remington's Code, *State v. Powles and Co.* (94 Wash. 416, 162 Pac. 569), wherein the court held that the language of the statute did not authorize the department to declare additional occu-

pations to be extrahazardous. In an effort to correct this situation the legislature of 1919 added another section to the workmen's compensation act, but this attempt also failed to accomplish the purpose apparently desired. *State v. Eyres Storage and Distributing Co.*, 115 Wash. 682, 198 Pac. 390 (Bul. No. 309, p. 287). In 1921 the legislature again made an attempt to grant the necessary power by amending section 2 of the original act, adding the following provision:

The director of labor and industries through and by means of the division of industrial insurance shall have power, after hearing had upon its own motion, or upon the application of any party interested, to declare any occupation or work to be extrahazardous and to be under this act. * * *

In December, 1921, the department of labor and industries, by virtue of the foregoing provision (ch. 182, Laws of 1921), after a hearing duly had, made a decision and an order that the business of operating a retail coal yard is in fact extrahazardous and therefore came within the provisions of the State workmen's compensation act. The decision and order fixed the amount to be paid by all retail fuel yards to the State as 1 per cent of the actual amount of the pay roll employed in such business. Because of this decision W. C. Bayles and another, copartners, became indebted to the State in the sum of \$1.96, which amount they failed and refused to pay. Action was brought for the recovery of this amount, and judgment against them sought by the State. The copartners contended that the complaint did not constitute a cause of action, but this was overruled. They set up defenses to the effect that their employees were not as a matter of fact engaged in any extrahazardous occupation, as provided by the workmen's compensation act; that the department had no power or authority to make any such order; and that such order was unconstitutional and void because it undertook to delegate legislative authority. The State contended that these defenses were not sufficient, and was sustained by the court. An appeal was taken to the supreme court, which held that the 1921 amendment authorized the department to find and decide that employees in retail fuel yards were engaged in extrahazardous occupations. As to the contention that the legislature was delegating legislative authority the court did not agree with the copartners, and cited several cases as a basis for the holding. The contention was argued in the supreme court that the power granted to the department to determine certain occupations to be extrahazardous was void, because no standard was fixed by which the department could be guided in coming to its conclusions. The court met this contention by referring to the large number of occupations which the legislature itself had declared to be extrahazardous, and saying that "In determining whether some occupation is extrahazardous the department would compare it with

those which the legislature itself has declared to be extrahazardous." The court further held that the contention to the effect that the employees of the copartners were not in fact engaged in an extrahazardous employment was a defense that could not be raised in this proceeding.

WORKMEN'S COMPENSATION—DISEASE—TYPHOID FEVER—*Industrial Commission v. Cross, Supreme Court of Ohio (April 25, 1921), 136 Northeastern Reporter, page 283.*—Ezra Cross was an employee of the park department of the city of Cincinnati in the State of Ohio. While working in the construction of a culvert during the month of April, 1920, he drank some water from a spring in a park nearby. He contracted typhoid fever from the water and died the following month. Mary A. Cross, mother, and Maize Cross, sister of the deceased, brought proceedings for an award of compensation under the workmen's compensation law of the State. The industrial commission denied compensation and an appeal was taken to the common pleas court. Trial was had which resulted in favor of the petitioners. The court of appeals reviewed the judgment of the trial court and affirmed it, and the case then came up to the supreme court of the State. Arguments were heard and the question before the court was reduced to "whether a disease contracted in the course of employment is an "injury" within the meaning of section 1465-68, general code. This section provides:

Every employee mentioned in subdivision 1 of section 14 hereof, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted * * * shall be paid such compensation out of the State insurance fund for loss sustained on account of such injury or death as is provided in the case of other injured or killed employees.

Judge Robinson in the decision of the court against affirming the award said in part:

Thus far this court has not been called upon to determine whether the term "injury" was intended by the legislature to include diseases generally, although in the case of *Industrial Commission v. Brown*, 92 Ohio St., 309, 110 N. E. 744 [Bul. No. 224, p. 305], it did declare that the original voluntary workmen's compensation act, passed prior to the adoption of the present constitution, did not contemplate compensation for occupational disease.

Since the enactment of that section, and prior to the enactment of the present workmen's compensation law, the constitution has been amended. Section 35, article II, of the constitution, in so far as applicable to the question here involved, reads: "For the purpose of providing compensation to workmen and their dependents, for death, injury or occupational disease, occasioned in the course of such workmen's employment, laws may be passed," etc.

But it can not be contended that the subsequent adoption of this provision of the constitution could in any way be helpful in the interpretation of the meaning of legislation enacted prior thereto. It must now be assumed with reference to the present law that the legislature acted in pursuance of the authority conferred by section 35, article II, and that where it used the same words used in the constitution it used them in the same sense that the constitution makers used them. The constitution makers apparently did differentiate between injuries and occupational diseases, and used the words "death" and "injuries" occasioned in the course of employment, as distinguished from death or injuries from diseases occasioned in the course of employment. That a disease is an injury must be conceded, but by the same token it must also be conceded that an occupational disease is an injury. The constitution makers, however, did not regard occupational disease as included in the term "injury," and so added it by specific designation. If, then, occupational diseases, which, experience has demonstrated, follow certain occupations with certainty to a considerable proportion of the persons so occupied, are excluded from the meaning of the term "injury," by what process of reasoning can we say that they intended to include diseases which occasionally occur without intending to include diseases which regularly occur?

In view of the constitutional interpretation, in view of the fact that during the eight years that the compulsory compensation law has been in force, the industrial commission has given the term "injury" an interpretation which excludes diseases which are contracted, as distinguished from diseases which are occasioned by or follow as a result of some physical injury, and in view of the fact that to interpret the term "injury" as including diseases generally would enlarge the scope of disabilities compensable to such an extent as to either bankrupt the fund or require a complete readjustment of premiums upward, we hold that, if the scope of cases compensable is to be extended, it should be done by unambiguous legislative enactment rather than by judicial construction. For it must be recognized that, if the term "injury" is to be construed to include typhoid fever contracted in the course of employment, it may as well include influenza, pneumonia, tuberculosis, smallpox, ordinary colds, rheumatism, and practically every disease which may be contracted by workmen in the course of employment, and the workmen's compensation department will become a health and life insurance department for workmen, compulsorily supported by employers, and the constitutionality of the whole scheme be endangered.

Judgment reversed.

Judge Johnson dissented from the foregoing conclusion, arguing that the new law enacted subsequent to the amendment to the constitution above quoted, was in terms broad enough to cover cases such as the one in question, not as an occupational disease, but as an injury as contemplated by the constitution and the law. Cases identical to the one at hand were cited, as follows: *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640 (see Bul. No. 189, p. 204); *Aetna Life Ins. Co. v. Portland Gas & Coke Co.*, 229 Fed. 552, 144 C. C. A. 12 (see Bul. No. 224, p. 129).

WORKMEN'S COMPENSATION—INJURY—DISEASE—TYPHOID FEVER—*Wasmuth-Endicott Co. v. Karst, Appellate Court of Indiana (January 5, 1922), 133 Northeastern Reporter, page 609.*—Clarence N. Karst and other workmen were employees in the cabinet factory of the Wasmuth Co. Drinking water was furnished from a well nearby, which, without the knowledge of the company, became contaminated by seepage from a toilet in the factory. Karst, during the course of his employment, used the water, became infected with typhoid germs, and was confined to his bed for several weeks. Proceedings were brought under the workmen's compensation act and an award was made by the industrial board on the grounds that Karst had received a personal injury by accident arising out of and in the course of his employment. The employer appealed from the decision of the board. The contention was based on the provisions of the act that directed compensation "for personal injury or death by accident arising out of and in the course of the employment," and also the provision that defined "injury" and "personal injury" to mean "only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury." The appellate court refused to uphold this view, and affirmed the award of the board. Presiding Judge Batman stated the opinion of the court, in part as follows:

In considering this contention we will first determine whether the evidence shows that appellee's disability was the result of an accident. This court, in determining questions of liability under the workmen's compensation act (Acts 1915, c. 106), has adopted the following definition of that term:

"An accident is any unlooked-for mishap or untoward event not expected or designed."

Applying this definition to the facts disclosed by the evidence in this case, it is clear that the entering of typhoid germs into appellee's intestines, by reason of drinking the polluted water furnished him by appellant for that purpose, while in its employ may rightfully be termed an "accident."

But the mere fact that an accident happens to an employee will not authorize the payment of compensation, unless it results in personal injury which causes disability to work. The resulting injury and disability to work, however, need not be concurrent with the accident in order to warrant payment of compensation.

In the instant case appellant raises the question as to when the injury can be said to have occurred, if the drinking of the germ laden water, under the circumstances, can be said to be an accident within the meaning of the workmen's compensation act. It has been said that—

"In common speech the word 'injury,' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability."

It can not be said that this definition is too comprehensive, in view of the settled policy of this court, in harmony with the courts of other jurisdictions, to give the provisions of the workmen's compensation act a liberal construction in favor of the employee, in order that its humane purpose may be realized.

The fact that the accident involved in this case occurred while appellee was engaged in quenching his thirst, rather than in the actual performance of some duty which he owed appellant under his employment, is not a matter of controlling importance, as it is recognized that "such acts as are necessary to the life, comfort, and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment."

The award was therefore affirmed, one judge dissenting.

WORKMEN'S COMPENSATION—INJURY—DISFIGUREMENT—CROOKED FINGER—*Frank W. Williams Co. v. Industrial Commission et al., Supreme Court of Illinois (June 21, 1922), 135 Northeastern Reporter, page 758.*—On December 3, 1919, Leopold Paluch while in the employ of the Frank W. Williams Co., a manufacturer of picture frames, had the end of the index finger on his right hand cut by a rip-saw. Proceedings were brought for an award of compensation and a hearing was had before an arbitrator. The facts brought out at the hearing were to the effect that the terminal phalange was fractured but without displacement of the fragments and without loss of any part of the bone; that the injured finger healed, and that, on the date of the hearing, there was a scar extending across the end of the finger, which was slightly discolored; that the nail-forming tissue was destroyed by the injury and that there remained but two small fragments of nail; that there was approximately a quarter of an inch of the finger gone; that the finger has a slightly crooked appearance; that there was no impairment of the joint function and that there was no involvement of the large nerves. Paluch testified that he was unable after the injury to pick up small articles because the end of his finger was tender. Paragraph (c) of section 8 of the workmen's compensation act of Illinois provides that compensation may be paid for any serious and permanent disfigurement. An award of \$14 a week for 16 weeks was granted in favor of Paluch. The industrial commission confirmed the award and the case was taken to the circuit court. That court confirmed the award and the employer took the case to the supreme court, contending that the disfigurement was not serious, as it did not involve a loss of earning power. The supreme court affirmed the judgment of the circuit court, Chief Justice Thompson saying that "The stat-

ute does not require that there shall be a showing of loss of earning power before compensation can be made for a disfigurement, and we are not authorized to read such a provision into the statute."

WORKMEN'S COMPENSATION—INJURY—DISFIGUREMENT—INDEPENDENT COMPENSATED INJURY—*Seneca Coal Co. et al. v. Carter et al., Supreme Court of Oklahoma (March 14, 1922), 205 Pacific Reporter, page 495.*—Weep Carter was an employee of the Seneca Coal Co. On December 21, 1920, while tamping a shot in coal, a live cinder from a steam shovel boiler dropped into the shot, causing it to explode. The explosion burned Carter's face and shot it full of coal, causing a permanent disfigurement of the face and the loss of an eye. The State industrial commission made an award under the workmen's compensation law in favor of Carter for the loss of his eye, at the rate of \$12.98 per week for 100 weeks, and for the permanent disfigurement of his face a sum amounting to \$1,000. The employer and its insurer brought an action to reverse and vacate the award for permanent disfigurement upon the grounds that as the commission had made an award for the loss of the eye it was without jurisdiction to make an award for permanent disfigurement to the face. The award of the commission was affirmed in an opinion rendered by Judge Kennamer, in which he said:

It is obvious that the compensation for permanent disfigurement must be independent of, and not in addition to, any compensation allowed for a specific injury. But, in determining the amount of the award to be allowed for such disfigurement under the proviso of the act, the commission is vested with jurisdiction to consider and qualify the amount that may be awarded under the statute for permanent disfigurement to the extent an awardable specific injury has contributed to the permanent disfigurement of the employee. It would be unreasonable to hold under sec. 6, art. 2, ch. 246, Session Laws 1915, as amended by sec. 9, ch. 14, Session Laws 1919, that the commission is without jurisdiction to compensate an injured employee for a permanent disfigurement of the head, face, or hands where the same exists independent of some compensable specific injury. To so hold would be to deny the commission jurisdiction to compensate an injured employee for permanent disfigurement where he lost his right eye, but suffered a permanent disfigurement to the left side of his face, entirely independent and apart from the loss of his eye. The authorities uniformly hold that statutes must be construed so as not to lead to absurd consequences.

WORKMEN'S COMPENSATION—INJURY—HERNIA—RECURRENCE OF DISABILITY—RECOURSE AGAINST PRIOR EMPLOYER—*Gaglione's Case, Supreme Judicial Court of Massachusetts (March 6, 1922), 134*

Northeastern Reporter, page 240.—Carmine Gaglione received injuries while in the employ of the Beacon Oil Co. which resulted in a hernia. After a period of disability he received an award of compensation under the State workmen's compensation act, and after being asked by the insurer, "to go and try to work," he secured employment from the city shoveling snow from sidewalks. He worked for five days for the city, at the end of which time he became totally incapacitated because of a recurrence of the hernia. A hearing was had before a member of the industrial accident board, who held that any injury he might have received while working for the city was not sufficient to break the causal connection between the original injury and the recurrence of the hernia and therefore made an award in favor of the employee and against the insurer of the oil company. His findings were adopted by the board and the case was appealed to the supreme court of the State. Judge Carrol rendered the opinion of that court, affirming the decree of the board upon the grounds that "if there was a return of the hernia while in the employ of another it was a question of fact on all the evidence for the industrial accident board to determine whether this condition had causal relation to the original injury," and as "there was evidence to warrant this finding the employee was properly awarded compensation against the insurer of the original employer."

WORKMEN'S COMPENSATION—INJURY—PREEXISTING DISEASE—*Centralia Coal Co. v. Industrial Commission et al.*, *Supreme Court of Illinois (February 22, 1922)*, 134 *Northeastern Reporter*, page 174.—John Gutzler was a loader in the employ of the Centralia Coal Co. On November 30, 1918, while lying on his side at his work in the mine a rock fell from the roof of the room and struck his hip, crushing the bones of the hips together. It appeared that prior to the accident he had suffered from catarrh of the bladder and had undergone two operations because of this disease. Proceedings were brought under the State workmen's compensation law and an award of compensation was made by the industrial commission, which was confirmed by the circuit court. The case was taken to the supreme court of the State on two assignments of error, first, the constitutionality of the act and, secondly, that there was no competent evidence in the record to sustain the award. The first question was disposed of in favor of Gutzler because the question of the constitutionality of the act had not been raised on the first opportunity offered in accordance with State law. With regard to the second question, Chief Justice Stone, speaking for the court, said:

The record discloses that, while the claimant was suffering from a disease of the bladder, affecting his earning power at the time of

the accident, his present inability to work is due to the injury received or to an aggravation of the disease ensuing therefrom. The presence of a preëxisting disease is not, of itself, sufficient to warrant a denial of compensation where such disease is shown not to have been of a character to disable the claimant, and, where the injury is shown to be a contributing cause of such disability, or such an aggravation of the disease as to result in such disability, compensation will be awarded.

The evidence in this record shows that Gutzler earned \$1,400 per year as loader, but, owing to the preëxisting disease, he could not load as many cars as a strong man. His earning power was depreciated by the disease, but was not destroyed. The award in this case was based on that depreciated earning capacity. Plaintiff in error is therefore not required to pay compensation for the effects of the disease as it existed prior to the injury. The award in this case is sustained by the record.

WORKMEN'S COMPENSATION—INJURY—PREEXISTING DISEASE —EXCITEMENT BY INHALING GAS—*Tintic Milling Co. et al. v. Industrial Commission of Utah et al., Supreme Court of Utah (April 8, 1922), 206 Pacific Reporter, page 278.*—Clarence Snyder was employed by the milling company named and submitted to the industrial commission a claim for compensation. This was based on an alleged accidental injury, caused by inhaling fumes from the roaster in which ores were reduced.

Snyder was a carpenter and was directed, with another employee, to remove or change a bulkhead in a flue, by which these fumes were ordinarily carried away. At the first attempt the fumes were so strong that they could not go into the flue, but a half-hour later they removed the bulkhead, following which, Snyder became ill and was afflicted with severe nausea. He continued to work, however, for three days, during which he continued coughing and kept getting worse.

Three days after the injury he saw a physician, and told him the circumstances as above related, and the doctor told him that his ailment was caused by the gas and fumes. About a week after the injury was pay day, when he informed his employer of his condition, and was told to see the doctor and have him prepare blanks for compensation.

Some months before this injury Snyder had had a light spell of "flu," which confined him to his bed for a short time, but kept him from work for about a month. However, subsequent to that time he continued at work until the gassing above described, since which "a very noticeable change appeared in applicant's health."

The company's medical witness testified that before the injury complained of, Snyder was suffering from tuberculosis of the lungs,

and that the alleged accident "had little or nothing to do with the injury of which he complained." He admitted, however, that there might have been an aggravation or acceleration of the disease, "but that it was by no means the starting point." The company contended that in any case the injury was not the result of an accident within the meaning of the compensation statute. In speaking on this point the court said:

It must be conceded on the very threshold of the discussion that if Snyder's injury was due entirely to a preexisting disease, whether such disease be occupational or otherwise, it can not be regarded as an accidental injury, and is therefore not within the industrial act.

If plaintiff's contention is true, that the injury of which Snyder complains is but the continuation of a disease previously existing, unaggravated or unaccelerated by any fortuitous event which may be denominated an accident, then, in view of the statute quoted, the injury is not compensable and the award made by the commission should be vacated, annulled and set aside. On the other hand, if the findings of the commission are true, that the gassing in the flue in January, 1921, was either the direct cause of the tuberculosis or lighted up a dormant condition which existed previously, but which had not incapacitated him for performing his duties as an employee, then the award made by the commission should not be disturbed unless it be determined as matter of law that the injury in question was not the result of an accident.

Judge Thurman, who delivered the opinion of the court, then expressed the view that Snyder was evidently suffering with the disease described as pulmonary tuberculosis, but that up to the time of the incident complained of, he had been able to continue at work; while subsequent to that date, "he was unable to perform any labor whatever and his condition grew worse from day to day." A case was then cited in which an accident accelerating an existing disease had been held by this court to warrant an award for compensation. (*Pinyon Queen Mining Co. v. Industrial Commission*, 204 Pac. 323.)

This decision would be conclusive, if the present injury were due to accident. The remainder of the opinion is therefore devoted to the discussion of this point, citing many cases and authorities. Several cases were found in which the exposure of the claimant to the effects of gases and fumes was found to result in impairment of health, the exposure itself being voluntary and recognized as a natural accompaniment of the work done. However, the consequences had not been anticipated, and the position was taken that unexpected results give an accidental quality to the incident, even though the setting was known to embody the conditions which actually produced the results, as that a mine was gaseous or a work place dusty. In speaking of these Judge Thurman said:

The writer is strongly impressed with the view that the following excerpt, quoted with approval by the court in *Carroll v. Ind. Com.*, 69 Colo., 73, 195 Pac. 1097 [see Bul. No. 309, p. 295], from 25 Harvard Law Review, 340, is a correct interpretation of the law in this class of cases:

"Since the case of *Fenton v. Thorley* nothing more is required than that the harm that the plaintiff has sustained shall be unexpected. * * * It is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected, and so, if received on a single occasion, occurs "by accident," is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing."

Concluding, the court said:

It is not necessary to prolong the discussion. Being convinced, as I am, that Clarence Snyder, the employee in this case, on the 17th day of January, 1921, at a definite time and place, while in the course of his employment, received an injury by inhaling gas, wholly unexpected by him, and that such injury aggravated and accelerated a pre-existing disease and rendered him wholly unable to thereafter continue his usual employment, I am of the opinion that the findings, conclusions, and award of the defendant commission should be affirmed, with interest on payments past due, at plaintiff's costs.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—ACT OF HUMANITY—*Sichterman v. Kent Storage Co. et al.*, Supreme Court of Michigan (February 8, 1922), 186 Northwestern Reporter, page 498.—Harry Sichterman was a traveling salesman in the employ of the Kent Storage Co. He covered his territory by means of an automobile. His home was at Grand Rapids, Mich., which he left every morning and returned at night. After he had finished the day's work and was returning home, when about two miles from Grand Rapids, after it had grown dark, he came across a peddler with his wagon on the side of the road. The peddler's wagon had been struck by an automobile about an hour before. Mr. Sichterman stopped his car, got out of the machine, and walked back in the road to where the peddler was and asked him if there was anything he could do for him. At this moment he was struck by a passing automobile and so seriously injured that he died shortly thereafter. He was survived by a widow and a 4-year-old son.

A claim was made for compensation by the dependents and compensation was awarded. The employer and its insurer took the case to the supreme court of the State for review. They raised the question of whether the accident arose out of and in the course of employment. The supreme court ordered that the award should be vacated. The court said that both the requirements of the statute pro-

viding that a compensable accident must arise out of and in the course of employment must be met to justify an award. After reviewing cases from many jurisdictions, the court said that the injury did not arise out of the employment. Chief Justice Fellows, for the court, said that "this unfortunate accident occurred when the deceased was performing an act of humanity entirely dissociated from the master's work."

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—BITE BY MAD DOG—*Chandler v. Industrial Commission of Utah, Supreme Court of Utah (June 20, 1922), 208 Pacific Reporter, page 499.*—George Chandler was employed by A. M. Miller as a deliveryman. His regular hours of employment were from 7 a. m. to 6 p. m. On January 2, 1918, Chandler left his home to go to his employer's garage to get the delivery car which he used in making deliveries of meats and groceries. On his way he was attacked by a dog and his hand was bitten and lacerated. He regarded the injury of minor importance and returned to his work. About two months later he was taken violently ill and died from hydrophobia as the result of the dog's bite. His widow, Emma Chandler, filed an application for compensation because of the death of her husband, which was denied by the commissioner. She brought proceedings in the district court, but judgment did not favor her. The case was appealed to the supreme court, where the judgment was reversed. The case was then tried, and evidence was introduced in the district court which resulted in a verdict in favor of the widow. From that judgment the case was taken to the supreme court a second time. The question directly presented to the court was whether the injuries resulting in the death of Chandler arose out of and in the course of his employment. The court held that they did, saying that "Chandler's going to the garage was a distinct part of a definite duty—more than merely going to work, and actually an errand for his employer at the time of the accident."

The court further said:

If instead of going directly to the garage, Chandler had gone to his employer's place of business, and, upon his arrival there, had been ordered to go to the garage for the purpose of obtaining his delivery car and for the purpose of supervising the preparation of the other cars for their drivers, the case would clearly come within one of the well-recognized exceptions to the general rule that an employee injured while on his way to work and before he has reached his place of work does not come under the protection of the compensation act. He took the direct route to the garage during working hours, and, at the very time he was bitten by the dog, he was engaged in the furtherance of his employer's business and not on an errand of his own. He was obeying the order of his employer, the order to

proceed to the garage for the purpose of attending to his duties there. He was under the control and direction of his employer from the moment he left home to go to the garage for the automobile, and was at that time in the course of, and within the scope of, his employment. His death resulting from the accident is therefore compensable.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—CHIEF ENGINEER DOING OTHER WORK—*Wilson v. Dakota Light and Power Co., Supreme Court of South Dakota (February 8, 1922), 186 Northwestern Reporter, page 828.*—The Dakota Light and Power Co. was engaged in the production and sale of electric light and power and electrical supplies. The company had in its employ one Herbert L. Wilson as its chief engineer. During the summer of 1918 the company enlarged the building which inclosed its power plant and office. This enlargement required the removal of one of the old walls adjoining the engine room. As this wall was composed of hollow tile and cement, bricklayers and plasterers were engaged to tear down and remove it. They were taking the wall down from the top. The chief engineer, thinking that he would expedite the work, took a "pinch bar" and proceeded to dig the support out from under one side of the wall. The result was that the wall fell upon him and caused his death. A claim was filed for compensation under the terms of the workmen's compensation law, and an award was granted by the board of arbitration, which was affirmed by the industrial commissioner. Proceedings were then brought in the circuit court to have the award set aside on the ground that the injury did not arise out of and in the course of the employment. That court held that the deceased was not employed or authorized to do any other work than keeping the engines and producers in proper condition and to do anything pertaining to the running of the machinery inside the plant; that in doing the work which resulted in his death he was a mere volunteer and not doing work in the course of his employment. The case was taken to the supreme court of the State. That court affirmed the judgment of the circuit court, Judge Smith dissenting. The injury to the engineer was said to be "in no wise connected with or incidental to the performance of his duties," which "did not expose him to the danger of the falling wall," so that no claim for compensation could be allowed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DEATH BY SHOOTING—ACTION WITHOUT AUTHORITY—*Chicago & Alton Railroad Co. v. Industrial Commission, Supreme Court of Illinois (December, 22, 1921), 133 North-*

eastern Reporter, page 204.—John H. Drischel was employed by the C. & A. Railroad Co. at one of its pumping stations. His duty was to pump water into a tank for engines. In a building near the pumping station gasoline was kept to run the pump engine. Drischel was custodian of the property but had no authority to sell gasoline. On the night of August 11, 1917, three men riding in an automobile went to the station and called Drischel from his bed, telling him that they wanted some gasoline and that it was an emergency case. He objected to letting them have it at first but finally agreed to sell them some. After filling a can, they refused to pay for it and in an attempt by the men to lock Drischel in the oil house he was shot and killed. The evidence showed that when one of the men drew his gun Drischel told them to quit fooling, take the oil, and go on. They were afraid, however, that he might telephone the police so it was thought best to lock him in the oil house. Drischel's widow and two children brought proceedings under the workmen's compensation act for compensation, but it was denied on the ground that the injury causing Drischel's death did not arise out of and in the course of his employment, within the terms of the workmen's compensation act. This decision was affirmed in the circuit and supreme courts of the State.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DEATH FROM DROWNING IN PREPARING TO WASH—*Tennessee Chemical Co. v. Smith et ux., Supreme Court of Tennessee (March 11, 1922), 238 Southwestern Reporter, page 97.*—Robert Smith, jr., was an employee of the Tennessee Chemical Co., manufacturers of fertilizer. The fertilizer was made from animal carcasses, bone meal, street sweepings, and other constituents, which makes it desirable, if not necessary, for the employees handling the product to bathe in hot water. The company knew of and acquiesced in a custom of its employees to take buckets and go to the company reservoir, in which hot water used in the plant was cooled, and get warm water with which to wash. On the evening of September 22, 1919, at the close of the day's work, Smith got his bucket and started for the reservoir to get some hot water with which to bathe. That was the last time he was seen alive. The next morning his body, with his working clothes on, together with his bucket and a small piece of pipe, was found at the bottom of the reservoir. The parents of the deceased put in a claim for compensation. At the hearing there was evidence to the effect that Smith's neck was broken, from which it was argued that he was killed or assaulted by some other party, but the judge found that the death was caused by an accident arising out of and in the course of his employment

and made an award. The employer brought the case up to the supreme court of the State, but that court held that the injury was "none the less an injury by accident arising out of and in the course of employment, though it occurred to the employee while not actually engaged in the work of the master," and, as there was ample evidence to support the finding of the circuit judge, the award was affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DRINKING ICE WATER WHILE IN HEATED CONDITION—*Gilliland v. Edgar Zinc Co., Supreme Court of Kansas (October 8, 1922), 209 Pacific Reporter, page 658.*—On a warm day in May, 1920, S. H. Gilliland, an employee of the Edgar Zinc Co. was shoveling his one-horse cart full of cinders as his employment required him to do. The cinders, which were moved to a dump nearby, were warm and sometimes hot. The place where the cinders were loaded was in full glare of the sun. But there was a drinking fountain inside the furnace building, within easy access, at which employees could get ice-cold water. About 2 o'clock in the afternoon Gilliland went into the furnace building for water. Two hours later he became weak and complained that he was sick. He climbed upon his cart but fell off. On a second attempt to drive the cart he fell backwards upon the cinders unconscious and so remained until his death, which occurred an hour later. The company doctor arrived 30 minutes before Gilliland died. He was of the opinion that death was caused by "congestion, or distension of the vascular system, the filling up of the veins, and probably the surface arteries, due to a constriction of blood vessels of the vital organs, produced from the shock due to taking cold water into an overheated system." An award of compensation was made in favor of the widow and children under the workmen's compensation law, upon the grounds that Gilliland "died from an accident arising out of and in the course of his employment." The company challenged the correctness of this award and the case was taken to the supreme court of the State. Judge Dawson, speaking for that court in affirming the award, said:

Here there was the added factor of the overheating, traceable to the workman's task of shoveling warm ashes on that unusually warm afternoon, and this brought about the condition which gave such sudden and fatal effect to the drinking of the ice water. This justified the trial court's conclusion that within the scope and intent of the workmen's compensation act the plaintiff's husband's death was caused by an injury arising out of his employment as well as in the course of it.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—FAINT FOLLOWING INOCULATION—*Freedman v. Spicer Mfg. Corp., Court of Errors and Appeals of New Jersey (February 9, 1922), 116 Atlantic Reporter, page 427.*—Harry Freedman was employed by the company named, and during the influenza epidemic of 1918 the employer offered to inoculate such of his employees as were willing to take the treatment, in an effort to check the spread of the disease. Accepting this invitation on the recommendation and inducement of the employer, Freedman was, with others in his department, inoculated, and upon the return to his desk fainted as a result of the inoculation and sustained a fracture of the skull. The above are the summarized facts as stated by the supreme court, to which the defendant appealed against an award under the compensation law in favor of claimant, the court holding that the injury, which was fatal, arose out of and in the course of employment. The case was thereupon appealed to the court of errors and appeals where, for the reasons expressed in the opinion of the supreme court, the judgment of that court was affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—FIGHT BETWEEN EMPLOYEES—*Taylor Coal Co. v. Industrial Commission, Supreme Court of Illinois (February 22, 1922), 134 Northeastern Reporter, page 172.*—W. E. Padgett was in the employ of the Taylor Coal Co. on August 14, 1918, as top foreman at its mine No. 5. This was the fifth day he had held this position, having been promoted from dock boss, which position he had held for some time. On the above date while he was on his way from the tippie to the office, where he intended to eat his lunch, he met one Mose Sweet, a miner, who was on his way home. A dispute arose between them with regard to a penalty on docking that had been imposed by Padgett upon Sweet in connection with his work some three weeks previous. Sweet claimed that he had been wrongfully docked by Padgett and told him so. In the course of the discussion that followed, Padgett, thinking that Sweet had a gun and would shoot him, struck Sweet and then ran toward the office. Sweet shot at Padgett and the bullet passed through the latter's arm just below the shoulder. Proceedings were brought under the State workmen's compensation act and an award of compensation was allowed by the industrial commission. The employer took the case to the circuit court, assigning several grounds as error, but the award was in principle affirmed. The case was then taken to the supreme court, where among other contentions raised it was argued that the accident in question did not arise out of and

in the course of the employment. With regard to this contention Judge Carter speaking for the court said in part:

This court has had the question of disputes or fights between employees under discussion in several cases as to whether or not the injury arose out of and in the course of the employment, and all these decisions agree that the accident, to be within the compensation act, must have had its origin in some risk in connection with the employment, and that no fixed rule to determine what is a risk of the employment can be established; that whether the injury arose out of the employment must depend on whether there was some causal relation between the employment and the injury, and while it is not necessary that the injury be one which ought to have been foreseen or expected, it must be one which, after the event, may be seen to have had its origin in the nature of the employment. For the accident arising out of this dispute, plaintiff in error was rightly held liable by the industrial commission.

However, for other reasons stated, the judgment of the lower court was reversed and the case remanded with directions as to further proceedings.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—FIGHT BETWEEN EMPLOYEES—INJURY TO INNOCENT EMPLOYEE—*Gavros' case, Supreme Judicial Court of Massachusetts (February 28, 1922), 134 Northeastern Reporter, page 269.*—The New England Construction Co. had a number of employees at work repairing tracks on the Boston and Albany Railroad. The laborers were transported by the railroad to the place where the work was to be performed, and upon arrival there they were accustomed to take their tools from the car and go to work. The employer furnished the tools. Some of the employees took the same tool day after day. Upon the day in question a discussion arose over the use of a particular tool, which resulted in a fight between two of the laborers. One John Gavros, a fellow laborer, took no part in the fight except that he advised the two participants not to fight. Because of this interference in the dispute two other employees struck him on the head, one with a shovel and the other with a sledge hammer. He brought proceedings under the workmen's compensation act for an award of compensation because of the injuries sustained. Compensation was denied after a hearing had before a member of the industrial accident board and this ruling was adopted by the board. An appeal was made to the supreme court of the State by the employee, but in that court the action of the board was confirmed. The reasons for not allowing the award are set forth in the opinion of the court rendered by Judge Crosby, in part as follows:

It can not reasonably be said that the danger of injury was incidental to the employment because men of different nationalities were

engaged in the work. The evidence shows that there had been no previous quarrel between the workmen on account of the use of the tools. Ordinarily assault by third persons can not be considered as incidental to the employment. But where the assault is one which might be reasonably anticipated because of the general character of the work, or of the particular duties imposed upon the workman, injuries resulting therefrom may be found to arise out of or in the course of the employment. (See cases cited in L. R. A. 1916A, 239.) However commendable may have been the claimant's act in endeavoring to dissuade his fellow workmen from fighting, it can not be said to have been incidental to his employment; it was no part of the duties imposed upon him, and the assault could not reasonably have been anticipated because of the character of the work. It is plain that the claimant's injuries were not the result of any special risk incident to his employment; there was no causal connection between the conditions under which his work was required to be performed and his injury. Accordingly he is not entitled to compensation under the act.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—GOING FROM WORK—*Clifton v. Kroger Grocery & Baking Co. et al.*, Supreme Court of Michigan (March 30, 1922), 187 *Northwestern Reporter*, page 380.—Albert Clifton was manager of one of the Kroger Grocery & Baking Co. stores located in the city of Detroit. On October 1, 1920, after he had finished his day's work, he started home with the money that he had collected at the store after the regular banking hours. The district manager of the company had instructed all store managers to take to their homes at the close of each day all money, except change, taken in after banking hours, and to care for it over night and in the morning to return it to the store. While crossing the street on his way to take a car that would carry him to his home he was struck by an automobile, knocked down and seriously injured, among other things losing the sight of an eye. He brought proceedings under the workmen's compensation act and was granted an award. The company and its insurer took the case to the supreme court of the State, raising the question of whether the accident which caused his injuries arose out of and in the course of his employment. The supreme court, speaking through Judge Steere, defined the phrase "out of and in the course of his employment" as meaning "those accidents which befall an employee while he is discharging some duty he is authorized or directed to perform for the furtherance, directly or indirectly, of his employer's business." The contention of the company and its insurer was that as the injury befell Clifton after he had closed the store for the day and was on his way home for the night, the trip he was taking was not because of his employment. With regard to this contention, the court said:

In support of this contention defendant's counsel invoked the general rule that the act does not apply to employees going to and from their day's work, and not in the immediate vicinity of their place of employment. This general rule has its full application to common laborers and other employees who work during stated hours at specified places, and when they are through for the day are free to go where they like and do as they please, with no further responsibility under their employment or duty to perform for their employers until working hours begin the next day, or until they again resume their employment. If in the meantime they are accidentally injured while going somewhere or doing some act wholly for their own benefit, they are not protected by the statute. But that rule does not necessarily apply where the injured employee is yet acting within the scope of his employment, carrying out the orders of his employer, and performing some duty to further the latter's business. Where he was going or what he was doing might also further his own interests, but it would not in itself bar him from recovery.

In concluding the opinion, affirming the award of compensation, the court said:

The instant case was not a casual or unusual service, incidentally performed for the employer's interest on the employee's initiative, but a regular, imperative, daily duty, in direct obedience to the terms of plaintiff's hiring, and in prompt compliance with a specific order to take the money home with him and there care for it. He had no orders or permission to carry the bulky roll with him while dining at some public place down town, or when attending a theater. He yet had an important duty to perform in the course of his employment, calculated to further his employer's business, and was engaged in performing it when injured. Under the general rule relative to performing a service within the scope of his employment tending to further his employer's interests, this case falls on the liability side of the line of demarcation so carefully pointed out, with review of many authorities, by Justice Fellows in *Sichterman v. Kent Storage Co.*, 217 Mich. 364, 186 N. W. 498. [p. 357.]

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—HORSEPLAY—*Lee's case*, *Supreme Judicial Court of Massachusetts (March 2, 1922)*, 134 *Northeastern Reporter*, page 268.—Francis H. Lee was an employee of the Washburn and Haywood Chair Co. He with other employees was required to register or ring out on a time clock when leaving work at noon. For this purpose the employees formed a line and took their turn at registering. At the noon hour on the day in question one Wallet, a fellow employee, endeavored to block the line and he was forcibly pushed out of the way and through a door. Lee, who was about to enter through the door to get into line and register, was knocked down by the force of Wallet coming through the door and severely injured. Lee brought proceedings under the workmen's compensa-

tion act for an award of compensation. An award was granted and the employer and its insurer appealed to the supreme court. That court granted that the injuries were received in the course of the employment, but reversed the decree and ordered a decree to be entered in favor of the appellants on the ground that the injury did not arise out of the employment. The reasoning stated by the court for this action was set forth in the opinion of Judge Crosby in part as follows:

The precise question presented by this record is whether an injury received by an employee in the course of his employment, as the result of fooling or play by other employees in which he takes no part, can be said to have arisen out of the employment. While this issue has been decided in other jurisdictions, it has not been directly adjudicated by this court. It is clear that there was no causal connection between the employment and the injury. The injury did not arise because the employee was exposed by the nature of his employment to some peculiar danger, it did not follow as a natural incident of his work, and it does not appear "to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." The pushing of Wallet out of the doorway by other employees and against the claimant, assuming it was a wrongful act, was not within the scope of his employment. Such acts, whether done in a spirit of play or from a malicious motive, have no relation whatever to the employment; and they are wholly outside the scope of the employment of those who caused the injury.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—HORSEPLAY—*Stark v. State Industrial Accident Commission, Supreme Court of Oregon (January 31, 1922)*, 204 *Pacific Reporter*, page 151.—On June 19, 1919, Ray E. Stark was an employee of the Columbia River Shipbuilding Corp. as a chipper and calker. During the afternoon of that day Stark took an air hose and purposely pointed it toward one W. T. Cooper, a fellow worker. The air blew Cooper's hat and goggles off just as he had finished disconnecting the air gun from his air hose. Cooper turned his air hose toward Stark, and walking forward kept the air blowing around Stark's chest and arms. When they got close enough together each grabbed the hose held by the other. Another employee took one of the hose, leaving both men holding the other one. Stark attempted to turn around, but stumbled and fell over a skid support block and in stumbling the hose got in such a position that the air from it was forced into his intestines, causing peritonitis, which caused his death on June 24, 1919. Claims for an award under the workmen's compensation act were filed with the accident commission, but were disallowed. An appeal was allowed to the circuit court where a trial was had and an award was allowed. The

case was then appealed to the supreme court of the State, where the trial court was affirmed and the judgment in favor of the claimants allowed to stand. Judge Bean, in rendering the opinion of the court, held that the injury was one arising out of and in the course of employment, saying in part:

There must be a causal connection between the employment and the injury and the injury must be the rational consequence of some hazard connected with the employment. The danger to which the employee is exposed may originate from the employment or outside of it, if the exposure is peculiar to it. In the one case the conditions of danger from the conduct of the employment cause the injury; in the other, the conditions of danger which arise outside the employment but are peculiar to it, cause it. Where there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former even when the connection is somewhat remote and when the direct and immediate agency is foreign.

In several of the cases it is indicated that where the injury is caused on account of the general surroundings of the place in which the injured employee is laboring and particularly where the instrument or appliance, which is a part of the plant and used in the prosecution of the work, is what causes the injury, or is a concurring cause, the accident may be said to arise out of and in the course of the employment.

It may be said that two things concurred to cause the injury: First, stumbling over the skid block; second, coming in contact with the air from the air compressor. Both the skid block and the air compressor were a part of the surroundings under which he had labored for more than a year. It is not necessary to say that the employer was at fault, or that Cooper was at fault, or that Stark was free from fault. It might be remarked, parenthetically, that it is not to be supposed that a crew of men could be obtained unless some of them during working hours would play practical jokes on their fellow workmen, especially if such men were red-blooded Americans. It is not conceivable that it was the intention of the legislature to preclude an injured workman or his beneficiaries from the benefits of the workmen's compensation act for the reason that at the time of, or immediately prior to, the accident causing the injury, such workman had been engaged in play, unless the injury or death results to such workman "from the deliberate intention of the workman himself to produce such injury." We think it may fairly be said under the facts in this case that the accident arose "out of and in the course of his employment." It was unquestionably caused by violent external means. The pressure in the air hose varied from 70 to about 110 pounds to the square inch. The appliance was known by some of the workmen to be an instrument of danger.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—INJURY BY FIRE—DISOBEDIENCE OF ORDERS—*Kraft v. West Hotel Co., Supreme Court of Iowa (December 15, 1921), 185 Northwestern Reporter, page 895.*—Miss Kraft

was employed by the defendant company as a chambermaid. On May 10, 1917, she was in her room preparing to retire and dressed in light clothing. The hotel management forbade the chambermaids to have or use in their rooms any alcohol lamps. Miss Kraft had one, which she was using on this night for the purpose of heating a curling iron. She had finished curling her hair and had left the room for a moment to find another girl to show her how to put the lamp out but found none. Upon returning to the room she saw that while she had been gone the wind had caused the flame to spread from the lamp to the curtains and other cloth about the room. She seized a towel and in her attempt to put out the fire her own clothing caught fire and she was severely burned. When others came to the room on hearing her screams they found the fire extinguished and found her lying on the bed wrapped in blankets which she had used to smother the flames. She brought proceedings for compensation under the workmen's compensation act. The arbitration committee made an award, but upon review by the industrial commissioner the decision of the committee was reversed. An appeal was taken to the district court and there the commissioner was reversed. There was a further appeal to the supreme court of the State, which brought up the question as to whether the injuries arose out of and in the course of the employment. This question was answered in the affirmative and the judgment of the district court awarding compensation affirmed. In arriving at this conclusion Judge Preston, speaking for the court, said in part:

It is true that a part of this whole transaction was the curling of her hair. But she had finished it, and had left the room, and upon returning discovered the fire, which threatened her employer's property. Under such circumstances it was her duty, as before shown, and she was expected, as an employee of the hotel company, to put out the fire. This is quite different from women generally curling their hair; nor was she engaged in the simple act of curling her hair as a matter personal to herself alone. We think, under the circumstances shown, the injury to her did arise out of and in the course of her employment.

There was no explosion of the lamp while she was curling her hair. That act had been completed up to the time when she had been injured. She was not injured while curling her hair. When she returned she found that some of the articles on the dresser were on fire, and the destruction of the building was threatened. In such a situation she was expected to put out the fire; perhaps it would have been her duty to do so and save her employer's property without any direction to do so. Suppose the fire had been started in some other way, or by the use of some other kind of a lamp, her duty to put out the fire would have been no different. She was injured, then, while attempting to put out the fire. She may have been negligent in the first instance in using such a lamp, but appellant does not claim that that question figures in the case.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—MURDER BY EMPLOYEE—*Scholtzhauer v. C. & L. Lunch Co., Court of Appeals of New York (February 28, 1922), 134 Northeastern Reporter, page 701.*—Irma D. Scholtzhauer, a waitress, was an employee of the C. & L. Lunch Co. in the city of New York on June 28, 1919. A colored dishwasher by the name of Arthurs was also in the employ of the company, and on the date named he invited the woman to go out with him that evening. She declined the invitation. Her statements to another employee that she would not go out with a negro was communicated to Arthurs and it made him very angry. Later in the day, as the woman was pushing some dishes through an opening in the partition between the restaurant and the kitchen, Arthurs drew a pistol and shot her. She died shortly thereafter. Proceedings under the workmen's compensation law were brought by the mother and two sisters of deceased, but only the claim of the mother was allowed by the industrial board. Upon appeal to the appellate division the award was confirmed and the case was taken up to the court of appeals. The order of the lower court was reversed and the claim for compensation dismissed in that court. Judge McLaughlin rendered the opinion, in which he said:

To justify the State industrial board in making an award, the injury complained of must have arisen both out of and in the course of the employment. It must have been received while the employee was doing the work for which he was employed, and in addition thereto such injury must be a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. An award can not be made where the accident results from the chances of life in general to which the injured person was exposed in common with all mankind rather than as an employee.

The authorities cited by the respondent are not in point. The injury in such cases all arose over some dispute as to the work to be done by the employee or in some other way were directly traceable to and connected with the employment. Here the injury to the daughter, while it arose during the course of, did not arise out of, the employment. The only suggestion that the employment had any bearing on the injury was that the employment brought the two persons together. The murder, however, arose not out of the employment, but because the deceased refused to accept Arthurs' invitation, and his anger by reason thereof. The fact that the murder took place on the employer's premises was a mere incident. It might equally well have happened on the sidewalk in front of the building, or while the daughter was on her way home, or at any other place where Arthurs had chanced to meet her. Had Arthurs made the proposal to the daughter while she was away from the place of employment, and after her rejection of it had killed her, it could not with any reason be contended that a claim could arise under the compensation law.

Order reversed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET RISKS—STABBING BY MADMAN—*Katz v. Kadans & Co. et al.*, Court of Appeals of New York (January 24, 1922), 134 Northeastern Reporter, page 330.—Louis Katz was a dairyman's chauffeur on May 7, 1920. On that day while driving his employer's car after delivering some cheese he was stabbed by an insane man. The man was being followed by many people and he was stabbing anyone that came near him. Katz claimed compensation for his injuries under the workmen's compensation act and was granted an award by the State industrial commission. The employer and insurance carrier appealed, but the appellate division of the supreme court affirmed the award and the case was brought to the court of appeals for final action. That court by a divided bench, four to three, affirmed the award. Judge Pound rendered the opinion of the court, as follows:

If the work itself involves exposure to perils of the street, strange, unanticipated, and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute. This is the rule unequivocally laid down by the House of Lords in England:

"When a workman is sent into the street on his master's business, * * * his employment necessarily involves exposure to the risks of the streets and injury from such a cause [necessarily] arises out of his employment." (Finlay, L. C., in *Dennis v. White* [1917], L. R. App. Cas. 479.)

So we have to concern ourselves only with the question whether claimant's accident arose out of a street risk.

Cases may arise where one is hurt in the street, but where the risk is of a general nature, not peculiar to the street. Lightning strikes fortuitously in the street; bombs dropped by enemy aircraft do not expose to special danger persons in a street as distinguished from those in houses. (*Allcock v. Rogers* [1918], House of Lords, 11 B. W. C. C. 149.) The danger must result from the place to make it a street risk, but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer. The street becomes a dangerous place when street brawlers, highwaymen, escaping criminals, or violent madmen are afoot therein as they sometimes are. The danger of being struck by them by accident is a street risk because it is incidental to passing through or being on the street when dangerous characters are abroad.

Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets which are peculiar to the use of the streets and do not commonly happen indoors.

The risk of being stabbed by an insane man running amuck seems in a peculiar sense a risk incidental to the streets, to which claimant was exposed by his employment. *Matter of Heidemann v. Am. Dist.*

Tel. Co., 230 N. Y. 305, 130 N. E. 302 [Bul. No. 309, p. 310], does not hold that where the street risk is one shared equally by all who pass or repass, whether in or out of employment, it should be shown that the employment involves some special exposure; that the night watchman is exposed by his employment to the risk of being shot by accident as he hears a sudden brawl which it is his duty to investigate, while the night clerk whose business brings him on the street, but whose duty is not to seek danger, is not so exposed. We decided the case before us and no other, dwelling naturally upon those features of the situation which emphasized the connection between the risk and the employment. But the fact that the risk is one to which every one on the street is exposed does not itself defeat compensation. Members of the public may face the same risk every day. The question is whether the employment exposed the workman to the risks by sending him on to the street, common though such risks were to all on the street. (Moran's Case, 234 Mass. 566, 125 N. E. 591 [Bul. No. 290, p. 404]).

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—SUDDEN IMPULSE TO SAVE PROPERTY—*Sebo v. Libby, McNeill & Libby, Supreme Court of Michigan (December 21, 1921), 185 Northwestern Reporter, page 702.*—Louis Sebo was in the employ of the defendant company as a gardener. His duty was to care for the lawn and shrubs between the highway and the company's plant. While at his work on the lawn, a team belonging to a public drayman from which cream was being unloaded at his employer's plant became frightened and began to run away. Sebo dropped the rake he was using, rushed to the horses and grasped a rein and part of the harness. He clung there for a moment, but losing his hold he fell, receiving injuries from which he died. A compensation award was made in favor of his widow. The employer and his insurer took the decision to the supreme court of the State, but the award was affirmed on the grounds that the injury arose out of and in the course of the employment. In the decision of the court, Judge Clark said:

Mr. Sebo may not have known whether the cream belonged to his employer or not, nor its value. But whether he did or not, and whether the cream was the property of the defendant or not, the delivery of it to the plant was the business of the employer. Mr. Sebo acted in an emergency, upon sudden impulse, to prevent a runaway upon his employer's property, and it may be inferred that the act was to prevent loss to the employer and that it was in furtherance of the employer's business. The finding of the board, therefore, must be sustained.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—VIOLATION OF RULES—*Hamberg v. Flower City Specialty Co., Supreme Court of New York, Appellate Division*

49978°—23—25

(July 6, 1922), 195 *New York Supplement*, page 170.—Yetta Hamberg was employed by the company named in a four-story building, her workroom being on the fourth floor. There was no elevator other than for freight, the employees being expected to walk up the stairs. Yetta, a girl of 15, walked to the second floor one morning, and finding the elevator there entered it and undertook to operate it to the fourth floor, and was killed. She had previously had some instruction from the girls as to its operation and had used it, but it was against the rules, and "it affirmatively appears that this girl had been told to keep away from the elevator."

Her mother submitted a claim for compensation, which the State industrial board allowed, whereupon the employer and insurer appealed. The claim was made that the injury was not one arising in the course of employment. As to this Judge Kiley, speaking for the court, said:

She was not engaged in any work for the benefit of her employer, but, on the contrary, was endeavoring to favor herself by avoiding the extra effort she would have to make going up the two flights of stairs. Under such circumstances the courts have held a claimant, or a claimant's intestate, was not acting in the course of the employment, and was not engaged in the work for which she was employed.

The award should be reversed, and claim dismissed, with costs against the State industrial board. All concur.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—DEATH BY FALL DUE TO DISEASE—PROXIMATE CAUSE—WILLFUL AND SERIOUS MISCONDUCT—*Gonier v. Chase Companies*, *Supreme Court of Errors of Connecticut* (November 30, 1921), 115 *Atlantic Reporter*, page 677.—Joseph Gonier was employed by the company named, as a painter, and at the time of his fatal accident had been so employed for about two years. He was troubled with indigestion, causing fainting and a consequent liability to fall. His physician had advised him against working in high places, but he replied that he knew no other work, and continued to do such work as his trade called for. The employer knew of his condition in this respect.

On April 15, 1920, Gonier was given his choice between inside and outside work, and chose the latter, saying that he was not feeling well, and he preferred to be out of doors. He went to the dispensary of the establishment and got some medicine for indigestion and returned to work. After a time he sat down, not feeling like continuing, but presently arose to resume work, fell backward, and received fatal injuries. Compensation was awarded Gonier's widow, from which the employer appealed to the superior court, which asked the advice of the supreme court. This was in favor of an affirmance of the award.

Chief Justice Wheeler delivered the opinion, stating the question as being whether the injury was one arising out of the employment; or, more exactly in this case, whether the death was due to the fall or to the attack of vertigo. As to this he said:

The fall of Gonier was the event, and it was followed by his injury which the fall was adapted to produce. In *Smith v. Connecticut Ry. & Ltg. Co.*, (80 Conn. 268, 270, 67 Atl. 888, 889), Baldwin, C. J., defined proximate cause thus:

"That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred."

Applying these definitions to the facts of this case we must hold that the proximate cause of the decedent's injury was his fall, and the proximate cause of his fall was his attack of indigestion. Whether his physical condition had been idiopathic, or due to his own fault, or to something that had occurred while he was outside the course of his employment, if by reason of it he fell and injured himself, the proximate cause of injury in each case was the fall, and of the fall the physical condition. In his discussion of this subject in *Fiarenzo v. Richards & Co.* (93 Conn. 581, 586, 107 Atl. 563, 565), Gager, J., quotes the maxim of Lord Bacon:

"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth the act by that, without looking at any further degree."

And this has been the underlying principle of our decisions.

In support of this conclusion, Chief Justice Wheeler cited a number of cases, saying that "We have examined all the cases upon this subject"; and while the courts have not ruled uniformly, the decision reached is the one that the court approves.

The contention was also made that Gonier was guilty of "willful and serious misconduct" in going upon the scaffold when subject to such indisposition. In considering this the court reached the conclusion:

If his conduct could be held to have been misconduct, it would be difficult to hold it to have been serious misconduct. But, aside from this, it could not be held to have been willful. He did not continue to work knowing at this time of his liability to suffer one of these spells of unconsciousness which would be likely to cause him to fall, so that his course could not be found to have been done purposely, with knowledge. Neither could it be said that the circumstances show on his part a reckless disregard of consequences for his own safety.

A similar conclusion to the foregoing was arrived at in a similar case before the Court of Appeals of Maryland, a workman falling in an epileptic fit and suffering fatal injuries. (*Baltimore Dry Docks & Ship Building Co. v. Webster* (Jan. 10, 1922), 116 Atl. 842.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—DEATH DUE TO STORM—NEGLIGENCE—*Merrill v. Penasco Lumber Co. et al.*, *Supreme Court of New Mexico (January 13, 1922)*, *204 Pacific Reporter*, page 72.—On March 3, 1920, J. M. Merrill was an employee of the Penasco Lumber Co., working in the woods in the Sacramento Mountains as a teamster. During the day, while Merrill was driving a team skidding logs, a violent windstorm arose which blew down many trees. One of the trees in falling struck Merrill and killed him. No one was working on the tree, and the employer in no way caused it to fall. Proceedings were brought under the workmen's compensation act for an award in favor of the surviving widow and children. Judgment was rendered in their favor, and the employer and the insurance carrier appealed to the supreme court. It was contended by the appellants, among other things, that the accident did not arise out of the employment, and that the tree fell through no act or negligence of the employer but because of a violent storm, for which no human agency could be responsible, and that the employee was in no greater danger from the accident than were the other employees or the general public. Judge Davis, in rendering his opinion affirming the judgment appealed from, said in answer to these contentions:

If we were dealing with a common-law action for personal injuries to an employee, the negligence of the employer would be the first subject of inquiry, for it would be the basis of the liability. But no such question arises under the workmen's compensation law. The economic theory of its enactment is to place upon the industry instead of upon the individual the loss resulting from injuries to its employees, and the loss is to be thus shifted in the case of all accidents arising out of and in the course of the employment. It is a new liability, created entirely by statute, and having no relation in principle or effect to that which arose at common law for injuries or under statutory provisions covering death by wrongful act.

The words "arising out of" the employment are found in the original English act and are in the statutes of most of the States. The question as to whether a particular accident falls within their scope has been the subject of frequent decisions. Certainly the employment must have had some causal connection with the accident; the accident must result from a risk reasonably incident to the employment, or the injury can not be said to arise out of it. A risk common to the public generally, and not increased by the circumstances of the employment, would not fall within this language of the act. A risk peculiar to the industry certainly would. Between the two extremes comes the gradation in instances which are more difficult of solution as they reach middle ground.

! The rule is illustrated by the decisions in cases where the death of the employee was caused by lightning. Without attempting to lay down an absolute rule, for each case must be determined according to its own facts, the authorities seem to hold that, if the deceased

by reason of his employment was exposed to a risk of injury by a storm or other action of the elements greater than that to which the public was subject, or his employment necessarily accentuated the natural hazard, the injury arose out of the employment.

The award was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—CHOICE OF REMEDIES—*Bristol Telephone Co. v. Weaver, Supreme Court of Tennessee (December 8, 1921), 243 Southwestern Reporter, page 299.*—Edwin E. Goodwin was employed by the Bristol Telephone Co. as an electrician. His duties required him to install telephones and make the necessary electric connections. On February 7, 1920, in the City of Bristol, Tenn., he and another employee were engaged in the installation of a telephone in a private residence. In the course of his employment Goodwin ascended one of the poles upon which the telephone company's wires rested for the purpose of connecting a telephone wire to a line, the other end of which had only a few minutes before been connected to a private residence on the opposite side of the street. The wire which he handled had been pulled across the street beneath high-powered wires of the gas and electric company, which company was engaged in furnishing electric current to the inhabitants of the city. The high-powered wires carried 2,300 volts of electricity and were required by a city ordinance to be at all times well insulated. Goodwin attempted to pull the slack out of the new wire so as to properly connect it to the wires at the top of the pole. The pole suddenly moved and leaned toward the street, causing an old wire which was suspended a foot or two above the high-powered wires of the gas and electric company to sag and come in contact with one of the high-powered wires at a place where the wires were not insulated. The old telephone wire became instantly charged with a heavy current of electricity, which was transmitted to the body of Goodwin and he was killed. An action for damages was instituted against the telephone company and the electric company because of the alleged negligent killing of Goodwin. It was contended that the telephone company was negligent in permitting one of its old unused and dead wires to remain attached to its pole in such a way as to come in contact with the defectively insulated electric wire of the electric company. It was further alleged that the electric company was negligent in not having its electric wires insulated in compliance with the city ordinance. The telephone company set up a defense that it was not liable, on the grounds that both Goodwin and itself were under the provisions of the workmen's compensation act. This defense was upheld by the trial court, and the suit against the telephone company was dis-

missed. The electric company raised substantially the same question, but was not successful, and the case proceeded to trial. A judgment amounting to \$9,000 was rendered in favor of the plaintiff. An appeal was taken in the court of civil appeals, but the judgment of the trial court was affirmed. The case was then taken to the supreme court of the State. The electric company contended that any right to compensation for the death of the deceased was controlled exclusively by the workmen's compensation act, and further that the act provided a remedy which excluded all other remedies. Judge Hall, speaking for the supreme court, again affirmed the judgment in favor of the plaintiff. In the course of his opinion he quoted section 14 of the act, after which he said:

Section 14 of said act gives certain rights to employer and employee. It provides that, whenever an injury for which compensation is payable under said act shall have been sustained under circumstances creating in a person other than the employer a legal liability to pay damages for such injury, the injured employee may, at his option, either claim compensation from his employer, or proceed at law against such other person to recover damages, or proceed against both the employer and such other person—that is, against his employer under the workmen's compensation act and against such other person in a common-law action—but he shall not be entitled to collect from both. If, however, compensation is awarded him under the workmen's compensation act against his employer, his employer, upon paying the compensation or becoming liable therefor, may collect in his own name or in the name of the injured employee in a suit brought for the purpose, from the other person in whom the legal liability for damages exists, the indemnity paid or payable to the injured employee.

It will readily be seen that the provisions of this section of the workmen's compensation act are strictly for the benefit of the employer and employee. It in no way protects a third person from suit whose negligence may have contributed to the injury or death of the employee. There is nothing in said section which abridges or limits the employee's common-law right of action against such third person. The fact that the telephone company's negligence may have concurred with that of defendant in causing the injury can make no difference in so far as the right of the employee to proceed against the defendant is concerned.

Our act nowhere undertakes to deny or abridge the employee's common-law right of action against a third person whose negligence may be the sole or a contributing cause of his injury. There is therefore no reason why plaintiff can not maintain her suit against defendant, and defendant's first and second assignments of error are therefore overruled.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—EMPLOYEE'S RIGHT TO SUE—*Whalen v. Athol Mfg. Co., Supreme Judicial Court of Massachusetts (October 11, 1922), 136 Northeastern*

Reporter, page 600.—Peter Whalen was employed on the premises of the company named, working for an independent contractor, and suffered injury through the negligence of the company. He accepted compensation for his injury from the insurance company with which his employer was insured, under an option granted by the law to proceed either in suit to recover damages against the negligent party or to claim compensation under the statute, though both recoveries can not be claimed. The statute further provides that the employer may enforce by an action at law the liability of such third person, with provision that if the recovery exceeds the amount paid to the employee four-fifths of the excess shall be paid the latter.

Whalen sought to induce the insurer to bring the suit for damages against the third party, which the company declined to do. He thereupon sought to bring the action in his own name, but a demurrer was sustained to his complaint and judgment ordered against him. He thereupon brought exceptions and appealed the case to the supreme court. Judgment was against him and the appeal was dismissed on the grounds stated in the concluding paragraph of the opinion of the court, delivered by Judge Pierce, which reads:

Upon satisfaction of a judgment obtained by the insurer against third persons, it holds four-fifths of the sum received over compensation paid the employee in trust for the employee; but the obligation to hold the interest of the employee in the excess fund in trust does not arise from or relate to any trust duty of the insurer to prosecute the action, which resulted in a judgment under the authority of the statute to prosecute actions against third persons. Whether it will prosecute such an action is for it alone to determine and the absence of a right in the employee to have an action brought by the insurer can not be converted into a right by the refusal of the insurer to enforce such action when it is requested so to do. Nor can such refusal justify the maintenance of an action by the employee for the benefit of the insurer and for his own benefit.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION—CONSTITUTIONALITY OF STATUTE—CONSTRUCTION—*City of Taylorville v. Central Illinois Public Service Co., Supreme Court of Illinois (December 22, 1921), 133 Northeastern Reporter, page 720.*—John O'Brien, an employee in the street department of the city of Taylorville, while engaged in his duties came in contact with live wires owned by the Central Illinois Public Service Co. and was badly burned. O'Brien filed an application with the industrial board for an award under the workmen's compensation act. An award was made in his favor for \$1,115.16. The Illinois law provided that in case the injury was caused under circumstances that

created a legal liability in a third person the employer shall pay the employee compensation and the rights of the employee against the third person shall be subrogated to the employer, and the employer may recover damages not exceeding the amount payable under the act. (Sec. 29.) The city brought an action against the company, alleging negligence for failing to remove from the street the broken wire that was the cause of O'Brien's injuries. At the trial the question arose as to whether the amount paid by the city to O'Brien was the measure of damages for which the company was liable to the city in consequence of its negligent act. The court held that it was, and directed the jury that if they found that the city was entitled to recover, the amount of damages was that fixed by the workmen's compensation act. A verdict and judgment followed in favor of the city, and the company appealed on the question of the validity of the statute involved. Counsel for both sides assumed that the compensation law authorized an action for the amount of the award and from that argued for and against the constitutionality of the provision before the supreme court. The court held that the provision as interpreted by counsel would violate the due process clause of the constitution as it would create a liability in the third person without giving him "notice and an opportunity to be heard to defend, enforce, and protect his rights." But the interpretation of counsel was held not correct; the statute was held constitutional, the lower court was reversed, and the case remanded for a new trial. The opinion, rendered by Judge Cartwright, is in part as follows:

In cases where private rights alone are involved, courts of review ordinarily decide questions submitted by counsel and do not go outside of or beyond such questions; but this case involves the validity of a statute of general public interest, and it ought not to be decided on views of counsel which do not appear to be correct. We do not find in the act any warrant for saying that the judgment is to be for the amount of compensation awarded by the industrial commission to an injured employee. The action is not to enforce any liability of the employer to his employee created by the workmen's compensation act, but, if the employer is not at fault, section 29 gives to him the right to maintain an action for damages resulting from the wrongful act of a third person. The workmen's compensation act does not rest on the theory of negligence, but on the theory that injuries to workmen and death caused by accident in any business shall be regarded as part of the expense of the business and be borne by the business. The workmen's compensation act fixes arbitrary standards regardless of actual damage, and the section gives to the employer a right of action against a third party for the amount of damage resulting from the negligent act of such party, which is the same action which the employee would have had but for the prohibition of section 6 [prohibiting suits by employees covered by the act].

The condition of section 29 is that there shall be a legal liability for damages in some person other than the employer to pay damages,

in which case the employer may bring an action against such person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under the act. The language of the act is that the amount recovered shall not exceed the aggregate amount of compensation payable under the act; and necessarily that would be so, because the amount paid by the employer is the limit of the damages suffered by him, regardless of the amount of the actual damage, which may greatly exceed such sum. Proof of the award by the industrial commission is admissible, not to prove damages or fix the amount to be recovered but to establish a limit to the recovery. It was for the plaintiff to prove the facts creating a legal liability of the defendant for damages and the resulting damage, just as O'Brien would have been called on to make such proof if his right of action had not been transferred to the plaintiff, and the defendant had a right to contest the same. The rulings of the court during the trial and the instructions to the jury as to the law were wrong.

The judgment is reversed and the cause remanded.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION OF INSURER—*Hartford Accident & Indemnity Co. v. Englander, Court of Errors and Appeals of New Jersey (September 30, 1921), 118 Atlantic Reporter, page 628.*—Simon Englander, an employee of the Fidelity Trust Co., was injured by the negligence of an employee of a third party, the Fisher-Sweeney Bronze Co. However, he secured an award against his employer, which its insurer, the Hartford Accident & Indemnity Co., proceeded to pay. Englander also sued the company whose employee caused his injury, and its insurer made a payment to Englander in settlement thereof. The Hartford company thereupon ceased making payments and brought this action to recover the compensation which it had paid under the award. Two grounds were named as a basis of this suit, one of which is a matter of evidence, and the other of law. The first is not of interest, while the second is decisive. The statement is made in the language of Vice Chancellor Foster, of the court of chancery, from which this appeal was taken, the court of errors and appeals affirming the dismissal of the bill for the reasons set forth. The essential language is as follows:

The second theory of complainant's case is that in some undisclosed way it is entitled to be subrogated to the rights of the defendant against the tort-feasor, the Fisher-Sweeney Bronze Co., and that this right of subrogation entitled it to the decree it seeks against defendant, regardless of the fact that it may have an entirely complete and adequate remedy at law against the defendant for money had and received by him on its account.

Admittedly there is no privity of contract, or otherwise, between complainant and defendant, and while it may be that the Fidelity Trust Co., as employer, on giving the statutory notice would, under

the provisions of the act, be subrogated to the amount of the compensation awarded, to the rights of the defendant against the third party, the tort-feasor, I am unable to find anything in the act, or any principle of equity, in the absence of privity between the parties, that will sustain complainant's claim to subrogation, and I will therefore advise that the bill be dismissed.

WORKMEN'S COMPENSATION—INJURY SUSTAINED IN THE COURSE OF EMPLOYMENT—DEATH FROM ACT OF ROBBERS—*Lumbermen's Indemnity Exchange et al. v. Vivier, Court of Civil Appeals of Texas (February 3, 1922), 239 Southwestern Reporter, page 286.*—On September 27, 1919, one Jules Vivier was in the employ of the George W. Smyth Lumber Co. as night watchman. While on duty that night he was assaulted by unknown persons and killed. The industrial accident board made an award under the workmen's compensation law of the State in favor of the widow. The insurance carrier brought suit in the district court to set aside the award, alleging that the purpose of the assault was robbery; that Vivier did not receive his injury and meet his death in defense of the property of which he was watchman, and that as his assassination had no connection whatever with his duties, his injury did not arise out of or in the course of his employment. The evidence upon which this contention was based showed that: Vivier had received his wages, amounting to \$19.25, during the day preceding the night of the assault; he had no known enemies; he had a pleasant disposition; everything was in order near the place the man's body was found except that a piece of pipe was found near by; in the neighborhood his pay envelope was found and only a few cents were found in his pockets. In the morning following the assault the man was found unconscious sitting up in a chair; he was taken to the hospital, where he died about 9 o'clock. It appeared that he had been struck on the back part of the head. From this evidence Chief Justice Hightower, stating the opinion of the majority of the court, said in part:

The injury which resulted in the death of Jules Vivier was not sustained in the course of his employment, under the provisions of the workmen's compensation act of this State. See section 1, pt. 4, p. 292, Workmen's Compensation Act of Texas. In the act as amended in 1917 we find the following:

"The term 'injury sustained in the course of employment,' as used in this act, shall not include:

"An injury caused by the act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee or because of his employment."

We are of the opinion that the only reasonable conclusion or deduction that can be drawn from the undisputed evidence in this case is that the deceased met his death at the hands of an assailant whose motive was to rob the deceased of money on his person at

the time, and that therefore such assault was prompted by a reason personal to deceased, and was not directed against him as an employee of the George W. Smyth Lumber Co. in any respect, or because of such employment, and that, therefore, section 2 above quoted excludes the injury which resulted in the death of the deceased as being one sustained in the course of his employment.

It follows from these conclusions that the judgment of the trial court should be reversed and judgment here rendered in favor of appellants; and such order has been accordingly made.

Judge Walker delivered a vigorous dissenting opinion, in part as follows:

My brethren have concluded that Vivier was murdered and robbed because of reasons personal to him, and not directed against him as an employee of the Smyth Lumber Co. Who murdered and robbed Vivier, and what was the motive? My brethren exclude a motive of revenge, because they find:

"The affirmative and undisputed evidence is that deceased was a man of lovable disposition and had no enemies so far as known."

I believe the evidence fully supports the conclusion that Vivier was assaulted by a night prowler, who entered the premises with no motive directed against him personally, but for the purpose of pilfering the premises, and having found Vivier on the premises, assaulted and robbed him as an incident of his unlawful entry. If Vivier was assaulted because he was the night watchman and not because he was Vivier, then this judgment should be affirmed, for his employment subjected him to just the risk that resulted in his death. As I think such an inference can and should be drawn from the testimony in this case, and as the trial court so found, I think his judgment should be affirmed.

On rehearing, Chief Justice Hightower said:

We have carefully considered appellee's motion for rehearing in this cause, but are still of the opinion, for the reasons stated in the former opinion, that the evidence adduced on the trial as shown by the present record was insufficient to sustain the trial court's judgment in favor of appellee. We are now of the opinion, however, that we ought not to have rendered judgment in favor of appellant, but should have reversed the trial court's judgment and remanded the cause. It follows that appellee's motion for rehearing, in so far as it complains of our rendition of judgment in favor of appellant, should be granted; and it is so ordered. It is now ordered by this court that the trial court's judgment be reversed, and that the cause be remanded.

WORKMEN'S COMPENSATION—INJURY SUSTAINED IN THE COURSE OF EMPLOYMENT — HORSEPLAY — UNINTENTIONAL SHOOTING — *United States Fidelity & Guaranty Co. v. Cassell, Court of Civil Appeals of Texas (May 24, 1922), 243 Southwestern Reporter, page 504.*—L. P. Cassell was a stage employee of the Wichita Theater Co. W. C. Shaver was manager of the theater company and as such had imme-

diate supervision, direction, and command over the employees on the stage, including Cassell. At about 11.30 on the night of October 9, 1920, Cassell and other employees were on the stage in the theater. Shaver, in fun and as a prank with no intent to injure anyone, aimed a pistol at the employees and snapped it several times. He finally snapped the pistol at Cassell, but this time with the result that it exploded and the bullet struck Cassell in the back, injuring his spinal column, and causing complete paralysis from the waist down. Proceedings were brought to recover an award of compensation under the provisions of the state workmen's compensation act. Judgment was rendered in favor of Cassell, and an appeal was taken in the court of civil appeals. The contention was raised that the injury was not sustained by him "while in the course of his employment," was not "one having to do with and originating in the business of his employer," and that the injury was not received "while engaged in or about the furtherance of the affairs or business of his employer." The court said that it was conceded that Cassell at the time of the injury was engaged in the business of his employer and that he did not instigate nor take any part in the horseplay which resulted in his injury. However, the question remained before it whether the injury was of a kind and character having to do with and originating in the business of his employer. The court reversed the lower court in its decision and held that "under the peculiar wording of the Texas statutes the injury resulted in the use by Shaver of a pistol which was his private property in a manner and circumstance foreign to his duty as vice principal." In the course of its reasoning in arriving at the conclusion to reverse the lower court, Judge Hall, speaking for the court, said that "it was clearly beyond the scope of his employment to be snapping his pistol at those associated with him in the business, and snapping pistols about the premises during the interim between plays was certainly not a matter which had anything to do with his duties, and did not originate in and is utterly without connection in any way with the business of his employer."

WORKMEN'S COMPENSATION—INSURANCE—CONSTITUTIONALITY OF STATUTE—PRESCRIBING FORM OF INSURANCE POLICY—*Travelers Insurance Co. v. Industrial Commission, Supreme Court of Colorado (June 5, 1922), 208 Pacific Reporter, page 465.*—An action was brought by the Industrial Commission of Colorado against the Travelers Insurance Co. and another, in which the constitutionality of a provision of the workmen's compensation law was questioned. The part of the law objected to was section 22, Laws of 1919, page 708, which reads:

The industrial commission shall from time to time approve and prescribe a standard or universal form, as nearly as possible, for every contract or policy of insurance, endorsement, rider, letter, or other document affecting such contract, for use in insuring the compensation herein provided for.

The insurance company, failing to obtain a judgment in its favor in the lower court, took the question to the supreme court of the State for adjudication. Their contention was that the provision in question delegated to the commission legislative power, which was prohibited by the constitution of the State. Many cases were cited to uphold their contention, but the supreme court, in its opinion, said that no one of them dealt with the insurance feature of workmen's compensation, or any similar subject, and therefore that they were not controlling. The supreme court held that the provision was constitutional.

Judge Burke stated the reasons of the court as follows:

The reason for the rule that a legislative power may not be delegated should first be noted. The power to "legislate" is the power to enact laws. A "law" is a rule of action prescribed by authority. To "prescribe" means to dictate, to positively command. Such laws being obligatory, leaving no option to those upon whom they operate, the people, who confer the authority, have a right to know by whom the power will be exercised, and having selected that agency with confidence in its judgment in the exercise of the wide discretion vested in it have a right to demand that such powers will not be delegated to unknown agents and their original authors be thus subjected to an exercise thereof un contemplated. To secure this protection the people have, by constitutional enactment, limited the exercise of this great power to those directly chosen by them and specifically authorized thereto.

Our workmen's compensation act contains 153 sections. But 10 of these relate directly to the subject of insurance. The disputed portion of section 22 might be wiped out and the act remain unimpaired. This portion therefore is but an administrative incident. If the industrial commission failed to prescribe a standard form of policy, not even the insurance feature of the act would be seriously interfered with.

Moreover our workmen's compensation act is optional. Employer and employee may bring themselves within its terms or stay out as they elect. Compensation insurance is a new field created by the act. No occupied territory is interfered with. The standard policy clause operates only on those who elect to become subject thereto. The form of policy is not forced upon them. It is no condition precedent to further operation in a field theretofore open. Moreover, having elected to come within the terms of the act, the employer is given a choice of three methods of insuring his liability; he may carry the insurance personally, or in the State fund, or in a private company. The latter privilege has attached to it the condition that the form of policy used must be that prescribed by the commission. In so far as this is dictation to the insurance company, it is dictation by the em-

ployer rather than by the law, the fixing of the form by private contract rather than by statute. The employer in effect says :

"I have elected to take advantage of the act, and of the three methods of insurance have elected to cover my liability in a private company. My right to make this election is based upon a condition which I have accepted. You must therefore write me the form of policy prescribed by the commission. Otherwise I will do no business with you."

When the insurance company elects to write the risk, it must comply with the condition thus fixed. There is in all this no element of legal compulsion; hence the power to prescribe the policy form is not legislative in the sense in which the delegation of such power is prohibited.

The judgment is accordingly affirmed.

WORKMEN'S COMPENSATION—INSURANCE—FAILURE TO INSURE—*People v. Donnelly, Court of Appeals of New York (January 24, 1922), 134 Northeastern Reporter, page 332.*—Albert E. Donnelly was an employer of labor, engaged in the business of painting, a hazardous employment as defined in group 42 of section 2 of the workmen's compensation law. For his failure to comply with the law requiring certain employers to secure compensation by insuring in the State fund, or by insuring with an insurance company, or by furnishing satisfactory proof to the commission of their financial ability to pay such compensation for themselves, the district attorney of Kings County brought criminal proceedings against him. Section 52 of the law as amended, under which the proceedings were brought, reads:

Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section 11 of this chapter.

The defendant was tried and found guilty as charged, but the court granted the defendant's motion in arrest of judgment and discharged him upon the ground that he was not amenable to prosecution in courts of criminal jurisdiction. This order was affirmed by the appellate division (198 App. Div. 296, 190 N. Y. Supp. 502, Bul. No. 309, p. 338), and the case was taken to the court of appeals for review. That court reversed the orders of the appellate division and the special sessions and held that the defendant was subject to criminal prosecution for a violation of the statute. Judge Crane rendered the opinion of the court, which reads in part as follows:

I am inclined to the opinion that the legislature has made the failure a misdemeanor to be punished as provided in section 1937 of the penal law (Consol. Laws, c. 40); i. e., by imprisonment in a

penitentiary or county jail for not more than one year, or by a fine of not more than \$500, or by both. I do not consider that the words of section 52 reading, "and have the effect of enabling the injured employee * * * to maintain an action for damages in the courts, as prescribed by section 11 of this chapter," is the punishment, penalty, or penal discipline for the misdemeanor created by that section. There might be much force in the position taken by the defendant if it were not for the amendments made to this law as originally enacted.

Attention was then called to the fact that by chapter 622 of the Laws of 1916, section 52 was amended by adding after the words, "Failure to secure the payment of compensation shall," the words, "constitute a misdemeanor and." Continuing, the court said:

Prior to the amendment, therefore, the workmen's compensation law provided that, where the employer failed to secure payment of compensation, a penalty could be recovered in an action by the commission, and the employee could maintain a common-law action in which certain defenses were barred to the employer. All of these are in the present law, but there is the addition made by the above amendment that the failure to secure payment of compensation shall constitute a misdemeanor. Why were these words put in the section if it were not intended to add another punishment or effect to the failure of the employer? These words could give no additional force to the provision regarding the penalty or that regarding the maintenance of an action. They were meaningless unless they brought to section 52 something more than had previously been in it. And that something more could only be and must be that which the words themselves state, namely, that a failure to secure payment of compensation would constitute a misdemeanor.

WORKMEN'S COMPENSATION — INSURANCE — FAILURE TO INSURE — EMPLOYERS' LIABILITY — PRESUMPTIONS — *Martin v. Chase*, *Supreme Court of Iowa (September 26, 1922)*, *189 Northwestern Reporter*, page 958.—One Chase, a clerk in a hotel, was injured during an altercation with a guest who was alleged to be intoxicated. Chase sued to recover damages and secured a verdict and judgment in the district court of Woodbury County. A number of points were involved in the case, but the one of particular interest is the effect of a provision of the workmen's compensation act of the State in regard to employers failing to insure under the act. In discussing this point, Judge Weaver, who delivered the opinion of the court, said:

As is commonly well known, compliance of an employer with the requirements of the act are to a certain extent optional, but failure to comply is not without its penalty in the fact that thereby the employer's common-law rights are materially abridged.

In the case before us the defendant does not appear to have formally rejected the benefits of the act, but it is conceded at least that he never had provided insurance as provided by law against his lia-

bility as an employer. As applicable to this condition the statute provides (Code Supplement 1913, section 2477m41, as amended by section 20, chapter 270, Laws of the 37th General Assembly) that in case of such neglect the employer shall be liable in case of injury to any workman in his employ under the common law as modified by the statute, and in the same manner and to the same extent as though such employer has legally exercised his right to reject the compensation provisions of the compensation statute. And in connection with this enactment it is still further provided that in an action by an employee to recover damages from an employer for personal injury arising out of and in the course of his employment, where it appears that such employer has rejected the terms of the statute or failed to insure the risk, it shall be presumed that the injury to the employee was the "direct result and growing out of the negligence of the employer and the burden of proof shall rest upon the employer to rebut the presumption of negligence."

Construing this statute, we have held that the plaintiff in such a case need allege and prove no more than the fact of his employment and his injury arising out of and in the course of such employment. This is a sufficient statement of a complete cause of action under the statute, and upon proof of these facts the statutory presumption obtains that the injury to the plaintiff was the direct and proximate result of the employer's negligence, and the burden is upon him to rebut such presumption.

Other points under consideration disclosed no reversible error, and, in accordance with the liability entailed by the failure to insure, the judgment of the court below was affirmed.

WORKMEN'S COMPENSATION — INSURANCE — RATES — RETROACTIVE OPERATION OF LAW—*Builders' Limited Mutual Liability Insurance Co. v. Compensation Insurance Board, Supreme Court of Minnesota (February 17, 1922)*, 186 *Northwestern Reporter*, page 860.—The first compensation law of the State of Minnesota was enacted in 1913. Under the provisions of this act the Builders' Limited Mutual Liability Insurance Company entered into several contracts of insurance between February 1, 1921, and June 1, 1921. A new compensation act was enacted in 1921, and the previous laws on the subject were repealed. The law became effective June 1, 1921. The act provided that only authorized insurance carriers could insure liabilities in the State, and a compensation insurance board and bureau were created, with duties to classify risks and fix rates which would be charged by the insurance companies doing business in the State, carrying workmen's accident risks. On August 5, 1921, the compensation insurance board made an order fixing the rates for workmen's compensation insurance effective on June 1, 1921, and further ordered that all policies in force after June 1, 1921, or issued thereafter must be indorsed to provide for the rates so fixed. The

rates fixed were substantially higher than those in effect prior to the order. The Builders' Limited Mutual Liability Insurance Co. applied to the district court to have this order vacated in so far as it required the company to collect upon policies which it had issued before the law went into effect.

The contention was that the statute did not authorize the insurance board to increase the rates on policies which were issued before the statute went into effect, and that if it was so construed it was unconstitutional and impaired the obligation of contracts. The district court refused to vacate or modify the order of the compensation insurance board. The case was taken to the Supreme Court of Minnesota. That court reversed the lower court with directions to vacate the order of the board in so far as the order required a change in the rate on policies issued by the company before the law of 1921 became effective. The supreme court, speaking through Commissioner Taylor, said:

It is thoroughly settled that a statute will not be given a retroactive operation unless it appears "by express command or by necessary and unavoidable implication" that such was the legislative intent. And, where a statute affects rights and liabilities, it will not be construed as affecting those previously existing unless such construction is essential to give it effect, or its terms are so explicit as to preclude any other interpretation.

We find no provision in the statute here involved which expresses a legislative intention to change or disturb existing contracts of insurance, or which directs that the rates to be established as provided in the statute shall apply to policies issued before it went into effect. The statute speaks prospectively and can be given full effect without construing it as retroactive in its operation.

WORKMEN'S COMPENSATION—INSURANCE—STATE FUND—PAYMENT OF PREMIUMS—OCCUPATION ENJOINED—CONTEMPT OF COURT—*State v. McCoy, Supreme Court of Washington (October 30, 1922), 209 Pacific Reporter, page 1112.*—The State of Washington maintains a State insurance fund. Section 6604-8, Remington's Code of 1915, as amended by section 5, chapter 120, Laws, 1917, being a part of the workmen's compensation act, provided that the commission may require from a defaulting employer a bond to the State for the benefit of the accident and medical aid funds conditioned upon the prompt making of all payments into said funds. It was further provided that in case of failure to give bond after due notice the State would be entitled to an injunction "restraining such delinquent from prosecuting an extrahazardous occupation or work until such bond shall be furnished." On December 11, 1920, the State in-

stituted proceedings to recover premiums due the State funds and to enjoin one E. W. McCoy from further engaging in any extra-hazardous business until a bond had been furnished. The summons and complaint were personally served, but McCoy failed to appear, answer, demur, or otherwise plead within the time allowed by law. Judgment in default was therefore entered against him and was served by the sheriff. Subsequently McCoy engaged in extrahazardous business, but failed to furnish a bond in any sum whatever. An affidavit to this effect was filed in court, and McCoy was ordered to show cause why he should not be punished for contempt for violating the judgment. The trial court heard arguments of counsel and released the respondent from liability because of lack of proper notice. The State took the case to the supreme court, where this last judgment was reversed with directions to the superior court "to proceed to hear and determine the contempt proceedings," because "it is the duty of the courts to enforce their valid orders, and when it comes to their knowledge that such orders are not obeyed they should enforce obedience by punishment for contempt." The court, speaking through Judge Holcomb, said:

The complaint alleged facts which under the workmen's compensation act rendered it good as against demurrer, and warrants, if true, the relief demanded. In view of the failure of respondent to answer, it was proper, and, indeed, mandatory to grant the injunction against him.

Having been personally served with the summons and complaint, it was not necessary to serve the judgment by default, which contained the injunction upon him, as was done. However, out of an abundance of care or consideration, he was personally served with the judgment of injunction and, as appears from the affidavit of the officer of the department, willfully violated it.

WORKMEN'S COMPENSATION—LAWYERS' FEES—RIGHT TO REGULATE—*Gritta's case*, *Supreme Judicial Court of Massachusetts (June 15, 1922)*, *135 Northeastern Reporter*, page 874.—Proceedings were brought under the State workmen's compensation act for the death of Andrea Gritta, by his alleged widow, Maria S. Gritta. Compensation was denied the widow because of the fact that her first husband was still alive, but an award was made to her two children by her second marriage, amounting to \$10 a week for a period of 400 weeks. This award was affirmed in the superior court and the case was taken to the supreme court, where the award was again affirmed. Maria was appointed guardian over the children. She then made an agreement with her attorney, A. David Epstein, under which she allowed him a fee of \$900, which he collected. Statutes

1911, chapter 751, part 3, section 13, as amended by Statutes 1917, chapter 297, section 9, provides that:

Fees of attorneys and physicians and charges of hospitals for services under this act shall be subject to the approval of the industrial accident board. If the association and any physician or hospital, or the employee and any attorney, fail to reach an agreement as to the amount to be paid for such services, either party may notify the board, which may thereupon assign the case for hearing by a member of the board in accordance with the provisions of this act.

Under this statute, Maria, an illiterate woman, asked for a review of the fees charged. A hearing was had and the board ruled that the written agreement was not binding on the guardian and allowed \$100 for preparing to try the case before the single member and the full board, \$25 for the actual hearing before the single member, \$25 for the argument before the full board, \$100 for preparation of the brief filed in the supreme court, \$50 for proceedings in having Maria appointed guardian, and \$57 for disbursements, and ordered him to pay back to Maria the balance of the \$900 which he had received. The case was taken to the superior court, where a decree was entered affirming the decision of the board. An appeal was then taken by the attorney to the supreme court of the State on the contention that section 13 was violative of the attorney's constitutional rights and that the board had no jurisdiction to determine the validity of his contract or to fix the amount of his fees. The decree was affirmed, Judge Braley rendering the opinion of the court, in part, as follows:

The rights of certain classes of workmen to compensation under prescribed conditions were created by, and are subject to regulation and supervision of, the legislature. It is reasonably clear that, unless the fees of counsel retained by injured employees, or their dependents, to enforce alleged claims under the statute are subject to the revision and approval of the board, charges more or less oppressive may be exacted. The statute goes no further than statutes relating to those engaged in the business of pawnbrokers, or of making small loans, or to the right of workmen to assign their future wages, or the restriction of the height of buildings, or the right to keep a hotel, upon compliance with certain conditions, all of which have been sustained as a valid exercise of the police power in the limitation of personal rights, and the rights of property in the interest of the public health, public morals, and public safety.

It is plain that the parties did not stand on an equal footing, and that, whether she acted for herself or as guardian of the children, the petitioner was overreached. The board accordingly was justified in holding that in effect the written agreement or contract was not binding on her, and the question whether the amount charged was unreasonable and excessive was before it for decision. The necessity and value of the respondent's services were to be measured by what he was required to do, and there can be no question that the amount obtained was largely in excess of the fair value of his work.

The board had discretionary power, not merely to approve the respondent's fees, but to fix his compensation at a sum which met with their approval, and the detailed statement of what in the judgment of the board he should receive does not appear to have been erroneous or unjust. If no money had been received by the respondent, he could lawfully demand and collect only the fees awarded. But the fact that he had charged and been paid a greater sum before the petition was brought can not defeat the purpose of the statute. It was a payment which could be reviewed and set aside. The board, although its members are not judicial officers, had been given authority in the administration of the statute to pass upon the entire subject, and to do complete justice between the parties, and it is no ground for reversal that the order also requires the respondent to repay to the petitioner the difference between the fees allowed and the amount he received.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN—*Smith v. State Industrial Accident Commission, Supreme Court of Oregon (July 29, 1922), 208 Pacific Reporter, page 746.*—The State Industrial Accident Commission of Oregon had a contract with the Powers Logging Co., of Coos Bay, Oreg., to furnish medical aid and hospital accommodations to anyone injured while in the company's employ, and the company in turn supplied a physician and hospital care to its employees. One Wincent Smith, during the course of his employment with the logging company, was injured and was promptly sent to the hospital. After 15 days spent at the hospital he became dissatisfied with the treatment by the physician in charge and left the hospital. He went to Salem and asked that the commission place him under the treatment of some other physician, which request was refused. He then went to Portland and received treatment at the Good Samaritan Hospital. Upon his recovery he demanded that the commission pay for the treatment that he received at Portland, amounting to \$206.15. This was refused. The claimant appealed and a trial in the circuit court was had. Questions were submitted to a jury and a judgment entered directing the payment of the sum stated. The commission appealed to the supreme court, which reversed the judgment of the circuit court and the proceedings were dismissed. The question of whether the case was one which could be appealed from the judgment of the commission was a matter of dispute. The court, speaking through Judge McBride, said:

We are of the opinion that it was the intent of the legislature to limit the right of appeal to decisions in respect to the right to secure compensation for injuries, the amount of such compensation, its duration, the beneficiaries to whom it should be paid, and the other kindred matters mentioned in the schedule. The words "provided that any such award shall be in accordance with the schedule of

compensation set forth in this act," if they mean anything, confine the authority of the court to a judgment in respect to the matters mentioned in that schedule; and its power to act thereby becomes the measure of the right of appeal. We are not prepared to say that cases may not arise wherein an arbitrary act or decision of the commission on matters outside the purview of the schedule may be reached by some appropriate proceeding, but we do not believe that such matters can be reached by appeal.

The court decided that the law placed the selection of a physician upon the commission, and from the honest exercise of the discretion so given that body there is no appeal. The court further said:

Neither do we believe that it was the intent of the legislature to allow an injured workman, when dissatisfied with the physician furnished him by the commission, to select another physician and drag the commission before a jury, to guess whether he or the commission were the better judge of the qualifications of the surgeon appointed to attend him.

The fund in the hands of the commission is trust money, and the commission and the injured workman have the same object in view, namely, to secure the speediest possible recovery of the injured workman; for the sooner he is restored, the sooner he will cease to be a burden on the State. The commission is therefore interested in the selection of a competent physician, and its discretion in that respect is not subject to review here. While in this particular instance the plaintiff selected a competent surgeon, there would no doubt occur many instances where ignorant workmen, if allowed to select at will a surgeon to attend them, might fall into the clutches of unskilled quacks whose ministrations would prolong their disability and thereby inflict unnecessary suffering upon them and an increased financial burden upon the compensation fund.

Judgment reversed and proceedings dismissed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CONTRACT WITH DOCTOR—JURISDICTION OF COMMISSION—*Associated Employers' Reciprocal v. State Industrial Commission, Supreme Court of Oklahoma (July 18, 1922), 208 Pacific Reporter, page 798.*—Fronia Henderson, an employee of the World Publishing Co., on May 15, 1920, while in the discharge of her duties, fell into the elevator shaft of the World Publishing Co.'s building. She was immediately removed to the Oklahoma Hospital by the authority and on the order of Mr. Larson, the business manager, or Mr. Lorton, the president of the company. Each of these men visited the hospital often after the injury. Miss Henderson remained at the hospital from the date of the injury to September 30, under the care of Dr. Fred S. Clinton. The Oklahoma Hospital filed an itemized bill amounting to \$1,568.90, and Doctor Clinton filed a bill for medical services for himself and assistants amounting to \$1,077. The State industrial commission made a finding that the claims were reasonable

charges and ordered that the company or its insurer pay the bills. An appeal was taken from this award to the supreme court. The question for determination was, "Did the State industrial commission have the jurisdiction to make the award complained of?" Under the provisions of the workmen's compensation law the employer becomes liable for medical fees in one of two ways. First by contract, either expressed or implied, with the physician; second, by the physician treating the injured employee when called under an emergency caused by the employer's failure to provide medical aid. It was not contended that the injured claimant ever made request for the medical services for which the charges were made. In this case, under the facts shown, the supreme court reversed the award on the ground that a contract existed between the employer and the doctor and that therefore the commission was without jurisdiction.

The court said that when the employer "voluntarily contracts, he may protect himself against excessive charges." On the other hand, "where the liability is imposed by law he has no such opportunity, and therefore the law makes the physician in such case subject to the approval of the industrial commission."

In concluding it was said that "where the employer voluntarily furnishes medical services, it is a matter of contract solely between the employer and the physician, and the industrial commission has no jurisdiction of such matter."

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—PURPOSES OF INDUSTRIAL COMPENSATION—*Union Iron Works v. Industrial Accident Commission of California, Supreme Court of California (October 31, 1922), 210 Pacific Reporter, page 410.*—On September 14, 1916, one Thomas Henneberry, 16 years of age, while employed as a rivet heater by the Union Iron Works fell from a ladder, breaking both legs and an arm. He received treatment for four years from the employers' physicians. During the four years there was a continuous discharge of pus from one leg, due to necrosis of the bone and unhealed wounds. As his condition was apparently growing worse, and having lost faith in the treatment of the employers' physicians, he of his own accord, on February 18, 1920, consulted another physician, who advised an immediate operation to remove the diseased bone. This advice was communicated to the other physicians but they did not agree to an operation. After waiting another nine months for relief he abandoned the treatment he was receiving and underwent operations. The operations were a complete success and Henneberry again became self-supporting. An award had been made on July 1, 1918. In April, 1921, three months after the last operation and nearly three years after the making

of the original award the injured employee applied to the commission for an award for the payment of the expenses incurred by him in having the operations and for treatment attendant upon the operation. An award was made accordingly.

The employers took the case to the supreme court for review. In that court the award was affirmed. Justice Lennon delivered the opinion of the court, in which he reviewed the purposes of industrial compensation. Taking up the issues presented, he said:

The underlying principle upon which the workmen's compensation act rests is, as its title indicates, the providing of compensation to an employee for injuries resulting from his employment. It emanates from the economic thought that personal injury losses incident to an industry is a part of the cost of production, to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry.

The primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work, and also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor. By this means society as a whole is relieved of the burden of caring for the injured workman and his family, and the burden is placed upon the industry. That the injured workman and his dependents may be cared for, compensation in the form of disability benefits is provided for by the act approximating the wages earned by the employee and varying with the degree of disability and dependency. And to secure the speedy return of the workman to productive employment it is provided that medical and surgical services shall be furnished by the employer. This liability for medical and surgical services is not therefore, a burden placed upon the employer as a penalty for any failure of duty on his part, but is merely a part of the whole compensation due the employee as the result of his injury. It therefore follows that the medical and surgical services contemplated and called for by the statute in question should be such as will tend to secure the return of the workman to productive employment. In other words, and perhaps more precisely stated, the treatment required by the statute is such as will reasonably and seasonably tend to relieve and cure the injured employee from the effects of the injury and, manifestly, if the treatment practiced and persisted in by physicians furnished by the employer, even though they be conceded to be skilled and competent in their profession, does not within a reasonable time effect a cure, and thereafter a course of treatment prescribed by other physicians procured by the injured employee does in fact seasonably effect a cure, then it can not be said that the employer has furnished such medical and surgical treatment as was reasonably and seasonably required.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—REFUSING OPERATION—*Bronson v. Harris Ice Cream Co., Supreme Court*

of Louisiana (January 2, 1922), 90 Southern Reporter, page 759.—W. T. Bronson suffered an injury to his knee in the course of his employment at defendant's ice cream factory. He sued under the workmen's compensation act as for total disability. The disability was not contested, but it was said that it was not attributable to the accident but to the plaintiff's refusal to allow an operation to be performed, which might have cured him. This operation would consist of opening the knee and removing some broken parts. As Bronson was 59 years of age he decided not to undergo an operation, which decision he reached after consultation with several surgeons. He was advised that the operation was not dangerous to life or health, but the chances of success were about even. If the operation was successful the limb would be completely restored, but if unsuccessful the knee would become ankylosed and rigid. He would have had to be anaesthetized, and as he was without means would have had to be a charity patient at a charity hospital. This appeared to be humiliating to him. Judgment favored the company and Bronson appealed. This judgment was set aside in the supreme court of the State and compensation to the claimant was decreed. Judge Provesty, in arriving at this conclusion, said:

We must recognize that such a thing might be as an injury curable by an operation so simple and unattended by risk that plainly the real cause of the disability would be not so much the injury as the not making use of the easy remedy at hand.

On this question of whether under the workmen's compensation act an injured employee may have to resort to an operation as a prerequisite to recovery of compensation for disability, and on the further and much more difficult question of under what circumstances he will be required to do so, there is much jurisprudence. [Cases cited.] Most of these cases are inapplicable under our statute, except in so far as establishing the proposition that the injured employee must not be entirely unreasonable in refraining from an operation, however simple and harmless; and the others turn upon the facts, as does the present.

In view of the age of the plaintiff, and of the seriousness of the operation, requiring the administration of an anaesthetic, and in view of the natural (though unreasoning and, we may add, groundless) prejudice against the resorting to the charity hospital, we do not think that plaintiff's unwillingness to submit to an operation was entirely unreasonable. It was not the result of caprice, but of the natural dread of a surgical operation, always attended with more or less risk, especially after a certain age.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—REFUSING OPERATION—*Frost v. United States Fidelity & Guaranty Co., Supreme Court of Nebraska (October 20, 1922), 190 Northwestern Reporter, page 208.*—Jack Frost was loading stone for his employer

when by an accident both legs were crushed, breaking them between the knee and the ankle. The injury occurred on December 26, 1919, and for two years he had been unable to work, receiving compensation for total disability. The insurer claimed that an operation would result in Frost's being able to work, and sought permission to discontinue payments on account of his refusal to submit to such operation. The trial court found that this refusal was not unreasonable, and denied the company the right to stop payments, whereupon this appeal was taken.

Three doctors testified, and an X-ray picture was shown. One physician said that the bones should be rebroken and secured in proper alignment, following which there would be a "proper or greatly improved functioning of the feet and ankles." The other two physicians said that the rebreaking was unnecessary, that the bones had healed in a satisfactory way, and that the proper operation would be to cut away a callous growth between the bones of the right leg and loosening adhesions in the tendons and tissues. The X ray submitted by Frost showed no callous growth, and his attending physician pointed out from the pictures that no rebreaking was necessary, and he strongly advised against it, both as unlikely to produce beneficial results, and also as creating additional disturbances from which the plaintiff would receive more harm than good. Other medical testimony was to the same effect.

Judge Flansburg stated the above facts, and said:

It is unnecessary for us in this case to determine just how far a claimant under the workmen's compensation act must go in submitting to surgical operations, for under any rule we might adopt, it must be conceded that the evidence in this case is quite sufficient to justify the trial court in its finding that the plaintiff could not be compelled to submit to a surgical operation, the nature of the operation being one upon which the physicians for the employer could not themselves agree. The question of the unreasonableness of the refusal of an injured employee to permit an operation to be performed is, in all events, a question of fact, to be determined from the evidence. It was within the judgment of the trial court to accept the opinion of the plaintiff's witnesses that the operation was inadvisable. The evidence being clearly sufficient to support that fact, the finding made is conclusive upon this court.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—REFUSING OPERATION—CHOICE OF PHYSICIAN—*Newhall Land & Farming Co. v. Industrial Accident Commission, District Court of Appeal of California (March 18, 1922), 206 Pacific Reporter, page 769.*—Ysmael Olivera was working on the ranch of the company named

and was injured by being thrown from his horse while trying to overtake a runaway team. The accident resulted in an inguinal hernia. The employer was insured in the Continental Casualty Co., which furnished medical treatment. A truss was fitted, but with the suggestion that an operation might be necessary if recovery did not follow the use of the truss. Later the physician decided that an operation would be required and so informed Olivera, who, however, was not willing at the time to submit to an operation. The doctor was not authorized by the insurance company to perform any operation, nor would he have done it himself in any case; neither did he suggest to Olivera who would be engaged to perform such a service. Some four or five months after the accident Olivera was informed that an operation would be necessary and was immediately desirable. He wrote to the company to this effect, but his request for such treatment was not attended to. A check for \$38.30 was forwarded as payment in full of all claims growing out of his injury and disability, with the request that he sign a receipt in full. This Olivera declined to do, and after a lapse of some two weeks underwent an operation at the hands of physicians whom he had consulted. On application, the industrial accident commission awarded to Olivera the reasonable cost of this treatment, and a review of this award was sought in the present action.

The court, speaking through Judge Langdon, reviewed the facts as above set forth, and incorporated in his remarks the award by the commission. This award stated that Olivera's refusal to accept the operation at the time first suggested by the insurer's physician was a bar to benefits from that date until the time the operation was finally performed, somewhat less than two months. Payments prior to the refusal were awarded, and also subsequent payments for the operation, hospital expenses, etc. These allowances seemed to the court "exceedingly reasonable upon the record before us; indeed petitioners do not contend that they are unreasonable."

The insurance company contended that the delay aggravated the condition so as to increase the period of disability following the operation, as well as denying liability after the refusal to submit to the operation when first suggested. The court found no evidence to support the first claim, and stated that the second had been adequately met by the suspension of benefits for the period above stated. It was further held that the company had not timely nor properly responded to the application for the operation, and that as Olivera "was in imminent danger, he had no choice but to select a surgeon and submit to the operation." Inasmuch as the requirements of the compensation act to provide seasonable medical treatment had not been complied with, the alternative of liability for the reasonable

expenses incurred by the employee in procuring the same supported the award made by the commission, which was therefore affirmed.

A rehearing of the case was denied by the court of appeal on April 13, 1922, the supreme court also denying a hearing on May 15.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—
“EMPLOYEE”—*Galloway et al. v. Lumbermen's Indemnity Exchange et al., Commission of Appeals of Texas (March 22, 1922), 238 Southwestern Reporter, page 646.*—Ernest Hadnot, a minor under the age of 15 years, was an employee of the Reese-Corriher Lumber Co. on February 7, 1918. The employer carried a policy with the Lumbermen's Indemnity Exchange to protect those who were employees within the purview of the workmen's compensation act. Hadnot was killed while employed in violation of the child labor law upon the date mentioned. The child's mother put in a claim for an award of compensation because of the death. An award was made in her favor. The underwriter was not satisfied with the final decision of the industrial accident board and filed a suit to set aside the final ruling of the board. The trial court and the court of civil appeals agreed with the underwriter in its contention that it was not liable, as the employee was not within the scope of the act, and rendered judgment accordingly.

Presiding Judge Spencer of the commission of appeals wrote an opinion affirming the judgments of the lower courts, which was adopted and entered as the judgment of the supreme court. The reasons stated for not allowing the award to stand are in part as follows:

One of the very objects of the child labor law, as declared by its caption and evidenced by its provisions, is to prohibit the employment of children under 15 years of age to labor in certain designated occupations. Section 5 of the act (article 1050i) provides for permits to be issued by the county judge, permitting children between the ages of 12 and 15 years to labor in the designated occupations, under certain conditions; one of the conditions being that the child is not to be employed in or around any mill, factory, workshop, or other place where dangerous machinery is used. Acts 35th Leg. c. 59, p. 104, sec. 5.

There is nothing in the workmen's compensation law, passed by the same legislature (Acts 35th Leg. c. 103, p. 269 [Vernon's Ann. Civ. St. Supp. 1918, arts. 5246-1 to 5246-91]), that expressly or impliedly repeals any of the provisions of the child labor law. On the other hand, it expressly recognizes and provides against its repeal, as revealed by section 12i of the act (article 5246-30), and therefore, impliedly at least, prohibits the employment of minors where such employment is prohibited by the statutes of the State.

As the contract of insurance between the lumber company and the defendant in error was entered into in virtue of the workmen's com-

pensation law, it will be presumed, unless the contrary appears, that its stipulations are in accord with and not contrary to that law. As the law prohibits the employment of minors between the ages of 12 and 15 years, in and around mills where dangerous machinery is used, it will be presumed that the contract between the parties, written in pursuance of the law, embodies no provision in conflict with the law. The insurance company's liability is restricted to the terms of its contract, and can not be extended to include the liability of the lumber company to persons employed by the latter in violation of the law.

This principle of law was announced by the Texarkana court of civil appeals in *Waterman Lumber Co. v. Beatty* (204 S. W. 448), in that case the injured employee sued the employer direct and recovered judgment. The lumber company contended that he should look alone to the terms of the workmen's compensation act for compensation, but the employee replied that the act did not apply because he was employed in violation of the child labor law. The court of civil appeals sustained the contention of the employee, and affirmed the judgment.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—"EMPLOYEE"—*Grand Rapids Trust Co. v. Petersen Beverage Co.*, Supreme Court of Michigan (July 20, 1922), 189 Northwestern Reporter, page 186.—Harlan Perry, a boy under the age of 15 years, was unlawfully employed by the Petersen Beverage Co. During the course of his employment a steam boiler exploded, causing injury to the boy, which resulted in his death. The administrator of his estate brought an action to recover damages against the company because of the boy's death. The company set up the fact that recovery could only be had under the workmen's compensation laws of the State. However, a judgment in the trial court was rendered in favor of the administrator, and the company took the case to the supreme court. The company set up the fact that compensation under the workmen's compensation law had been paid between the time when the boy was injured and the time of his death. But the supreme court of the State held that the compensation law excluded from its provisions minors who were not legally employed under the laws of the State, and this barred the relation of employee and employer between the boy and the company, and therefore no recovery could be had under that law.

Upon the subject Judge Wiest said:

The child labor law and the workmen's compensation law have provisions in harmony and intended to prevent the very hiring here in question, the one making it unlawful and a misdemeanor to so hire, and the other excluding such a hiring from its provisions. These statutes prevented the relation essential to an election to come under the compensation act. The election by a minor, unlawfully employed, to accept compensation under the workmen's compensation

law is void, and can not rise to the dignity of a legitimate defense to the common-law liability of an employer so violating the statute. The compensation law lifts the disability of minors to make the necessary contract only in cases where they may be lawfully employed under the laws of the State. If not lawfully employed then the disability to make the essential contract has not been lifted, and the minor can make no valid contract of employment within the compensation act, and, of course, can not elect to have remedy thereunder.

The supreme court held that the trial court committed no error in holding that the unlawful employment was the proximate cause of the accident, and that the employment of this boy in violation of the child labor law was sufficient evidence of the company's negligence. It was further held that the company could not set up as a defense the fact that there had been a misrepresentation of the age of the boy.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—“EMPLOYEE”—*Indiana Manufacturers' Reciprocal Assn. et al. v. Dolby, Appellate Court of Indiana (December 9, 1921), 133 Northeastern Reporter, page 171.*—Myrtle Dolby while in the employ of the Wasmuth-Endicott Co. took typhoid fever germs into her system through water furnished by the company, and, after suffering from typhoid fever, died. David Dolby, father of deceased, put in a claim to recover for care, nursing, and burial expenses, on the ground that her death resulted by reason of an accident arising out of and in the course of decedent's employment. The claim was allowed by the industrial board, but on appeal to the appellate court the board was reversed with instructions to dismiss the claim. The reason for the reversal was that the industrial board had no jurisdiction of the claims. It appeared that Miss Dolby during all the time of her employment was over the age of 14 years and under the age of 18 years, held no employment certificate, and therefore was not lawfully employed. The Indiana law expressly requires that an affidavit shall be made by the parents or guardian, showing the age, date, and place of birth of a person between the ages of 14 and 18, before such person can be lawfully employed. The evidence showed that no such affidavit was on file. Because of this it was held the award was not sustained by sufficient evidence and on the authority of *In re Stoner* (128 N. E. 938), such a person is not lawfully employed and is not an employee entitled to recover compensation under the workmen's compensation act.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—STATUTE HELD APPLICABLE—*Garcia v. Salmen Brick & Lumber Co., Su-*

preme Court of Louisiana (May 1, 1922), 92 Southern Reporter, 335.—Frank Garcia, 17 years of age, was fatally injured while at work in the brick and tile factory of the company named, for which the parents sought recovery. Suit was for damages, with an alternative demand for compensation under the compensation statute of 1914. The trial court found no claim for damages, but awarded a judgment in accordance with the provisions of the compensation statute. The parents appealed.

Garcia had been at work for some time for the company with the consent and approval of his parents, who received from him all wages paid him for his work. His employment was of a general nature, without any specific agreement as to the character of the work he had been assigned to. No objection had been raised by his parents as to the kind of work their son was placed at, nor had they made any election to take their son out of the provisions of the compensation act. Counsel for the plaintiffs conceded that if Garcia had been injured at the occupation at which he had previously been employed they would have had no right of action except as provided by the compensation statute, but in the change to the occupation in which he suffered the fatal accident, it was claimed that the company was guilty of "gross and criminal negligence," so that there was liability for damages as in cases of tort, without the limitations of the compensation statute.

Judge Thompson, speaking for the court, described the occupation and the accident and stated that "if the case were governed by the law and jurisprudence applicable to the relation of master and servant, we would feel constrained to hold the defendant liable in damages for the death of young Garcia," as it was an act of negligence to place a young and inexperienced worker in a place of "unusual and extraordinary risk and peril." Continuing, Judge Thompson said:

The case, however, clearly comes under the employer's liability [compensation] act. As before stated, the young man was employed with the knowledge, consent, and approval of his parents to work about the defendant's factory. There had been no special agreement as to the particular work the employee was to perform. The relation of employer and employee had not been terminated at the time of the accident. The mere transfer from one position of labor to that of another did not have the effect of abrogating the contract. The presumption is that the contract is to be governed by the act regulating the rights and remedies of the employer and employee, in the absence of any agreement or notice to the contrary.

Therefore, while the act of defendant in changing the position of young Garcia in the manner as was done, without giving him proper instruction and warning, may, under the general rule and jurisprudence relating to master and servant, be regarded as an act of negligence, it can not be so considered under the compensation

statute. Under that statute the liability of an employer is not to be determined by negligence or want of negligence. Our conclusion is that the case was correctly decided by the lower court.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—SUIT FOR DAMAGES—COMPENSATION AGREEMENT—*Delaney v. Phila. & Reading Coal & Iron Co., Supreme Court of Pennsylvania (February 6, 1922), 116 Atlantic Reporter, page 537.*—William Delaney, a minor, was injured while illegally employed at a coal washery. Seventeen days after the accident he, with the consent of his father, made a compensation agreement, and later entered into a supplemental agreement; under this he received payments for 14 months, when further payments were refused on the advice of counsel, but no money was returned or tendered to the defendant company. Based on the illegal employment of a minor, suits were brought by him by his father as next friend, and also by the father in his own right for the injuries received. The employer contested these suits on the ground of the compensation agreements already made, but judgment went against the company in the trial court, from which this appeal was taken. The appeal resulted in the judgments in behalf of William and his father being reversed.

Judge Simpson, who delivered the opinion of the court, stated the facts as to the agreement and payments thereunder, saying that, "It is clear that the facts stated would ordinarily operate as an estoppel to the maintenance of this suit." However, the plaintiffs relied on a decision of the court in *Lincoln v. National Tube Co.*, 268 Pa. 504, 112 Atl. 73 (see Bul. No. 309, p. 329), in which a suit for damages was held to be properly brought, where, as here, a minor was employed at work prohibited by the law. As to this Judge Simpson said:

The facts in the two cases are, however, essentially different, for there the employer sought to compel the wrongfully employed minor to proceed under the original act, while here the minor, with the consent of his father and next friend, voluntarily accepted relief under it and the amendatory act of 1919. Though this distinction is vital and controlling, it is not necessary to further consider it, for here the supplementary agreement between the minor and defendant was made under the amendatory act, [and] 14 months' payments were accepted in accordance therewith.

Reference was then made to the provisions of the law to the effect that all agreements for compensation and all receipts executed by injured employees of whatever age shall be valid and binding unless modified or set aside by an approved supplemental agreement, or because it is found that the agreement was "procured by the fraud, coercion, or other improper conduct of a party, or was founded upon a mistake of law or of fact." As it did not appear that the agree-

ment had been modified or set aside, it was valid and binding and must operate as a surrender of any claims to any other form of compensation or damages, as provided by law. "This, of course, covers the father's claim also, for when the act applies defendant is liable only for the payments thereby required."

WORKMEN'S COMPENSATION—PARTIAL DISABILITY—LUMP SUM OR PERIODICAL PAYMENTS—AMOUNT—*Anderson v. Commonwealth Oil & Refining Co., Supreme Court of Kansas (May 6, 1922), 206 Pacific Reporter, page 900.*—Eulate Anderson was a pumper at the defendant company's oil plant, and because of an alleged defect in the machinery his arm was caught, carrying his body around so that it struck the ground repeatedly, resulting in his arm being broken in six places, fractured ribs, punctured lung, and body badly bruised. Permanent disabilities affected the arm, knee, and ankle, while his throat and vocal cords were also injured. Actions at common law and under the workmen's compensation act were brought on separate grounds. The employer refused to arbitrate the claim for compensation, and the case was proceeded with under the compensation law so that "the rulings relating to the common-law feature were no longer material." There was a trial, the jury fixing the damages, which were modified by the court. The judgment was for a lump sum of \$3,238.90 for the loss of the arm, temporary total disability, hospital and medical attention, etc.; also a small sum with interest. It was further ordered that he recover \$4,194.67 for permanent partial disability other than the loss of the arm, this being payable in monthly installments of \$47.66 $\frac{2}{3}$ each.

The company contended that the award was excessive, though conceding the amount for the loss of the arm, hospital, etc., expenses and payment for temporary total disability. As to the sum to be paid for other permanent partial disability, it was said that the verdict was not supported by sufficient evidence, and that, as it exceeded what could have been allowed for total disability, it was unwarranted under the law.

The court cited previous decisions disposing of identical contentions after careful consideration, saying that "no reason is seen for placing a different construction on the statutory rules of computing compensation than was expressed in the cited cases."

The power of the legislature to make classifications and prescribe rules that measure the compensation for each class was asserted. If the rule seemed to some to operate unjustly, the remedy lies with the legislature, but "affords no ground for the court to substitute rules different from those enacted."

The plaintiff wished a lump sum instead of periodical payments for the second portion of the judgment, but the court found that "the compensation act provides its own rules as to the compensation to be awarded and the nature of the judgment awarding it." The act gives the trial court authority to determine that payments for permanent partial disability should be made periodically, and the judgment as rendered was affirmed.

WORKMEN'S COMPENSATION—REVIEW—CONCLUSIVENESS OF COMMISSION'S FINDINGS—LIMITATION—INCOMPETENTS—*Whitehead Coal Mining Co. v. State Industrial Commission, Supreme Court of Oklahoma (May 9, 1922)*, 207 *Pacific Reporter*, page 305.—The mining company and its insurer brought an action against the commission to reverse an award in favor of William Walsh. Walsh was working for the mining company in one of its mines and was injured July 1, 1919, by a rock falling upon his back. On July 28 an award was made for temporary total disability and medical expenses. This continued until September 3, 1919, when Walsh resumed his employment as a coal miner, working until March 15, 1921. About this date Walsh became mentally incapacitated and was taken to a hospital for the insane. In July following Mrs. Walsh petitioned for a review of the award of July 28, 1919, alleging a material change in her husband's condition which was a direct result of the injury. It was further claimed that the injury had caused a permanent disability, Walsh's back being permanently stiff, and that an X-ray examination disclosed a crushed vertebra.

After hearing, an award was made beginning with March 15, 1921, to continue during disability. Three objections were made by the appellants, first as to lack of evidence to support the order; second, that after having directed a medical examination to be made, an award was allowed before the examination; and third, that the limitation of one year for placing claims barred the present petition by Mrs. Walsh.

Judge Kennamer found no merit in the first contention, but stated that the company's counsel "attempted to impose the duty upon this court of weighing the evidence and determining on which side of the controversy the weight lies." This was said to be against the settled law in the State, which is to the effect that after a determination by the industrial commission the court will not consider the question of the weight of evidence. There was no question that Walsh had received a serious injury, and witnesses who worked with him supported the view that he had never recovered from the injury inflicted. The employer contended, on the evidence of

physicians, that Walsh's mental condition was due to disease rather than to the injury, while another physician credited the accident with the results that followed in time.

This contention as to the weight of evidence was said to show "conclusively that the petitioners are seeking to have this court weigh the evidence." If it was found that the award was not supported by any evidence, it should be reversed; but it is not necessary that its findings should be supported by a preponderance if there is substantial evidence in its favor. It was said that it would be better practice for the commission, after having ordered an examination, to await its results, "but it would not be necessary for the commission to delay its award where the commission is satisfied that the plaintiff is entitled to an award."

This disposed of the first and second points. The third, as to limitation, was rejected since the statute only requires that a claim be made within one year from the date of the injury. This had been done, and the present proceeding was for a review, which the statute specifically authorizes the commission to make at any time upon any showing of a change in the condition. This may be made by the commission on its own motion or upon the motion of any interested party.

Another point discussed was as to the right of the wife to make a claim. As to this it was said:

It would be a most narrow construction of section 12, supra, to deny to the wife of the injured employee the right to call to the attention of the industrial commission, by motion, the claim of her husband, who by reason of his injury is mentally incapable of presenting his claim.

The award was therefore affirmed with a slight modification in the amount on account of apparent error in computation.

WORKMEN'S COMPENSATION—REVIEW—POWER OF COURT—INDEPENDENCE OF THE JUDICIARY—CONSTITUTIONALITY OF STATUTE—*Otis Elevator Co. v. Industrial Commission et al.*, Supreme Court of Illinois (February 22, 1922), 134 *Northeastern Reporter*, page 19.—Theodore Rosgard while in the employ of the Otis Elevator Co. received injuries which caused his death. The mother of the deceased applied to the industrial commission for an award of compensation under the State workmen's compensation act, alleging that the son's death arose out of and in the course of his employment. On January 18, 1921, an arbitrator made an award in favor of the mother. The company petitioned for a review, which was granted, but the industrial commission confirmed the award of the arbitrator. The circuit court of Cook County, by writ of certiorari, reviewed the

case, but rendered a judgment confirming the award after refusing to review the facts in the case. The case was then taken to the supreme court of the State by writ of error upon the ground that the circuit court should have reviewed the facts as well as the law, as an amendment to the workmen's compensation act (Laws 1921, p. 446) granted this power and was in force at the time the circuit court reviewed the case. The supreme court decided this question in favor of the company, holding that the company was entitled to have the court review all questions of fact as well as law presented by the record. Another ground for taking the case up was the contention that the provision in the amendment of 1921 to the effect that the findings of fact made by the industrial commission shall not be set aside unless contrary to the manifest weight of the evidence was unconstitutional and void. The supreme court held that this limitation on action by the court was an attempt by the legislature "to prescribe a rule governing judicial action and determination and is a usurpation of judicial power." The court held the statute giving a right to a review of the law and facts valid, but held the limitation stated above void. Judge Cartwright rendered the opinion of the court, which is in part as follows:

The constitution divides the powers of government into three distinct departments, legislative, executive, and judicial, and provides that no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as therein expressly directed or permitted. Under that division of governmental powers and prohibition the judiciary can not instruct the legislature what statutes it shall enact, and the legislature can not direct the judiciary how cases shall be decided.

Due process of law requires submission to a judicial tribunal for determination upon its own independent judgment as to both law and facts, according to the settled rules governing judicial action and decision. There are other provisions of the constitution which also secure uniformity in the proceedings and practices of courts. Section 29 of article 6 provides that all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments, and decrees of such courts severally, shall be uniform. Whatever application that provision may have to the limitation attempted to be imposed by the proviso in question, the limitation is expressly prohibited by section 22 of article 4, which prohibits the passage by the general assembly of any special law regulating the practice in courts of justice. Under that section it is plainly not within the power of the legislature to select a class of cases and by a special act provide for them a different rule of decision from that which is applicable in other cases. It will not be presumed that the legislature would not have amended the statute so as to give a review on the law and facts without also transgressing the constitutional limitation by infringing on the powers of the

judiciary in the particular class of cases. The limitation is in a proviso as an attempted qualification of the statute, and not as a part of the substantive law. Whether the limitation states the same rule adopted by courts in deciding upon questions of fact or not is of no importance, because, whether it is or not, the legislature can not give such a direction.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to review all questions of law and fact presented by the record.

WORKMEN'S COMPENSATION—SECOND INJURY—LOSS OF SECOND EYE—“PERMANENT LOSS”—TOTAL DISABILITY—*Heaps v. Industrial Commission, et al., Supreme Court of Illinois (June 21, 1922), 135 Northeastern Reporter, page 742.*—W. F. Betow, while firing a boiler had his left eye injured by a cinder striking the eyeball, which resulted in blindness in that eye about the year 1915. On May 15, 1920, while in the employ of C. E. Heaps and engaged in driving a steel scraper used in road building, he was thrown into the scraper, when the team he was driving became suddenly frightened at the sight of a tractor engine. His face and right eye were very seriously injured. The muscles of the right eyelid became paralyzed and the eye could not be opened by Betow, except by artificial means. This condition was stated to be permanent by eye specialists. Compensation was awarded by an arbitrator after a hearing. Upon review before the industrial commission a new award was made. This award was confirmed in the circuit court and the employer took the case to the supreme court. Judge Duncan speaking for that court in its action affirming the judgment of the circuit court sustaining the award as for total disability, said, in part:

After his injury he returned to his work, and drove for a while in the work he was doing when injured, by having his eye held open by plasters, and having stakes set for him to drive by; but his eye continued to have less and less sight, until he was finally compelled to quit the job and take his boy out of school to drive for him.

The evidence shows conclusively that defendant in error, by the injury to his right eye, was reduced to total blindness, except when his eye was propped open or kept open by plasters or other artificial means. It further shows that he is practically blind and unable to see to do his work when his eye is kept open, and that keeping it open is very injurious to it, because not protected from dust and other flying particles by tears and other natural processes.

“Permanent loss,” as used in the compensation act concerning the loss of an eye, limb, etc., means the taking away of the normal use of the member. The loss of the member is complete when the normal use of the member has been taken away. Ability to do some work by aid of a mechanical device is not inconsistent with complete loss of the use of an eye or a hand. It is now a well-established rule, in this State and other States, that where an employee, who previous to his

employment has lost an eye, loses the other eye as the result of an injury, or who has lost an arm, and loses a leg as the result of an injury arising out of and in the course of his employment, he is entitled to compensation for total permanent disability. The reason for this rule is that by the destruction of the one remaining eye the employee loses all the capacity to see that he has, and an injury causing such a loss of the remaining eye necessarily causes total disability to see.

WORKMEN'S COMPENSATION—SECOND INJURY—LOSS OF SECOND EYE—SPECIFIC AND GENERAL PROVISION—*Stevens v. Marion Machine Foundry & Supply Co.*, Appellate Court of Indiana (December 2, 1921), 133 *Northeastern Reporter*, page 23.—W. H. Stevens permanently lost the vision of his right eye in an accident when he was 11 years of age. In February, 1919, being then 48 years of age and while in the employ of the Marion Machine Foundry & Supply Co., he received an injury by accident arising out of and in the course of his employment, which resulted in the permanent loss of his other eye. The parties agreed to the payment of compensation for a period of not more than 500 weeks, which agreement was approved by the industrial board. After 100 weeks, further payments were refused by the employer. A hearing was had before the industrial board and it was determined that the full amount the injured party was entitled to under the law had been paid. The statute in force at the time of the accident made a specific and arbitrary provision that, "For the permanent and irrecoverable loss of the sight of one eye, or its reduction to one-tenth of normal vision with glasses, 100 weeks' compensation equal to 55 per cent of the weekly wages would be paid. The injured man contended that where the injury causes total disability compensation should be paid during a period not to exceed 500 weeks as the statute provided. When the question came before the appellate court on appeal, Chief Justice Dausman answered the contention in favor of the employer as follows:

The contention rests on the proposition that, the workman having permanently lost the sight of one eye in the days of his youth, it necessarily follows that the permanent loss of the sight of his other eye, by the industrial accident, resulted in permanent total disability for work. The contention can not be sustained. The compensation plan is a legislative venture; and, of course, those who are intrusted with the administration of it can do nothing other than ascertain and execute the legislative intent. The rule is fundamental that in the construction and application of a statute specific provisions take priority over general provisions.

In the case at bar the injury resulted in "the permanent and irrecoverable loss of the sight of one eye," and nothing more. It is inaccurate to say that the injury resulted in total blindness. The industrial injury plus the injury received in childhood resulted in total blindness. Evidently the legislature acted on the basis that

normally a man has two eyes, either one of which is capable of supplying some light to the body, and that the loss of one constitutes a partial impairment only. This interpretation is supported by the fact that this feature of the statute has been amended to provide compensation for 500 weeks where the loss of the sight of both eyes results from the same accident. Evidently the legislature did not intend that an industry should be chargeable on account of an injury to an eye which occurred long before the workman came to that industry.

WORKMEN'S COMPENSATION—SECOND INJURY—TOTAL OR PARTIAL DISABILITY—NOTICE OF INJURY—CONSTITUTIONALITY OF STATUTE—*Chicago Journal Co. v. Industrial Commission, Supreme Court of Illinois (October 21, 1922), 136 Northeastern Reporter, page 697.*—Floyd Tidrow was employed by the Chicago Journal Co. as subforeman or pressman, his duties being supervisory, "and of a character that required brain work rather than physical or manual labor." Several years before his employment by this company he had lost the sight of his right eye, but this did not interfere with his usefulness in his employment, where he worked for about eight years. On April 10, 1920, he sustained an accidental injury which necessitated the amputation of his left hand at a point a little below the wrist joint. He was able to return to work in about seven weeks, without loss of pay, since he was not expected to do manual work beyond setting the rollers of the press, moving the screws, or setting ink. He testified that "his ability to do the work for which he was employed, and which he did before the accident, had been in no wise impaired by the injury which he sustained to his left hand." He also expressed the opinion that if he left his present employment and got a job elsewhere in the same capacity he would receive the same salary paid to those doing the same work, though there might be some hesitancy on the part of some employers to employ him because of the fact that he had lost his hand and that he had only one eye.

Application for compensation led to the reference of the case to an arbitrator, who allowed compensation at the rate of \$12 per week for a period of 291 weeks, also one week at \$8, and thereafter a pension for life of \$23.33 per month. This award was based on the provisions of the law relating to the loss of an eye and a hand as constituting permanent total disability. The commission confirmed this award, as did the circuit court of Cook County. The case was then brought to the supreme court on a writ of error, where the action below was reversed and the case remanded with directions for further proceedings in accordance with the determinations announced by the supreme court.

There was no dispute as to the facts, though the knowledge of the employer as to the loss of the eye was not established. The foreman who employed Tidrow had known him for several years before the employment and knew that he was blind in his right eye, but this point was not referred to at the time of the hiring. The rule of law was announced that knowledge by an agent before the commencement of his agency does not charge his principal with constructive notice of such knowledge. If, however, circumstances warranted the conclusion that the agent had the fact in mind when he employed the employee, knowledge on the part of the principal would be imputed. The record does not indicate whether Tidrow's defective eye was readily noticeable or not. As the award stood, the company would be required to pay for the loss of an eye and the loss of a hand, for the former of which it was in no way responsible. The question of the propriety of this finding was the chief one before the court.

Various cases were cited in which similar situations had been considered, but a number of these were found to be distinguishable as to the actual conclusions, as where a man with one arm was employed at a small salary on account of the limitation, the loss of the second arm absolutely disabling him. (*Wabash R. Co. v. Industrial Commission*, 286 Ill. 194, 121 N. E. 569, see *Bul. No. 290*, p. 458; *Heaps v. Industrial Commission*, 303 Ill. 443, 135 N. E. 742, see p. 406.) Continuing, the court said:

In this case, if it be found that Tidrow has lost the complete use of his hand, the plaintiff in error will have to pay compensation at the rate provided by the compensation act for the loss of a hand, and without regard to the question whether or not the amount paid will be equal to or greater than the loss of wages for the time he was not able to work, and without regard to the question of loss of capacity to follow his occupation. This is so because the statute so provides, and because the legislature had the right and power to enact such a statute. But Tidrow is not entitled to compensation for the loss of his hand upon the theory that he is permanently and totally incapacitated for work, which is not the fact, although he only had one eye when he lost his hand. This is so simply because the injury received while so employed did not occasion total disability as a matter of fact. An employer can not be required to pay for total disability for the loss of a hand, unless such loss of the hand does occasion total disability or incapacity to work, as already explained. If Tidrow had lost both the eye and hand while working for plaintiff in error, then under the statute he would be entitled to the compensation awarded him, because the statute provides that the loss of a hand and an eye as a result of an injury arising out of and in the course of his employment entitles him to compensation for total permanent disability, but, where the injury results only in the loss of one hand or one eye during the employment, the employer can not be required, under the act, to pay compensation for total disability

under any circumstances, unless the injury destroys the employee's total capacity as an actual fact, and without regard to the fact that he may have lost an eye or a hand or a limb previous to his employment.

This construction was held to permit the statute to stand without violating any provision of the Constitution, State or Federal. To permit compensation as for total disability where two members are lost is not so unreasonable as to make the law void, even though the employee was not totally incapacitated. On the other hand, if but one member is lost, compensation for total disability would not be justified unless it was actually caused.

Our decision amounts to nothing more than that an employee may recover the compensation provided for in the statute for an injury in his employment where the amount fixed is not entirely unreasonable; also, that an employee under the statute may recover compensation for total disability where the loss of one member of the body occurs in the employment and creates total incapacity by reason of the fact he had lost another member before his employment.

It was ruled, therefore, that compensation was due only for the loss of a hand, and the case was remanded for a correction of the awards.

WORKMEN'S COMPENSATION — WILLFUL CARELESSNESS — REMEDY EXCLUSIVE—*De Carli v. Associated Oil Co., District Court of Appeal, First District of California (April 11, 1922), 207 Pacific Reporter, page 282.*—Joe P. De Carli sought to recover in an action for damages against his employer for injuries alleged to be due to its "gross and willful carelessness and negligence." The right to recover was denied in the superior court of Contra Costa County, and from this judgment this appeal was taken. The court of appeal affirmed the judgment of the court below. De Carli contended that the workmen's compensation act was authorized by a constitutional amendment giving power to establish a system of compensation for injuries occurring "irrespective of the fault of the party," limiting by implication the scope of the law so that where there was negligence the common-law right of trial by jury survived.

Presiding Judge Tyler, having stated the facts, declared that the question had been put to rest by the supreme court in numerous decisions. Continuing he said:

The workmen's compensation act as originally enacted provided for an election of remedies by an injured employee where such injuries were caused through the gross or willful misconduct of the employer. (Section 12 (b), c. 176, Laws 1913.) In 1917 the act was amended, and this election was eliminated, and in lieu thereof it was provided that when an employee was injured through "the serious and willful misconduct of the employer, etc.," that the amount of

compensation should be increased one-half. Section 6 (b), Laws 1917, p. 834. The remedy here provided for has been held to be exclusive of all other statutory or common-law remedies, and the constitutionality of the provision has been upheld in numerous cases.

The judgment of the court below was therefore affirmed.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—INTENTION TO INJURE—*Delthony v. Standard Furniture Co., Supreme Court of Washington (March 24, 1922), 205 Pacific Reporter, page 379.*—Section 3473 of Pierce's Code for the State of Washington provides that if an injury to a workman results from the "deliberate intention of his employer to produce such injury or death, the workman * * * shall have the privilege to take action under this act [workmen's compensation act] and also have cause of action against the employer." Anthony Delthony was employed at the general retail furniture store of the Standard Furniture Co. as an electrician and general maintenance man, and while in the performance of his duties and near a boiler in the basement of the building, he was seriously injured by the explosion of the boiler. He thereafter filed a claim and was awarded \$777 compensation for the injury by the industrial insurance commission. He then brought the action based upon the statute above referred to. The company asked the court to direct a verdict in its favor, which was done, and a judgment was entered dismissing the action. Delthony appealed to the supreme court of the State, contending that if the company knew of the dangerous and unsafe condition of the boiler, and with this knowledge maintained the boiler in a dangerous and unsafe condition, these facts would be held to have been deliberately intended to produce the injury. But the court would not sustain this contention, and in an opinion by Judge Main the language of the Oregon Supreme Court in *Jenkins v. Carman Mfg. Co.* (79 Oreg. 448, 155 Pac. 703) was quoted with approval. Construing a similar statute of Oregon the supreme court of that State said:

We think by the words "deliberate intention to produce the injury" that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—VIOLATION OF LAW—*Fortin et al. v. Beaver Coal Co., Supreme Court of Michigan (March 31, 1922), 187 Northwestern Reporter, page 352.*—In 1913, the legislature of the State of Michigan enacted a law to provide for the health and safety of persons employed in and about coal

mines. There was a provision that a safe and convenient way must be constructed around the bottom of the shaft for employees and animals, and it was made unlawful for any employee to pass across the shaft bottom in any other manner than the traveling way. Earl Fortin, 25 years of age and unmarried, was employed in the Beaver Coal Co.'s mine as a trip rider. He had worked in the mine 11 years. After finishing his day's work and apparently in ending to volunteer his help to the cager, he attempted to jump across the sump or bottom of the shaft and was struck by a piece of coal, falling down the shaft. He was instantly killed. There was a traveler or run-around for use in going from one side of the sump to the other, in accordance with the provisions of the law. An award of compensation was made to the dependents of the deceased employee. The case was taken to the supreme court of the State.

The employer pointed out that no reason appeared for the deceased employee not using the run-around instead of doing the rash and exceedingly dangerous thing of attempting to jump across the sump. They contended that as a matter of law the accident was caused by the intentional and willful misconduct of the deceased, and was not sustained in the course of his employment. The award was vacated by the court. The court said that mere negligence, however great, is not willful misconduct, but on the other hand he pointed out that "If the conduct occasioning the injury is of a quasi criminal nature, involving the intentional doing of something with knowledge that it is dangerous and with a wanton disregard of consequences, then it is intentional and willful misconduct."

Judge Wiest stated the reasons for holding this particular act willful misconduct as follows:

It can not be said that the accident had its origin in a risk connected with the employment, and to have happened as a consequence thereof.

The mining company could not, under the law, have employed the deceased or have directed him to do the act causing his death. The law enacted for safeguarding the lives of miners against taking hazardous risks of life and limb must be obeyed, and it would be anomalous, to say the least, to permit one statute to be invoked and award compensation thereunder for death occasioned in violating another statute prohibiting the act and making it a misdemeanor.

INDEX.

	Page.
Admiralty.....	81-85, 280-287
Aliens:	
Contract laborers.....	59, 60
Workmen's compensation rights.....	287-289, 322, 323
Antitrust law.....	78, 79, 179-181, 185-187
Army as police force.....	165-167
Bankruptcy.....	240, 241
Barbers' license law.....	135-137
Bonus, right to.....	241, 242
Children:	
Contributory negligence of.....	99, 100, 108, 109
Employment during school term.....	101, 102
Misrepresentation of age.....	99-101
Street occupations.....	101, 102
Tax as employment regulation.....	60-61
Tax law in Territories.....	57
Unlawful employment.....	98-105, 397-402
Clayton Act.....	153-157, 169, 170, 205-216
Collective agreements.....	148-153
"Commodity of common use".....	78, 79
Conspiracy.....	140-142, 153-165
Constitutionality of law as to—	
Advertisements for labor.....	196, 197
Display of banners.....	183, 184
Examination, etc., of workmen.....	135-138
Federal control of employment of children.....	60-62
Garnishment of wages.....	243, 244
Injunctions (Oregon).....	220-222
Minimum wages for women.....	245-254
Municipal, etc., conduct of business.....	227, 231-234
Paint spraying machines, use of.....	227-231
Power of court to review compensation awards.....	404-406
Regulation of prices of coal.....	73, 74
Service letters.....	75-77
Shelters for railway repair men.....	227-231
Strike notice in advertisements for labor.....	196, 197
Third-party liability under workmen's compensation laws.....	377-379
Wage assignments.....	238, 239
Wage rates in private employments.....	142, 245-254, 258-261, 264-266
Wage rates on public works.....	261-264
Wash rooms at mines.....	225, 226
Workmen's compensation classifications.....	347-349
Workmen's compensation insurance policies.....	382-384
Workmen's compensation payments if no dependents.....	318, 319
Contempts, power of governor to pardon.....	172-175
Contract of employment:	
Agreement between relatives.....	62, 63
Breach.....	63-73, 148-153, 241, 242, 267-269, 272, 273
Damages for causing discharge.....	238, 239
Deductions for sickness.....	70
Duress.....	267-269, 271, 272
Employment of injured workman for life.....	68, 69
Enforcement.....	66-68, 71, 72
Formation.....	95-98
Freedom in making.....	245-254
Procuring breach.....	200, 201, 235-237
Seamen.....	267-272
Statement of cause of discharge.....	75-77
Cost of living (coal prices).....	73, 74

	Page.
Criminal syndicalism	167-169
"Employee" under bankruptcy law	240, 241
Employers' associations	78-81
Employers' liability:	
Admiralty	81-85
Assumption of risk	85-92
Assurance of safety	105
Charitable corporations	104, 105
Children unlawfully employed	98-105
Contributory negligence	85, 86, 99, 100, 102, 103, 105-109
Course of employment	92-95
"Employee"	95-98
Federal railroad statute—	
Assumption of risk	119-121
Attempted rescue	126, 127
Contributory negligence	119, 120, 126, 127
Fellow service	120, 121
Fraudulent representation	122, 123
Interstate commerce	124-126, 134, 135, 338-343
Limitation	122, 123
Panama Railway	121, 122
Independent contractor	102, 103, 111, 112
Infancy as affecting release	127-131
Injury by third party	134, 135
Injury to third party	93, 94, 113, 114
Intentional acts	93-95
Joinder of parties	113, 114, 131, 132
Last clear chance	107, 108
Latent danger	86, 87
Leased factory	117-119
Negligence	83-85, 87, 88, 104-118, 134, 135
Occupational disease	114, 115
Overexertion	115, 116
Release	127-132
Rule of haste	115, 116
Safe place and appliances	87-92, 116-119
State as employer	132, 133
Unguarded machine in sales room	109, 110
Violation of statute	83-85, 106, 107, 335-338
Volunteers	95-98, 108, 109
Workmen's compensation proceedings	99, 100, 110, 111, 113-115, 134, 135
Examination, etc., of workmen	135-138
Factory, etc., regulations	106, 107, 109, 110, 112, 113, 117-119, 335-338
Females:	
Hours of labor in Federal offices, District of Columbia	57, 58
Minimum wages	245-254
Fishermen, status of, as seamen	82, 83
Hours of labor:	
Drug clerks	133, 139
Females in Federal offices, District of Columbia	57, 58
Public works	139, 140
Hydroaeroplane classified	81, 82
Industrial Workers of the World	167-169
Injunction:	
Purpose and effect of	165-167, 172-175
To compel delivery of property	218-220
To prevent breach of contract	66-68, 71-73, 148-153
To prevent competition	72, 73, 234-237
To prevent conduct of business until insurance premiums are paid	337, 338
To prevent enforcement of statute	227-234
To prevent interference with employment	70-81,
153-157, 169, 170, 172-179, 200-204	
To prevent interference with interstate commerce	204-216
To protect local union	189-192
To protect public welfare	218
To protect right to do business	153-157, 171, 172, 179-187, 216-218, 220-225

	Page.
Interference with employment.....	79-81, 140-142, 153-157, 172-181, 185-187, 216-218
Interstate commerce in gas, employment in.....	90-92
Interstate commerce, State regulation of.....	98, 99
<i>(See under Employers' liability, and Workmen's compensation.)</i>	
Labor disputes:	
Power of industrial court.....	142, 258-261
Power of courts of law.....	71, 72
Powers of Railroad Labor Board.....	142-148, 264-266
Labor organizations:	
Anticipation of violence.....	165-167
Collective agreements.....	148-153
Conspiracy.....	153-165
Contempt.....	169-175, 201-204
General and local organizations.....	157-165, 187-192, 194, 195
Industrial Workers of the World.....	167-169
Injunctions.....	148-157, 165-167, 169-177, 181-187, 189-192, 200-225
Insurance.....	188-189
Interference with employment.....	153-157, 177-181, 216-218
Interference with interstate commerce.....	157-165, 204-216
Liability for damages.....	157-165
Membership.....	188, 189, 192, 193, 195, 196
Parties to proceedings.....	175-177
Picketing.....	181-187, 220-225
Procuring breach of contract.....	200, 201
Property rights.....	187, 188
Refusal to work for nonunion employer.....	177-179
"Regular meetings".....	194, 195
Rules.....	187-196
Socialist Party.....	195, 196
Strikes.....	196-225
Termination of strike.....	184, 185
Worker's educational association.....	195, 196
Lever Act.....	73, 74
Mechanics' Hens.....	244, 245
Mine regulations.....	225, 226
Minimum wage law, constitutionality of.....	245-254
Monopolies.....	78-81, 179-181
Municipal conduct of business.....	227
Paint-spraying machines, law regulating use of.....	227-231
Plumbers' license law.....	187, 138
"Property," injunction to protect.....	216-218, 222-225
Public officers, garnishment of wages of.....	243, 244
Public works, employment on.....	189, 140
Railroad Labor Board, powers of.....	142-148, 264-266
Railroad regulations.....	227-231
Railway relief society, taxation of.....	231
Seamen:	
Duty to navigate vessel.....	267-269
Effect of deserting vessel.....	272, 273
Recourse as to wages.....	269-271
Release of wages under duress.....	271, 272
Seaworthiness of vessel, determination of.....	267-269
Service letter, law requiring.....	75-77
Shelters for railway repair men.....	227-231
Socialist Party.....	195-196
State conduct of business.....	231-234
Strikes, notice of, in advertisements for labor.....	196-199
Trade secrets, protection of.....	66-68, 234-237
United States Railroad Labor Board, powers of.....	142-148, 213-216
Wages:	
Assignments of.....	237-240, 256, 257
Bonus, right to.....	241, 242
Deductions for sickness.....	70
Discount for advances.....	254-256
Effect of tender on penalty for nonpayment.....	257, 258
Forfeiture by breach of contract (seamen).....	272, 273

	Page.
Wages—Concluded.	
Garnishment	243, 244
Mechanics' liens	244, 245
Minimum-wage law	245-254
Mode and time of payment	254-256
Nonpayment, penalty for	256-258
Preference in bankruptcy	240, 241
Regulation of—	
In private employments	245-254, 258-261, 264-266
On public works	139, 140, 261-264
Release under duress	271, 272
Seamen	267-273
Workers' Educational Association	195, 196
Workmen's compensation:	
Accident	273-280, 349-352
Admiralty	280-287
Agricultural workers	313, 314
Alien beneficiaries	287-289, 322, 323
Arising in course of employment	380-382
Arising out of and in course of employment	303, 304, 357-375
Assaults, etc.	289, 290, 303, 304, 380, 381
Attempt to save property	371
Attorneys' fees	388-390
Award as vested right	292, 293, 301, 302
Awards, basis, etc., of	290-292, 294-302
Boards, commissions, etc., powers as to findings, rules, etc.	275-277, 391, 392, 403-406
Business for gain	312, 313
Claim	302-312, 324-326
Classification, power of commission as to	347-349
Common hazards	370, 371, 374, 375
Computing wage	291, 292
Continuing causes	273, 274, 279, 280
Courts, powers of	275-277, 294-296, 404-406
Coverage	312-318, 329-335, 345-349
Death following disability	293, 294, 324-326
Death of beneficiary	292, 293, 301, 302
Death without dependents	318, 319
Delayed disability	305, 308-311, 353, 354
Dependents	296-299, 319-324
Deserted wife, rights of	296-299
Disability affecting reemployment	326, 327
Disease as injury	349-352
Disfigurement	352, 353
Disobedience of orders	367, 368, 371, 372
Domestic employment	329, 330
Earning capacity	290, 291
Election—	
Effect of prior	328, 329
Notice of	327, 328
Employees, who are	330-335, 397-402
Evidence of disability	324-326
Exclusiveness of remedy	343, 410, 411
(See also Suits for damages, etc.)	
Findings of boards. (See Boards, etc.)	
Extraterritoriality	343-345
Going to and from work	333, 334, 358, 359, 364, 365
Hazardous employments	345-349
Hernia	276, 277, 353, 354
Horseplay, quarrels, etc.	362-367, 369, 381, 382
Hotel service	329, 330
Incompetence as affecting limitation	305, 403, 404
Injury	349-357
Insurance—	
Failure to insure	384-386
Form of policy	382-384

Workmen's compensation—Concluded.

Insurance—Concluded.	Page.
Payment of premiums to State fund, enforcement of.....	387, 388
Rates, effect of statute prescribing.....	386, 387
Interstate commerce.....	338-343
Knowledge as affecting lack of notice.....	307, 308
Lawyers' fees.....	388-390
Limitation.....	302-312, 403, 404
Lump sums.....	294-296, 346, 347, 402, 403
Medical and surgical aid—	
Choice of physician.....	390-393, 395-397
Refusing operation.....	393-397
Regulation of fees.....	391, 392
Service prior to notice.....	308-311
"Member of family".....	321-324
Minority as affecting limitation.....	307, 308
Minors illegally employed.....	397-402
Numerical basis for coverage.....	314-318
Occupational disease.....	273, 274, 277-280
Officers, etc., of corporations.....	330, 331, 334, 335
Overwork.....	278, 279
Partial disability.....	402, 403
Police men.....	315, 316
Preexisting condition.....	273-276, 354-357, 372, 373
Prejudice from lack of notice.....	306-311
Prior employer's liability.....	353, 354
Promise as estoppel.....	311, 312
Purpose and principles of law.....	392, 393
Quarrels. (See Horseplay, etc.)	
Railway mail clerk.....	340, 341
Review, revocation, etc., of awards.....	296-300, 403-406
Rules of boards. (See Boards, etc.)	
Second injury.....	303, 304, 406-410
Separate awards for disability and disfigurement.....	353
Settlement.....	305, 306
Suits for damages as affected by.....	289, 290, 335-343, 376, 377, 385, 386, 401, 402
Third parties.....	340, 341, 375-380
Total disability.....	303, 304, 406-410
Two or more employers.....	300, 301
"Upon the premises".....	333, 334
Volunteers.....	332, 333, 359, 360
Willful injuries.....	289, 290, 372, 373, 410-412

LIST OF CASES.

Abbott v. Concord Ice Co.....	290
Accident Fund v. Jacobs.....	292
Adkins v. Children's Hospital of the District of Columbia.....	249
Aird, <i>Ex parte</i>	59
Alabama Brokerage Co. v. Boston.....	238
American Ry. Express Co. v. Davis.....	92
Anderson v. Commonwealth Oil and Refining Co.....	402
Associated Employers' Reciprocal v. State Ind. Acc. Com.....	391
Atherton Mills Co. v. Johnson.....	62
Atlantic Coast Line Ry. Co. v. Williams.....	124
Bacon v. Payne.....	126
Bailey v. Drexel Furniture Co.....	60
Bailey v. George.....	62
Baker v. Lyell.....	62
Baltimore & O. S. W. R. Co. v. Burch.....	95
Baltimore Dry Dock & Ship Building Co. v. Webster.....	373
Bamberger Elec. R. Co. v. Industrial Com. of Utah.....	300
Barres v. Watterson Hotel Co.....	329
Beardsley v. Kilmer.....	140
Belkin v. Skinner & Eddy Corp.....	85
Biersach & Neidermeyer Co. v. State.....	196

	Page.
Bingham Mines Co. v. Bianco	88
Board of County Commrs. of Chaffee County v. Denver & R. G. R. Co. Employees' Relief Assn.	231
Borden's Farm Products Co. (Inc.) v. Sterbinsky	218
Bricklayers', Masons' and Plasterers' International Union of America, Local No. 7 v. Bowen	189
Bristol Tel. Co. v. Weaver	375
Bronson v. Harris Ice Cream Co.	393
Brown v. United States	271
Bruns v. Milk Wagon Drivers' Union, Local 603	188
Builders' Limited Mut. Liability Ins. Co. v. Compensation Ins. Board	386
Campbell v. Motion Picture Machine Operators (contempt)	171
Campbell v. Motion Picture Machine Operators (restraint of trade)	185
Canoe Creek Coal Co. v. Christinson	169
Cavender v. Hewitt	243
Central Lumber Co. v. City of Waseca	227
Central Metal Products Corp. v. O'Brien	153
Centralia Coal Co. v. Ind. Com.	354
Chambers v. Davis	71
Chandler v. Industrial Com. of Utah	358
Chicago & Alton R. Co. v. Industrial Com.	359
Chicago & N. W. Ry. Co. v. R. R. & Warehouse Com. of Minn.	227
Chicago Journal Co. v. Ind. Com.	408
Chicago, R. I. & P. R. Co. v. Perry	77
Child Labor Tax Law in Territories (Op. A. G.)	57
Children's Hospital of the District of Columbia v. Adkins	245
Cincinnati Times Star Co. v. Clay's Admr.	101
City of Taylorville v. Central Illinois Public Service Co.	377
Clifton v. Kroger Grocery & Baking Co.	364
Commonwealth v. Beaver Dam Coal Co.	225
Consolidated Coal & Coke Co. v. Beale	165
Cook v. West Side Trucking Co.	318
Cooper v. Rollins	135
County Commissioners v. Denver & R. G. R. Co. Employees' Relief Assn.	231
Court of Industrial Relations v. Chas. Wolf Packing Co.	258
Craig v. Riter-Conley Mfg. Co.	111
Crane & Co. v. Snowden	216
Dahn v. Davis	340
Dakota Coal Co. v. Fraser	231
Danville Local Union No. 115 v. Danville Brick Co.	204
Darsch v. Thearle Duffield Fire Works Display Co.	343
Davis v. Merrill	98
De Carli v. Associated Oil Co.	410
De Gaetano v. Merritt & Chapman Derrick & Wrecking Co.	282
Dejaney v. Phila. & Reading Coal & Iron Co.	401
Delthony v. Standard Furniture Co.	411
Dewey v. Lutcher-Moore Lumber Co.	345
Dillon v. Trustees of St. Patrick's Cathedral	312
Early v. Houser & Houser	97
Elliott, The M. S.	272
Emerson Brantingham Co. v. Growe	87
Emery v. Jewish Hospital Assn.	104
Employers' Indemnity Corp. v. Woods	294
Employers' Liability Assurance Corp. (Ltd.) v. Ind. Acc. Com.	331
Everett v. United States	269
Fairfield, State Auditor, v. Huntington	132
Federal Laundry Co. v. Zimmerman	72
Federal Mutual Liability Ins. Co. v. Industrial Accident Commission	321
Fisher v. John L. Roper Lumber Co.	68
Flynn v. Brotherhood of Railroad Trainmen	192
Foppen v. Peter J. Fase & Co.	82
Ford v. United States	73
Forrest v. United States	201
Fortin v. Beaver Coal Co.	411
Frank W. Williams Co. v. Industrial Com.	352
Frasca v. City Coal Co.	287

	Page.
Freedman v. Spicer Mfg. Corp.....	362
Frost v. U. S. Fidelity & Guaranty Co.....	394
Fulton Grand Laundry Co. v. Johnson.....	234
Gaglione's case.....	353
Galloway v. Lumbermen's Indemnity Exchange.....	397
Garcia v. Salmen Brick & Lumber Co.....	399
Gauthier v. Atchison, T. & S. F. Ry. Co.....	122
Gavros's case.....	363
General Amer. Tank Car Corp. v. Weirick.....	277
Gentile v. Phila. & R. Ry. Co.....	113
Georgia Casualty Co. v. Darnell.....	291
Gilliland v. Edgar Zinc Co.....	361
Goldsmith v. Payne.....	134
Gonier v. Chase Companies.....	372
Gottlieb v. Matckin.....	218
Grand Lodge of International Assn. of Machinists v. Reba.....	187
Grand Rapids Trust Co. v. Petersen Beverage Co.....	398
Granow v. Adler.....	63
Grant Smith-Porter Ship Co. v. Rohde.....	280
Great Northern R. R. Co. v. Local Great Falls Lodge of International Assn. of Machinists.....	205
Greenfield v. Central Labor Council of Portland and vicinity.....	220
Gritta's case.....	388
Guderian v. Sterling Sugar & Ry. Co. (Ltd.).....	303
Halley v. Ohio Valley Elec. Ry. Co.....	125
Hamberg v. Flower City Specialty Co.....	371
Hanna v. Warren.....	313
Hartford Acc. & Indemnity Co. v. Englander.....	379
Heaps v. Industrial Com.....	406
Heine v. Libby, McNeill & Libby.....	267
Helder v. Luce Furniture Co.....	275
Hill v. Ancram Paper Mills.....	324
Hines, Director General of Railroads, v. Thurman.....	86
Hogan v. State Ind. Com.....	332
Holmberg v. Cleveland-Cliffs Iron Co.....	323
Hopper v. Wilson & Co.....	305
Hours of Labor of Women, D. C., Federal Employment (Op. A. G.).....	57
Hulswit v. Escanaba Mfg. Co.....	344
Indiana Manufacturers' Reciprocal Assn. v. Dolby.....	399
Industrial Accident Commission v. Payne.....	338
Industrial Commission v. Cross.....	349
Industrial Commission v. Nordenholt Corp.....	285
Industrial Commission of Ohio v. Dell.....	296
International Agricultural Corp. v. Cobble.....	100
International Assn. of Machinists v. Reba.....	187
Jahn v. City of Seattle.....	261
Jeffreyes v. Charles H. Sager Co.....	279
Jirmasek v. Great Northern Ry. Co.....	115
Johnson's case.....	326
Jurman v. Hebrew National Sausage Factory.....	316
Katz v. Kadans & Co.....	370
Katzenmaier v. Doeren.....	110
Kerwin v. Amer. Ry. Express Co.....	291
Kuffel & Esser v. International Assn. of Machinists.....	181
King v. Smart.....	108
Kirk, In re.....	306
Kitchen (R. R.) & Co. v. Local Union No. 141.....	175
Klein v. Len H. Darling Co.....	273
Kraft v. West Hotel Co.....	367
Labor Board v. Penn. Co.....	142
Laundry Co. v. Johnson.....	234
Lawson v. Wallace & Keeney.....	308
Lee's case.....	365
Los Angeles Shipbuilding & Drydock Co. v. Industrial Accident Com.....	282

	Page.
Lough v. State Ind. Acc. Commission	305
Lumbermen's Indemnity Exchange v. Vivier	330
McNamara v. Eastman Kodak Co.	131
Mackay Telegraph-Cable Co. v. Armstrong	105
Madera Sugar Pine Co. v. Industrial Acc. Com. of California	320
Mansfield v. Wagner Elec. Mfg. Co.	112
Mariow v. Mayor and Aldermen of City of Savannah	315
Martin v. Chase	385
Martin v. Going	256
Merrill v. Penasco Lumber Co.	374
Messerall v. Dreyer	244
Miller v. Canadian Northern Ry. Co.	107
Millers' Mutual Casualty Co. v. Hoover	334
Minimum Wage Law cases, D. C.	245
Moore v. Marine Fireman, Oilers & Watertenders' Union of the Pacific	194
Mulhall v. Nashua Mfg. Co.	311
Neversweat Mining Co. v. Ramsey	129
Newberry v. Central of Georgia Ry. Co.	89
Newhall Land & Farming Co. v. Ind. Acc. Com.	395
Nupp v. Estep Bros. Coal Mining Co.	293
Oeffein (Walter W.) v. State	197
Okmulgee Democrat Pub. Co. v. State Ind. Com. of Okla.	346
Otis Elevator Co. v. Industrial Com.	404
Outcalt v. Chicago, B. & Q. R. Co.	119
Overland Publishing Co. v. Union Lithograph Co.	79
Panama R. Co. v. Minnix	121
Passini v. Aberthaw Const. Co.	322
Patten v. Aluminum Castings Co.	335
Patton Hotel Co. v. Milner	307
Penn. R. Co. v. U. S. Railroad Labor Board	148
People v. Amanna	78
People v. Donnelly	384
People v. Roe	167
Perry v. Beverage	239
Portland Terminal Co. v. Foss	213
Princeton Coal Co. v. Dorth	254
Producers' Oil Co. v. Daniels	327
Prudential Ins. Co. of America v. Check	75
Railway Labor Board v. Pa. Co.	142
Red Cross Mfg. Co. v. Stroop	70
Reed v. Director General of Railroads	120
Reinhardt v. Newport Flying Service Corp.	81
Rhodes v. New Orleans Great Northern Ry. Co.	264
Rice, Barton & Pales Machine & Iron Co. v. Willard	200
Richter v. Chicago, M. & St. P. Ry. Co.	124
Roberts v. Mays Mills	241
Robinson v. Hotel & Restaurant Employees	222
Robinson v. St. Maries Lumber Co.	257
Robison v. Floesch Construction Co.	127
Ross v. Howieson	333
Rusch v. Louisville Water Co.	275
St. Louis-San Francisco Ry. Co. v. Conly	98
Safford v. Morris Metal Products Corp.	65
Schlesinger v. Quinto	149
Scholtzhauer v. C. & L. Lumch Co.	369
Schwartz v. Cigar Makers' International Union, Schwartz v. Driscoll	148
Sebo v. Libby, McNeill & Libby	371
Seneca Coal Co. v. Carter	353
Sheehan v. Levy	177
Sherman v. Pfefferkorn	66
Shevers Ice Cream Co. v. Polar Products Co.	235
Sichterman v. Kent Storage Co.	357
Sizemore v. Beattyville Co.	328
Sloss-Sheffield Steel & Iron Co., Ex parte (Steagall case)	302
Smith v. State Ind. Acc. Com. (Oreg.-Medical aid)	390
Smith v. United Fuel Gas Co.	90

	Page.
Southern Surety Co. v. Childers.....	330
Staker v. Industrial Commission.....	276
Standard Engraving Co. v. Volz.....	179
Stark v. State Industrial Accident Com.....	366
State v. Bayles.....	347
State v. McCoy.....	387
State v. Tibbetts.....	139
State ex rel. Hopkins v. Howat.....	142
State ex rel. Rodd v. Verage.....	172
State Accident Fund v. Jacobs.....	292
State Industrial Commission v. Nordenholt Corp.....	285
Stevens v. Marion Machine Foundry & Supply Co.....	407
Stoll v. Frank Adam Elec. Co.....	109
Sutton v. Melton-Rhodes Co. (Inc.).....	116
Tank Car Corp. v. Weirick.....	277
Taylor Coal Co. v. Industrial Commission.....	362
Taylorville v. Central Ill. Public Service Co.....	377
Tennessee Chemical Co. v. Smith.....	360
Tennessee Finance Co. v. Thompson.....	239
Terry v. General Electric Co.....	299
Tintic Milling Co. v. Industrial Com. of Utah (Christensen case—Dependency).....	319
Tintic Milling Co. v. Industrial Com. of Utah (Snyder case—Preexisting disease).....	355
Toledo Cooker Co. v. Sniegowski.....	338
Tollison v. George.....	237
Toulinson v. Marshall.....	117
Travelers' Ins. Co. v. Industrial Commission (Const'y. of Colo. Stat. as to form of insurance policies).....	332
Trowitt v. City of Dallas.....	137
Trout v. Wickwire Spencer Steel Corp.....	114
Troutman, In re.....	306
Twing, Ex parte.....	138
Union Iron Works v. Industrial Acc. Com. of California.....	392
United Mine Workers of America v. Coronado Coal Co.....	157
United States v. Railway Employees' Department of Amer. Fed. of Labor.....	208
United States Fidelity & Guaranty Co. v. Cassell.....	381
United States Railroad Labor Board v. Penn. R. R. Co.....	142
Unrein v. Oklahoma Hide Co.....	106
Van Vlaanderen v. Peyet Silk Dyeing Corp.....	240
Volpe v. Hammersley Mfg. Co.....	99
Wagner v. City of Milwaukee.....	262
Waldron v. Garland Pochontas Coal Co.....	102
Walker v. City of Port Huron.....	316
Wall v. Studebaker Corp.....	343
Walter W. Oeffeln, Inc., v. State.....	197
Ward & Gow v. Krinsky.....	314
Wasmuth-Endicott Co. v. Karst.....	351
Watters v. City of Indianapolis.....	183
Wenning v. Turk.....	301
West v. Kozer.....	283
Whalen v. Athol Mfg. Co.....	376
Whitehead Coal Mining Co. v. State Industrial Com.....	403
Wilks v. United Marine Contracting Corp.....	83
Williams v. Southern Pac. Co.....	341
Williams (Frank W.) Co. v. Industrial Com.....	352
Wilson v. Dakota Light & Power Co.....	359
Workers' Educational Assn. v. Renner.....	195
Yates Hotel Co. v. Meyers.....	184
Yosemite Lumber Co. v. Industrial Acc. Com. of California.....	318
Young v. Melrose Granite Co.....	278
Zaitz v. Drake-Williams Mount Co.....	94

ADDITIONAL COPIES
OF THIS PUBLICATION MAY BE PROCURED FROM
THE SUPERINTENDENT OF DOCUMENTS
GOVERNMENT PRINTING OFFICE
WASHINGTON, D. C.
AT
50 CENTS PER COPY
PURCHASER AGREES NOT TO RESELL OR DISTRIBUTE THIS
COPY FOR PROFIT.—PUB. RES. 57, APPROVED MAY 11, 1922

